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A History of Our Country’s Judicial System

The United States Supreme Court: Landmark Decisions and the Justices Who Made Them

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Featuring Essays by Constituting America’s
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The United States Supreme Court: 
Landmark Decisions And The Justices Who Made Them
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The United States Supreme Court:
Landmark Decisions and the Justices Who Made Them
Guest Essayist: William Morrisey

Introduction: Why Study the Landmark Decisions?
What does it mean to “constitute” America?
How would anyone do that? And why?
And what is “America,” anyway?

“Amercia can mean simply the “New World”—the two American continents, “new to the late-Renaissance Europeans who stumbled upon them en route to China, if not to the Asian settlers who’d lived here for centuries. In that sense, hundreds of millions of Americans now live in dozens of countries, under several distinctive forms of government.

Given the prominent display of the Stars-and-Stripes flag on the Constituting America website, no one reading these words will imagine “America” to mean that, here. We mean the United States of America, a particular country in America, which declared its independence, its self-government, from an empire ruled from Europe. To assert self-government requires one to establish the terms and conditions by which that government will proceed. By leaving home, a young man or woman declares independence from parents: Very well then, but how will you live, under your newfound self-rule? You say you want to live at liberty, pursuing happiness, but what’s your plan?

In declaring their independence from the British Empire, Americans (as they called themselves) asserted unalienable—natural and inherent—rights to those very things. They went on to say that government should be designed to secure the “safety and happiness” of the people it governs. Governments issue commands, often in the form of laws, which they then proceed to execute and to use as criteria for judging disputes that arise under those laws, between citizens, our civil institutions and the commands issued by the persons who hold offices within them rightly aim at protecting the natural rights citizens enjoy by virtue of higher laws—the Laws of Nature and of Nature’s God. If civil institutions fail to do this, it is the unalienable right of the people so misruled to alter or abolish them, on the grounds that a government that misgoverns is by definition no real government at all, having failed to fulfill the rightful aim of all government.
The Americans proceeded to do just that. Their first constitution, the Articles of Confederation, proved inadequate to the task of governing. For soldiers and revenues, it depended upon the not-always-good graces of the thirteen state governments. This government couldn’t even settle border disputes between one state and another. These and other controversies threatened the unity of the United States. Without that unity, how would the North American seaboard not become another Europe—a cockpit of war, an incubator of monarchy—and therefore the graveyard of republican self-government?

In re-constituting American republicanism, the framers of the 1787 Constitution aimed to secure Americans’ natural rights better than the framers of the Articles had done. Men being men—not angels, as Alexander Hamilton, no angel himself, had occasion to remark—disputes immediately arose. The worst of these, centering on the existence of slavery in the United States, in contravention of the principle of the equal natural right to liberty, issued in civil war. But many disputes found peaceful resolution in the law courts. Here you have more than seventy of the most important such disputes, along with essays on some of the eminent judges who settled them.

To understand how Americans constituted America, the first step is to read the United States Constitution itself, in light of the principles of the Declaration of Independence. The Constituting America website already features a clause-by-clause analysis of the constitution, articles written by an array of Constitutional scholars. The next step, the one we invite you to take with us now, is to study the ways in which our Supreme Court justices have interpreted the Constitution as they addressed disputes over its meaning brought to them by their fellow citizens.

To dispute the meaning of the Constitution is to dispute the meaning of the American form of government, the American regime. The questions underlying every case that comes before the Supreme Court has always been: What is the American republic?

That being so, it is crucial to notice a change in approach seen in these cases, as they built up over time. Chief Justice John Marshall, justly called “The Great Chief Justice,” understood the Court’s function to be “to say what the law is.” He meant that the Court should attempt to understand the meaning of the supreme law of the land according to the language of that document and the intentions of its framers, as discernible in that language. Over time, as American university professors (including professors in the law schools that became basic training for most lawyers only in the last decade of the nineteenth century) drifted away from the natural-rights foundation of the Constitution, a new ‘reading’ of the Constitution emerged.

Under the new doctrine, which called itself “Progressivism,” human rights were said to derive not from the laws of Nature and of Nature’s God but from “History”—that is, from the ever-changing opinions and actions of human beings as they move through time. Under the Progressive dispensation, rights are not permanent possessions of human beings as such; they evolve, develop, and (Progressives are great optimists) improve. A constitution, therefore, should no longer be understood as a statement unchanging unless amended. It should “grow” along with the ever-improving consciousness of humanity.

This means that the original text of the Constitution as understood by its framers constituted a mere starting-point. To understand American republicanism, not the text but rather the Supreme
Court cases themselves make up the bulk of American constitutionalism. Only they track the historical progress of America as it has unfolded; this is what Justice William Brennan, one of the most dedicated of the Court’s Progressives, meant when he described the “living” Constitution. In this view, despite some setbacks along the way, American constitutionalism consists of a long ‘story’ of ever more refined, ever-improving body of case law. Given historical progress, not the intentions of the framers of the Constitution and its amendments so much as the most recent majority opinions of the Justices carry the most authority—as they must, if Progressivism is true.

The establishment of an administrative state which itself takes over many of the tasks delegated by the self-governing American people to their legislators, presidents, and Constitutionally-ordained courts has thus found favor with the Supreme Court acting under the doctrine of Progressivism. This transforms American republicanism into a new kind of regime—to be sure, still holding elections, enacting and enforcing laws framed in a Congress of representatives who win those elections, but also a regime largely ruled by a permanent aristocracy or ‘meritocracy’ of university-trained, unelected professional administrators who have a large say in determining what the people’s rights are, and what they are not. Republican self-government, that isn’t.

This is what gives your study of these Supreme Court cases such urgent and immediate importance. We live our lives under laws that are said to mean what the judges say they, the judges, mean. The judges take what they mean as an expression of social and political progress, which has left the intentions of the framers far behind on many key principles, including the principle of American republicanism or self-government. This isn’t what Justice Marshall had in mind when he said he wanted to say what the laws ratified by “We the People” mean.

How do we want to live? Far from being specimens of abstract legal reasoning of interest only to specialists, the Constitution, the case law derived from it, the case law devised against it, and the thinking of the justices who argued the cases discussed here guide our actions and shapes how we think about ourselves. In that sense, at least, we do indeed have a “living” Constitution, one that has turned our way of life in new directions.

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**JUDICIAL POWERS**

*Marbury v. Madison (1803)*

**Guest Essayist: Daniel A. Cotter**

Marbury v. Madison (1803) – A Landmark Decision Establishing The Supreme Court’s Role
In an effort to fill the Chief Justice vacancy on the Supreme Court before leaving office, President John Adams offered the position to John Jay, who declined, citing the lack of dignity and respect of the Supreme Court. Secretary of State John Marshall was with Adams when Adams received Jay’s rejection letter and, with time running out, Adams offered Marshall the Chief Justice position, which Marshall accepted. The Senate confirmed Marshall on January 27, 1801, and he became Chief Justice. However, a Democratic-Republican Party-led Congress repealed the Judiciary Act of 1801 (aka the “Midnight Judges Act”) and subsequently replaced it with the Judiciary Act of 1802, causing the Supreme Court to be on hiatus from December 1801 until February 1803.

When the Court resumed hearing cases in February 1803, one of the first orders of business was deciding *Marbury v. Madison*, which presented the question of whether Adams had the power to issue the appointments to a number of “midnight judges,” including Marbury. On February 24, 1803, the Court issued its opinion in *Marbury*, setting a precedent that would make the Supreme Court “supreme” when it came to deciding Constitutional questions. While the Supreme Court previously had suggested the principle, the Marshall Court made clear in *Marbury* that, when it came to judicial review, “It is emphatically the province and duty of the Judicial Department to say what the law is.”

The story of the election of 1800 and the events leading to the *Marbury* decision are worth telling.

**The Election of 1800 and the Changing of Parties**

The Election of 1800 was a hard-fought presidential contest in which Vice President Jefferson defeated President John Adams. The election saw the passing of the Presidency from Adams’ Federalist Party to Jefferson’s Democratic-Republicans, and Congressional control changed in the same manner. Such a political change was a first in the United States’ brief history.

**The Judiciary Acts of 1801 and 1802 and the Midnight Judges**

Adams and the lame-duck Federalist Congress passed the Judiciary Act of 1801, which expanded the circuits and jurisdiction of the Federal courts, added a number of justices of the peace (including the justice of the peace seat that Marbury was offered), and reduced the number of Supreme Court Justices from six to five effective upon the next retirement. One of the Act’s goals was to eliminate Jefferson’s ability to nominate a Justice.

On March 3, 1801, the night before his term as President ended, Adams named his judicial appointees (the “midnight judges”). The Senate approved the appointees, and the next day Adams’ Secretary of State, John Marshall, who had just become the Chief Justice of the Supreme Court but still remained Secretary of State, was to deliver the commissions to the midnight judges. Marshall delivered some of them, but given the number, and because he believed the appointments were routine, he did not deliver all of them. Rather, Marshall thought that the next Secretary of State would deliver the remaining commissions, including that of William Marbury.

Jefferson believed the commissions for Adams’ appointees were void and instructed his Acting Secretary of State, Levi Lincoln, to immediately stop delivery of the remaining
commissions. The new Congress quickly repealed the Judiciary Act of 1801 and replaced it with the Judiciary Act of 1802, which was enacted on April 29, 1802. The Act of 1802 provided for six federal judicial circuits, with one Supreme Court Justice from each circuit. The Act of 1802 also eliminated the Supreme Court’s summer session, providing instead for a single Court session commencing on the first Monday in February of each year. As a result of the Act of 1802, no session of the Supreme Court officially took place in 1802 and the Court did not sit from December 1801 until February 1803, when the first Court session pursuant to the Act of 1802 commenced.

**Marbury and the Petition for his Commission**

Marbury filed a petition directly with the Supreme Court, seeking to have the new Secretary of State, James Madison, ordered to deliver the papers for Marbury’s commission as Justice of the Peace in the District of Columbia. In December 1801, Marbury applied for a writ of mandamus. The Supreme Court agreed to hear the case, despite pressures that the Justices might be impeached for doing so. Because of the repeal of the Act of 1801 and the subsequent enactment of the Act of 1802, the Supreme Court did not sit in session from the end of 1801 until February 1803. When the Supreme Court returned in February 1803, the second case it heard was *Marbury v. Madison*, on February 11, 1803.

**The Decision**

On February 24, 1803, John Marshall announced the unanimous 4-0 decision of the Supreme Court (Justices William Cushing and Alfred Moore missed oral arguments and did not participate in the decision due to illness). Marshall, despite his direct involvement in the failure to deliver the midnight judges’ commissions, did not recuse himself from participating in the case. In his opinion, Marshall stated that Marbury was entitled to his commission and that the Judiciary Act of 1789 gave the Court the authority to issue a writ of mandamus that would enforce Marbury’s right. However, Marshall found that the Constitution defined the Court’s original jurisdiction and that Congress could not expand such jurisdiction by statute. As a result, that portion of the Judiciary Act of 1789 authorizing the Court to enter writs of mandamus was found unconstitutional. *Marbury* is the only decision during Marshall’s tenure as Chief Justice in which the Court ruled an act of Congress was unconstitutional. In supporting the decision, Marshall stated for the Court:

> “It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each.”

**Conclusion**

With that statement, Marshall definitively established the Court’s role as interpreter of the United States Constitution. The Constitution provided no guidance for which branch of government had the final word on such questions. While many legal scholars have noted that the interpretive power had been exercised by the Supreme Court prior to *Marbury*, and that the Founding Fathers had discussed judicial authority at the Constitutional Convention, Marshall’s assertion of
Supreme Court power remains controlling precedent 214 years later. It is one of his many powerful decisions that makes Marshall perhaps the greatest Chief Justice in our nation’s history.

Marbury v. Madison (1803) Supreme Court decision: [https://supreme.justia.com/cases/federal/us/5/137/#annotation](https://supreme.justia.com/cases/federal/us/5/137/#annotation)

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**Chief Justice John Marshall (1755-1835)**

**Guest Essayist: William Morrisey**


The longest-serving Chief Justice in our history, author of every major Supreme Court ruling in the first third of the nineteenth century—including the one establishing the principle of judicial review—John Marshall earned undisputed honor as “the Great Chief Justice.” He deserves honor also as a great man.

Someone—it may have been his fellow Virginian, John Randolph—called Marshall “that great master of the human heart.” That is an unusual thing to say about a Supreme Court justice, but one of the best things that could be said about any judge. Properly to judge requires mastery of the human heart in two senses. The judge must understand the human being standing before him, the many kinds of human beings there are. He must know human nature in its rich variety. And, in order to do justice, the judge must master his own heart, rise above personal interest and passion in order to apply the law to the case. He must know himself, governing himself according to that knowledge. When, at the age of seventy-one, Marshall read Jane Austen’s novels, he saluted that other great master of the human heart, his contemporary: “Her flights are not lofty, she does not soar on eagle’s wings, but she is pleasing, interesting, equable, and yet amusing.” Equable: Miss Austen has received no more accurate assessment from anyone more worthy to bestow it—a tribute from one great Chief Justice to another.

As a young man and then as a historian in his mature years, Marshall always had before him an example of self-government who did soar on eagle’s wings, a man not only great but conspicuously great: George Washington. His friend and Supreme Court colleague Joseph Story called him a “federalist of the Washington School.” So he had been, before and after the short life of the Federalist Party, first as a young soldier in Washington’s army at Valley Forge and the Battle of Monmouth, then as a rising Virginia politician in the 1790s, as an ambassador to France during the Adams administration, and finally, while a Supreme Court justice at the height of his powers, years after Washington’s death, author of a history of the Revolutionary War seen through the prism of Washington’s life and character. By contrast, the traitor Benedict Arnold, far from the master of his own heart, was in Marshall’s words “the slave of his rage,” a man of character on the battlefield who lacked the self-knowledge to see that he had no ability to engage
in successful financial speculation. This “false pride,” this lack of just self-assessment, led Arnold into the indebtedness which made him vulnerable to the blandishments of the enemy. Washington, “the example of virtuous moderation,” displayed an “unyielding firmness of mind,” a “perfect self-possession under the most desperate circumstances,” which “struggled against adverse fortune” and won independence for his country.

In Marshall’s estimation, these moral qualities made Washington a great ‘judge’ in his own way: “In his civil administration, as in his military career, ample and repeated proofs were exhibited of that practical good sense, that sound judgment, which is perhaps the most rare, and is certainly the most valuable quality of the human mind. Taught to distrust first impressions, he sought to acquire all the information which was attainable, and to hear, without prejudice, all the reasons which could be urged for or against a particular measure. His own judgment was suspended until it became necessary to determine; and his decisions, thus maturely made, were seldom if ever beshaken.” This is not only a portrait of Washington, but a self-portrait: if in Washington we see self-government in America’s founding executive—military commander and president—in Marshall we see it in America’s found judge—guardian of the rule of the Supreme Law of the Land. Both men acted in defense of self-government in the form of the American constitutional union.

Marshall called Washington “a real republican,” devoted to the United States Constitution “and to that system of equal political rights upon which it is founded.” “But between a balanced republic and a democracy, the difference is like that between order and chaos.” Democracy breeds demagogues, men who overturn the laws and disperse governmental energy in factional wrangling. Republicanism breeds patriots, men who “preserv[e] the authority of the laws and maintain the energy of the government.” The language echoes The Federalist #10, in which Publius contrasts democracy—“a society consisting of a small number of citizens, who assemble and administer the government in person”—with a republican or representative government—whereby more citizens and territory may be accommodated, rendering factional passions less powerful and thus giving rational, disinterested government the chance to take effect.

Marshall scarcely fit the standard image of the wealthy American federalist. As his biographer Albert J. Beveridge explains, Virginians from the rich, tidewater section were ruled by landed oligarchs. The upland counties—poorer, more rural, the citizens quite unfashionable in dress and deportment—sought but often did not receive funding for “roads, bridges, and other indispensable requisites of social and industrial life.” The Marshalls came from that region, and Marshall’s lifelong carelessness of attire and awkwardness of carriage fit the type. In his personal style, Marshall resembled a democrat even as the rather more democratic Thomas Jefferson more resembled an aristocrat. But federalist republican he was, citing the state governments framed after the Declaration of Independence as “exhibiting the novel spectacle of matured and enlightened societies, uninfluenced by external or internal force, devising, according to their own judgments, political systems for their own government.” Only Connecticut and Rhode Island, “whose systems had ever been in a high degree democratic,” failed to adopt written constitutions that “prescribe[ed] bounds not to be transcended by the legislature itself.” Legislative dominance comported with democratic leanings in America before 1787; popular government that was republican set limits on passionate majorities by separating
and balancing governmental powers. Such limits spared Americans the horrors seen in France, only a few years after the Constitution of Washington and Madison was ratified.

As a Virginia state legislator in the 1780s, working under the Articles of Confederation system, Marshall saw firsthand the causes of American disunity, which had been nearly fatal during the war. Not only jealousy and state pride but reluctance to pay war debts and partisan administration of justice embittered Virginians.

“[T]he general tendency of state politics convinced me that no safe and permanent remedy could be found but in a more efficient and better organized general government.”

This was especially true in organizing the defense of the young country. National defense “requires a superintending power, in order to call forth the resources of all to protect all. If this be not done, each State will fall a sacrifice.” The first duty of self-government is self-defense. It is also the prerequisite of continued self-government. And constitutional union is indispensable for American self-defense.

Throughout his career Marshall unwavering sought to strengthen Americans’ consent for constitutional union. Like James Madison, he had listened with alarm as the great anti-federalist orator Patrick Henry decried the first phrase of the Constitution: “We the People.” “The question turns,” Henry said, on that poor little thing—the expression, ‘We the people, instead of the states.” That phrase constituted “a revolution as radical as that which separated us from Great Britain,” because it transferred sovereignty from the states to the American people as a whole, thus giving the federal government authority over state governments in certain enumerate matters. But only under the state governments, Henry insisted, could Americans secure such “human rights and privileges” as the rights of conscience, trial by jury, and liberty of the press.

The young Marshall was ready with his counter-argument. He denied any parallel between the relationship of the colonial American governments to the British imperial government and that of the state governments to the federal governments under the new constitution. The colonists’ arguments had turned on the slogan of self-government, “No taxation without representation.” Marshall observed, “We were not represented in Parliament. Here we are represented” in the federal government. What is more, the federal government must really govern, which means it will need to have revenue sources independent of the states, as legislated by representatives elected by the people or (in the case of senators under the original Constitution) by the state legislatures. Representation guarantees the ‘self’ in self-government. Necessity, including national defense, helps to define the means of government, the kinds of taxes imposed. It helps to define the ‘government’ side of self-government. Here Marshall anticipated his argument in the McCulloch v. Maryland opinion, some thirty years later, in which he held that in both ratifying the constitutions of the states and the Constitution of the United States, the people and not the governments were sovereign, under the Laws of Nature and of Nature’s God.

In this debate, and throughout his public life, Marshall exhibited the courage of self-command he had seen in his great mentor.
“I had reason to know that a politician even in times of violent party spirit maintains his respectability by showing his strength; and is most safe when he encounters prejudice most fearlessly.”

In private life, he commanded himself no less. After what must have been an excruciating surgery in old age, Marshall was sitting up in bed writing to his wife the next day. His physician recalls:

“I consider it but an act of justice, due to the memory of that great and good man, to state that in my opinion, his recovery was in great degree owing to his extraordinary self-possession and to the calm and philosophical views which he took of his case, and the various circumstances attending it.”

On his deathbed, in the words of another physician, Marshall “met his fate with the fortitude of a Philosopher, and the resignation of a Christian.”

In his last years, Marshall feared for the American union, and its constitution. How long can the union be “prolonged,” he wondered, by such “miracles” as those effected by Henry Clay in the Compromise of 1820 and by Andrew Jackson in facing down the nullification crisis of the 1830s? But he saw reason for some hope in the character of those still devoted to republican self-government, not only in America but in the world at large. In 1824 Marshall attended a dinner honoring his old companion in arms under General Washington, the Marquis de Lafayette, now in his mid-sixties. Marshall offered a toast: “To rational liberty—the cause of mankind. Its friends cannot despair when they behold its champions.”

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**Cohens v. Virginia (1821)**

**Guest Essayist: Joerg Knipprath**

Over the years, the Supreme Court has addressed several constitutional topics in cases involving lotteries. Perhaps none is as significant as Chief Justice John Marshall’s opinion in *Cohens v. Virginia*. The case was the third major act in a decades-long contest over the nature of the Union and, more specifically, over the constitutional relationship between federal and state laws and between the federal and state judiciaries. On the last point the contest directly involved repeated clashes between the United States Supreme Court and the Virginia Court of Appeals (the state supreme court), and between two dominant jurists, Marshall and the chief judge of Virginia, Spencer Roane. *Cohens v. Virginia* is the climax in the story of those two rivals.

The case was factually straightforward. Brothers Philip and Mendes Cohen owned, among other enterprises, the largest and most honest lottery company in the country. They sold lottery tickets for the District of Columbia lottery established by act of Congress. When they sold such tickets...
through their office in Norfolk, Virginia, they were prosecuted for violating a state law that prohibited the sale of out-of-state lottery tickets. Not that Virginia was opposed to gambling, as such. Prohibition of lotteries as a vice that preyed on the poor is a product of later decades. Rather, like many American jurisdictions then and now, the state had its own lottery to raise money for its treasury. It simply wanted to exclude private competitors from this rather regressive form of voluntary taxation. The Cohens were convicted and appealed by writ of error.

The Cohens hired Maryland’s Senator William Pinkney as one of their attorneys. Pinkney, known for his articulate speech and pleasant voice, argued several famous cases before the Supreme Court, including for the Bank of the United States in *McCulloch v. Maryland*. This one would be his last, as he died a year later. As in *McCulloch*, Pinkney argued that enforcement of the state law was unconstitutional, since federal law had established the D.C. lottery whose tickets the Cohens sold.

Virginia disagreed with Pinkney on the merits, but, before addressing the merits, counsel challenged the very jurisdiction of the Supreme Court to review a state criminal conviction. Section 25 of the Judiciary Act of 1789 may purport to confer that jurisdiction on the Supreme Court, but that provision was unconstitutional. The state’s argument reprised those Roane had made in *Martin v. Hunter’s Lessee* (1816) regarding appeals from civil cases decided by state courts.

Marshall and Roane were the dominant personalities on their respective courts. Their lives intersected at numerous points. They had been classmates, briefly, while studying law with Virginia Chancellor George Wythe at the College of William and Mary. They were both members of the fledgling Phi Beta Kappa Society there. Both married into politically-connected Virginia families, though Roane did better, by marrying the eldest daughter of his boyhood idol and later political mentor, Patrick Henry. They both led political factions in Virginia. Roane was the more influential, in that he was the boss of a political machine, the *Richmond Junto*, which included some cousins and powerful agrarian republican politicians like Senator John Taylor of Caroline and Congressman John Randolph of Roanoke. Both jurists moved their respective courts away from deciding cases *ad seriatim* in the style of English courts, where each judge announced his opinion separately, to a unified—and, if at all possible, unanimous—opinion for the court written by a single judge. Eventually they became uneasy neighbors in downtown Richmond for several years.

Of more fateful consequence was their competition for a seat on the Supreme Court. Lame-duck President John Adams appointed John Marshall to the chief justiceship in 1801, a month before Thomas Jefferson took office. Jefferson wanted to appoint Roane, a missed chance Jefferson is said to have regretted the rest of his life. The Republicans’ later unsuccessful effort to impeach and remove Federalist Justice Samuel Chase was to be a potential prelude to the impeachment and removal of Marshall, as well as to make room for Roane.

In *Martin*, Roane argued that the Constitution was founded on dual sovereignty and did not create a consolidated union. Moreover, while Article VI, Section 2, obligated state judges to uphold the Constitution, laws, and treaties of the United States even against conflicting provisions of state law, they were bound as judges of the sovereign state of Virginia, not as
functionaries of the general government. Not a word in the Constitution authorized the general
government to be the final judge of its legislative or judicial powers. Nor was there anything that
prohibited the state courts from being the final judges of the validity of state laws. Though
Roane’s court had no part in the proceeding against the Cohens, his states’ rights arguments
in Martin were replicated by Virginia’s attorney in his argument before the Supreme Court.

In a manner reminiscent of Justice Joseph Story’s holding in Martin, though with much less
rhetorical flair, Marshall in Cohens upheld the Supreme Court’s final judicial authority over state
courts. He began with a textual analysis. Article III, Section 2, of the Constitution defines the
federal judicial power, including the appellate jurisdiction of the Supreme Court. It speaks of
parties (“between Citizens of different States”) and causes (“arising under this Constitution”),
not courts. Section 25, too, expressly allows for review of such state cases, and no constitutional
objections were raised when it was enacted shortly after the Constitution was adopted.

To show the original understanding of the Court’s role, Marshall contended that even the
Articles of Confederation had provided for Congress to establish courts to review the judgments
of states and, implicitly, of state courts in cases of captures of enemy ships. For the Constitution,
he quoted The Federalist No. 82 and Hamilton’s discussion of the concurrent jurisdiction of state
and federal courts over specified matters:

“The Constitution in direct terms gives an appellate jurisdiction to the Supreme Court in
all the enumerated cases of federal cognizance in which it is not to have an original one,
without a single expression to confine its operation to the inferior federal Courts. The
objects of appeal, not the tribunals from which it is to be made, are alone contemplated.
From this circumstance, and from the reason of the thing, it ought to be construed to
extend to the State tribunals….The evident aim of the plan of the national convention is
that all the causes of the specified classes shall, for weighty public reasons, receive their
original or final determination in the Courts of the Union.”

Referring to customary practice that shaped constitutional doctrine, Marshall noted that in no
case but one (Roane’s Martin opinion) had a state court challenged the Supreme Court’s status,
despite plentiful occasions to do so. Finally, quoting an unnamed “very celebrated statesman”
(Alexander Hamilton in The Federalist 80), Marshall appealed to basic practicality. Having
twenty different state courts decide without a final authority would be a “hydra in government
from which nothing but contradiction and confusion can proceed.”

On a more fundamental level, Marshall rejected the “constitutional compact” basis of Virginia’s
argument and strongly reaffirmed his McCulloch view that the states had surrendered a part of
their sovereignty. “These states are constituent parts of the United States. They are members of
one great empire.”

The paramount nature of the federal government in areas delegated to it under the Constitution
produced a necessary corollary, namely, that each federal department was supreme in its function
vis-à-vis the states. Therefore, the Supreme Court must be the ultimate arbiter in matters that
involved the state courts’ interpretation of the Constitution and other federal law. This did not,
ipsos facto, turn state courts into mere instruments of the federal government. Their existence was
still connected to the state sovereignties, and they still decided cases of state law over which the
federal courts had no control. But this did reflect the choice of the ultimate sovereigns, the American people, to take some of the state governments’ traditional powers and place them in the general government and its branches.

Having rejected Virginia’s refusal to accept the Court’s authority to issue the writ of error on appeal, Marshall quickly dismissed the state’s argument that the Eleventh Amendment and the doctrine of sovereign immunity prevented the Cohens from challenging their conviction. Again, Marshall relied on the Constitution’s text and the historical understanding of the language. Here, the Cohens had not sued Virginia. The state could not simultaneously prosecute the Cohens and claim immunity from suit when they fought back.

In the final point of the litigation, whether the federal statute permitting the lottery in the District of Columbia authorized the Cohens to sell tickets in Virginia, Marshall found for the state. The Cohens had not shown that Congress intended to reach beyond the boundaries of the District into the states. This was classic Marshall. It has been said that Marshall never denied to Jefferson the specific result the latter desired, even as he increased the judiciary’s constitutional powers and institutional prestige. *Marbury v. Madison* was the prime, but not the only, example. In similar vein, while affirming the federal courts’ power over state judiciaries specifically and state governments more generally, he upheld Virginia’s prosecution of the Cohens. As in *Marbury*, and unlike with Story’s haughty mandate to the Virginia courts in *Fairfax’s Devisee v. Hunter’s Lessee* (1813)–the predecessor to *Martin*–there was no judicial order to disobey. Their paper victory on the conviction did not prevent the more militant states’ rights advocates like Roane, egged on by the increasingly alarmed Jefferson, from attacking the essence of the decision in tones that sometimes verged on the intemperate.

After the decision in *McCulloch*, Roane had written editorials in the Richmond *Enquirer*, a Republican paper he had helped found in 1804. Under the pseudonyms “Hampden” and “Amphictyon,” he had challenged Marshall’s reasoning and launched a strong defense in favor of state sovereignty. He now did the same in five articles following the decision in *Cohens* in 1821, under the name Algernon Sidney, after the executed 17th century Whig politician whose writings influenced Revolutionary War-era Americans. Roane’s impassioned reasoning persuaded those who needed no persuading, but Marshall’s decision still stood.

Having been thwarted by Marshall in the courtroom, Roane rallied for a final charge. Using the willing agency of Kentucky’s Senator Richard Johnson, he pushed for a constitutional amendment to give the Senate the right of final appellate review of cases where state constitutions or laws were questioned, or where a federal court decided a case arising under the Constitution, treaties, or laws of the United States. According to one scholar, “From the standpoint of an advocate of State Rights no more powerful argument was ever made in Congress than that of Johnson. He analyzed the decision of Marshall with a clearness neither Jefferson nor Madison had surpassed.”

That was Roane’s last campaign. He died in 1822, followed in two years by John Taylor of Caroline, and in four years by Thomas Jefferson and John Randolph of Roanoke. Virginia’s intellectual leaders of radical agrarian states’ rights republicanism were gone. Senator Johnson abandoned his proposal. Marshall had survived, victorious.
The victor writes the history. Had it not been for that one month in 1801 before Jefferson’s inauguration, Roane would have been in Marshall’s seat. As one scholar has observed cogently,

“To the student of the Constitution, no imagination can construct the fate of the Nation if there had been no Marbury v. Madison, no Cohens v. Virginia, no Dartmouth College case, no Fletcher v. Peck, no Martin v. Hunter’s Lessee, no Gibbons v. Ogden, no McCulloch v. Maryland.”

Perhaps that is exaggerated, for one will never know to what extent the responsibilities of the office of Chief Justice would have tempered the ardency of Roane’s advocacy against a consolidated Union. But it is unlikely that Roane’s temperament, political outlook, and upbringing would have produced the judicial nationalism of the Marshall Court or the institutional vigor that Marshall’s skills bequeathed to the judiciary.

Cohens v. Virginia (1821) Supreme Court decision: https://supreme.justia.com/cases/federal/us/19/264/case.html

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Swift v. Tyson (1842)
Guest Essayist: Daniel A. Cotter

Section 34 of the Judiciary Act of 1789 provides that “the laws of the several states, except where the Constitution, treaties or statutes of the United States shall otherwise recognize or provide” were to be applied and followed “as rules of decision in trials at common law.” George Swift, a Maine resident, was assigned a bill of exchange from John Tyson in New York. The bill was dishonored when it became due, and Swift brought a diversity action in the United States District Court for the Southern District of New York seeking payment. New York common law held that bills of exchange could not be assigned, and the federal court found in Tyson’s favor on that basis. Swift appealed to the United States Supreme Court, and the main issue before the court was whether the reference to “the laws of the several states” in Section 34 included common law decisions as well as enacted statutes.

Background of the Case

Swift, a Maine resident, received a bill of exchange from Tyson, who in turn obtained it from North & Keith as partial consideration for a property purchase in Maine, for which North & Keith had fraudulently claimed title. Swift accepted the bill of exchange as payment of a
promissory note that North & Keith provided to him as part of a property transaction. The bill was dishonored after it came due.

**The Controversy**

Swift filed suit to compel Tyson to pay the debt due Swift. Tyson refused, defending on the grounds there was no consideration for the obligation to Swift and that New York common law did not permit assignments of bills of exchange. As New York played a significant role in the financial and commercial market at that time, this issue was of significant importance that the Circuit Court certified the issue for direct appeal to the United States Supreme Court.

**The Supreme Court Decision**

The Supreme Court unanimously held that Section 34 of the Judiciary Act of 1789 was not intended to require federal courts in diversity actions to apply the common law of the jurisdiction in which the action was brought. While it is appropriate for the federal courts to consider the common law of the particular jurisdiction, Justice Story, writing for the Supreme Court, noted that the federal courts are not bound by the decisions of the state courts:

“But, admitting the doctrine to be fully settled in New York, it remains to be considered whether it is obligatory upon this court if it differs from the principles established in the general commercial law. It is observable that the courts of New York do not found their decisions upon this point upon any local statute or positive, fixed or ancient local usage, but they deduce the doctrine from the general principles of commercial law. It is, however, contended that the 34th section of the judiciary act of 1789, ch. 20, furnishes a rule obligatory upon this court to follow the decisions of the state tribunals in all cases to which they apply. That section provides”

“that the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision, in trials at common law, in the courts of the United States, in cases where they apply.”

“In order to maintain the argument, it is essential, therefore, to hold that the word ‘laws’ in this section includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language, it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not, of themselves, laws…. It never has been supposed by us that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law….”

Justice Story, who was one of the nation’s leading authorities on commercial law and commercial paper at that time, concluded by holding that the bill of exchange was a negotiable instrument, that the New York common did not apply, and that federal common law, which did
apply to this dispute, permitted assignment of commercial paper such as the bill of exchange at
issue.

The *Swift* case permitted the creation of a body of federal common law in diversity cases. Many
criticized the decision for intruding into areas that were the responsibility of state courts. Others
also criticized the holding because it could lead to differing outcomes, based on the same facts,
due solely to whether the case was filed in federal court (in which federal common law would
apply) or in state court (in which the state common law would apply).

**Conclusion**

The *Swift* decision was a landmark one because it permitted federal courts sitting in diversity to
establish federal common law. The *Swift* decision remained good law until it was overturned in
1938 by the Supreme Court in *Erie Railroad Co. v. Tompkins*, which held that “the mischievous
results of the doctrine [created by the *Swift* decision] had become apparent” in promoting forum
shopping in diversity actions.

*Swift v. Tyson* (1842) Supreme Court decision: 9-0, with Justice John Catron concurring in the
decision: [https://supreme.justia.com/cases/federal/us/41/1/#annotation](https://supreme.justia.com/cases/federal/us/41/1/#annotation).

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**Justice Joseph Story (1779-1845)**

**Guest Essayist: Daniel A. Cotter**

**Justice Joseph Story: The Youngest Justice Appointed to the Court**

Most lawyers in private practice at the age of 32 are preparing for potential consideration for,
and transition to, partnership. At that same age, after a distinguished government and law firm
career in Boston, Joseph Story took his seat on the United States Supreme Court in 1811,
becoming the 18th Justice of the Supreme Court and the youngest justice appointed to the
Supreme Court. Story served on the Court for almost thirty-four years, writing a large number of
opinions and dissents. His tenure coincided with those of two of the longest serving Chief
Justices in the Supreme Court’s history, John Marshall and Roger B. Taney.

**Early Life and Career**

Story was born in Marblehead, Massachusetts on September 18, 1779, to Dr. Elisha Story, a
participant in the Boston Tea Party, and Elisha’s second wife, Mehitable Pedrick. Story was the
first of eleven children of the second marriage, and the eighth child of Elisha. He attended
Marblehead Academy, which he left after the schoolmaster beat him in front of his classmates,
and enrolled at Harvard University at the age of 16. Story graduated from Harvard in 1798, finishing second in his class.

Story then read law under U.S. Representative Samuel Sewall, who later became Chief Justice of the Massachusetts Supreme Judicial Court. Story also read law under Samuel Putnam. In 1801, Story was admitted to the bar at Salem, Massachusetts, and went on to work for a prominent shipping firm, George Crowninshield & Sons. In 1805, Story was elected to the Massachusetts House of Representatives, serving approximately two years, until he successfully ran for the U.S. House of Representatives from Massachusetts’s 2nd district, to fill the vacancy created by the death of a Crowninshield son. Story served less than one year and was not up for reelection in 1808. Story returned to private practice but then returned to politics, winning election as a state representative again and becoming Speaker of the Massachusetts House in 1811.

**Supreme Court**

When an opening on the Supreme Court became available during James Madison’s presidency as a result of William Cushing’s death, Madison nominated Story (Story was the fourth choice of Madison for this vacancy). Story was nominated on November 15, 1811, and was confirmed by the United States Senate a mere three days later by Senate voice vote. Madison hoped that Story would serve as a counter to the positions and views of Chief Justice John Marshall, but Madison’s hopes were not fulfilled. Story quickly became a strong ally of Marshall and sided with him on many of the Court’s most important decisions over the next twenty years. Story issued a large number of opinions for the Marshall Court, second only to the Chief Justice. After Marshall’s death, Story served another dozen years under Chief Justice Roger B. Taney. Story did not like the fragmentation on the Taney Court and believed that the Taney Court favored states’ rights over nationalism too strongly.

Story brought his expertise in commercial law to the Supreme Court and, riding circuit in the New England region, brought national jurisprudence to the North. The process of circuit riding enabled both Story and Marshall to influence which cases reached the Supreme Court. Story’s judicial philosophy was based on “legal science,” believing that proper and uniform application of law would make the United States stronger.

Story’s scientific judicial philosophy at times led to unintended consequences, such as his opinion in *Prigg v. Pennsylvania* (1842), which held that any state law that interfered with enforcement of the Fugitive Slave Act of 1793 was unconstitutional. The *Prigg* case gave slavery national constitutional standing. Story claimed that the decision was an antislavery opinion, but the opinion also led to a number of “personal liberty laws” being enacted in the Northern States. Eventually, in 1850, the Fugitive Slave Act of 1793 was replaced with a harsher one. Around the same time as *Prigg*, Story authored the decision in *The Amistad* (1841), holding that the Africans who had been sold into slavery were free. *The Amistad* was the first time that the Supreme Court decided a slavery case, and *Prigg* was the second instance. (Story was portrayed in the movie version of *Amistad* by Justice Harry Blackmun — the only known time one Justice has played another Justice in a movie.) Story also was very much opposed to slavery, but believed the language of the Constitution expressly authorized the institution.
Story strongly advocated federal jurisdiction and nationalism, causing Andrew Jackson to call him “the most dangerous man in America.” Early in his judicial career, Story authored the opinions in *Fairfax Devisee v. Hunter’s Lessee* and *Martin v. Hunter’s Lessee*, finding in the latter that Section 25 of the Judiciary Act of 1789, which gave the Supreme Court the jurisdiction to review state judicial decisions that interpreted the Constitution and federal laws, was constitutional. (In both cases, Marshall did not participate as the cases involved his family’s investments in properties, although some historians have asserted the language of the decisions has a Marshall-esque flavor.) Virginia initiated an anti-Court movement after the decision, but the supremacy of the Supreme Court was further cemented by Story’s opinion.

During his long judicial tenure, Story was also a prodigious author, with numerous treaties on law and commentaries to his credit, including his three-volume *Commentaries on the Constitution*, a source that is still consulted for understanding the Founders’ language. Story’s nine commentaries consistently advocated nationalism and economic liberty.

In 1819, Story was elected to the Harvard Board of Overseers. Beginning in 1829, Story also taught for many years at Harvard University as the Dane Professor of Law. Story planned to retire from the Court to further pursue his interests in writing and teaching, but died unexpectedly of an illness on September 10, 1845, having served more than thirty-three years on the Supreme Court.

**Conclusion**

Story had a long and distinguished career on the Supreme Court. His judicial philosophy and his interest in preserving the Union led to decisions that were not always consistent. Story is the ninth-longest serving justice in the Court’s history and also has the longest tenure as the Junior Justice on the Supreme Court—he served in that role for eleven years until Smith Thompson became the 19th Justice in 1823.

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**Propeller Genesee Chief v. Fitzhugh (1851)**

Guest Essayist: Joerg Knipprath

On June 19, 1846, the Rochester, New York, Democrat newspaper reported that over 4,000 people assembled to witness the launch of a new steamship (then often called a “propeller” due to the novel screw propulsion mechanism), the *Genesee Chief*. She was described as “faultless in her model and appointments.” At 144 feet long, with 20 state rooms, and berths for 75 cabin and 100 steerage passengers, with room for more, she was to be the start of regular steamship service between Rochester and Chicago.
Less than a year later, on May 6, 1847, on Lake Ontario, the *Genesee Chief* collided with the schooner *Cuba*, a sailing vessel laden with nearly 6,000 bushels of wheat. The *Cuba* sank. The cargo was lost. The owners of the *Cuba* thereupon sought a libel (claim) in admiralty law in federal court for their damages. They based their claim on an 1845 statute of Congress. The *Genesee Chief*’s owners challenged that court’s jurisdiction, averring that the federal court lacked diversity jurisdiction over the case because owners of both ships were from New York State. Further, they claimed that the court lacked federal question jurisdiction because admiralty law only applied on the high seas or adjacent waterways, while this incident occurred on a portion of a lake within the territorial waters of New York State. The federal statute that had given the federal court jurisdiction over this claim therefore must be unconstitutional.

The matter proceeded to the Supreme Court for decision in 1851. The Court’s opinion, by Chief Justice Roger Taney, roiled the waters of American jurisprudence. The opinion upheld the trial court’s jurisdiction as well as its decision on the merits. In doing so, the Court touched on three areas of controversy. Viewed from the narrowest perspective, the Court abandoned long-standing English (and more recent American) precedents about application of admiralty law. In addition, the Court carefully trod a narrow path between powers of the general government and reserved powers of the states. Finally, the Court gave enhanced jurisdiction and power to the federal courts.

As to the first, English law traditionally limited the powers of admiralty courts to matters that occurred on the high seas or tidewater areas, that is, those places that, though inland, were nevertheless subject to the ebb and flow of tides. These were deemed navigable waters. That definition worked well because, as the Court maintained, in England there were no public navigable waters beyond the tidal influence. However, a large country as the United States, encompassing a number of large navigable rivers and inland lakes far from ocean tides, had to adjust its law to different conditions.

What made the matter more ticklish for Taney was that Chief Justice John Marshall, in *The Thomas Jefferson* case in 1825, had applied the English approach. Since then, commercial navigation on rivers and lakes had expanded, made even more efficient by the canal-building programs of the early 19th century. Business interests needed relief from potentially overlapping, and even conflicting, application of state property law by competing state courts. Congress responded to their concerns about *The Thomas Jefferson* case by enacting the 1845 statute that opened the federal courts to litigants in tort and contract disputes involving navigation and commerce on lakes and navigable waters between states and territories. Since that case also formed the basis for the argument of the *Genesee Chief*’s owners about the federal statute’s unconstitutionality, Taney distinguished and, effectively, overruled it.

Taney pointed out that there was nothing inherent to connect navigation to the ebb and flow of tides. That system had been of practical effect in England and in the early states. As the Chief Justice noted, “In the old thirteen states, the far greater part of the navigable waters are tidewater.” Moreover, the decision in *The Thomas Jefferson* was made “when the commerce on the rivers of the west and on the lakes was in its infancy and of little importance and but little regarded compared with that of the present day.” In addition to these geographic and demographic changes, there had occurred a technological revolution: “Until the discovery of
steamboats, there could be nothing like foreign commerce upon waters with an unchanging current resisting the upward passage.” Taney reasoned that Congress simply reacted to these changes through its new statute, and that the Court must follow suit.

While the result was a victory for the practical commercial nationalism of the rising business interests, Taney was very grudging in his constitutional nationalism. The Jacksonian Democrat in him gave as little ground as possible to Congress at the expense of the states’ reserved powers. Congress made Taney’s constitutional path easier by not clarifying its view of the statute’s constitutional roots.

Counsel for the Cuba argued that the statute was a proper exercise of Congress’s power to regulate interstate commerce. They could point, among other precedent, to John Marshall’s opinion in Gibbons v. Ogden that the commerce power could reach navigation. Taney demurred. The commerce power does not distinguish between commerce on land and on water. However, that commerce must take place between, not within, states. Were the Court to find that this statute was based on Congress’s commerce power, Congress then could extend admiralty jurisdiction to contracts and torts that arose on land. On the other hand, Congress could extend such power only to matters occurring between states, not those arising on navigable waters within a state. That, in turn, would undermine the statute’s constitutionality in cases such as this, where many of the parties on both sides were from New York. Conversely, if the Court upheld this statute under the commerce power, that clause could be read as permitting Congress to reach commerce internal to a state. Safer from all points, therefore, to rest the decision on the express constitutional power of Congress to define the jurisdiction of the federal courts under Article III of the Constitution, including the placing of admiralty jurisdiction.

The reasoning in the Genesee Chief case was consistent with Taney’s jurisprudence of dual federalism. It had been basically a self-evident truth to Andrew Jackson and his ideological fellows that the Marshall Court’s judicial nationalism stood in service to an enhanced and dangerous national government. Marshall’s broad interpretations of the necessary and proper clause in McCulloch v. Maryland and of the commerce power in Gibbons v. Ogden demonstrated the need for a constitutional change of course. Taney, Jackson believed, was just the man for the task. While matters rarely turn out as well as one hopes, and the Taney Court was no exception, Taney did strike a balance that was potentially friendlier to the states’ local police powers.

Taney the jurist may have been willing to clip the potential excesses of the Marshall Court’s nationalism in regards to Congressional powers. Taney the judicial politician, however, was not so quick to discard the Court’s own institutional nationalism and the increased power and stature that would come with it. If Congress wanted, as here, to expand the power of the federal judiciary at the expense of state courts, who was he to object?

In other cases, as well, Taney saw the federal judiciary as a nationalizing institution responsible for creating a national body of law. One example was the 1842 decision in Swift v. Tyson that sought to develop a federal commercial common law. To reach that result, the Court even had to override the Marshall Court’s cases to the contrary. If the states were constitutionally disabled from doing so, and if Congress could not or would not, the courts were the logical source for
such a uniform corpus of national commercial law, akin to what the English courts had done with the law merchant. His opinion in *The Genesee Chief* is in line with Taney’s judicial nationalism.


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**Ex Parte McCordle (1869)**

**Guest Essayist: Joerg Knipprath**

*Ex parte McCordle* was forged in the superheated atmosphere of Southern reconstruction after the Civil War. The struggle to shape that reconstruction pitted the “Radical” Republicans (representing the pre-war abolitionist wing) against moderates within the party. Democrats, reduced to a rump faction, could do little more than get out of the way and, if palatable, delicately offer support to the Republican moderates. The political and constitutional fault line cut between the restrained Lincoln-Johnson presidential reconstruction based on maintaining the existing federalism, but with abolition of slavery, and the program of congressional radicals to treat the South as a conquered province reduced to territorial status, prostrate before Northern arms and to be cleansed of the twin stains of slavery and secession by stripping the erstwhile states of their old constitutional privileges.

A moderate alternative eventually emerged as the template for reconstruction. It was based on the “grasp-of-war” theory that the Civil War had been a war in fact, but not between international belligerents. Since secession was constitutionally impossible, the Confederate States had been merely a simulacrum of a nation. Thus, the states were still within the union, but suffered at the moment from disorganized governments. It was up to the North to restore to those states republican forms of government, consistent with the constitutional obligations imposed on the general government under the “Guarantee Clause” of Article IV, Section 4. The only effective authority to oversee that restoration in the South was the military.

A key component of the eventual program, one that came closest to the Radicals’ vision, were the Military Reconstruction Acts of 1867, adopted over President Andrew Johnson’s veto. Relying on the grasp-of-war theory, these laws declared the lawfully-elected Southern states’ “Johnson governments” to be merely provisional and subject to the control of Northern military commanders. Those commanders could overrule and, indeed, abolish those governments; remove state officials; control the adoption of new state constitutions that protected the rights of
Blacks to vote; oversee voter registration; and arrest, try by military commission, and confine in military prison disturbers of the peace and other criminals.

Many aspects of these acts were constitutionally suspect, to say the least. As to the last provisions, control by the military over ordinary criminal matters during peacetime was already a part of the re-enacted Freedmen’s Bureau Act of July, 1866. However, in December, 1866, in *Ex parte Milligan*, the Supreme Court gave notice that, in places where the civil courts were open, trial of civilians by military commission was unconstitutional. That decision cast serious doubt about the constitutional viability of using the military to protect the rights of Blacks.

When the Court followed up with two other decisions that appeared to undercut the overall approach of Congressional reconstruction, several cases were brought that challenged directly the constitutionality of the Military Reconstruction Acts of 1867. *Ex parte McCardle* was one. As editor of a Mississippi newspaper, William McCardle had written articles critical of the national government’s policies. He was charged with disturbing the peace for publishing “incendiary and libelous” articles and held for trial by military commission.

Using the Habeas Corpus Act of 1867 (the “Act”), McCardle filed a petition for a writ of habeas corpus in a lower federal court, which was denied. McCardle then appealed to the Supreme Court. Given the portentous nature of his argument, his case was heard at great length between March 2 and 9, 1862. Both sides rolled out the legal heavy artillery. Jeremiah Black (President Buchanan’s attorney general) and David Dudley Field (top New York attorney and legal reformer, progenitor of the Field Codes that set the model for the then-beginning statutory codification of law, and brother of sitting Supreme Court Justice Stephen Field) were among those arguing for McCardle. Senator Lyman Trumbull of Illinois, the major force behind the Freedmen’s Bureau legislation and the Civil Rights Act of 1866, and two prominent Supreme Court litigators defended the law.

Congress, alarmed by reports that the arguments against the military commissions were so persuasive that this portion of the acts would likely be struck down, quickly intervened. Relying on its constitutional authority to control the specifics of the Supreme Court’s appellate jurisdiction, Congress moved to repeal the portion of the Act that gave the Court the power to review habeas petitions that were brought under that statute and denied by lower federal courts. When the Justices met in conference to consider McCardle’s case, the bill had passed Congress but had not been signed by the President. The justices then delayed proceedings to give the political branches time to act. President Johnson vetoed the bill. Congress overrode the veto. The Court postponed its ruling for a year to allow the parties fully to consider the effect of the repeal, and to allow Chief Justice Salmon Chase to focus on his duties as presiding officer over the Senate’s impeachment trial of President Johnson.

Upon reconvening and hearing arguments in April, 1869, the Court dismissed the case. The Chief Justice’s opinion focused on the broad power given to Congress under Article III, Section 2 of the Constitution to make “Exceptions, and…Regulations” to the full scope of the Supreme Court’s appellate jurisdiction defined in that same section. The Chief noted that, had Congress never passed any law on the matter, the Supreme Court might well exercise the full appellate power as it saw fit. However, uninterrupted practice since the Judiciary Act of 1789 showed that
Congress regulated the Court’s appellate jurisdiction. Therefore, Congress could directly revoke the Court’s jurisdiction to review McCardle’s case.

The *McCardle* proceedings triggered much negative reaction, on and off the Court. Justices Grier and Field filed a statement condemning the original postponement. Counsel for McCardle, Jeremiah Black, reacted with an unusually bitter, though colorful, denunciation of the Court. Secretary of the Interior, Orville Browning, and Secretary of the Navy, Gideon Welles, accused the Court of cowardice and weakness. Historians generally have been critical of the opinion and accused the Court of abandoning its constitutional duty.

That judgment is not without basis, in that the Court was well aware of its precarious position against a Congress bent on imposing its vision of reconstruction. Declaring the Military Reconstruction Acts unconstitutional so soon would only embolden stronger action against the Court. Moreover, Chief Justice Chase’s perennial ambition to become President of the United States by way of whichever party would have him also counseled caution.

However, unnoticed unless one is trained to read the judicial tea leaves, Chase’s opinion at the very end remarks that it would be an error to assume that the repeal law deprived the Court of all appellate power in habeas corpus cases. *McCardle* involved only jurisdiction, then repealed, given by the Act. There remained the Court’s jurisdiction to issue writs of habeas corpus under the Judiciary Act of 1789. Just six months after the *McCardle* decision, the Court ruled in *Ex parte Yerger* that it had such jurisdiction under the 1789 law. Again speaking through Chief Justice Chase, the Court described its *McCardle* decision as an exception—indeed a narrow, explicit one—to the general trend of expanded habeas corpus jurisdiction.

The *McCardle* case raises three constitutional points. First, other than the rare occasion when the Supreme Court sits as a trial court in “original jurisdiction,” the jurisdiction of federal courts is not simply set under the Constitution, but requires a statutory “grant” from Congress. Anything not granted by Congress constitutes an “exception” to the full potential scope of jurisdiction listed in Article III, Section 2, and is implicitly denied.

Second, Chief Justice Chase suggested that Congressional curtailment of the Court’s power to review or issue writs of habeas corpus might require more express restriction than a mere failure to grant such authority affirmatively. The historically recognized nature of the writ as a fundamental guarantee of individual liberty places it in a unique position. Chase referred to the historical trend to expand the judiciary’s role in that regard. Indeed, the Act for the first time extended federal court power to issue such writs against state courts.

This view of the writ’s special status came up recently in attempts by unlawful enemy combatants held at Guantanamo Bay to have their detentions reviewed through habeas corpus petitions. In a series of cases beginning in 2004, the Court frustrated attempts, first, by the Executive Branch and, subsequently, by Congress and the President acting in tandem, to restrict the detainees’ access to federal courts. The Court repeatedly emphasized the special nature of the writ and, eventually, in 2008 in *Boumediene v. Bush*, held that even an express statute cannot effectively deny such access to the courts and review by the Supreme Court.
Third, the Court’s artful efforts in *McCardle* and other contemporaneous cases to avoid deciding the constitutionality of the controversial Military Reconstruction Acts of 1867 reflect classic judicial deference to the political branches in the conduct of military and national security matters. It remains to be seen whether the current federal judiciary will respect that constitutional tradition, emboldened as they may be by the legal elite’s campaign to superimpose a structure of “lawfare” on Congress and the President.

Ex parte *McCardle* (1869) Supreme Court decision: https://supreme.justia.com/cases/federal/us/74/506/case.html

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**CONGRESSIONAL POWERS**

**McCulloch v. Maryland (1819)**  
**Guest Essayist: Tony Williams**

In May, 1818, James William McCulloch was a cashier at the Baltimore branch of the Second Bank of the United States. McCulloch issued a series of bank notes on which the bank did not pay a Maryland state tax. The state treasurer quickly sued to recover the money and won a judgment in Maryland’s highest court. The Supreme Court soon accepted the case, which would have a profound impact in defining the principle of federalism, the reading of the Necessary and Proper Clause in the Constitution, and the national vision of the Marshall Court.

The Bank of the United States was the brainchild of Treasury Secretary Alexander Hamilton who laid a foundation for a national economy. In 1791, the Congress easily passed the bank bill over the objections of James Madison, and it went to President George Washington to sign. Washington took Madison’s constitutional objections seriously and solicited opinions from his cabinet including Thomas Jefferson and Hamilton. The debate centered on the implied powers of the Constitution, whether the powers of the bank were sufficiently related to congressional powers under Article I, section 8 to be covered under the Necessary and Proper Clause, and whether the Constitution would be interpreted loosely or strictly. Washington sided with Hamilton and signed the bill into law with a twenty-year charter for the bank.

While President Thomas Jefferson continued to think the bank was unconstitutional, his Treasury Secretary Albert Gallatin thought great economic benefits were derived from the national
bank. Gallatin later persuaded President Madison of its benefits, and Madison thought that the constitutional issues were “settled” by its passage in 1791 and use for twenty years. The Democratic-Republicans in Congress, however, were wary of national power and narrowly defeated the re-charter by one vote in each house. The absence of a national bank had disastrous financial consequences during the War of 1812, and Congress and the president consequently chartered the Second Bank of the United States in 1816.

The Second Bank, however, was more poorly managed than the first, and lent money in a cavalier fashion. It had difficulty meeting its obligations and was forced to tighten the money supply and credit. The Panic of 1819 rippled through the economy, and led to many bankruptcies and a sharp recession. The mismanagement tarred the reputation of the Bank, and hostility increased. New states such as Indiana and Illinois banned any branches in their constitutions, and Maryland was only one of several states that passed a tax on the bank. A congressional investigation followed. This was the atmosphere in which the Supreme Court would decide *McCulloch v. Maryland* in 1819.

Chief Justice John Marshall had been a Federalist who argued for ratification of the Constitution in Virginia in 1788, and later served as President John Adams’ Secretary of State. Marshall helped make the judiciary a co-equal branch with the legislative and executive branches, and enshrined the principle of judicial review in *Marbury v. Madison* (1803). The Marshall Court enhanced the power of the national government is several seminal precedents. That nationalist vision shaped the *McCulloch* decision.

The attorneys for both sides presented oral arguments—often in the form of lengthy orations—for nine days in late February and early March of 1819. Daniel Webster was one of the attorneys for McCulloch, while delegate to the Constitutional Convention and Maryland Attorney General, Luther Martin, helped represent the state. The justices virtually swooned at the “brilliant and sparkling” rhetoric on both sides.

A few days later, on Saturday, March 6, the Supreme Court rendered a unanimous decision. The chief justice wrote the opinion of the Court. Marshall asserted that the Bank of the United States was constitutional under the Necessary and Proper Clause which authorized Congress “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.” Marshall argued that the powers of the Bank were related to its enumerated powers in Article I, Section 8.

“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution,” Marshall wrote. He added that the Necessary and Proper Clause was “placed among the powers of Congress, not among the limitations of those powers.” He argued “its terms purport to enlarge, not diminish, the powers vested in the government.”

The Court then addressed the ability of a state to tax the national government. The Supremacy Clause in Article VI read, “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.” Marshall argued that, “If any one proposition could command the universal assent of mankind, we might expect it would
be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action.” Marshall supported a constitutionally limited though energetic national government. He famously declared the principle that the power to tax was the power to destroy. Therefore, under the Supremacy Clause, the Maryland tax on the national bank was unconstitutional.

The bank continued to be controversial in the ensuing decades and subject to the partisan politics of the 1830s. President Andrew Jackson was guided by states’ rights and a strict interpretation of the Constitution when he vetoed an early congressional re-charter of the bank in 1832. Jackson’s veto rejected the precedent of previous congresses and presidents, and the legal precedent of *McCulloch*, which helped to define the constitutional principle of federalism. The twentieth century would see the expansion of the federal government and national power well beyond that envisioned by Marshall that upset the constitutional balance of federalism.

*McCulloch v. Maryland* (1819) Supreme Court decision: 
http://supreme.findlaw.com/supreme_court/landmark/mcculloch.html

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**Field v. Clark (1892)**

**Guest Essayist: Joe Postell**

Can Congress give away its legislative powers to other branches of government, including administrative agencies? In the case of *Field v. Clark*, the Supreme Court decisively said “no,” laying down a precedent that stands against much of what our government does today.

The McKinley Tariff Act of 1890, which gave rise to this case, gave the President of the United States the power to suspend duty-free status in sugar, molasses, coffee, tea, and hides when he determined that a country producing and importing those items into the United States had imposed “reciprocally unequal or unreasonable” tariffs on American goods. When the President suspended these items’ duty-free status, taxes had to be paid by companies bringing these goods into the country.

Importers of these goods such as Marshall Field & Co. sued to recover the taxes they paid, on the grounds that the law had unconstitutionally delegated Congress’s legislative powers to the President. They argued that giving the President the power to suspend the law was equivalent to giving the President the power to make the law, and the power of making law was specifically vested in Congress, the elected representatives of the people. The law was therefore illegitimate, they argued, and so the taxes were unlawfully collected.

Although the Supreme Court ruled against Marshall Field, it unequivocally affirmed the importance of the “nondelegation doctrine,” which forbids Congress giving away its powers to other branches. It proclaimed,
“That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.”

If Congress were to give its legislative powers to the executive, then our representatives would no longer be the lawmakers, and we would be subjected to the rules of an unelected bureaucracy that is less accountable to us than our own elected legislature.

The reason the Court refused to strike down this aspect of the McKinley Tariff Act was that it gave the President only the power to declare a fact that would trigger suspension of the law, not the power to write the law himself. In the Court’s words, “Congress itself prescribed, in advance, the duties to be levied, collected and paid,” and merely gave the President the power to trigger those provisions of the law by finding that another country was refusing to engage in free trade with us. Congress made the law, and the President merely decided when it would go into effect.

Scholars on the nondelegation doctrine dispute whether giving the President this power to find facts that trigger legal outcomes is equivalent to delegating legislative power. One could argue that every law gives this power to executive officials. Take the simple example of speeding: the law says that drivers shall not exceed a certain speed, and leaves it to the executive—the police—to find the fact by determining that a person has exceeded the speed limit.

But this dispute is far less important than the real message of Field v. Clark: that Congress may not, under the Constitution, transfer its powers to unelected administrative officers, including the President. If this principle were followed more faithfully today, it would call much of modern American government into question.

Today, administrative agencies routinely make rules that have the force of law. (They also routinely investigate, prosecute, adjudicate, and enforce those rules, serving as lawmaker, investigator, prosecutor, judge, jury, and executioner.) Congress’s laws are typically vague and open-ended, leaving to administrative agencies the ability to engage in rulemaking to fill in the details. Our Congress passes laws so that we can find out what is in them later from the bureaucrats.

This threatens the very republic that our Constitution’s Founders worked so diligently to establish, and many generations thereafter preserved for their posterity. The core principle of republican government is that our own elected representatives make the law, and Field v. Clark is a case which affirms this basic principle of republicanism.

Field v. Clark (1892) Supreme Court decision:

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PRESIDENTIAL POWERS

United States v. Curtiss-Wright Export Corp. (1936)
Guest Essayist: Daniel A. Cotter

The three branches of the United States government are often questioned with respect to whether their exercise of powers exceeded the limitations imposed upon them by the United States Constitution. In U.S. v. Curtiss-Wright Export Corp. (1936), the issue was the extent of the president’s and executive branch’s power to conduct the foreign affairs of the United States. The decision has been recognized as a very influential one, establishing the president’s supremacy when it comes to foreign affairs.

Background of the Case

On May 28, 1934, the United States Congress approved a Joint Resolution, which provided that if the president decided, it would be “unlawful to sell” arms to countries engaged in the conflict in Chaco, a region in South America. Congress’ Joint Resolution delegated this power to President Franklin Delano Roosevelt only if:

the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and if, after consultation with the governments of other American Republics and with their cooperation, as well as that of such other governments as he may deem necessary, he makes proclamation to that effect.…

President Roosevelt issued a proclamation on the same date (48 Stat. 1744), stating:

I, Franklin D. Roosevelt, President of the United States of America, acting under and by virtue of the authority conferred in me by the said joint resolution of Congress, do hereby declare and proclaim that I have found that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and that I have consulted with the governments of other American Republics and have been assured of the cooperation of such governments as I have deemed necessary as contemplated by the said joint resolution, and I do hereby admonish all citizens of the United States and every person to abstain from every violation of the provisions of the joint resolution above set forth, hereby made applicable to Bolivia and Paraguay, and I do hereby warn them that all violations of such provisions will be rigorously prosecuted.

On November 4, 1935, President Roosevelt revoked this Proclamation, (49 Stat. 3480), noting that “the prohibition of the sale of arms and munitions of war in the United States…will no longer be necessary…” However, Roosevelt’s revocation did not have the “effect of releasing or extinguishing any” criminal activity incurred while the Proclamation was in effect.
The Controversy

Curtiss-Wright allegedly planned to sell fifteen machine guns to Bolivia, a country involved in the Chaco War, in violation of the Proclamation. Curtiss-Wright was indicted on January 27, 1936 on charges of conspiring to sell these weapons beginning on May 29, 1934, one day after President Roosevelt’s Proclamation was issued. Curtiss-Wright moved to dismiss the indictment on a number of grounds, including that the Joint Resolution “effects an invalid delegation of legislative power to the executive.” The District Court for the District of Columbia agreed and entered a judgment dismissing the indictment. The United States appealed directly to the Supreme Court under the Criminal Appeals Act.

The Supreme Court Decision

The Supreme Court granted certiorari to consider several issues, the most important being whether the Joint Resolution violated the non-delegation doctrine, which provides that Congress, being vested with “all legislative powers” by Article One of the Constitution, cannot delegate that power to the president or anyone else. Associate Justice George Sutherland wrote the 7-1 decision, holding that in conducting foreign affairs, the Executive is the supreme branch of government. Justice Sutherland distinguished between “our internal affairs” and “foreign or external affairs.” If the question were one addressing the former, then Congress could not delegate, and the president could not exercise, such powers. Sutherland wrote:

The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution [and certain implied powers] is true only in respect of our internal affairs.

However, with regard to foreign affairs, Sutherland stated that with the separation of the colonies from Great Britain, the power previously held by the Crown passed “to the colonies in their collective and corporate capacity as the United States of America.” Sutherland wrote: “Rulers come and go; governments end, and forms of government change; but sovereignty survives.”

The Court’s opinion next examined the scope of the president’s powers and held “the President alone has the power to speak or listen as a representative of the nation” and that such power was independent of any delegation of power by Congress. In reaching this conclusion, Sutherland quoted from John Marshall’s March 7, 1800 statement, made when he was a Representative in the United States House: “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”

Sutherland examined a number of laws passed by Congress from 1794 forward to show that the delegation of legislative power to the President found in the Joint Resolution was the latest in a long line of legislation that “has prevailed almost from the inception of the national government to the present day.” Sutherland’s decision reversed and remanded the lower court’s ruling. Justice James Clark McReynolds dissented and Justice Harlan F. Stone did not take part in the case.

Conclusion
Sutherland’s decision granted extremely broad powers to the president to conduct foreign affairs, but the Court since the Curtiss-Wright decision has not fully adopted such a broad scope of executive powers. However, the executive branch has often asserted Curtiss-Wright as justification for presidential action in the absence of judicial decisions to the contrary (many of the disputes that arise between the two branches are political questions, which the Supreme Court will not hear).

United States v. Curtiss-Wright Export Corp. (1936) Supreme Court decision:
https://supreme.justia.com/cases/federal/us/299/304/#annotation

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Youngstown Sheet & Tube Co. v. Sawyer (1952)
Guest Essayist: Daniel A. Cotter

At times during our nation’s history, the executive branch of the United States government has tested the limits of its power by taking actions that are not explicitly granted to the president or executive branch. For example, in Youngstown Sheet & Tube Co. v. Sawyer (the “Steel Seizure Case”) (1952), the Supreme Court addressed the issue of executive power during emergencies in the absence of express statutory or Constitutional authority. The Supreme Court decision spans more than 140 pages, including Justice Hugo Black’s opinion for the majority, holding that President Harry S. Truman had exceeded the limits of the president’s power, as well as concurring opinions from each of the five members of the Court agreeing with Black’s conclusions, and a long dissent by the Chief Justice. The decision and bases for the Steel Seizure Case are hard to discern from the six opinions written to support the majority. Justice Robert Jackson’s concurrence is often cited to assess the limits of executive power, as it sets forth a categorization that is the most comprehensible of the six opinions.

Background of the Case

Youngstown Iron Sheet and Tube Company was created on November 23, 1900, in Youngstown, Ohio. In 1950, President Truman sent American troops to South Korea consistent with a U.N. resolution, but without a formal declaration of war by Congress. In support of the war effort, President Truman created the Wage Stabilization Board with the goal of preventing labor strikes, but those efforts were not successful. The United States Steel Workers threatened a strike against all of the major steel producers, including Youngstown, and when negotiations failed, the union issued a notice of intent to strike when the existing collective bargaining agreement expired.

In order to avert the strike, President Truman issued an executive order directing his Secretary of Commerce, Charles W. Sawyer, to seize the steel mills:
The Secretary of Commerce is hereby authorized and directed to take possession of all or such of the plants, facilities, and other property of the companies named in the list attached hereto, or any part thereof, as he may deem necessary in the interests of national defense; and to operate or to arrange for the operation thereof and to do all things necessary for, or incidental to, such operation.

While President Truman could have acted to prevent the union from striking pursuant to the emergency authority granted under the Taft-Hartley Act, he disliked that Act, which had been passed over his veto, and he also did not believe the union was to blame for the threatened strike. Truman’s action against the mills was not based on any express authority:

but was based generally upon all powers vested in the President by the Constitution and laws of the United States and as President of the United States and Commander in Chief of the Armed Forces.

The Controversy

Immediately after the Secretary of Commerce issued the order seizing the steel mills, the mills sued Secretary Sawyer in the United States District Court for the District of Columbia, seeking a declaratory judgment and an injunction. The District Court issued a preliminary injunction, which the Court of Appeals for the D.C. Circuit stayed.

The Supreme Court Decision

The Supreme Court granted certiorari to consider the executive branch’s powers in an emergency. Associate Justice Hugo Black wrote the 6-3 decision, stating:

The President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied. Indeed, we do not understand the Government to rely on statutory authorization for this seizure.

Finding no Congressional or Constitutional authority, Black concluded that the president had no power or authority to issue orders to, or actually, seize the steel mills. Justice William O. Douglas concurred, finding that the action by the president in seizing the mills was a condemnation of property, and the only branch with the authority to pay for a condemnation was Congress. Each of the concurrences agreed with the decision but for different reasons. As noted, Justice Jackson set forth a framework for considering the limits of the president in three different circumstances. Justice Jackson’s concurrence began:

A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other.
Jackson next set out the president’s power in three situations: 1) when the president acts in accordance with “an express or implied authorization of Congress,” the president is at his broadest authority; 2) when the president acts without “either a congressional grant or denial of authority,” his power is based only upon reliance of his own independent powers” where there is potential for concurrent authority with Congress; and, 3) when the president acts against the express or implied will of Congress, “his power is at its lowest ebb.” Jackson found that the seizure by President Truman fell within the third category, and agreed with the Court’s decision.

Chief Justice Fred Vinson dissented, joined by Justices Stanley Reed and Sherman Minton. Citing the extraordinary circumstances under which President Truman issued the executive order and seized the mills, Vinson outlined the history of similar presidential action in comparable circumstances:

With or without explicit statutory authorization, Presidents have at such times dealt with national emergencies by acting promptly and resolutely to enforce legislative programs, at least to save those programs until Congress could act. Congress and the courts have responded to such executive initiative with consistent approval.

Upon the Supreme Court ruling in the Steel Seizure Case, Truman immediately returned the mills to the owners. The union struck soon after and remained on strike for fifty days, until President Truman threatened to use the powers under the Selective Service Act.

Conclusion

The Steel Seizure Case decision was a landmark one because it set limits on the president’s powers absent a Congressional act or Constitutional provision. Jackson’s framing of the three contexts in which a president may exercise power has subsequently been referenced often when assessing the extent of a president’s authority.

Youngstown Sheet and Tube Co. v. Sawyer (1952) Supreme Court decision: https://supreme.justia.com/cases/federal/us/343/579/

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FEDERALISM AND STATES’ SOVEREIGNTY

Fletcher v. Peck (1810)
Guest Essayist: Joerg Knipprath

At the Peace of Paris that ended the Revolutionary War, the United States (defined, as in the Declaration of Independence, as the individual states) were recognized by the British as free and
independent. While the British relinquished to those United States territory from the Atlantic to
the Mississippi, the several states did not thereby relinquish their own, sometimes conflicting,
claims to that land. The Articles of Confederation provided procedures for the settlement of
boundary disputes between states under the aegis of Congress and also anticipated that there
might be disputes between grantees of land from two different states. Yet, no state was to be
deprived of land for the benefit of the United States, so the Confederation Congress could not
force the states to cede their western land. Still, a number of states released their claims, so that
Congress gained de facto control over those lands and organized the Old Northwest under the
Northwest Ordinance of 1787.

That ceding of land continued under the new Constitution of 1787. However, some states lagged.
Pressure had built since the War to open western lands to settlement. Individuals setting out to
make a living, and populations in the settled portions of the original states who wanted
pacification of the frontier and protection against Indian raids, supported this expansion. Hence,
states along the Atlantic coast made grants of their western public lands to potential settlers. One
such example was the epic-like tale of the Yazoo River lands in the Old Southwest.

In 1789, Georgia sold 16 million acres of western land to land companies, one of which was
headed by Patrick Henry. The purchasers tried to pay by tendering Georgia’s own Revolutionary
War-era scrip, a practice that speculators successfully employed in some other states. When
Georgia refused the tender and demanded gold and silver, the deal collapsed. The companies
eventually sued in federal court to compel the sale. One case, by a South Carolina plaintiff,
reached the Supreme Court. In *Chisholm v. Georgia*, the Court held the state amenable to suit in
federal court. That decision precipitated an immediate and violent (both literally and
figuratively) reaction by Georgia and brought about, in record time, the adoption of the Eleventh
Amendment to the Constitution to prohibit such suits.

The legislature then granted 35 million acres of Yazoo River lands to four companies in 1795.
The Yazoo territory was claimed by Georgia and encompassed most of the current states of
Alabama and Mississippi. It was lauded in *The American Gazetteer* in 1797 as a “healthy, fertile,
and pleasant country” with a “luxuriancy and diversity of its soil” and “remarkably well watered
by springs and brooks.”

Such an attractive area might produce a handsome price for the treasury, but the legislature sold
the entire territory for $500,000 (about 1.5 cents per acre) in gold and silver. All but one of the
legislators had been bribed by the companies. One member was “criticized” for selling his vote
for $600, while the going price appeared to be $1000. He replied that “it showed he was easily
satisfied and not greedy.” Following considerable turmoil, at the next election the aroused voters
chose an almost entirely new legislature. That body swiftly repealed the tainted grant and
purported to void any rights under it.

Of course, the original land companies were not content to sit on their purchases. It is difficult
today to grasp the scope and prevalence of land speculation by people of great and moderate
means. The United States was rich in land and poor in every other respect. The hope for future
profits lay in easy immigration by those who would need land to settle. There was, then, a ready
market for rights to those lands. Moreover, if there were unclean hands in the original grant, best
to sell to innocent purchasers whose claims would be harder to undo. Thus, the companies, which included numerous politicians, judges, and prominent members of society, sold rights to millions of acres to smaller investment syndicates that also included numerous politicians, judges, and prominent (and more middling) members of society.

One such sale, in 1796, was of 11 million acres at 10 cents per acre by the Georgia Mississippi Company to the New England Mississippi Land Company. Among the investors in the latter was John Peck of Boston. He sold a Yazoo parcel to Robert Fletcher of New Hampshire. Invoking their diversity of state citizenship, Fletcher sued Peck in 1803 in federal court for failure to convey proper title due to Georgia’s repeal act.

The plot now thickens even more. Both Fletcher and Peck owned stock in the New England company, which may or may not have been involved in the bribery of the Georgia legislature. The transaction between it and the Georgia Mississippi Company was complex. That opacity suggested to commentators at least some knowledge of the transaction’s questionable circumstances. There was no evidence that the two individual litigants were involved in the bribery; however, there was much evidence that they knew about it at the time of their “contract.”

It is difficult to know the players without a scorecard in this case. The original companies and the various subsequent purchasers—including both Fletcher and Peck—wanted to have the courts resolve the constitutionality of Georgia’s repeal and to remove the cloud hanging over their land titles. A victory for Peck, the defendant, would uphold the original 1795 grant and confirm title in the companies who had bribed the legislature. It would also mean that the 1796 repeal act by the new Georgia legislature was invalid, as was any subsequent sale by that legislature. To test his title, Fletcher, the nominal plaintiff, argued on behalf of the new legislature that the original grant was void due to bribery, and that the new legislature could not be bound by it. In reality, however, Fletcher personally would win only by losing. His loss would clear his title, and he could keep the land that he had “bought” from his fellow-investor Peck. Both parties, then, needed Fletcher to lose.

Since the Eleventh Amendment prevented suit in federal court against Georgia, and since the repeal statute also forbade the Georgia courts from hearing Yazoo cases, Fletcher’s suit against Peck was the only way to get judicial review of the matter. However, their apparent collusion raised doubts about whether a federal court could hear this case, as it would not involve the kind of concrete dispute needed under the Constitution’s “case or controversy” requirement for federal court jurisdiction. Justice William Johnson, concurring in the Supreme Court’s eventual resolution, acknowledged that there was strong evidence of a “feigned case.” He sarcastically concluded, “My confidence...in the respectable gentlemen who have been engaged for the parties, has induced me to abandon my scruples, in the belief that they would never consent to impose a mere feigned case upon this court.” Never, indeed. What was one more abandonment of scruples in this matter, after all?

Among the “respectable gentlemen” was Joseph Story, future founding professor of the Harvard Law School and less than two years from joining Johnson on the Supreme Court. He had also been a lobbyist before Congress for his company. Another was Senator (and future President)
John Quincy Adams. A third, on Fletcher’s side, was the “federal bull dog,” long-time Maryland Attorney General Luther Martin, counsel for Justice Samuel Chase in his impeachment trial before the Senate, defense attorney for Vice-President Aaron Burr at his treason trial, and attorney for Maryland in the foundational case of McCulloch v. Maryland. Martin, a heavy drinker, appeared for the argument intoxicated. In what is surely a unique tribute to Martin’s standing among the legal fraternity at the time, John Marshall adjourned the Court’s session to allow Martin to sober up. Once sober, Martin delivered an unusually brief and tepid argument for Fletcher (and, by extension, for Georgia and its repeal statute) that ignored a couple of crucial issues, lending further credence to the collusion claim.

The federal trial court upheld the original Georgia grant. Still, Fletcher appealed, because, technically, he lost. More important, a circuit court opinion would not protect investors in other states, so a Supreme Court decision was needed. The matter eventually reached that tribunal in 1809. Due to procedural complications, the case was held over a year. When the Court finally decided the case, in 1810, Marshall did not let technical concerns about collusion and lack of a concrete dispute stand in the way of resolving—at long last—the constitutional issues.

Based on his experience in the Virginia legislature and his observations of other such bodies, Marshall had become convinced that legislatures too readily disregarded the rights of creditors and were too quick to relieve debtors of their obligations. Such legislation produced economic turmoil in that it made the propertied class less willing to risk money needed for new enterprises, thereby increasing the cost of innovation. Marshall also viewed this more profoundly as a breach of faith by those seeking to avoid their obligations, a matter that frayed the bonds of community by “confound[ing] liberty with an exemption from legal control,” and that required “protection of the rights of the peaceable and quiet, from the invasions of the licentious and turbulent part of the community.” There was also a more directly personal angle. Marshall and his brother James themselves had invested in such land syndications. The largest of these was their purchase of 160,000 acres of land from the estate of Lord Fairfax. Virginia had confiscated and sold that land to others, which eventually produced its own litigation to come before the Court a few years after Fletcher.

Marshall was not alone in his concerns. Hence, Article I, Section 10, of the Constitution prohibits states from interfering with the obligations of contracts. Marshall also could rely on lower court opinions, such as Justice William Paterson’s opinion in the 1795 circuit court case Van Horne’s Lessee v. Dorrance and the Massachusetts supreme court’s 1796 opinion in Derby v. Blake, both of which had struck down attempted revocations by states of earlier land grants as violations of the Contracts Clause. Even more persuasive may have been the opinion of Alexander Hamilton, who had been retained by the Yazoo land companies to advise them on the legality of the Georgia repeal act. Hamilton’s 1796 advisory to his clients laid out the argument on the Contracts Clause and broader principles. As happened in other major cases, such as Marbury v. Madison and McCulloch v. Maryland, Hamilton’s arguments found their way into Marshall’s opinion, sometimes almost verbatim.

On several levels, then, Marshall was inclined to favor the “Yazooists.” Addressing the validity of the repeal, three issues arose. Was the original grant a valid conveyance despite the allegations
of bribery? If so, is a subsequent legislature nevertheless free to disregard the acts of its predecessor? If it was not, why not?

Marshall first established that a court cannot look “behind” the acts of a legislature to examine the motives of individual legislators. Questions of how much corruption, how direct the corruption (bribery or just influence), and how pervasive the corruption (one member, a majority, all) would necessarily arise. Such a course would be unworkable. It would also be constitutionally inappropriate for an unelected court to examine the motives of a legislative body. Such matters must be left to the political decisions of the voters. The courts have generally followed that rule. Therefore, even if bribery produced the 1795 grant, proper recourse was to turn out those legislators, as happened, or to prosecute, not to void the grant.

On the second point, Marshall agreed with the fundamental principle that a legislature cannot bind its successor in law, any more than an executive can bind his successor, a supreme court can bind its successor, or a sovereign people can bind theirs. However, that principle only applies to discretionary acts of legislation. A legislature may enact a tax that a later one alters or repeals. But that principle does not apply where the earlier act vests rights in a person that the later legislature seeks to abolish.

It only remained to determine the basis for the repeal act’s invalidity. Marshall’s conclusion was that it violated the Contracts Clause. Marshall noted that “contracts” was not defined, so the clause was not limited to state interference with purely private contracts, such as by debtor relief laws. It also applied to grants by states. Equally significant was Marshall’s alternative basis that the repeal act violated “general principles…common to our free institutions.” Marshall, like many of his time, saw security in property as the basis of civilization and progress. Unlike current Court doctrine, property and liberty were inseparable. Mirroring sentiment expressed in other cases, Marshall, in effect, said that, even had there been no Contracts Clause, the 1796 repeal law was so profoundly destructive of the social compact and human freedom that no court could countenance it.

Justice Johnson’s concurrence was even more rooted in extra-constitutional philosophy. Disagreeing with Marshall’s interpretation of the Contracts Clause, he moored his disapproval of the repeal act exclusively to “a general principle, on the reason and nature of things: a principle which will impose laws even on the deity.” He agreed with the essential significance of property to self and society, declaring that property, once vested in the owner, “becomes intimately blended with his existence, as essentially so as the blood that circulates through his system.”

Johnson’s musings about the existence of a “nature” of God and its limit on His omnipotence might not go unchallenged by theologians. However, they indicate how much natural law reasoning influenced him. Moreover, his and Marshall’s reliance on principles outside the constitutional text established a judicial aura of sanctity for vested rights that guided pro-growth and pro-business decisions until the 1930s. That doctrine, known today as “substantive due process” and filtered through the due process clauses of the Fifth and Fourteenth Amendments, no longer protects a person against laws that create insecurity in property. Instead, its use today is to protect other, judicially-selected attributes of personal autonomy, such as a general “right to privacy” in marriage and reproduction. All the while, there have been fierce contests about the
legitimacy of judges referring at all to philosophical principles outside the Constitution’s text for their reasoning.

The controversy over Yazoo did not end with the Court’s decision in *Fletcher v. Peck* in 1813. Peck’s victory was hollow in that Georgia had sold its western territories to the United States after the repeal act, with the proviso that up to 5 million acres be used to settle claims arising out of the Yazoo grants. Some of that land went to innocent purchasers under the original grant. More significant from the position of the Yazooists was that, after nearly two decades of failure, their attempts to have the federal government compensate them for their lost investment bore fruit. On March 31, 1814, President James Madison signed a bill that provided $5 million to compensate those original investors who did not want actually to settle on Yazoo lands.

The end came largely due to political fatigue with a controversy that had plagued the first four administrations. After twenty-five years of political theater, it was best to settle the matter. The nation was dealing with the War of 1812. Pressure had also become politically overwhelming to open up the Old Southwest to settlement, which could now proceed in a systematic manner. Even Thomas Jefferson, retired at Monticello, could rouse himself only to a formulaic criticism of John Marshall, complaining that his third cousin’s “twistifications” in *Fletcher* showed the “cunning and sophistry within which he is able to shroud himself.”

Historians have traditionally characterized the Yazoo grants as the illegitimate product of bribery, fraud, and corruption. That judgment may well be correct, but some caution is in order. The treasury of the State of Georgia was empty, and the state desperately needed money. Through the sale, it received $500,000 in gold. Using current values, and accounting for the difference in population, it is analogous to giving nearly $100 billion to the United States treasury. Moreover, Georgia received this money for land, much of which was under the control of the Cherokees and the Creeks, and part of which was claimed by Spain. Georgia could not guarantee eventual title or even peaceful possession, and all risks about this were assumed by the purchasers. So, even if the sale was ethically or criminally marred, it did not mean it was a bad deal for the state.


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**Green v. Biddle (1823)**  
**Guest Essayist: Andrew Langer**

**Green v. Biddle: Clear Title and the Relationship of States to the Federal Government**

The easy conveyance of clear title to real property is an essential element of both a stable and prosperous civil society. “Clearing” title by conveying “unappropriated” lands to a central government is one way that fledgling or developing nations spur exploration, settlement, and development of lands. Such was the issue in the 1823 Supreme Court Case, *Green v. Biddle*, 21 US 1 (1823), wherein the conveyance of certain unappropriated lands from Virginia to the federal government resulted in confusion when much of that land was used to create the state of Kentucky.

In 1784, Virginia ceded title of the land that was eventually to become the state of Kentucky to the Federal government—land that had been a part of Virginia since England’s King James I had granted the patent for what would become the Virginia colony. As would become the standard whenever territories were going to become states, the agreement between Virginia and the federal government under Article 4, Clause 1 of the Constitution enumerated that the title to all unappropriated lands (i.e., lands still held by the public) would convey from Virginia to the federal government, and that the manner of the patents and titles to privately held lands would remain unchanged:

“That all private rights and interests of lands within the said district [of Kentucky] derived from the laws of Virginia prior to such separation shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state.”

The problem, of course, is that different states can, and do, approach various elements of property ownership different, and Kentucky passed a series of laws setting out new elements for property claims when the disputes arose between titles that had been granted by the state of Virginia and then those that were granted by the state of Kentucky.

The heirs to a gentleman named John Green sued a man named Richard Biddle in order to enforce their claims to land. The high court found that Kentucky’s acts had been unconstitutional—that Virginia was well within its powers to negotiate that titles remain unchanged when the land was conveyed to the federal government for management and disposition.

In his seminal work, *The Mystery of Capital*, Peruvian scholar and economist, Hernando DeSoto goes into great detail as to the essential nature of clear title in the stability and prosperity of a fledgling society. In fact, his research has concluded that one can draw a direct relationship between the clarity and security of a nation’s property laws and that nation’s economic prosperity and political stability. As DeSoto points out, for instance, Haiti, despite massive international attention and interference remains a nation mired in poverty and political turmoil—and that this is in no small measure due to the fact that it takes a dozen or more years, on average, to acquire a parcel of private property, with more than one hundred separate steps involved and no guarantee that the courts will protect one’s claim.
If one cannot invest in one’s own property, if one doesn’t have a reasonable expectation to either own or hold onto their property, what reason is there for that person to invest in their own (or their nation’s) political or economic future, as DeSoto explains.

DeSoto spends a great deal of time discussing the mechanisms that made America’s successful westward expansion possible—and a major part of this was the clearance of title to the federal government for unappropriated public lands, and the recognition that titles would remain in force once a territory (or former colony) became a state. This stability encouraged people to press westward, to invest in the improvements on their own property. Absent such stability, no such expansion would have been possible.

Virginia, itself, had (and continues to have) unique property laws, which figured into the dispute between Green and Biddle. Unlike most states, for instance, in which landowners adjacent to navigable bodies of water only have title to the “mean high water mark” for their land (more on this in the essay regarding Willson v Black Bird Creek), with the water being “owned” by the federal government and the beds under the water owned by the state governments, under many royal charters to land granted by King James I (and his successors) the landowners themselves retained ownership and title to stream beds and the waters therein.

Undoubtedly, when Kentucky became a state, it wanted to assert jurisdiction over the same aspects of property ownership that many of its sister states (save Virginia) retained. And this gave rise to the very kinds of conflicts at issue in Green v. Biddle. But thankfully, the Supreme Court recognized that shifting the aspects of ownership in a post-hoc basis would have created chaos among land-owners, and that Virginia was well-within its powers to specify that titles would remain constant once real property was conveyed to the federal government for the creation of a new state.

Presumably Professor DeSoto would agree, and the history of westward expansion seems to confirm it.

Green v. Biddle (1823) Supreme Court decision:
https://supreme.justia.com/cases/federal/us/21/1/case.html

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Willson v. Black Bird Creek Marsh Company (1829)
Guest Essayist: Andrew Langer


In The Colorado Kid, author Steven King says, “Sooner or later, everything old is new again.” This is certainly true when it comes to issues of public policy and constitutional law. In this essay, we discuss the concept of the “Dormant” Commerce Clause, specifically within the context of navigable waterways. The issue of who has jurisdiction over “navigable” waters is
one that remains a subject of enormous debate—especially as the environmental movement has pushed an ever-more-marginal definition of “navigability” in order to pull more waters under the jurisdiction of the federal government.

On its face, the Commerce Clause in Article I of the U.S. Constitution is straightforward: the federal government has the power to regulate “interstate” commerce—commerce between the several states, or between the United States and other nations, sovereign tribes, etc. Any commerce within a state is, therefore, within the regulatory jurisdiction of that state (or at least it should be, in theory).

But an interesting converse also flows from this. As enunciated by early Supreme Court justices like John Marshall and William Johnson, though not explicitly written in Article I of the Constitution, the Commerce Clause acts to constrain state governments from interfering in interstate commerce—and that such power is “dormant” (thus the concept of a “Dormant” Commerce Clause.

The concept was fleshed out in an 1829 Supreme Court case, Willson v. Black Bird Creek Marsh Co., 27 US 245 (1829). In that case, the owner of a sloop, Thomas Willson, had been sued by the Black Bird Creek Marsh Company for ramming his ship through a dam that had been built, in accordance with Delaware state law. Willson argued that the dam, having been placed in a navigable waterway and therein blocking his ability to sail, interfered with interstate commerce, and was thus violative of the Commerce Clause.

Had the case been decided just over a century later, the high court might have found differently, but in his instance, the court found that the underlying Delaware law was violative of neither the Commerce Clause, nor the converse Dormant Commerce Clause. Chief Justice Marshall wrote:

“We do not think that the [state] act empowering the Black Bird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject.”

Strangely enough, the High Court’s attitude towards the Commerce Clause (generally) and navigable waterway regulation (specifically) changed markedly over the next 180 years. Over the course of the century immediately following Willson, the Supreme Court steadily expanded the concept of “interstate commerce” so that it encompassed virtually any and every aspect of American life (and the regulation thereof by the federal government). In fact, for many decades, few, if any, Supreme Court cases found such a limitation until cases like US v. Lopez, 514 US 549 (1995), which explicitly found that Congress’ power under the Commerce Clause was in fact, limited.

With regards to the power over waterways, the trajectory was similar... one of expansive deference towards federal assertion of power, only to have the Supreme Court press back in recent years. The Clean Water Act of 1972 (CWA), building on prior water pollution laws, asserted federal jurisdiction over the health of these same “navigable” waterways. But the concept of “navigability” changed over time—wherein in Willson, the Supreme Court found federal jurisdiction lacking in a truly “navigable” waterway, the U.S. Environmental Protection
Agency and the Army Corps of Engineers (the two agencies responsible for enforcing the CWA) asserted regulatory authority over waters that could, in no reasonable way, be considered either “navigable” and in “interstate commerce” (but because of the Supreme Court’s decision in *Chevron v NRDC*, 467 US 837 (1984), the agencies were granted “deference” in how they interpreted the laws).

Dry patches of desert sand, patches of land that had to be put under artificial sources of water, isolated puddles… all of these were asserted to be “navigable waterways” under federal jurisdiction, largely through a bizarre bit of legalistic gymnastics. For instance, when pressing CWA enforcement cases, the federal government would assert a “glancing goose” rule that birds that flew from state to state might want to land on a “wetland”. Or federal lawyers might produce experts in the muskrat trade, because muskrat fur or even meat *might* be sold in interstate commerce.

It was only in the 2006 Rapanos decision (*Rapanos v US*, 547 US 715) that the Supreme Court said that enough was enough. In that case, the High Court found that, in fact, the federal government did *not* have jurisdiction over marginal and isolated wetlands under the guise of protecting “navigable” waters of the United States.

In the ensuing years, the concept of “navigability” and the ensuing intersection of the Commerce Clause in justifying federal regulation of wetlands has become a hotly-contested political issue. While Congress was controlled by the Democrats in the years after the *Rapanos* decision, and attempt was made to remove the concept of navigability from the Clean Water Act (in order to prevent the confusion that cases like *Rapanos* raised). When this effort failed, the Obama Administration attempted to do it through the regulatory process—an effort that has been halted by the Trump Administration.

Justice Marshall and his colleagues in the majority on *Willson* would have been baffled by such efforts. If a waterway that allowed a sloop to sail through it wasn’t subject to federal jurisdiction, it is fairly certain that they would have looked askance at any attempts by the federal government to regulate dry land by declaring it “navigable”.


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*Barron v. Baltimore* (1833)

**Guest Essayist: Tony Williams**

In the early 1830s, the city of Baltimore was developing as a bustling urban center and port. The city diverted the streams around John Barron’s successful wharf and lowered the water level, which negatively impacted his business. He sued the city to recover his financial losses.
Barron claimed that the city government had taken his property without just compensation. Property rights were an essential natural right and constitutional liberty protected by the Fifth Amendment. The amendment protects individuals against having their property taken without their consent.

“No persons shall be...deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

The case however raised even more significant issues than whether Barron had his property unjustly taken. Chief Justice John Marshall saw an opportunity in this relatively minor local case to examine the character of the Bill of Rights and the parameters of the principle of federalism in the relationship of the national government and the states in the early republic.

Marshall was well-suited to explore the origin of the Bill of Rights and federalism since he had been one of James Madison’s key allies among the Federalists arguing for ratification of the Constitution at the Virginia ratifying convention. Indeed, Madison had been integral to the creation of the Bill of Rights, even though he had a curious relationship with it. Madison had predicated his constitution-making in the 1780s upon a belief that most of the violations of rights were occurring in the states.

Madison had prepared for the Constitutional Convention by examining the defects of the Articles of Confederation in his “Vices of the Political System.” In the document, Madison thought that the tyranny of the majority in the states resulted in unjust laws that violated individual liberties. For example, he witnessed the persecution suffered by religious minorities in Virginia, which guided his fight for the Virginia Statute for Religious Freedom. In “Vices,” he wrote:

If the multiplicity and mutability of laws prove a want of wisdom, their injustice betrays a defect still more alarming: more alarming not merely because it is a greater evil in itself, but because it brings more into question the fundamental principle of republican Government, that the majority who rule in such Governments, are the safest Guardians both of public Good and of private rights.

At the Constitutional Convention, Madison fought vigorously for a national veto over the laws of the states to prevent violations of rights, but he lost that battle. When the Constitutional Convention was wrapping up its work in the summer of 1787, George Mason proposed a bill of rights. Madison and the other delegates were generally opposed. As he told Thomas Jefferson, “the rights in question are reserved by the manner in which the federal powers are granted.” In other words, the federal government was limited to its enumerated constitutional powers and not authorized to violate individual liberties. Madison fought the inclusion of “prior amendments,” or a bill of rights, as a condition for ratification throughout the entire debate over ratifying the Constitution.

However, with great irony, Madison became the leading voice for a bill of rights in the First Congress. In his June 8, 1789 speech to Congress proposing a bill of rights, Madison gave several reasons for doing so, but asserted, “I wish also, in revising the constitution, we may throw into that section, which interdicts the abuse of certain powers in the state legislatures...I
think there is more danger of those powers being abused by the state governments than by the
government of the United States.”

One of Madison’s great objects in constitution-making had been to guard against encroachments
of liberties by state governments. But, Madison lost the national veto at the Constitutional
Convention, and he lost the battle to apply the Bill of Rights to the states. The Bill of Rights
applied only to the national government.

In *Barron v. Baltimore* (1833), John Marshall confirmed that the Bill of Rights did not apply to
the states. The opinion of the unanimous Court ruled against Barron and supported the principle
of federalism. For example, several New England states had constitutional establishments of
religion some forty years after the Bill of Rights was ratified. State governments had their own
constitutions and bills of rights.

The application of the Bill of Rights to the states only occurred with the gradual “incorporation”
of the Bill of Rights by the Due Process Clause of the Fourteenth Amendment which read: “Nor
shall any State deprive any person of life, liberty, or property, without due process of law; nor
deny to any person within its jurisdiction the equal protection of the laws.” Ratified in 1868, the
Fourteenth Amendment, although it was aimed at protecting the rights of African Americans as a
“Civil War Amendment,” assumed much larger implications in the Court. Beginning with two
decisions prior to the twentieth century, but accelerating rapidly from the 1920s through the
1960s, the Supreme Court expanded the reach of the Bill of Rights. The Court ruled, one right at
a time, that almost all provisions of the Bill of Rights are “fundamental and essential in the
concept of ordered liberty,” and thus apply against state and local laws just as they limit the
federal government. Madison’s view that the federal government should prevent encroachments
of liberties by state governments, won the day through court decisions. However, this
development was too late to help John Barron. The incorporation doctrine became a highly
contentious principle of jurisprudence. On one hand, supporters point out the liberties that were
protected as a result. On the other hand, opponents point out the significant contribution made to
the erosion of the principle of federalism in the twentieth century.

*Barron v. Baltimore* (1833) Supreme Court decision:

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**Craig v. Missouri (1830)**

**Guest Essayist: Daniel A. Cotter**

In 1821, the State of Missouri enacted legislation entitled, “An act for the establishment of loan
offices,” which permitted the Missouri Treasurer to issue loan certificates – a form of paper
currency issued by the state – up to a total of $200,000. The Missouri Supreme Court found the
loans to be valid, and the appellants submitted a writ of error to the United States Supreme
Court. Missouri Senator Thomas Hart Benton argued the Missouri law was a valid exercise of
state sovereignty and also urged the Supreme Court to declare unconstitutional Section 25 of the Judiciary Act of 1789, the putative basis for the Supreme Court’s jurisdiction over the case. The Court decided both issues.

**Background of the Case and the Controversy**

Under the 1821 Missouri law, loan certificates were issued to those who promised to repay the state and were receivable at the treasury of any loan office created under the law. The underlying action was filed against Hiram Craig and others, who had made a promissory note in County of Chariton in exchange for the loan certificates. The defendants did not repay the state, and the state sued for collection. The defendants challenged the state’s ability to issue loan certificates as a violation of Article I, Section 10, of the United States Constitution, which provides that “No State shall…emit Bills of Credit.” Missouri argued that the loan certificates were not “Bills of Credit” and the Missouri Supreme Court found for the state. The defendants in the Missouri action appealed on a writ of error, pursuant to Section 25 of the Judiciary Act of 1789, which provided:

That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in … the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity, …may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error.

**The Supreme Court Decision**

Senator Benton argued to the Court that Missouri had authority to issue the loan certificates on the basis of state sovereignty and also that Section 25 of the Judiciary Act of 1789 was unconstitutional, a position he and others in Congress had asserted supporting their argument for the section’s repeal. The Supreme Court held, by a 4-3 majority, that the Court had jurisdiction under Section 25 of the Judiciary Act, rejecting Benton’s argument. Chief Justice John Marshall, writing for the majority, further found that the Court had no discretion, citing *Cohens v. Virginia* (1821).

Justice Marshall next examined the drafters’ intent in prohibiting any state from being able to “emit bills of credit,” finding:

To ‘emit bills of credit’ conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purposes, as money, which paper is redeemable at a future day. This is the sense in which the terms have always been understood.

Marshall then recited the colonial history and considered the prohibitions on states issuing paper money throughout our nation’s history, concluding that the Missouri statute was unconstitutional as a violation of Article I, Section 10’s ban on states emitting bills of credit.

Justices William Johnson, Smith Thompson, and John McLean each dissented, based on their reading of the state statute, finding that there was enough latitude so that the loan certificates did
not violate the “bills of credit” prohibitions. For example, Justice Thompson discussed the history of the challenges presented by depreciated currency during the early days of the United States, but concluded that the intention of the Constitution drafters was so broad that the prohibition would extend to

“a paper circulating medium of every description, and thereby render illegal the issuing of all bank notes by or under the authority of the states, will not, I presume, be contended for by anyone.”

In the early days of the Marshall Court, the opinions often were unanimous, and there was strong comity among the justices. Toward the end of his tenure as Chief Justice, the Court more often was divided. In Craig, of the three dissenting justices, only Johnson had been on the Court for an extended period before Craig was decided. Thompson joined the Court in 1823 and Mclean in 1829.

**Conclusion**

The Craig decision was a landmark one because the Court addressed the inability of states to issue their own currency. The dissenters would be vindicated seven years later, when Chief Justice Marshall was replaced by Roger B. Taney, in the case, Briscoe v. Bank of Kentucky (1837), which held that another state’s bank’s notes were not a violation of the “Bills of Credit” prohibition. While McLean writing for the Court asserted that nothing in Craig was inconsistent with Briscoe, and distinguished the cases because in Craig the state gave its pledge for repayment and in Briscoe the state made no such backing, the difference in the Court’s makeup was a major factor in the change in views of states’ rights. In addition, Justice Baldwin switched from dissent in Craig to majority in Briscoe, based on the difference in state’s backing in each case.


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**Briscoe v. Bank of Kentucky (1837)**

**Guest Essayist: Tony Williams**

In 1832, Nicholas Biddle, president of the Second Bank of the United States, applied for an early renewal of the bank’s charter. He feared that bank opponent, President Andrew Jackson, would move to destroy the bank after he was re-elected. So, Biddle tried to outmaneuver the president before the election. His opponent, Henry Clay, and other National Republicans (future Whigs), supported Biddle’s move because they wanted to make it a campaign issue. Both houses of Congress voted to re-charter the bank in July.
On July 10, Jackson promptly vetoed the bill. Among his many reasons, Jackson argued that the bank was unconstitutional even though Congress and two presidents—George Washington and James Madison (who had once been an opponent)—had chartered the bank in 1791 and 1816. Moreover, the Supreme Court under John Marshall had unanimously declared the bank to be constitutional in *McCulloch v. Maryland* (1819).

President Jackson did not just want to use his executive authority to prevent the re-charter of the bank, he wanted to kill the existing bank. The bank had approximately $79 million in assets and $37 million in liabilities, making it a solvent and sound financial institution. Jackson wanted to remove government deposits to destroy the bank and had the support of Attorney General Roger B. Taney.

However, other members of the administration opposed the action and refused to carry out Jackson’s will. The president responded with a “Saturday-night massacre,” similar to Nixon’s actions during Watergate. When Treasury Secretary Louis McLane refused, Jackson moved him to State and appointed William J. Duane in his place. When Duane did not obey Jackson’s wishes because he warned it would result in reckless lending, the president fired him too. The compliant Roger Taney was put into Treasury, though Jackson made it an interim appointment not subject to Senate approval so that Taney could act quickly and without restraint against the bank.

Treasury Secretary Taney drew down bank assets by the end of the year by paying bills but making no additional federal deposits. Instead, Taney placed the government’s deposits in state “pet banks.” Two cabinet members resigned in protest, and Vice-President Martin Van Buren distanced himself from the policy. Congress responded by refusing to confirm Taney, and, on March 28, 1834, censured the president because he “assumed upon himself authority and power not conferred by the Constitution and the law.” It is the only censure of a U.S. President in history.

President Biddle retaliated against Jackson by sharply curtailing bank loans and caused a brief financial panic and recession. Meanwhile, as predicted, the state banks greatly expanded their lending and even started circulating its notes as currency. The Bank of Kentucky was one of those banks.

The Bank of Kentucky issued bank notes that seemed to circulate as currency in violation of Article I, section 10 of the Constitution (which enumerated limitations upon state governments), which read: “No State shall…emit Bills of Credit.” In addition, the bank stock was owned by the state. The president and board of the bank was selected by the state legislature. In short, the bank was closely tied to the state.

The case of *Briscoe v. Bank of Kentucky* was originally argued before the Supreme Court in 1834, and Chief Justice John Marshall was prepared to rule that the actions of the state bank were unconstitutional. He planned to rest this decision on the precedent of *Craig v. Missouri* (1830), which blocked bank certificates circulating as money because they were a violation of the Constitution. However, by 1835, Marshall was dead, and the Bank of the United States was defunct. The new chief justice of the Supreme Court was Roger Taney, the Treasury secretary who helped kill the bank.
In the case of *Briscoe v. Bank of Kentucky* (1837), the Court had to weigh the constitutionality of circulating notes by state-chartered banks. The Court thus had to grapple with several larger issues including the principle of federalism due to the competing powers of national and state governments regarding banks. Moreover, important political and economic issues of a growing divide between commercial and agrarian interests, and increasing sectionalism between North and South formed the background of the case.

The court decided the *Briscoe* case by a vote of 6 to 1, with the majority breaking with precedent and upholding the circulating notes as constitutional because they were not bills of credit. The Court narrowly defined a “bill of credit” as a note issued by the state, on the faith of the state, and designed to circulate as money. Even though the notes in this case were redeemable by the bank, which was closely related to the state, the Court argued that they were not redeemable by the state and therefore were constitutional.

The lone dissenter, Justice Joseph Story, recognized the direction the Court was taking with the decision and wrote that the Court was breaking with precedent. He wrote a withering dissent that warned the decision was setting the Court “adrift from its former moorings.” He wrote that he delivered the dissent with “profound reverence and affection” for the former Chief Justice Marshall.

The *Briscoe* case represented a decisive turn from John Marshall’s economic and constitutional nationalism in favor of states’ rights. Taney and the Supreme Court were completing the financial revolution of Andrew Jackson and adopting the outlook of the Democratic Party. *Briscoe* was part of Taney’s judicial shift that year that saw the Court restrict the Contract Clause of the Constitution in the more famous *Charles River Bridge v. Warren Bridge* (1837) case.


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**Charles River Bridge v. Warren Bridge (1837)**

**Guest Essayist: Joerg Knipprath**

In 1785, Boston’s population was around 18,000; across the Charles River, Charlestown counted 1,200. Forty years later, Boston’s population had more than tripled, to 60,000; that of Charlestown to 8,000. The need to accommodate the increased travel and commerce between Boston and points inland resulted in protracted litigation before the Supreme Court in the 1830s in the *Charles River Bridge v. Warren Bridge* case.

Freed from their status as colonial economies by the War for Independence, many states initially sought to encourage economic development by granting monopoly licenses to entrepreneurs. The fortuitous contemporary emergence and rapid development of the modern business corporation
as a means of accumulating capital facilitated that process. Protecting worthy investors against personal liability for losses and from potential free-riding imitators to maximize profits was seen as the best incentive for risk-taking and innovation. The Constitution incorporated this approach in Congress’s power to grant patents and copyrights.

Accordingly, in 1785, Massachusetts conveyed a license to build a bridge across the Charles River to the eponymous company. The grant was to run 40 years, later extended to 70 and, in the 1820s, to 100, years, with a right to collect tolls from the bridge’s users. Initially, matters went well, indeed. The investors, buoyed by the growth in population and traffic, eventually collected $30,000 in tolls annually, on an investment of $70,000.

However, as residents of Southern California know only too well, population growth and aging infrastructure create economic stresses and political pressure for change. Unlike the typical reaction of today’s politicians, the Massachusetts legislature in 1827 responded by approving a charter for the Warren Bridge Company to build a bridge across the Charles River. That bridge, to be located less than 300 yards from the existing Charles River Bridge, would charge tolls as a return on investment no longer than six years. Thereafter, the structure would revert to the state as a toll-free bridge.

The owners of the Charles River Bridge Company rightly saw this as a mortal danger to their enterprise and, in 1829, sued to enjoin the construction. They hired top-of-the-line legal talent in Massachusetts Senator Daniel Webster and soon-to-be chief justice of the Massachusetts Supreme Judicial Court, Lemuel Shaw. The state court, by evenly split opinion, rejected the challenge to the new charter, whereupon the plaintiffs appealed to the United States Supreme Court by writ of error. Arguments were heard in March, 1831. Four of the seven justices had been together more than 20 years, with only two appointed by the incumbent President, Andrew Jackson. The Court was unable to reach a decision, but permitted re-argument in 1833. Once more, the Court was unable to resolve the matter.

At that point, the “national republican” Marshall Court representing the America of the early 19th century gave way to the emerging “democratic” polity of the Jackson era. Justice William Johnson died in 1834, after 30 years on the Court. Justice Gabriel Duvall resigned five months later, after 23 years. Most significant, John Marshall died in 1835, having served 34 years as Chief Justice. This cascade allowed President Jackson to appoint three new justices, including his trusted political adjutant Roger B. Taney as chief. The Court once more heard arguments on the matter in early 1837 and, finally, upheld the legislature’s power to grant the new charter.

The Constitution’s framers had been alarmed by the lack of security in property during the early republican era. The abrogation by states of the vested rights of creditors through debtor relief legislation and the insecurity of business operations produced by legislative repeal of previously-authorized corporate charters were threats to social peace and economic development. Hence, the Constitution contained clauses intended to combat such “levelling.” Among them, Article I, Section 10, prohibited state laws “impairing the Obligation of Contracts.”

The Marshall Court had used that clause to limit legislative power in a series of decisions during the 1810s. In *Fletcher v. Peck*, for example, Marshall wrote that the usual power of a legislature to act free from any attempted restriction on its sovereignty by a predecessor did not apply when
the predecessor’s action involved vested property rights. Included in such vested rights were those created by a grant from the state itself. Indeed, so fundamental was the protection of property rights that, even in the absence of a specific constitutional limitation, an attempt to revoke such a grant would violate “general principles common to our free institutions.” In concurrence, Justice William Johnson went further, declaring that such a revocation violated “the reason and nature of things: a principle which will impose laws even on the deity.” Whatever might be said about Johnson’s musing from a theological perspective, it certainly showed how vital even Jeffersonian republicans saw the protection of rights in property to the stability of free government.

In *Dartmouth College v. Woodward*, the Court extended the Contracts Clause to protect corporate charters against unilateral modification by legislatures. However, Justice Story noted in concurrence that a state was free to reserve such power to modify in the grant itself. When the plaintiffs in the *Charles River Bridge* case rested their constitutional argument on a violation of the Contracts Clause, Taney used Story’s reasoning to reject their claim. Moreover, in two other cases, the Marshall Court held that such grants should be protected only to the extent explicitly provided and should not reach rights and immunities only found by implication. At least as to the “great powers of the state” that were needed to act for the benefit of the community, there could be no alienation by mere implication. Taney also used those cases to hold that the Charles River Bridge Company’s charter had not expressly granted it monopoly status. A century-long monopoly status was not to be presumed over the legislature’s power to deal with changing conditions.

Taney’s opinion fit both Jacksonian Democrats and Jacksonian democracy. As the party of states’ rights, Democrats lauded Taney’s opinion as a model of legal reasoning that would revolutionize constitutional doctrine and promote independence of the states from the nationalizing tendencies of the Marshall Court’s jurisprudence. From that perspective, the opinion furthered Jacksonian democracy by allowing popular majorities represented in state legislatures to react to changing societal conditions by overriding entrenched corporate interests. After all, if a legislature could tie its successor’s hands, periodic elections were in vain.

Justice Story dissented, joined by Justice Smith Thompson. Not coincidentally, they were the only pre-Jackson justices on the Court and represented the old National Republicanism of Madison, Monroe, and Quincy Adams. Story saw the bridge charter as analogous to the private law established by two equal parties to a contract. The state wanted a bridge, and the company wanted to make a profit. The result was the freely negotiated grant in its particulars. Had the investors known that the state unilaterally could destroy that grant by another, they would never have undertaken their risky venture under the fixed terms.

Taney rejected this “private contract” approach and its “vested rights” framework. Instead, he saw a corporate charter as analogous to a royal grant, a franchise or privilege bestowed by the sovereign who could not be deprived of his inherent powers by that grant.

It was precisely that conception which alarmed Story. To him, Taney postulated a relationship of ruler and subject, not of free equals, between a legislator and a constituent. Taney substituted expediency and pragmatism for republican morality and the rule of law as the constitutional
essence. This resulted in private rights existing only at the pleasure of a popular majority in the legislature and undermined the security in property that was crucial to economic development. Legislatures were not monarchs. The people might be sovereign, but the legislative power was limited.

The decision’s importance lay less in the particular result or in producing revolutionary constitutional doctrine than in how it acquiesced in the settlement of what had emerged as conflicting pulls on the economy and political structure of the United States. In economics, the emerging era of competition and innovation manifested in commerce and manufacture clashed with the received doctrine of protecting vested rights that viewed property as having the longevity and permanence of land. The earlier protection of vested property rights to encourage innovation had come to be viewed as anachronistic, at best, and, more likely, as inimical to progress. The monopolies that had made earlier generations wealthy now stood in the way of the younger entrepreneurs’ and inventors’ path to fortune. New technologies were replacing older ones, just as the Charles River Bridge in 1785 had supplanted the grant given to Harvard University in 1650 to operate a ferry service across that river. A decision against the Warren Bridge Company’s new charter would have doomed not only the construction of new bridges in competition with other bridge monopolies. More significantly, it would have set back the emerging railroads in their bids to compete with chartered canal and turnpike monopolies.

In its political sense, the opinion reflected the emergence of a more assertive demos who would use their numbers to promote their interests, for better or worse, against the rights-based claims of a property-owning Whig elite. Still, contrary to the fears of Story and the hopes of the more radical elements among the Jacksonians, in the end the generally pro-business Taney Court did not revolutionize the Marshall Court’s Contracts Clause jurisprudence. Story’s dissent in the Charles River Bridge case may have been more satisfying intellectually and better-grounded jurisprudentially. Story’s warnings may have foretold the dangers to rights in property and to the rule of law posed by modern legislative majorities. Taney, however, captured the spirit of the time, a free-wheeling and innovative era of technological change and economic advancement relatively unrestrained by regulation.

Charles River Bridge v. Warren Bridge (1837) Supreme Court decision: https://supreme.justia.com/cases/federal/us/36/420/

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Guest Essayist: Joerg Knipprath

Unlike many of his decisions, Chief Justice John Marshall’s opinion in the foundational case *Gibbons v. Ogden* (1824), which upheld the right of Gibbons to operate a ferry between Elizabethtown, New Jersey, and New York City in competition with his former partner, Ogden, was well-received by the public. It negated a New York State monopoly grant and struck a blow in favor of restive younger entrepreneurs who hoped to prosper by providing technological innovation and expanding infrastructure as the country’s population and commerce grew.

Judgment by the political elite was more divided. The struggle for dominance between the general government and the states was still a tightly-fought matter. Marshall’s reasoning provided the basis for a potentially robust use of Congress’s authority to regulate interstate commerce that reached deep into the internal affairs of the states. Even more troubling for some was his discourse, unnecessary to the result, about the states’ concurrent power—or lack thereof—to regulate interstate commerce when Congress had not acted.

The issue of concurrent versus exclusive Congressional powers was debated during the adoption of the Constitution. Alexander Hamilton devoted considerable attention to it in No. 32 of *The Federalist*. As so often, the charge was made that the proposed Constitution would result in a complete consolidation of the states into the national government.

Hamilton replied that the states retained “all the rights of sovereignty…which were not…exclusively delegated to the United States.” [Emphasis in the original.] Only those are exclusive that the Constitution makes so expressly (such as Congress’s power to “exercise exclusive legislation” over the District of Columbia); if there is an express grant to Congress and a like prohibition of that power to the states (such as Congress’s power to tax imports, while another part of the Constitution expressly restricts the states’ power to do so); or if there is an express grant to Congress and, despite textual silence on the matter, having the states exercise a similar power would be “absolutely and totally contradictory and repugnant” [Emphasis in the original.] (such as Congress’s power to “establish an uniform Rule of Naturalization”).

Hamilton distinguished those examples from an area of concurrent power, such as taxes, which might sometimes interfere with the policy of one or the other governments, but which would not be directly repugnant to either government’s constitutional authority. In *Gibbons*, Ogden argued that Congress’s power to regulate interstate commerce was concurrent with the states like power to tax, whereas Gibbons claimed Congressional exclusivity because “‘to regulate’ implies in its nature full power over the thing to be regulated, [and] excludes necessarily the action of all others that would perform the same operation on the same thing.” Marshall rejected Ogden’s analogy by distinguishing the taxing power. Marshall found Gibbons’s assertion more appealing, “There is great force in this argument, and the Court is not satisfied that it has been refuted.”

The tone of the opinion is emblematic of Marshall’s always-present inclination to favor national power over state power. The fear of overbearing state governments suffocating the national government may be difficult to comprehend today. But many in the founding generation, to which Marshall belonged, had witnessed what for them appeared to be, correctly or not, a
dysfunctional Confederation characterized by economic chaos, unhealthy commercial rivalry, and financial insecurity.

Five years later, Marshall revisited the issue in Willson v. Black Bird Creek Marsh Co. There, Delaware authorized a company to build a dam across a small, but arguably navigable, creek in order to drain a swamp. In those days, such modern “wetlands” were viewed as health hazards because they were breeding grounds for mosquitoes. Willson obtained a license under the same federal law as Gibbons. He crashed his vessel into the dam and damaged it. When the company sued him, he claimed that the dam obstructed a navigable waterway. The company pointed to Delaware’s authorization, and Willson argued that the power to regulate commerce was exclusive in Congress.

Surprising in light of his Gibbons musings, Marshall rejected that argument because Congress had not acted directly to exclude state laws that affected small tidal creeks. He concluded that the law’s purpose to protect the public health was not “repugnant to the power to regulate commerce in its dormant State, or as being in conflict with any law passed on the subject.” To reach that conclusion, Marshall must have assumed that the state had some concurrent power to regulate in a way that directly affects interstate commerce (as in the case before him). If Congress’s power were exclusive, the state could not act whether or not Congress had passed a conflicting statute.

Following Willson, a state could regulate its internal affairs even if that directly affected interstate commerce, as long as Congress had not precluded such state action (the “statutory preemption” doctrine) and the state law did not violate implied restrictions on the states that arise, even in the absence of a federal statute, from the very existence and historical purpose of the Commerce Clause (the “dormant commerce clause” analysis). Marshall’s resolution posed another constitutional conundrum, namely, how to balance the state’s legislative power with the implied restriction from the dormant (unexercised) federal commerce power. Marshall raised that issue but did not resolve it.

The issue arose again in Cooley v. Board of Wardens (1851). A Pennsylvania law of 1803 required all vessels engaged in foreign or interstate travel to take on a pilot to navigate the ship to harbor. Any ship’s master who did not do so had to pay half the pilotage fee to the “Society for the Relief of Distressed and Decayed Pilots, their widows and children.” By further legislation, ships engaged in the Pennsylvania coal trade were exempted. Cooley, who operated under a federal license just as Gibbons and Willson had done, failed to pay the fee. When sued, he claimed that the law violated the Commerce Clause.

Justice Benjamin Curtis, speaking for 6 justices in the 7-2 decision, rejected Cooley’s argument. He treated the statute as simply a safety law to prevent accidents. Even the apparent discrimination in exempting coal ships and small vessels was not a problem, as it reflected merely a legislative judgment that certain types of vessels and crews might need assistance more generally than others. As to the Commerce Clause, Curtis held first that, by the accepted definition of commerce as including navigation, and by the actions of Congress in the 1789 law addressed in Gibbons, it was clear that Congress could regulate the use of pilots.

Curtis then addressed whether, in the absence of the 1789 law, the states could regulate pilots without running afoul of the “dormant” Commerce Clause. If the power was exclusive in
Congress, they could not. Neither could Congress authorize them to do so, any more than Congress could authorize the states to make their own rules of naturalization and immigration. However, since the 1789 law by Congress did just that as to pilotage, the power to regulate interstate commerce must not be exclusively national.

The opinion buttresses its conclusion with some “originalist” analysis. The text of the Constitution does not make the commerce power exclusive in Congress. The 1789 law, which operates on that same assumption, was adopted by the First Congress, to whose acts the Court has traditionally given great deference because most members had been active in the debates over the adoption of the Constitution. The nature of the power itself potentially covered so many subjects that it was unrealistic to exclude the states. Finally, the continued practice over six decades by Congress and the states in reliance on the concurrent nature of the power gave that view a strong constitutional foundation.

What remained was to decide how to draw the line between those subjects of interstate commerce the states could regulate and which they could not, even if Congress was silent. The Court held that the key was the “nature” of the subject legislated, whether it was “national” or “local.” If the subject could “admit only of one uniform system or plan of regulation,” it was exclusive in Congress. If it was one that called for the “superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience and conformed to local wants,” it was concurrent. Due to the local variability and frequent changes of harbor conditions, particularly near rivers, the pilotage laws were of the latter type. The Pennsylvania law was constitutional.

Curtis’s solution was characteristic of the more state-friendly structural federalism of the Taney Court, where this case was decided. As noted earlier, Marshall viewed the states with suspicion and had a strong nationalist bent. As much as the Constitution’s text and history allowed, he emphasized Congress’s power to legislate in seemingly local matters. If Congress did not act on a subject, he treated the very existence of Congress’s power as a restriction on state legislation, if possible. President Andrew Jackson, whose sympathies generally lay more with the states, had elevated Taney to the Supreme Court in part to adjust the balance. Taney’s dual federalism treated the states and the federal government as two sovereigns, each with its domain secure from the other, rather than as a system of overall national dominance over semi-autonomous states. The national-local subject matter distinction of the Cooley opinion is a manifestation of that, although Curtis could not (and would not have been inclined to) negate Congress’s overall control of interstate commerce.

The decision gave a boost to the states’ power to regulate for the community’s health, safety, morals, and welfare. States increasingly passed statutes to address novel issues that arose out of the Industrial Revolution. Cooley made it more difficult for the commercial class to prevent such state regulatory laws on the grounds that they invaded the dormant powers of Congress.

The “Cooley Doctrine” has not been overruled. It is rarely used, in light of the policy analysis on which it is based for which judges are ill-trained. The doctrine has been replaced by other judicial formulae to balance the federal and state interests when Congress has acted in a field and federal preemption of the state law is the issue, as well as when Congress has not acted and the
restraint on state law by the dormant Commerce Clause must be evaluated. In both situations, the Rehnquist and Roberts Courts in their quest for an invigorated federalism have been inclined to favor greater discretion for the states. Unlike 19th century federalism, when Congress generally did not pass regulatory legislation, today’s Congress and the federal agencies are hardly reticent to do so. The result is not decentralized policy-making but is more likely to be concurrent multi-level regulation at federal and state levels that imposes more obstacles in the way of innovation and efficiency.

Cooley v. Board of Wardens (1851) Supreme Court decision: https://supreme.justia.com/cases/federal/us/53/299/

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Prigg v. Pennsylvania (1842)
Guest Essayist: Gennie Westbrook

In 1776, the Declaration of Independence asserted that “all men are created equal.” And yet, slavery was legal in all thirteen colonies at the time. Beginning with Pennsylvania in 1780, northern states moved toward the revolutionary ideal by enacting gradual abolition statutes. All children born in Pennsylvania after that time were free persons, though any child born to slaves was required to work for his/her mother’s master until age 28.

At the Philadelphia Convention of 1787, delegates from slaveholding states, concerned that northern states where slavery was outlawed would become safe havens for runaway slaves, insisted on the provision that “No person held to service or labor in one state, under the laws thereof, escaping into another, shall…be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.” (Article 4, Section 2, Clause 3). This clause affirms the right of a slaveholder to reclaim his property in human beings, but it does not stipulate who is responsible for “delivering up” the runaway slave.

In 1793, the federal Fugitive Slave Act provided additional implementation details. Slaveholders or their agents could cross state lines in order to reclaim runaway slaves. However, the law implemented no protection against slave catchers seeking to kidnap free African Americans and force them into slavery. There was no standard for proving the identity of a seized person accused of being a fugitive slave; the agent merely had to convince a local, state, or federal judge to provide a warrant allowing the removal of the accused fugitive.
In 1826, Pennsylvania enacted a personal liberty law. This statute did not interfere with the federal law for rendition of fugitive slaves, but provided protection against slave catchers who kidnapped free people. It required agents to show documentary evidence establishing the slaveholder’s ownership.

In the 1840s, amid increasingly intense debate over slavery, officials in northern states became less cooperative with the return of runaway slaves. Personal liberty laws in various states stipulated that the Fugitive Slave Act could be enforced only by federal officers. *Prigg v. Pennsylvania* (1842) was the first Supreme Court case interpreting the Constitution’s fugitive slave clause and the 1793 Fugitive Slave Law when they conflicted with the personal liberty laws.

Some time before 1812, John Ashmore of Maryland allowed a married slave couple belonging to him to live as free individuals, though he never formally emancipated them. In 1832, Ashmore consented to their daughter, Margaret, marrying a free black man, Jerry Morgan. The young couple moved just across the state line from Maryland to Pennsylvania, and had children who were born free under Pennsylvania law. When Ashmore died without a will in about 1836, his heirs hired Edward Prigg to deliver Margaret Morgan, who had never lived as a slave, back to Maryland, intending to sell her to slave traders.

Edward Prigg was an attorney, justice of the peace, and part-time slave catcher. Along with three others, he entered Pennsylvania in 1837, and, though they had no title of ownership, obtained a warrant to reclaim Margaret Morgan. They seized the whole family in the night and forced them “into an open wagon in a cold sleety rain.” (Hambly’s Argument, p. 8) The captors released Jerry Morgan, assuring him they would settle the issue in the morning. When Jerry was out of sight, the slave catchers took Margaret Morgan and her children across the state line into Maryland, where they were immediately sold to a slave trader to be transported to the south.

Convicted of violating Pennsylvania’s 1826 anti-kidnapping statute, and facing a fine and prison sentence of 7 – 21 years at hard labor, Prigg maintained that the law violated both the fugitive slave clause of the U.S. Constitution and the 1793 law.

Arguing Pennsylvania’s case before the U.S. Supreme Court, Thomas Hambly asserted that his state’s law protected free individuals from being carried away without due process. He stressed that legislation regarding slavery had been a power of the states throughout our history.

In *Prigg v. Pennsylvania* (1842), the Supreme Court had to decide two constitutional questions. Did the Pennsylvania law punishing the kidnapping of free people of color violate Article 4, Section 2 of the U.S. Constitution and Fugitive Slave Law of 1793 as applied by the Supremacy Clause? Is the owner of a runaway slave, or his agent, entitled to pursue, capture, and carry away that slave, wherever he may be found?

Yes and yes. Justice Joseph Story wrote the Court’s majority opinion, ruling that the return of runaway slaves was governed only by federal law. The Court affirmed the right of slaveholders to pursue and reclaim alleged fugitive slaves regardless of state laws to the contrary where the capture may take place.
The Court issued seven separate opinions, and only that of Justice John McLean was a dissent. Historian Paul Finkelman, in “Sorting Out Prigg v. Pennsylvania,” (pp. 629 – 635), summarized the rulings. First, all of the justices agreed that states could not impose additional requirements to the federal law or interfere with the return of runaway slaves. Second, almost all of the justices agreed that the federal Fugitive Slave Act of 1793 was constitutional, that the state officials should cooperate in the process of returning runaway slaves, and that fugitive slaves were not entitled to due process. Third, four justices agreed with Story that Pennsylvania’s personal liberty law was unconstitutional, Prigg’s conviction should be reversed, and slaveholders had a right to take matters into their own hands to retrieve runaway slaves.

Justice John McLean dissented on most of these points. He wrote that the states had the power to legislate to protect due process and other rights of free blacks. Without the personal liberty laws, there was nothing to prevent slave catchers from kidnapping free blacks to sell them into slavery.

The case illustrates the fragility of the lives of slaves and of free blacks at the time, in tragic events representing the brutality and injustice of slavery. After personally petitioning the governor of Pennsylvania to protect and return his family, Jerry Morgan died in a canal boat accident on his way home. The story of Margaret and her children after they were sold to a slave trader is lost to history. Edward Prigg returned to his comfortable life in Maryland.

The case had far-reaching significance in stirring the sectional controversy over slavery. Since the Supreme Court supported the side of slaveholders, free states were crippled in their ability to maintain rule of law as slave catchers grew bolder—and more prosperous. Increasing refusal of abolitionists in the free states to comply with the 1793 law and the ruling in Prigg prompted southern representatives to demand a stricter Fugitive Slave Act in the Compromise of 1850. The compromise soon broke down and within a decade a bloody Civil War was fought over the intractable issues related to slavery.


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Texas v. White (1869)
Guest Essayist: Marshall DeRosa

TEXAS v. WHITE ET AL., 74 U.S. 700 (1869) is one of the most important decisions made by the Supreme Court, because it addresses the nature of the Union. More specifically, is the Union bound together through the consent of the States or the coercive power of the United States government.

The essential facts of the case are somewhat obscure. In 1851 the U.S. Congress transferred to the State of Texas $10,000,000 in bonds. The Texas Legislature mandated that the Texas governor endorse the bonds prior to transferring them to private parties. After Texas seceded from the Union, the Texas legislature in 1862 repealed the mandate that the bonds be endorsed by the governor. In 1866, while Texas was under Reconstruction, Texas refused payment to George White and others who sought to redeem them. On an original appeal to the U.S. Supreme Court, the provisional government of Texas sought relief from making payment on the bonds. The Supreme Court focused on whether the 1862 Texas legislature was authorized to repeal the mandate that the governor endorse the transfer of the bonds to private parties. Texas seceded from the Union on February 1, 1861, and was admitted to the Confederate States of America on March 2, 1861. Texas was officially readmitted to the Union on March 30, 1870.

Here's the constitutional conundrum: Texas never officially seceded from the Union in 1861, but was officially readmitted to the Union in 1870.

Writing for the majority, Chief Justice Chase makes clear that his primary concern is not the constitutionality of secession per se, but political necessity: He wrote that “. . . the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null. . . If this were otherwise, the State must have become foreign, and her citizens foreigners. The war must have ceased to be a war for the suppression of rebellion, and must have become a war for conquest and subjugation” [emphasis added].

This explains why he concedes that “[i]t is needless to discuss, at length, the question whether the right of a State to withdraw from the Union for any cause, regarded by herself as sufficient, is consistent with the Constitution of the United States” and then concludes that when “Texas became one of the United States, she entered into an indissoluble relation.”

Had Chase put aside political necessity, he would have had several difficult questions to address.

First, is the Constitution a compact among the people of the United States, or the States? More specifically, are the States sovereign? The Declaration of Independence acknowledges when the colonies seceded from the “State of Great Britain” they became “Free and Independent States” and have “full power . . . to do all other Acts and Things which Independent States may of right
do.” The States, in effect, became sovereign. This fact is acknowledged in the first U.S. Constitution, the Articles of Confederation: “Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled. (Article II) If the States became sovereign as a consequence of secession from the State of Great Britain, when did they relinquish their sovereignty?

As St. George Tucker points out in his 1803 Blackstone’s Commentaries With Notes of Reference to the Constitution, sovereignty cannot be relinquished through implication. For a State to surrender its sovereignty the surrender must be explicit, e.g., by treaty, or conquest. The argument could be made that the States retained their sovereignty and secession is a reserved power. Nothing in the U.S. Constitution could be fairly interpreted, including the supremacy clause (Article VI), executive powers (Article II), the ratification process (Article VII), or the guarantee and domestic violence clauses (Article IV, section 4) to militarily suppress the secession of a State.

Second, secession was part and parcel of American political culture. In his book A View of the Constitution of the United States (1829) William Rawle wrote that the “states, then, may wholly withdraw from the Union, but while they continue, they must retain the character of representative republics.” (chapter XXXII) It is notable that this was the assigned text at West Point for several years.

Moreover, secession was used as a political tool during the War of 1812 by New England States, during the enforcement of the fugitive slave laws in Midwestern States, and favored by Abolitionists.

In his dissenting opinion, Justice Grier stated the obvious:

“The ordinance of secession was adopted by the convention on the 18th of February, 1861; submitted to a vote of the people, and ratified by an overwhelming majority. I admit that this was a very ill-advised measure. Still it was the sovereign act of a sovereign State, and the verdict on the trial of this question, “by battle,” as to her right to secede, has been against her. But that verdict did not settle any question not involved in the case. It did not settle the question of her right to plead insanity and set aside all her contracts, made during the pending of the trial, with her own citizens, for food, clothing, or medicines. The same “organized political body,” exercising the sovereign power of the State, which required the endorsement of these bonds by the governor, also passed the laws authorizing the disposal of them without such endorsement. She cannot, like the chameleon, assume the color of the object to which she adheres, and ask this court to involve itself in the contradictory positions, that she is a State in the Union and was never out of it, and yet not a State at all for four years, during which she acted and claims to be “an organized political body,” exercising all the powers and functions of an independent sovereign State. Whether a State de facto or de jure, she is estopped from denying her identity in disputes with her own citizens. If they have not fulfilled their contract, she can have her legal remedy for the breach of it in her own courts... however astute may be the
argument introduced to defend this decree, I can only say that neither my reason nor my conscience can give assent to it.”

Texas v. White is controlling case law which denies the constitutional right of a State to secede from the Union. *Ipso Facto*, should a State or States desire to secede from the Union, to that extent the Union is coercively bound together, and thereby not necessarily deriving its powers from the consent of the governed and anathema to the “consent of the governed” principle of the Declaration of Independence.

Texas v. White (1869) Supreme Court decision: https://supreme.justia.com/cases/federal/us/74/700/case.html

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**LOCAL GOVERNMENT**

**Gelpcke v. City of Dubuque (1863)**
Guest Essayist: Gary Porter

**Gelpcke v. City of Dubuque, 68 U.S. 1 Wall. 175 (1863) – “Oscillations” in the Law**

On its face, Gelpcke v. Dubuque appears to be about the validity of municipal bonds and not much else, but there were deeper legal issues at play. Namely, who has the ultimate authority to interpret a state constitution or statute, the highest state court or the federal courts (including the Supreme Court)? And when a state supreme court gives a new interpretation to a state statute, does that constitute an amendment of the statute, i.e. does it have the status of “law?” If so, and this has the effect of rendering a contract void, can this then bring the opinion of the state supreme court into conflict with the U.S. Constitution, i.e., the Impairment of Contracts clause?

Here are the facts in the case:

The 1846 Iowa Constitution contained a provision (Article 7) which restricted the General Assembly from creating any “debt or debts, liability or liabilities, which shall, singly or in the aggregate, with any previous debts or liabilities, exceed $100,000.” The following year, an act of the General Assembly incorporated the city of Dubuque. In 1857, the Assembly passed an act authorizing the City of Dubuque to issue bonds, redeemable in 20 years but paying interest along the way, to aid in the construction of railway lines to be built and operated by the Dubuque Western, and Dubuque, St. Peter’s & St. Paul Railroad Companies. Bonds in the amount of $250,000 (notice the amount) were authorized to be issued for each of the two companies. In the act authorizing the bonds the Assembly declared “Said bonds shall be legal and valid.” and “neither the City of Dubuque nor any of the citizens shall ever be allowed to plead that the said bonds are invalid.” Such bond measures required the approval of 2/3 of the citizens in an
election, which the citizens gave (it would appear that, as now, the citizens were not completely conversant in their state constitution).

A New York citizen, Edward Langworthy, purchased some of these bonds, the amount not disclosed in the opinion, and subsequently conveyed some of them to Mr. Gelpcke. On January 1st, 1877, when Mr. Langworthy attempted to redeem a coupon for an accrued half year’s interest, the bank, acting on behalf of the city, refused payment. Gelpcke sued the City of Dubuque in the U.S. District Court for the District of Iowa.

At trial, the City claimed that since the bonds exceeded the constitutional limit of $100,000, the bonds were improperly issued, were thus void, and that the interest should not be paid (What about redemption? Not mentioned.). The plaintiff objected (“demurred”) to this line of reasoning and the court overruled the objection and rendered judgement for the defendant. The case record does not specify this, but clearly Mr. Gelpcke, a citizen of another state, could not have known of the conflict between the amount of the bond issue and the Iowa Constitution, and must have received the bonds in good faith.

Gelpcke then appealed to the U.S. Supreme Court, which reversed the District Court opinion.

Before the high court, the city argued that the Iowa Constitution did not confer upon the legislature the authority it gave to the City of Dubuque.

The Court pointed to a series of cases in which the Supreme Court of Iowa rejected this argument. But then in a later case, State of Iowa v. County of Wapello, the Iowa Supreme Court had apparently reversed itself, and the city argued that the U.S. Supreme Court should defer to the Iowa Supreme Court’s later opinion and thus sustain the District Court ruling. Associate Justice Noah Swayne, in delivering the opinion of the court, called these changed opinions of the Iowa Court “oscillations.”

“It cannot be expected that this Court will follow every such oscillation, from whatever cause arising, that may possibly occur. The earlier decisions, we think, are sustained by reason and authority....However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past....The sound and true rule is that if the contract, when made, was valid by the laws of the state as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law.... It is the settled rule of this Court in such cases to follow the decisions of the state courts. But there have been heretofore, in the judicial history of this Court, as doubtless there will be hereafter, many exceptional cases.”

And then, in what could now be called “Scalia-esque” fashion, Swayne concluded: “We shall never immolate truth, justice, and the law because a state tribunal has erected the altar and decreed the sacrifice.”

Associate Justice Samuel Miller delivered a heated dissent. He pointed out that the Supreme Court of Iowa had the responsibility to “construe the constitution of the state,” and that its
“decision is binding on all other courts which may have occasion to consider the same question until it is reversed or modified by the same court.”

Miller argued that his fellow Justices had, in effect, said to the Federal District Court sitting in Iowa,

“You shall disregard this decision of the highest of the state on this question. Although you are sitting in the State of Iowa and administering her laws and construing her constitution, you shall not follow the latest, though it be the soundest, exposition of its constitution by the supreme court of that state, but you shall decide directly to the contrary, and where that court has said that a statute is unconstitutional, you shall say that it is constitutional. When it says bonds are void issued in that state because they violate its constitution, you shall say they are valid because they do not violate the constitution.”

He went on to note that, yes, courts on occasion reverse a previous ruling:

“I understand the doctrine to be in such cases not that the law is changed, but...that the former decision was not and never had been the law, and is overruled for that very reason. The decision of this Court contravenes this principle and holds that the decision of the court makes the law, and in fact that the same statute or constitution means one thing in 1853 and another thing in 1859. For it is impliedly conceded that if these bonds had been issued since the more recent decision of the Iowa court, this Court would not hold them valid.”

Soon after the opinion, many in the law profession took issue with the case, generating, among other analyses, a four part expose in the American Law Register.[1] In the years immediately leading to the Civil War, state’s rights issues were prominent in the courts. Some contended that a state court system should have the exclusive authority to interpret the state’s statutes unless there is a constitutional issue at stake; others agreed, but insisted that the Iowa Supreme Court’s ruling itself brought a constitutional issue into play: the Impairment of Contracts Clause.

This ruling is similar to Fletcher v. Peck, another case where tainted contracts (in Fletcher, by corruption, in Gelpcke, by constitutional infirmity) were held to be legitimate nevertheless.

Aside the implications that Gelpcke had on contract law, the more dangerous result, as Justice Miller rightly pointed out, was the implication that any court ruling creates “law.” Today that implication is considered received wisdom. We bow down to the rulings of the high court and now act in accordance with the new “law.”


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Village of Euclid v. Ambler Realty Co. (1926)
Guest Essayist: Richard E. Wagner

In *Euclid v. Ambler*, the Supreme Court upheld the right of the Village of Euclid in Ohio, mostly farmland east of Cleveland, to impose zoning restrictions on property owners. Today, zoning is a near-universal practice. While zoning did not originate with the village of Euclid, the *Euclid* case was the first federal case, and it became a beacon of attraction for zoning upon reaching the Supreme Court. Since *Euclid*, municipalities in America have had nearly unlimited ability to restrict how landowners can use their property, provided only that they assert that they have a good public purpose in doing so.

Prior to Euclid, landowners were the proper judges of how to use their land. In making such judgments, landowners would be guided by the common law of nuisance, which mostly entails common sense and decent morality applied in situations where conflicts might arise. In subdividing land as well as in assembling land, owners would engage in market-governed zoning in determining how they would use their land.

Municipal zoning replaced the ability of landowners to determine how to use their land with political and bureaucratic determination. Fresh from its enactment of a zoning ordinance in 1922, Euclid restricted the ability of Ambler Reality to develop a 68-acre tract of land that lay between two railroads, and which Ambler had planned for industrial development. Euclid zoned much of Ambler’s property as residential. At that time, residential property in the area was valued at about $2,500 per acre while industrial property was valued at about $10,000. Euclid’s zoning ordinance effectively destroyed about three-quarters of the value of Ambler’s property.

The final clause of the 5th Amendment to the U.S. Constitution enables governments to take private property, but it imposes two significant restrictions on any such taking. First, the taking must serve a genuine public purpose. Second, that taking must be accompanied by payment of just compensation. Euclid offered no compensation. As for public purpose, there was none other than Euclid’s assertion that as a government its sole desire was to pursue the public good.

The very presence of the takings clause reflects clear recognition that governments cannot be trusted to pursue the public good without facing constitutional restrictions to limit misuses of governmental power. In this respect, the Founders recognized that government unavoidably entails a form of Faustian bargain.

Governments have the power to coerce people, which entails the Faustian bargain of embracing an instrument of evil in the hope that more good than evil will result. The two restrictions of the takings clause recognize that holders of government power might be tempted to take property for
private use and to do so without providing just compensation. The takings clause makes sense only if it is recognized that its intent is to resist the ordinary use of public power for private purposes. Prior to *Euclid*, claims on behalf of using governmental power were greeted skeptically, as befits the Faustian character of replacing contract with compulsion that government represents. After *Euclid v. Ambler*, however, the fundamental default setting with respect to takings of property shifted from skepticism toward the claims of government to full-bore credulity.

In May 1923, Ambler sued Euclid on grounds that the taking was unconstitutional. Ambler won that case in the U.S. District Court [*Ambler Realty Co. v. Euclid* 297 F. 307 (1924)]. Euclid appealed to the Supreme Court, and won the appeal by a 6:3 verdict, with Justice Sutherland writing the opinion. There, the Court ruled that the zoning ordinance was a reasonable extension of the police power to protect public health and safety. The Court also denied that any compensation for the taking was warranted because the claimed loss of property value was a matter of speculation and not a demonstrable fact.

If there were residents of Euclid who wanted to prevent development of Ambler’s land, they could have offered to buy that land. They would have had to pay something on the order of $10,000 per acre to do so. What zoning does is enable well-placed individuals who wield political power to take property they could alternatively have tried to buy; however, taking that property through zoning is cheaper for them than buying it. To be sure, no political official is going to announce that he or she is imposing a zoning ordinance because this allows the official to gain control over the land more cheaply than a purchase would have cost. But this is exactly what zoning accomplishes once the ideological smokescreen has been blown away.

Such straightforward honesty would surely marshal strong opposition because it would place the venal character of much political action too directly onto center stage of the human drama. Hence, images of public health and welfare are invoked to deflect attention away from the reality of this use of political power. Our Founders recognized this downside of political action, and sought to limit its destructiveness by imposing constitutional limits on governmental action. *Euclid* is a landmark case in bringing our attention to the significant erosion in constitutional wisdom that has been underway for a good century.


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Justice George Sutherland (1862-1942)
Guest Essayist: Daniel A. Cotter

Justice George Sutherland: One of the Four Horsemen

Introduction

In the Supreme Court’s history, six justices were born outside of the United States. The fifth of those born on foreign soil was George Sutherland (second born in England). After a career in private practice and public office, Sutherland became an Associate Justice of the Supreme Court in 1923, and would figure prominently in the New Deal jurisprudence as one of the “Four Horsemen” of the Supreme Court.

Early Life and Career

George Sutherland was born on March 25, 1862, in Buckinghamshire, England, to Alexander George Sutherland and Frances Sutherland (nee Slater). His father, a convert to The Church of Jesus Christ Latter Day Saints, moved his family to the Utah Territory in 1863 and pursued prospecting, as well as other occupations, including practicing law, there. His father later renounced his Mormon faith. At the age of seventeen, Sutherland enrolled in Brigham Young Academy (now Brigham Young University) and, upon graduation, attended the University of Michigan Law School.

Sutherland did not graduate from law school, but was admitted to the bar in Michigan, and returned to Utah to join his father’s law practice. Sutherland practiced law in Utah for almost a decade. During that time, he also served as a State Senator in the first Utah Senate. In 1900, he ran for and was elected to the United States House of Representatives, defeating his former law partner. After one term, Sutherland returned to Utah and private practice, preparing for a run for a United States Senate seat.

In 1905, he became a U.S. Senator and served two terms, establishing a strong reputation for his mastery of the Constitution. Sutherland also advocated for women’s rights, sponsoring the Nineteenth Amendment in the Senate and working hard for its passage and ratification. Sutherland is also considered one of the main proponents behind the passage of the Federal Employer Liability Act, which established a worker’s compensation system. In his last year as Senator, Sutherland served as President of the American Bar Association.

Upon leaving the Senate, he remained in Washington, D.C., where he practiced law and was a close advisor to President Warren Harding. On September 5, 1922, Harding nominated Sutherland to the vacancy created by Justice John Clarke’s retirement. Sutherland was confirmed by voice vote the same day and took his oath on October 21, 1922. Along with fellow Justices James McReynolds, Pierce Butler and Willis Van Devanter, Sutherland became part of a conservative bloc on the Supreme Court that became known as the “Four Horsemen.” During his sixteen years on the Court, Sutherland voted with the majority to invalidate seventeen acts of Congress, including several of the “New Deal” initiatives advanced by President Franklin Roosevelt’s administration.
The Four Horsemen

When Van Devanter and McReynolds were joined by Sutherland and then Butler in early 1923, they formed a powerful conservative faction on the Court, first under Chief Justice William Howard Taft and then under Chief Justice Charles Evans Hughes. In the 1932 Term, their cohesiveness on Court decisions resulted in the nickname “The Four Horsemen” from the national press (a reference to the “Four Horsemen of the Apocalypse”). From 1932 to 1937, the Four Horsemen (together with Chief Justice Hughes and Justice Owen Roberts) issued opinions invalidating much of President Roosevelt’s New Deal legislation, including the Agricultural Adjustment Act, the Federal Farm Bankruptcy Act, the Railroad Act, and the Coal Mining Act. The Four Horsemen also ruled with Justices Roberts and Hughes that the National Industrial Act and minimum wage laws for women and children were unconstitutional. One of the last opinions joined by the four justices was a dissent in Associated Press v. National Labor Relations Board (1937), a case in which the majority held that the Wagner Act’s prohibition of unfair labor practices applied to the Associated Press and the First Amendment did not shield the AP from the Act. Sutherland, writing for the Four Horsemen, dissented:

No one can read the long history which records the stern and often bloody struggles by which these cardinal rights [in the First Amendment] were secured, without realizing how necessary it is to preserve them against any infringement, however slight….For the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time.

The Four Horsemen rode to the Supreme Court in one car every day to discuss strategy and positions, and were opposed to laws regulating labor as well as state economic regulation. The Supreme Court’s invalidation of much of the New Deal led to a potential constitutional crisis when President Roosevelt proposed a court-packing plan that would have added a new justice for each sitting justice over the age of 70. (The Constitution does not specify the number of justices who sit on the Supreme Court, and the current composition of nine justices, which was also in effect at the time of Roosevelt’s proposal, is set by the Judiciary Act of 1869.) The crisis was averted when Justice Roberts voted to uphold a Washington minimum wage law in West Coast Hotel v. Parrish (1937). Known as the “switch in time that saved nine,” recent scholars have concluded that Roberts actually cast his vote in this case before the court-packing legislation was introduced, rather than as a result of political pressure stemming from Roosevelt’s effort to reconstitute the Court. Sutherland considered retirement from the Court several times, but was determined to remain on the bench so long as President Roosevelt continued his efforts to pack the Court. Once that plan was defeated, Sutherland gave notice of his plans to retire and did so on January 17, 1938, at the age of 75.

Sutherland’s Other Work on the Court

In his more than fifteen years on the Court, Sutherland wrote a number of other important decisions, including Powell v. Alabama, a 1932 case that overturned a conviction in the Scottsboro Boys Case because the defendant was deprived of counsel. He also wrote the majority opinion in U.S. v. Curtiss-Wright Export Corp., a case that established the president’s strong powers in foreign affairs.
**Conclusion**

Upon his retirement, Sutherland was replaced by Stanley Reed. Combined with the retirement of Van Devanter the previous year, The Four Horsemen were no more and Roosevelt saw a number of New Deal victories from the Supreme Court. The Supreme Court has not seen such a consistent voting bloc since the Four Horsemen and one wonders if we will see its equal in the future. To date, Sutherland is the only Utahan to sit on the Supreme Court.

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**San Antonio v. Rodriguez (1973)**

**Guest Essayist: Gennie Westbrook**

From our nation’s earliest days, the national government has been involved in education, due to its significance in preparation for constructive citizenship in a republican form of government. In 1787 the Northwest Ordinance set aside public lands specifically for the establishment of schools. Through additional grants of land and money, formation of administrative agencies, the G.I. Bill, and court-ordered desegregation, federal policy has influenced education throughout our history, though traditionally the details of implementation were worked out at state and local levels.

Is a free public education a fundamental right? If so, what is the role of the federal government in assuring that the right is guaranteed in a manner that aligns with the Fourteenth Amendment’s Equal Protection Clause? These questions are at the heart of _San Antonio v. Rodriguez_, a 1973 Supreme Court case.

Demetrio Rodriguez, son of migrant farm workers, was born in 1926, and he had to leave school and go to work after the sixth grade. In the 1960s he lived with his wife and five children in San Antonio, Texas. Their west-side neighborhood in the Edgewood school district was home to almost exclusively Mexican-American families. Rodriguez had served in the military and in 1968 was a sheet metal worker at Kelly Air Force Base. He was well-acquainted with the substandard condition of his children’s schools. That year, Latino students all across the southwest U.S. protested unequal educational opportunities. On May 16, four hundred students from Edgewood High School walked out of class to hold a protest march and demonstration at the district’s administration offices. Their grievances included lack of books and supplies, crowded and unsafe buildings, and lack of well-qualified teachers.

Rodriguez and seven other Edgewood parents formed a parents’ association which filed a federal law suit that summer against the Texas Board of Education and others, charging that Texas school finance law violated the Equal Protection Clause of the Fourteenth Amendment, preventing their students from having opportunity for equal education. Under Texas law, state funding was appropriated to provide each child with a minimum education, and school districts voted to supplement that minimum with locally-levied property taxes. Even though it had four
times more students than the much wealthier north-side Alamo Heights district, Edgewood had a far lower tax base. The residents of the Edgewood district had never defeated a bond issue, but they could not keep up with the needed capital improvements. Even with one of the highest tax rates in the county, their school district raised only $37 per pupil while Alamo Heights raised $413 per student.

In 1971, the federal district court’s three-judge panel ruled in favor of the Edgewood parents’ group, finding unanimously that education was a fundamental constitutional right, and that Texas’ school finance law created a wealth-based classification that deprived children in property-poor school districts of their equal protection guarantees. The court ordered the state to restructure its school finance system to correct these inequities.

In 1973, the U.S. Supreme Court reversed the lower court’s decision. Justice Lewis Powell wrote for the majority in the 5-4 ruling. The majority ruled that “the Equal Protection Clause does not require absolute equality or precisely equal advantages.” The Court also ruled that education is not a fundamental right with explicit protection under the Constitution, however important it is to having an informed citizenry. The majority held that the Texas law financing education met the standard of the Equal Protection Clause to further the legitimate state purpose and interest in providing its citizens with an education.

Justice Potter Stewart concurred with the decision, stating that while the Texas educational funding system, like that of almost all states, was “chaotic and unjust,” it was not unconstitutional. He explained, “it has long been settled that the Equal Protection Clause is offended only by laws that are invidiously discriminatory – only by classifications that are wholly arbitrary or capricious.” He wrote that the Texas law did not meet that description.

Justice Thurgood Marshall disagreed and wrote a strong dissent. He asserted, “The majority’s holding can only be seen as a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens.” While Marshall admitted that education is not a constitutionally-protected right, he implied that it supports other constitutional rights and therefore needs protection. He wrote, “The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution.”

The U.S. Supreme Court’s narrow decision upholding Texas’ school finance law against an equal protection claim in San Antonio v. Rodriguez did not settle questions related to school finance. Charges that inadequate and inequitable school funding plans violated state constitutions have resulted in decades-long struggles in which several states’ highest courts have ordered their legislatures to create new formulas for meeting the high cost of a good education. In a republic, the cost of poor education is even higher.


Sources Consulted
ELECTIONS AND REPRESENTATIVE GOVERNMENT

Baker v. Carr (1962)
Guest Essayist: Joerg Knipprath

In 1962, the Supreme Court embarked on what has been described by one scholar as “the most significant reformist activism in which the Warren Court engaged,” other than civil rights cases involving blacks. The constitutional arena was the apportionment of legislative districts, and the case was Baker v. Carr. Chief Justice Earl Warren called Baker “the most important case of [his] tenure on the Court.” Apportionment is the periodic drawing of lines by a state for its congressional districts and for its state legislative districts. Until Baker, federal courts had stayed out of what Justice Felix Frankfurter in a prior case had called a “political thicket,” because it was a “non-justiciable political question.” Such questions could not be resolved by courts for reasons that Justice William Brennan addressed in Baker.

The case arose out of the failure of the Tennessee legislature to reapportion its districts for a half-century, despite a requirement in the state’s constitution that both legislative chambers must be organized on the basis of population. Due to both population growth and migration from rural to urban areas, the relative populations of these districts changed, sometimes producing significant disparities. Malapportionment created disproportionate power for rural districts over cities and
the growing suburbs. Tennessee was not the only offender. Only 36 state constitutions required reapportionment after each national census. Even among those, 24 state chambers (senates or assemblies) had not been reapportioned in thirty years or more. The issue took on greater urgency in the South, because rural malapportionment benefitted the Democratic Party and contributed to the South being a “one-party” region.

The Court’s reluctance to intervene in legislative districting can be traced to the 1849 case *Luther v. Borden*, which arose out of a tumult in Rhode Island, the “Dorr War,” over the adoption of a new constitution. In that remarkable case, the Court was asked to decide which was the legitimate government of Rhode Island, the old Charter government or the new People’s Convention government. Formally, the Court chose neither, characterizing the matter as inherently political and, therefore, non-justiciable under Article IV, Section 4, the “Guaranty Clause.” (“The United States shall guarantee to every State in this Union a Republican Form of Government.”) That controversy, too, had arisen out of voting restrictions and malapportioned legislative districts.

The Court adhered to that position as recently as *Colegrove v. Green* in 1946. Thereafter, however, it upheld, using the 15th Amendment, a challenge to a race-based drawing of a district that excluded a large number of blacks from voting in the city of Tuskegee, Alabama. Other reapportionment cases were brewing, and, in 1959, Charles Baker, a Republican voter and politician, sued as the named plaintiff on behalf of a well-organized group of political activists and lawyers to mount a long-planned challenge to the Tennessee apportionment.

When the case reached the Supreme Court, Justice Brennan first had to overcome the *Colegrove* hurdle of non-justiciability. “Justiciability” means capable of being resolved in a court. Brennan identified six classes of non-justiciable cases. There are those where the Constitution’s text has placed the resolution of the issue in a coordinate political department (Congress or the President), for example, in matters involving impeachment. Also, there are cases where courts as tribunals to resolve legal matters are institutionally incapable of acting because they lack an appropriate standard to resolve the matter or where the issue involves a policy determination clearly for non-judicial discretion. Among those might be an attempt to enjoin executive action in enforcement of federal law. Finally, there are cases where prudential considerations counsel against judicial involvement, such as matters that involve the courts in the internal operations of another branch or where sensitive questions of war and peace, foreign relations, or national security arise.

Brennan concluded that none of these applied. As to the most obvious, that the Guaranty Clause prevented a decision on the merits, Brennan declared that the reason such claims historically had been refused consideration is not that the Guaranty Clause itself precluded the Court from hearing such a case. Rather, particular cases brought under that clause had one or more of the other characteristics of non-justiciable political questions. There would be no blanket rejection of all Guaranty Clause cases, but only of those which, on a case by case analysis, met one of his six characteristics. Regarding the related argument that there was no recognizable judicial standard as to what was a proper representational structure for the states, Brennan offered that the claimants had presented their claim under the Equal Protection Clause, which courts had
frequently used in constitutional analysis and could provide a proper standard to evaluate the issue.

Justices Felix Frankfurter and John Marshall Harlan II dissented. Frankfurter, the author of the prior *Colegrove* opinion, was particularly skeptical. He quite rightly dismissed Brennan’s use of the Equal Protection Clause and declared the matter to be a Guarantee Clause claim masquerading under a different label. He agreed with Brennan that it is the characteristic of the controversy that makes it non-justiciable, not the specific clause under which it is brought. Where Brennan went wrong, according to Frankfurter, was in not properly applying his own test. Where the facts are such that courts cannot decide such a case, “judicial competence…cannot be created by invoking one clause of the Constitution rather than another.” Indeed, the Court itself in an earlier case had rejected using the Equal Protection Clause as a guise to have it hear what was really a Guarantee Clause claim. It was an inescapable fact that the controversy was over an allocation of influence and power within a republic. Republics take many forms, and the judges would be choosing one such among many. Quoting Justice Levi Woodbury in *Luther*, Frankfurter pointed out the dangers of such a course:

“If the people…should ever think of making judges supreme arbiters in political controversies, when not selected by nor, frequently, amenable to them…they will dethrone themselves and lose one of their invaluable birthrights; building up this way…a new sovereign power in the republic,…one more dangerous…than the worst elective oligarchy.”

Brennan’s opinion only addressed the preliminary justiciability issue, which cleared the way for a resolution of the constitutional merits. As with the school desegregation cases, the Court declined to specify an immediate remedy, mindful of the disruption of the political order that the opinion would produce. However, Brennan’s discussion of the Equal Protection Clause made the framework of the remedy clear for future litigants. The only issue would be what was meant by “Equal.”

One of the confusing aspects of the controversy was to determine exactly what right was injured. The Court framed this as a right to vote, but, as Frankfurter pointed out, all could vote, and their votes were counted. The Court also talked about vote dilution, but, as Frankfurter noted, something cannot be diluted until its value has been determined. For a vote, this depends on the chosen political system, so, inescapably, the Court was taking it upon itself to define what a proper republic looks like.

Two years after *Baker*, the Court applied a rigid equality analysis to strike down Georgia’s congressional apportionment (*Wesberry v. Sanders*), Alabama’s state legislative apportionment (*Reynolds v. Sims*), and Colorado’s state legislative apportionment (*Lucas v. 44th General Assembly District*).

All three were based on dubious assertions by the Court about the true nature of representative government, thereby doing exactly what Frankfurter had feared in *Baker*, that is, picking among competing theories of political philosophy. What was worse, in *Reynolds*, the Court struck down a system that was patterned after Congress, with one house apportioned on population, while the other was based primarily on geographic units. The Court declared the “federal analogy”
inapposite, declaring that to have been a political compromise between sovereign states. Justice Harlan’s lengthy discussion of historical precedent and understanding to the contrary was in vain, just as Frankfurter’s had been in Baker. Harlan’s discussion of the text and structure of the 14th Amendment and of first principles of state self-government under dual federalism fared no better with a reformist Court determined to rule by ideology.

The “federal analogy” also was popular with voters, who had approved such a system in a number of states, including California and Colorado. Even overwhelming popular support did not help with the justices, as amply shown in Lucas. There, Colorado voters overwhelmingly approved a “federal-style” apportionment for their legislature. The initiative passed in every political subdivision. The Colorado Assembly would be apportioned by population. For the state senate, population was the principal consideration, but geographic factors would also be used. The reason, as Justices Potter Stewart and Tom Clark pointed out in dissent, was that Colorado had varied geographic features over large areas, along with different industries, while the population was clustered in pockets of a relatively narrow strip along the eastern side of the Rocky Mountains, in Denver, Pueblo, and Colorado Springs. Those urban area voters would elect the governor and the lower house of the legislature, based on majority voting. By factoring in geography in the apportionment of the state senate, Colorado voters had tried to give some representational voice to voters dispersed around the rest of the state. As Stewart showed, rural voters were still too few to block urban districts even in the state senate. Nevertheless, Chief Justice Earl Warren was unconvinced and declared that even a popular majority could not deprive an individual of his constitutional rights.

Since then, the Court has loosened its strict equality test under certain circumstances. For a state’s congressional districting, the Court requires the state to “make a good faith effort to achieve precise mathematical equality.” A plan that had less than 1% average deviation from perfect equality was struck down in White v. Weiser (1973). For internal state and local legislative districting, however, the Court only requires “substantial equality” and upheld a plan in Mahan v. Howell (1973) that deviated 16% from the ideal between the largest and smallest districts. Then-Justice Rehnquist wrote that the state was permitted to consider political subdivision boundaries, such as counties and cities, to avoid splitting such jurisdictions between districts, as long as any deviations from population ideal were reasonable in relation to that goal.

Additional problems arose with the equality test. Thus, in 2016, the Court in Evenwell v. Abbott considered whether a state must look at the numbers of eligible voters in the districts to determine equal population size. As states traditionally have done, Texas uses total residents, not voters, for drawing district lines. In a unanimous ruling, the Court upheld the Texas approach. The justices did not outright prohibit states from using voters as the measure, but the implication was that residents, not voters, should be used. Justice Ruth Bader Ginsburg wrote, “Nonvoters have an important stake in many policy debates.” The problem, of course, is that the Court for over 50 years has described the constitutional right affected as the “right to vote” and prohibited unequal districts as unconstitutional “vote dilution.” Indeed, In Reynolds, the Court specifically declared that “citizens, not history or economic interests, cast votes.”

Suddenly recasting the right as “ensuring that each representative is subject to requests and suggestions from the same number of constituents” illogically conflates disparate concepts of
voting and representation, just as critics of the early reapportionment cases argued. The result in *Evenwell* helps Democrats, because those who are ineligible to vote, such as noncitizens, legal or otherwise, count as part of the relevant district population. At the same time, the value of *votes* in districts that have fewer ineligible voters relative to other districts is diluted when total *population* between those districts must be the same.

Another problem that has evaded a judicial resolution is the hoary practice of partisan gerrymandering, that is, drawing districts to favor the dominant political party. Both parties do this with alacrity, and current computerized maps of voter affiliation allows very finely-tuned line drawing. In 2004, in *Vieth v. Jubelirer*, the Court rejected a challenge to Pennsylvania’s redistricting plan. Justice Antonin Scalia, writing for a four-person plurality, found partisan gerrymandering to be a non-justiciable political question, as he saw no judicially discoverable standard that could determine when there has been such systemic exclusion of a political party that “both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group” have been shown. Justice Kennedy concurred in the result, but was unwilling to say that such a standard might never be discovered, despite the failure of 18 years of effort by various lower courts to develop such a standard.

It is particularly ironic that the Court has gone back to the future and declined to enter this most political of thickets, partisan gerrymandering. As Justice Harlan and other critics pointed out long ago in *Reynolds*, it was precisely the decision of the Supreme Court to prohibit the use of political subdivisions as the principal factor to draw lines that has enshrined partisan districting. Under the “federal analogy” plans, legislatures were stuck with preexisting city and county boundaries when drawing district lines. Now, such boundaries can be only a subsidiary consideration. Moreover, other factors, such as “history; ‘economic or other sorts of group interests’; area, geographical considerations, a desire ‘to insure effective representation for sparsely settled areas’; ‘availability of access of citizens to their representatives’; theories of bicameralism; occupation; ‘an attempt to balance urban and rural power; the preference of a majority of voters in the state” are off the table. Thus, the most expansive discretion politicians have in this area is to draw district lines by political affiliation of the residents.

The law of unintended consequences has struck in another way. The Warren Court embarked on its constitutional journey to reapportion legislatures consistent with its vision of proper republican government in the hope of breaking the power retained by rural interests in malapportioned legislatures. The expected result was that more liberal, more Democratic urban areas would benefit, which would result in more liberal policies, particularly in the South. Instead, political scientists have concluded, the principal beneficiaries were moderate-to-conservative suburban areas controlled by Republicans. Somewhere, Justices Frankfurter and Harlan are smiling.


An expert on constitutional law, and member of the Southwestern Law School faculty, Professor Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has
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PROPERTY RIGHTS

**Chicago, Burlington & Quincy Railroad Co. v. City of Chicago (1897)**

*Guest Essayist: Daniel A. Cotter*

In October 1880, the Chicago City Council decided to widen Rockwell Street, requiring the City to acquire certain private property owned by individuals and a right-of-way owned by the Chicago, Burlington & Quincy Railroad Company. The City of Chicago brought a condemnation suit in state court, and the jury awarded compensation to the individuals but only awarded one dollar to the railroad for its right-of-way. The railroad appealed, asserting that the condemnation was a taking in violation of the Due Process Clause of the Fourteenth Amendment. The Illinois Supreme Court affirmed the judgment and the railroad thereafter appealed to the United States Supreme Court on a writ of error. The issue before the Supreme Court was whether a provision in the Bill of Rights to the United States Constitution applies to a state through the Due Process Clause of the Fourteenth Amendment.

**Background of the Case and the Controversy**

At the time, the Illinois State Constitution included specific provisions relating to the taking of property, which in part provided:

> [N]o person shall be deprived of life, liberty or property, without due process of law.

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Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the State, shall be ascertained by a jury, as shall be prescribed by law. The fee of land taken for railroad tracks, without consent of the owners thereof, shall remain in such owners, subject to the use for which it is taken.

A general statute passed on April 10, 1872, relating to the incorporation of cities and villages, provided that:

> [t]he city council shall have power, by condemnation or otherwise, to extend any street, alley or highway over or across, or to construct any sewer under or through any railroad track, right of way or land of any railroad company (within the corporate limits); but where no compensation is made to such railroad company, the city shall restore such
railroad track, right of way or land to its former state, or in a sufficient manner not to have impaired its usefulness.

When Chicago was founded in 1875, the provisions in the 1872 statute were incorporated into its charter.

The Supreme Court Decision

The Court, in a 7-1 decision written by Justice John Marshall Harlan, first rejected the City’s argument that due process was satisfied simply by permitting the railroad company’s grievance to be heard, stating:

But a State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what due process of law is, regard must be had to substance, not to form. This Court, referring to the Fourteenth Amendment, has said:

‘Can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application, where the invasion of private rights is effected under the forms of state legislation.’


Finding that the substance of due process required compensation, the Court continued, stated that:

Notice to the owner to appear in some judicial tribunal and who cause why his property shall not be taken for public use without compensation would be a mockery of justice.

Id. at 237.

By finding that compensation was required, the Court incorporated the “just compensation” requirement of the Fifth Amendment through the Due Process Clause of the Fourteenth Amendment. In so doing, the Court, for the first time, held that a specific provision in the Bill of Rights was applicable to the states. On its face, the Bill of Rights was only applicable to the federal government and not to the states. The City had argued against incorporation. In holding the prevision applicable to a state, Harlan stated:

In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument.

Id. at 241.
The Court considered whether just compensation had in fact been given to the railroad and, based on a review of the Illinois Constitution and the 1872 Act, the Court held that the State had adequately compensated the railroad for its right-of-way. Justice David Brewer dissented from this ruling, asserting that the railroad had been deprived of “valuable property without any, or at least only nominal, compensation.”

Conclusion

The Chicago decision was a landmark one because the Court for the first time incorporated a specific provision of the Bill of Rights through the Due Process Clause of the Fourteenth Amendment and applied the requirements in the Bill of Rights to the States. Since this decision, the Supreme Court has on numerous occasions incorporated many other provisions of the Bill of Rights through the Due Process Clause and likewise applied them to the States.

Chicago, Burlington & Quincy RR v. City of Chicago (1897) Supreme Court decision: 7-1: https://www.oyez.org/cases/1850-1900/166us226

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COMMERCE AND CONTRACTS

New Jersey v. Wilson (1812)

Guest Essayist: Gary Porter

New Jersey v. Wilson, 11 U.S. 7 Cranch 164 164 (1812)

Are the terms of a contract inviolate? Can a contract run in perpetuity and affect something other than the parties involved? Can contracts be impaired (modified or broken) without the consent of both parties? These were the questions facing the Court in 1812 when they accepted an appeal of New Jersey v. Wilson.

Following the form in which Chief Justice Marshall outlined them in the opinion, the facts were these:

The remnant of the tribe of Delaware Indians had claims to a considerable portion of land in New Jersey which they desired to eventually be rid of. In 1758, the Indians and commissioners appointed by New Jersey met and the Indians proposed to designate a portion of the land that they would continue to live on; release their claim to all other land; and appoint certain chiefs to meet with NJ commissioners to draft plans for the eventual release of the entire claim.
This was agreed to by the state’s commissioners, and the legislature passed an act to that effect that same year.

This act, among other provisions, stipulated “that the lands to be purchased for the Indians shall not hereafter be subject to any tax, any law usage or custom to the contrary thereof, in any wise notwithstanding.” (Emphasis added)

The state paid for the land, conveyed it to the Indians, and the Indians released their claim to the rest of their holdings.

In 1801, the Indians decided to join a related tribe living at Stockbridge, New York. They applied for, and obtained an act of the legislature of New Jersey, authorizing the sale of their New Jersey land.

This new act made no mention of the exemption from taxation which was part of the original agreement and the original act of the legislature.

In 1803, the land in question was broken up and sold to several new owners.

In October, 1804, the legislature repealed the section of the 1758 act, which had exempted the lands from taxes. The lands were then assessed and the taxes demanded of the new owners. The new owners, aware of the agreement made in 1758 regarding tax exemption of the land, sued New Jersey for breach of contract. The New Jersey Supreme Court ruled that the 1804 repeal act was valid and that the land was indeed taxable. The plaintiffs appealed to the Supreme Court.

The question presented to the Court was this: did New Jersey’s act of 1804, repealing the tax exemption of the land, violate the Impairment of Contracts clause of the Constitution?

The Court, in a unanimous decision delivered by Chief Justice John Marshall, said it did; the grant of tax immunity was a contract protected by Article 1 Section 10, which reads:

“No State shall … pass any Law impairing the Obligation of Contracts.”

The Court opined that: “This is certainly a contract clothed in forms of unusual solemnity. The privilege, though for the benefit of the Indians, is annexed, by the terms which create it, to the land itself, not to their persons.”

The tax exemption increased the value of the land, and though the 1801 act made no mention of continued tax exemption, neither did it repeal such exemption, that occurred in the 1804 act, after the land had been sold to new owners — who no doubt considered the tax exemption in their assessment of the sale price.

Leonard W. Levy, author of numerous books and articles on the Constitution, including The Origins of the Bill of Rights[1], called this a “breathtaking expansion of the contract clause” involving “some species of metaphysics.” “The Court simply extended the contract clause beyond the intentions of its framers to protect vested rights and promote business needs.”[2] I disagree.
While I’m not a lawyer, and have never seen the wording of the original agreements and acts in this matter, the Supreme Court Justices were, and did.

Citing *Fletcher v. Peck* as precedent, the court decided that the original agreement with the Indians represented a valid contract, and contracts, with few exceptions, remain in force unless and until the terms have been met or they are severed by mutual agreement of both parties. “Hereafter” as a contract specification can be a long time. New Jersey’s modification of that contract, even though the Indians were no longer owners of the land (or still in the state) was precisely what the Impairment of Contracts Clause was intended to prevent.

During the Articles of Confederation period state legislatures and courts meddled in contracts willy-nilly, sometimes making life easier for debtors, sometimes for creditors. The post-war economy was a mess and debtors and creditors alike faced hard times. But to bring stability and predictability to the economy, such “impairment” of contracts had to stop, thus Article 1, Section 10.

A contract is a contract.


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**Trustees Of Dartmouth College v. Woodward (1819)**  
**Guest Essayist: Daniel A. Cotter**

Dartmouth College was chartered in 1769 by King George III. In 1816, over thirty years after the conclusion of the American Revolution, New Hampshire’s legislature attempted to alter Dartmouth College’s charter by giving the Governor of New Hampshire authority to appoint trustees to the board and creating a state board with veto power over trustee decisions—in effect, converting the school from a private to a public institution. The existing trustees filed suit against William Woodward, the newly appointed secretary under the new charter, claiming that the acts of the legislature violated the Constitution. The main issues presented by the trustees’
suit were whether the Contract Clause of the United States Constitution applied to private corporations and whether the corporate charter of Dartmouth College could be changed by the New Hampshire legislature.

**Background of the Case**

Dartmouth College is one of the nine colonial colleges chartered by Great Britain before the Revolutionary War. The original 1769 charter set forth the purpose and mission of the college and also granted land to the college. The original charter set the purpose and mission of the college to educate Native Americans. In 1816, in response to the college’s trustees deposing the school’s president, the New Hampshire legislature amended the college’s charter. The amended charter placed control of appointing officers and trustees with the governor, appointed new trustees, and changed the name of “Dartmouth College” to “Dartmouth University.”

**The Controversy**

Trustees of Dartmouth, who were largely Federalists, sued in New Hampshire state court challenging the actions of the Republican-dominated legislature and Republican governor to change Dartmouth College’s charter. The New Hampshire Courts ruled in favor of the governor and legislature.

**The Supreme Court Decision**

Daniel Webster, an alumnus of Dartmouth College, was selected by the trustees to argue their position before the Supreme Court of the United States. Webster was one of the greatest constitutional scholars of his time, arguing 223 cases before the Supreme Court, earning the nickname as the “Great Expounder of the Constitution.”

Webster argued that the New Hampshire legislature had violated the Contract Clause of the Constitution by passing a law “impairing the Obligation of Contracts.” Article I, Section 10 of the Constitution provides in pertinent part:

“No State shall…pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.”

Webster and his team asserted that the state legislature through its action had taken property rights from one group and given them to another group, in violation of the Contract Clause. Webster purportedly ended his oral argument with the statement:

“It is, Sir, as I have said, a small college. And yet there are those who love it!”

The Supreme Court ruled in favor of the Trustees by a 5-1 vote. In the decision written by Chief Justice John Marshall, the Court found that the college charter was a contract and that the charter made it clear Dartmouth College was a private entity and not a public one. Marshall’s opinion held that the Contract Clause was drafted to prevent states from taking actions directed at private property, and that the charter of Dartmouth College was a contract between New Hampshire (the successor to the King) and the college, which was protected from legislative interference. Marshall went on to describe the details of how a corporation functions:
A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality — properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it was created.

Almost two hundred years later, Justice John Paul Stevens cited some of this language in his dissent in *Citizens United v. Federal Election Commission*, in arguing that corporations, as artificial entities, did not have the right to invoke First Amendment protections.

Associate Justice Joseph Story in his concurring opinion asserted that a state legislature could insert reservation clauses into corporate charters that would permit the state to amend a particular charter.

**Conclusion**

The *Dartmouth College* decision was a landmark one because it imposed a significant constitutional limitation on states’ authority to intervene in and change state charters and contracts. The case significantly strengthened the Contract Clause and encouraged economic growth.

Trustees of Dartmouth College v. Woodward (1819) Supreme Court decision 5:1: [https://www.oyez.org/cases/1789-1850/17us518](https://www.oyez.org/cases/1789-1850/17us518), which Justice Thomas Todd took no part in the deliberations or decision.

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**United States v. E.C. Knight (1895)**

**Guest Essayist: Tony Williams**

**Federal Regulation and the Rise of Big Business: United States v. E.C. Knight (1895)**

The late nineteenth century was a time of business consolidation as the American economy experienced a “great merger movement” with the rise of big business. Through means foul and fair, corporations formed trusts that dominated entire industries to combat competitive pressures
that drove prices and at times to monopolize for control. The sugar industry was a part of this consolidation movement.

The sugar industry supported free trade as it imported much of its sugar from Cuba. The industry was centered on the refining of sugar, which was manufacturing activity. In 1892, the American Sugar Refining Company bought out the stock of several competitors and controlled ninety-eight percent of the industry. The federal government brought suit against the “sugar trust” under the Sherman Anti-Trust Act of 1890.

Congress enacted the Interstate Commerce Act (1887) and Sherman Act as a response not only to reformers such as the Populists who wanted federal regulation of railroads and corporations, but also by businesses and railroads who were struggling to keep up prices and remain profitable during a time of competitive pressures and deflation. The Commerce Clause in Article I, section 8 of the Constitution granted Congress the power to regulate interstate trade (but not trade within a state). The regulations of the Sherman Act banned “every … combination … in restraint of trade or commerce among the several states.” However, the legislation was vague and satisfied neither its supporters nor opponents.

The Supreme Court decided the first test case of the Sherman Act in United States v. E.C. Knight (1895). The key question in the case was whether the manufacturing activity could be regulated under the Sherman Act or whether it fell under the police powers and regulatory authority of the states. In an overwhelming 8-1 decision, Chief Justice Melville W. Fuller and the Court decided that the Congress had unconstitutionally regulated manufacturing within states rather than interstate trade. The Court thus preserved the principle of federalism, which divided powers between the national government and the states. The Court also expressed a fear that if Congress could regulate manufacturing or intrastate trade, then it could regulate “every branch of human industry” and thereby have an unlimited government.

The lone dissenter in the case, Justice John Marshall Harlan, believed that the Sherman Act could be applied to business combinations because they acted indirectly to restrain interstate trade. He posited that manufacturing and prices of goods were matters of a national economy and related to interstate trade. Therefore, Congress could regulate business activity that was not actually interstate commerce. Like many progressives at the turn of the century, Harlan held federal regulation was necessary because only the national government was strong enough to combat monopoly.

Although the Court broke up the railroad combination Northern Securities Company in 1904 and the Standard Oil Company in 1911, it enunciated the “rule of reason” which held that the immense size of a trust was not the problem and not all restraints of trade were unreasonable or illegal. In other words, the Court distinguished between “good” and bad” trusts depending on behavior and intent. Some companies were reasonably large and efficient, and were not unconstitutional violations of interstate commerce. The Supreme Court was accused of being a “laissez-faire” court, but it was helping to establish the constitutional limits of federal regulation with the rise of big business.

The Court would fundamentally shift its interpretation of the Commerce Clause during the New Deal judicial revolution in 1937. Among other cases, the Court decided in N.L.R.B. v. Jones &
The Court would not invalidate another law under the Commerce Clause until *U.S. v. Lopez* (1995), which it ruled that a law banning handguns near schools had nothing to do with interstate commerce.

**United States v. E.C. Knight (1895) Supreme Court decision:**
https://supreme.justia.com/cases/federal/us/156/1/case.html

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**Allgeyer v. Louisiana (1897)**

Guest Essayist: Gennie Westbrook

After the Civil War, United States commerce experienced rapid growth, both among the states and in international markets. Congress passed the Interstate Commerce Act in 1887 regulating interstate trade. Many state legislatures wrote constitutional provisions and statutes intended to protect their states’ businesses from what they perceived as unfair competition from other states.

For example, the 1879 Louisiana Constitution contained Section 236, which provided that a corporation with its main offices outside the state could only do business in Louisiana if it received a license to do so and maintained an office and authorized agent in the state. The provision was intended to protect the citizens of Louisiana from insurance fraud. Louisiana Act 66 of 1894 provided that anyone who purchased marine insurance from an out of state marine insurance company that had not complied with the Louisiana regulations “shall be subject to a fine of one thousand dollars, … for the use and benefit of the charity hospitals in New Orleans and Shreveport.”

E. Allgeyer and Company, located in New Orleans, exported cotton to ports in Great Britain and Europe. The company sought to purchase shipping insurance coverage from Atlantic Mutual Insurance Company of New York to cover cotton shipments scheduled to depart from New Orleans. In October of 1894, Allgeyer mailed his request for insurance coverage. In December, the state of Louisiana filed suit against Allgeyer, charging him with violation of the Louisiana law.

Allgeyer maintained that the Louisiana law violated the U.S. Constitution’s Fourteenth Amendment by depriving him of liberty of contract without due process. He argued that contracts such as his were beyond the jurisdiction of state courts, and the U.S. Constitution protected the right of people to make contracts with parties in other states, free of arbitrary restrictions. The Contract Clause forbids the states impairing the obligations of contracts in Article I, Section 10, Clause 1, but it does not specifically provide for the liberty of contract, which is more rooted in reason and natural law. Therefore, Allgeyer based his liberty of contract claim in the Fourteenth Amendment, rather than the Contract Clause.
The parish court found in favor of Allgeyer, but Louisiana’s Supreme Court reversed the decision and fined Allgeyer $1000 to be paid to support the charity hospitals.

The Louisiana Supreme Court wrote,

“There is in the statute an apparent interference with the liberty of defendants in restricting their rights to place insurance on property of their own whenever and in what company they desired, but in exercising this liberty they would interfere with the policy of the state that forbids insurance companies which have not complied with the laws of the state from doing business within its limits. Individual liberty of action must give way to the greater right of the collective people in the assertion of well-defined policy, designed and intended for the general welfare.”

Allgeyer appealed the decision and in 1897 the U.S. Supreme Court agreed to hear the case. The central question was whether the Louisiana law limiting contracts its citizens could make with parties in other states violated the Due Process Clause of the Fourteenth Amendment.

In an opinion written by Justice Rufus W. Peckham, the U.S. Supreme Court unanimously ruled in Allgeyer’s favor, basing their reasoning in principles of natural law, and ruling for the first time that a state law regulating business violated liberty of contract:

“The ‘liberty’ mentioned in [the Fourteenth] amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.”

The decision increased federal influence over state laws. The Fourteenth Amendment was written after the Civil War to protect the personal rights of African-Americans. Allgeyer v. Louisiana was the first decision in what would become a 40-year period in which the U.S. Supreme Court invalidated a number of state-level economic regulations, such as those affecting working conditions, wages and hours. The Court extended the substantive meaning of the Due Process Clause to protect economic rights, liberty of contract, and commercial activity as part of the definition of liberty. Justice Rufus W. Peckham, author of the Allgeyer decision, also wrote later for the majority in the 5-4 decision, Lochner v. New York (1905). He explained that the state’s police power was limited to laws protecting the public’s morals, health, safety, and welfare, and a maximum hours law for bakers in New York did not meet that test, because it violated the liberty of contract. The Lochner Era represented a chapter of laissez-faire decisions in which the Court protected property rights and liberty of contract up through 1937. With that year’s decision in West Coast Hotel v. Parrish during the Great Depression, the Court reversed itself by upholding a state minimum wage law. Since then, the high court has largely permitted increased levels of state and federal regulation of the economy, based on the U.S. Constitution’s Interstate Commerce Clause, Article 1, Section 8, Clause 3.

Allgeyer v. Louisiana (1897) Supreme Court decision: https://supreme.justia.com/cases/federal/us/165/578/
Sources Consulted


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Champion v. Ames (1903)

Guest Essayist: Joerg Knipprath

The Industrial Revolution created theretofore unimaginable wealth, some of which trickled down as wages to workers in the mills and factories of the 19th century. Though substandard by today’s measure, those wages were sufficiently high and working conditions sufficiently appealing to attract people from farms to the growing cities. Waves of immigrants, mostly impoverished Europeans, flooded the labor pool, as well. That labor surplus depressed wages, which, in turn, kept low-skilled workers poor, at least in relation to the growing middle and upper classes. Churches and other private relief societies undertook the increasingly urgent efforts to ameliorate the poverty of the working class.

As the Victorian Age’s noblesse oblige behind those private efforts morphed into the Progressive Era’s reformism through government action, the foundations of the modern regulatory state were laid. In constitutional law, that change became manifest in several doctrines, including the power of Congress to “regulate Commerce…among the several States.” At the time, “to regulate” meant to standardize or to conform to a norm. That meaning is also apparent in other parts of the Constitution, such as the Second Amendment. Modern usage as a synonym for “to control” in a legal context at that time was met by “to police.” The original purpose of the Commerce Clause was to give Congress the tool to standardize the flow of interstate commerce by legislating directly against disruptions by the states. Under the Articles of Confederation, Congress could appoint itself or others as a tribunal to resolve commercial disputes among states on appeal from a state, but had no power to legislate preventively.

“Commerce,” as understood by the Framers, was trade and navigation attendant thereto. In the leading case, Gibbons v. Ogden, Chief Justice John Marshall similarly defined this term as
reaching both “traffic” (buying and selling) and “intercourse” (the flow of goods). More ambiguous and controversial was the meaning “among the several states.” In *Gibbons*, Marshall interpreted this to allow Congress to reach not only commerce that moves from one state to another, but also commerce that, while local, affects other states. Only purely local commerce might be beyond Congress’s reach.

Under the conditions of the time, much commerce was still entirely local, so the potentially far-reaching effect of the last part of Marshall’s opinion was left untested. Congress generally legislated only to authorize state actions that otherwise might interfere with interstate commerce. With the lack of congressional legislation that affirmatively regulated interstate trade, the Supreme Court, in turn, focused its jurisprudence on the question of what limitations the existence of the Commerce Clause itself placed on state laws that had extraterritorial effect.

Towards the end of the 19th century, Congress began to use its commerce power more affirmatively, in the Interstate Commerce Act of 1887 and the Sherman Antitrust Act of 1890. The latter’s constitutionality was challenged in *U.S. v. E.C. Knight Co.* (the “Sugar Trust” case). The Supreme Court held that the government could not apply the law to an alleged monopoly in manufacturing, because it went beyond Congress’s constitutional power. Manufacturing was a local activity, not interstate. Moreover, commerce followed manufacture (or other “production”), but was not part of it, a distinction well understood by the Constitution’s framers.

*E.C. Knight Co.* pruned back Marshall’s holding in *Gibbons* by effectively eliminating Congress’s ability to reach local activities that affected commerce among the states. The decision also curtailed national power to control industrial conglomerates and, more generally, most economic activity. What remained was Congress’s ability to control movement of people or goods across state lines. Congress began to use that tool around the turn of the 20th century.

It long had been argued by those who professed themselves concerned about the poor that much of the latter’s fate was due to moral failing or poor choices in behavior. It was almost an article of faith that alcohol was a major culprit. Consequently, in quite a turn from the traditionally heavy consumption of alcohol by Americans, temperance movements arose. A prolonged period of such efforts began in the latter couple of decades of the 19th century and culminated in the Eighteenth Amendment (“Prohibition”).

But alcohol was not the only destructive vice. Opium consumption and other drug abuse, pornography, prostitution, and gambling—especially through lotteries—were also common at the time and came under increasing attack. The Progressive movement viewed these vices as impairing efforts to raise the poor out of their condition and obstructing human progress more generally. Private reform efforts were not enough; the power of government needed to be harnessed for the task. This coincided with the Progressive mindset that law was not just a set of basic rules to allow society to resolve disputes and maintain peace, but an instrument of policy towards a “just” and “modern” secular paradise on Earth.

Gambling long had been a popular pastime for many, with state-recognized lotteries having the additional benefit of raising money for public projects. Critics objected that, though they were voluntary, lotteries were a regressive form of taxation that disproportionately preyed on the hopes and desperation of the poor. Eventually, states passed laws to prohibit such lotteries within
their domains. Though the 1821 case of *The Cohens v. Virginia* held that a state could prosecute in-state sellers of tickets for out-of-state lotteries, since then the improved postal system and other efficient means of interstate transportation allowed lottery promoters to evade a state’s controls by remaining outside that state’s boundary. Hence, the federal government was pressed into service, which it undertook through the Lottery Act of 1895.

The Act prohibited transportation in interstate commerce of lottery tickets. The Act was challenged by a seller of tickets for a lottery conducted in Asuncion, Paraguay, by the Pan-American Lottery Company. He was indicted in 1899 for shipping such tickets from Dallas, Texas, to Fresno, California. His constitutional argument was that Congress’s commerce power could not be used to prohibit the transportation of these tickets because, 1) to “regulate” does not include to “prohibit”; 2) lottery tickets are not “commerce”; and 3) Congress’s purpose was not to control the flow of commerce, but to enforce morals, a power reserved to the states.

Speaking for a bare majority in *Champion v. Ames* in 1903, Justice John Marshall Harlan brushed aside these objections. Since the power over interstate commerce was “plenary,” Congress could regulate that commerce even by eliminating it, if prohibition was deemed necessary and proper to control the commerce. The problem with Harlan’s conclusion was that he interpreted “regulate” in the modern sense of “control,” rather than the traditional understanding of “standardize.” Congress was not preventing state obstructions to the flow of interstate trade here. Rather, Congress was creating the obstruction.

Champion also argued that lottery tickets were not articles of trade, such as manufactured goods might be, because they had no inherent value. They were “intangibles” and, akin to insurance contracts, simply represented promises to pay. The Court had previously decided that insurance contracts were not commerce. Justice Harlan disagreed. He argued that these tickets had value, as shown by the fact that they were bought and sold. He analogized the Act to Congress’s prohibition of shipment of diseased cattle in interstate commerce. That analogy did not sit well with Chief Justice Melville Fuller, whose dissent noted that contaminated livestock poisoned the operation of interstate trade itself by spreading disease, whereas “we do not understand these pieces of paper themselves can communicate bad principles by contact.”

Most significant, Champion argued that Congress had no “police power,” traditionally reserved to the states and defined as the general power to legislate for the health, safety, morals, and welfare of the community. That bedrock principle of federalism was reflected in the enumeration of congressional powers through Article I, Section 8, of the Constitution and in the Tenth Amendment. The Act was based not on concern about free trade, but about morality. Were the Court to uphold the Act, it would empower Congress to act as a general legislature akin to the British Parliament.

Harlan responded with the time-honored judicial excuse for the exercise of expansive and potentially unconstitutional powers: “[T]he possible abuse of power is not an argument against its existence. There is probably no governmental power that may not be exerted to the injury of the public.” If that abuse goes against the Constitution, the Court will so declare. If it is not unconstitutional, but merely injurious, the remedy is through the political process. Moreover, as long as Congress is using its constitutional powers and not violating any restriction thereon,
Congress is entitled to act equally with the states. Harlan asked, “If a state…may properly take into view the evils that inhere [in lotteries], why may not Congress…provide that such commerce shall not be polluted by the carrying of lottery tickets from one state to another?”

The problem with Harlan’s rhetorical question is that it assumes a premise, namely, that the states and Congress are entrusted with the same objectives of government. It is this premise that Champion (and most Americans of the Founding Era) denied. Indeed, Chief Justice John Marshall in McCulloch v. Maryland, the most expansive declaration of federal power before the New Deal, recognized that there were objectives that Congress could not pursue even if that body hewed to the technical words of the Constitution. He wrote that laws passed under Congress’s admittedly broad authority still must “consist with the letter and spirit of the Constitution.” Mere compliance with the form of the power within the letter of the Constitution was not enough. The law must not violate the spirit of the framework. What might such a violation be?

“Should Congress…under the pretext of executing its powers pass laws for the accomplishment of objects not intrusted to the Government, it would become the painful duty of this tribunal…to say that such an act was not the law of the land.”

That significant qualifier to congressional power was cast aside by Harlan in Champion. Henceforth, all that mattered was the technical adherence to the form of the power granted, not whether the substantive objective was of the type reserved instead to the general powers of the states. Congress could legislate under pretext, as long as they incanted the proper formalities.

The impact of Champion was both immediate and long-term. It marked the go-ahead for a national “police power.” Seizing this open invitation for constitutional pretense to legislate, Congress proved Chief Justice Fuller’s dissent prophetic. In quick order, Congress passed the 1906 Pure Food and Drug Act (upheld in 1911 in the “rotten egg” case, Hipolite Egg Co. v. U.S.) and the 1910 Mann Act or White Slave Act to fight interstate prostitution rings (upheld in 1913 in Hoke v. U.S. as to prostitution and in 1917 in Caminetti v. U.S. as to private adultery). Similarly, in line with Champion, the Court broadly upheld the use of Congress’s taxing power as a purely regulatory tool in McCray v. U.S. (1904). Congress followed up that case with the Harrison Narcotics Tax Act of 1914. Few cases of the time showed any alarm on the part of the justices about the Frankenstein monster they created in Champion. One, Hammer v. Dagenhart in 1918, struck down the federal Child Labor Act of 1916, in a holding that was difficult to reconcile with Champion.

Since then, the Court has approved vast expansion of Congress’s regulatory powers and acquiesced in the growth of the constitutionally obscure and politically hidden administrative state. That has occurred in significant part through the Court’s New Deal cases, which upheld a broad power of Congress to regulate entirely local productive activities, as long as they had some tenuous connection to an interstate market. Still, it was Champion v. Ames, along with a handful of other cases in the first decade and a half of the 20th century, which validated the claim of constitutional legitimacy for the Progressive program of national direction of economic and social policy.
One should not blame the Court, though. The Court did not birth the Progressive Era, nor could it have halted Progressivism’s subsequent march that has resulted in our current regulatory welfare state. It serves well to remember the aphorism by Joseph de Maistre, “Every nation gets the government it deserves.” Ultimately, it is the people that control their constitution.


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### Nebbia v. New York (1934)

**Guest Essayist: Gennie Westbrook**

In the late 1920s, farmers across the country generally did not participate in the prosperity of the decade. They were often unable to sell their crops to distributors for sufficient prices to cover their costs of production. Especially in New York, where the milk industry was the cornerstone of agricultural economy, tension between dairy farmers and distributors resulted in angry confrontations. The Great Depression further exacerbated economic chaos and hardship throughout the American economy, making it even more difficult for farmers to adjust to the economic collapse. One farmer wrote to a local newspaper in 1932, “Every can of milk we sell leaves us further in debt than we were before we produced it. This robbery must stop soon or reform will be too late to help us.” By March and April of 1933, farmers and dairymen in various areas joined together in “Milk Wars” and “Farm Strikes” to try to prevent farm products from getting to towns and cities, in hopes that the resulting scarcity would lead to higher prices. They set up blockades to stop any trucks carrying dairy and farm products, seized the cargo and destroyed it.

The New York legislature sought to resolve the unrest by managing the marketing and sale of milk. Declaring that the production of milk was “a business affecting the public health and interest,” the legislature enacted a Milk Control Law in April of 1933 to regulate milk prices, setting the minimum price that retailers could charge at nine cents per quart. The result was a temporary end to the strikes. However, many of the state’s farmers believed that the price-fixing would benefit large corporations and co-ops rather than family farmers, and they once again took matters into their own hands. In spite of police guards accompanying milk truck convoys, the strikers attacked, leading to violent confrontations in multiple New York counties. The August 10, 1933 *Syracuse Herald* reported numerous incidents of violent clashes resulting in the
dumping of thousands of gallons of milk, dynamite blasts, hand-to-hand combat, and many arrests.

In the midst of the controversy, and only two days after the Milk Control Board set the minimum price for a quart of milk, Rochester grocer Leo Nebbia carried out his own steps to keep his small grocery store afloat. Struggling to make ends meet through the kind of creative marketing that many retailers were attempting, he gave away a five-cent loaf of bread with the sale of two quarts of milk, bringing the price of milk below the 9-cent minimum. In a March 9, 1934 letter, Nebbia wrote, “I thought I was doing good, to the welfare of the people, also to compete with the chain stores, even today the price of milk is chiseled. I do not like to cut prices, but if I don’t cut prices I can’t stay in business.”

He was convicted of violating the price regulations, but Nebbia argued that the price-fixing legislation destroyed his liberty of contract, violating the Due Process Clause of the Fourteenth Amendment. The county court and court of appeals both upheld Nebbia’s conviction, and he appealed his case to the U.S. Supreme Court.

The central question in *Nebbia v. New York*, 1934, was whether the New York price regulation violated the Due Process Clause of the Fourteenth Amendment. In a 5-4 decision, the Court upheld the New York law. Writing for the majority, Justice Owen Roberts explained that:

> neither property rights nor contract rights are absolute, [and] the power to promote the general welfare is inherent in government...[A] state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare ... Price control, like any form of regulation, is unconstitutional, only if arbitrary, discriminatory, or demonstrably irrelevant ...

The phrase “affected with a public interest,” Justice Roberts wrote, can mean that the legislature has decided that an industry is subject to their control for some good reason, and the courts are “both incompetent and unauthorized” to rule on the wisdom, adequacy, or practicability of such a regulation.

Justice James C. McReynolds wrote for the dissenters. He argued that the regulation of business “has long been upheld as permissible legislative action,” but he thought that price-fixing was something different. He wrote that the New York legislation was “not regulation, but management, control, dictation.” The problem with government control and management of private market interactions was that, “It amounts to the deprivation of the fundamental right which one has to conduct his own affairs honestly, and along customary lines.” The statute interfered both with the right of Mr. Nebbia to conduct his business as he pleased and with the “liberty of twelve million consumers to buy a necessity of life in an open market.” The legislature, the dissenters held, harkening back to arguments made by James Madison in his essay “On Property,” could not “lawfully destroy guaranteed rights of one man with the prime purpose of enriching another, even if, for the moment, this may seem advantageous to the public.” If this were allowed to occur, they warned, then “all rights will be subject to the caprice of the hour; government by stable laws will pass.”
For more than forty years the High Court had ruled consistently that constitutional government must not fix prices to override the laws of supply and demand. In response to the hardships of the Great Depression, the majority ruling in *Nebbia* helped set the stage for all three branches of state and federal government to regulate the economy in ever-increasing ways through the New Deal and beyond. The New Deal at the federal level sought to fix prices with the National Industrial Recovery Act and the Agricultural Adjustment Act. Echoing the procedures of New York farmers during the Milk Wars, the federal government directed the destruction of millions of hogs and acres of wheat, and twenty-first century farmers are eligible for government subsidies if they abide by prescribed policies. The appropriate degree of government involvement in the economy continues to prompt controversy today.


**Sources Consulted**


*Nebbia v. New York* [https://www.oyez.org/cases/1900-1940/291us502](https://www.oyez.org/cases/1900-1940/291us502)


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Home Building & Loan v. Blaisdell (1934)
Guest Essayist: James D. Best

To stem home and farm foreclosures during the Great Depression, Minnesota passed a law which allowed a mortgagor to pay court-determined rent set below the contractual mortgage amount. The mortgage holder could not foreclose as long as the mortgagor paid the reduced rent.

The Minnesota law was passed on April 18, 1933, and the Supreme Court (5-4) decided in favor of the law’s constitutionality in January of 1934.

Constitutional issues are seldom black and white, but Home Building & Loan Association v. Blaisdell would appear to be one of those rare cases. The Constitution reads, “No state shall pass any law impairing the obligation of contracts.” This simple sentence seems clear, but the headnote to the Blaisdell case, paragraph 3 reads:

The clause providing that no State shall pass any law impairing the obligation of contracts is not to be applied with literal exactness, like a mathematical formula, but is one of the broad clauses of the Constitution which require construction to fill out details.

Yet, it can be argued that the Framers meant this statement to be taken with “literal exactness.” During the Constitutional Convention in 1787, foreclosures were rampant, and several states had passed laws that impaired contracts by forcing debtors to accept as legal tender purposely inflated state-generated paper money. These laws put a stranglehold on credit markets, deepening the difficult economic times. The Framers didn’t want this to happen again, so they added the Contracts Clause to preclude the exact type of action taken by Minnesota.

How did the Supreme Court justify an apparent violation of the Contracts Clause? Minnesota argued that previous cases had established that private contracts could be impaired for the general good, and that in a state of emergency, the general good included action to alleviate the emergency. For example, in Manigault v. Springs (1905), the Supreme Court rationally ruled that states—on a limited basis—could override an individual contract.

“It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers … for the general good of the public, though contracts previously entered into between individuals may thereby be affected.”

The Blaisdell decision further weakened the Contracts Clause, but more important, this decision laid the groundwork to negate the clause in toto. Using Blaisdell as a precedent, the Gold Clause Cases (1935) further eroded the Contracts Clause, and ever since, no significant case has been won relying on this clause.

In his Blaisdell dissent, Justice Sutherland, presciently wrote that the decision had:

the potentiality of future gradual but ever-advancing encroachments upon the sanctity of private and public contracts. The effect of the Minnesota legislation … is of trivial significance compared with the far more serious and dangerous inroads upon the
limitations of the Constitution which are almost certain to ensue as a consequence naturally following any step beyond the boundaries fixed by that instrument.

Although the Supreme Court sometimes makes momentous decisions that alter our way of interpreting the Constitution, a more common pattern is gradual erosion of constitutional limits. First, a sympathetic case opens a pinprick, then that case is used as a precedent to open a fissure, and follow-on cases expand the precedents to breach the restriction entirely.

Beyond legal implications, the Blaisdell decision had economic consequences. Contract interference chilled the nation’s credit markets because lenders could no longer rely on recovering the collateral that backed a loan. Some have even argued that the Supreme Court’s action was heartless because its sympathetic treatment of a few borrowers helped to deepen and elongate the Great Depression.

Another aspect of Blaisdell made it a monumental decision: the case started a trend of treating the Constitution as a living force that could be molded to meet popular passions. The Constitution had certainly been violated in the past, but the basic meaning had not been irrevocably altered. The Supreme Court discovered that when they overruled constitutional restrictions to favor a popular issue of the day, they suffered few complaints, while proponents cheered. The FDR courts, and those that followed, gained license to ignore the wording and intent of the Constitution.

The selection of a Supreme Court Justice has become a highly charged emotional event. It’s instructive that political movements spend an inordinate amount of time and resources influencing Supreme Court nominations, and hyperventilate when fighting a nomination they dislike. Everyone knows that these are enormously powerful people—with life tenure. Everyone pretends their candidates are impassive judges that will decide each case based only on the law. If that were so, no one would care who sat on the bench.

Thomas Jefferson wrote, “It has long, however, been my opinion, and I have never shrunk from its expression…that the germ of dissolution of our federal government is in the constitution of the federal Judiciary; … working like gravity by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped.”

Home Building & Loan v. Blaisdell (1934) Supreme Court decision: https://supreme.justia.com/cases/federal/us/290/398/

James D. Best, author of Tempest at Dawn, a novel about the 1787 Constitutional Convention, Principled Action, and the Steve Dancy Tales.

Gold Clause Cases (1935)
Guest Essayist: Keith E. Whittington

Soon after his first inauguration, President Franklin D. Roosevelt tried to close the gold window. At the time, the American currency was tied to the value of gold, and the financial crisis was
putting serious pressure on government gold reserves. To deal with the problem, the government devalued the dollar. As an emergency measure, Congress passed a joint resolution declaring that the federal government would no longer recognize any debts that required “payments in gold or a particular kind of coin or currency, or in an amount of money of the United States measured thereby.” During World War I, however, the U.S. Treasury had issued Liberty Bonds that provided that the “principal and interest hereof are payable in United States gold coin of the present standard of value.” Some of those bonds were now due, and creditors filed suit against the federal government demanding payment in the promised gold coin.

The case was of extraordinary economic, political, and legal importance. The government’s outstanding obligations were substantial. The Treasury calculated that the difference between paying in gold and paying in deflated dollars was worth over $50 billion dollars to the government, and the attorney general warned the justices of the U.S. Supreme Court that there would be economic “chaos” were the government to lose the case. The case involved one of the new president’s first and most consequential actions to try to climb out of the Great Depression. The government had already lost other cases involving New Deal policies, but the economic stakes seemed far higher in the Gold Clause Cases. Losses on other New Deal policies were disappointing, but there were options for adjusting to the Court’s rulings and trying again. The financial fallout from a negative ruling in the Gold Clause Cases would be immediate and severe. The administration did not shy away from communicating the gravity of the situation to the Court. The government’s presentation to the justices relied as much on economic arguments as on legal arguments. The press was filled with speculation on what the government would do if the Court ruled against the administration. In public, it was credibly rumored that the president would declare martial law and disband the Court in the case of a loss. In private, the attorney general was advising the president that he should immediately pack the Court with new justices and demand a rehearing of the case.

The constitutional case against the government was clear, but not necessarily decisive. The Constitution empowered Congress to regulate the value of the currency, and it did not explicitly prohibit the federal government from interfering with contracts. It did, however, explicitly prohibit the state governments from impairing the obligations of contracts, and the Court had long interpreted that provision as meaning that the state governments could not renege on their own contracts and had generally assumed that the spirit of that prohibition applied to the federal government as well as the states. Privately, the justices thought it was horrifying and shameful that the federal government might effectively repudiate part of the national debt. Publicly, Chief Justice Charles Evans Hughes wrote for the Court that the constitutional authority that empowered Congress to borrow on the public credit simultaneously obligated the government to be bound by the promises it made when borrowing money. The four dissenters in the case were even more emphatic that the Constitution protected individuals from having their property taken by the federal government, and repudiating or devaluing public debt was effectively taking private property.

Despite their displeasure with the government, a narrow five-justice majority found a way to rule in favor of the government in the Gold Clause Cases. Although the federal government had a sacred obligation to repay its debts in full, the chief justice argued that the courts were not free to provide a perfect remedy for the government’s creditors. In this case, the courts had to take into
account the fact that the government had sharply curtailed what private individuals could do with gold, and as a consequence of those regulations the government had effectively reduced how valuable gold actually was. When accounting for damages from the government’s failure to pay its debt in the promised gold coins, the courts were constrained to recognize that gold coins were no longer as valuable as they had been. Since the Court was unwilling to strike down those regulations on the private ownership and exchange of gold, then it could not award significant damages to bondholders who received paper currency instead of gold. The dissenters thought the result was “appalling” and an obvious legal dodge. Justice James McReynolds paused from reading his written dissent to simply declare, “the Constitution as many of have understood it has gone.” The administration breathed a sigh of relief, but the president promptly leaked a radio address that he had prepared to deliver had the Court decision gone in the other direction. The president had been prepared to announce that the government would not stand “idly by” as the Court brought about an economic disaster and would instead continue to deal with its creditors as if the Court had never spoken.

Gold Clause Cases (1935) Supreme Court decision: https://www.oyez.org/cases/1900-1940/294us330

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**Guest Essayist: Tony Williams**

The “Sick Chicken” Case: *Schechter Poultry Corp v. U.S. (1935)*

In 1933, the American economy was mired in the great depths of the Great Depression characterized by unprecedented unemployment and deflation of prices for business and farmers. President Franklin D. Roosevelt and his advisors believed that the problems of the economy were rooted in excessive business competition resulting in low prices, faltering incomes, and underconsumption. In 1933, Congress passed the National Industrial Recovery Act (NIRA) to stimulate business recovery and economic growth as part of the New Deal. The legislation established National Recovery Administration (NRA) as an executive agency to work with business to craft a variety of industrial codes and regulations for entire industries to decrease competition by setting codes within industries. The goal was to set production quotas to increase prices and introduce labor regulations including a minimum wage to benefit workers. The Roosevelt administration sought to prevent “unfair competition,” ironically by allowing business to cooperate in a way that broke antitrust laws.

The Commerce Clause of the Constitution allows Congress to “regulate commerce...among the several States.” President Roosevelt believed in a Living Constitution that could be interpreted and molded to meet the great crisis of modern industrial capitalism. He believed that solving the national economic crisis was more important than strictly following the Constitution and justified nearly any federal actions on behalf of the American people. The ultimate vision was to achieve a more efficient and planned economy managed by progressive experts in administrative agencies rather than left to the private market.
In Brooklyn, New York, Joseph, Martin, Alex, and Aaron Schechter were four brothers who operated two poultry shops. They were observant Jews whose shops were kosher and adhered to the Jewish laws of kashrut. In 1934, the Schechter brothers were jailed for offering safe, reliable merchandise to their customers.

The government was punishing the Schechter brothers for violating NRA competitive codes, which were minute and specific. The “Code of Fair Competition for the Live Poultry Industry of the Metropolitan Area in and About the City of New York.” This code strictly regulated their butcher shops and required them to violate some laws of kashrut that, as a kosher establishment, they were morally bound to uphold.

The laws of kashrut were concerned with more than just dietary standards. They ensured that animals were treated humanely and that no animal would pose a health risk to consumers. The Schechter brothers, allowed customers to inspect the birds themselves and reject any they deemed unfit. One of the NRA codes, however, specified that no consumer could check poultry for tuberculosis or select individual birds. The Schechter brothers’ own internal inspection process—which was one reason many in the community trusted the shop and bought chickens from them—was now illegal. They lost a number of their devout Jewish customers, and the business suffered from the federal regulations.

The National Recovery Administration inspected the poultry shops numerous times in 1934, and took them to court for violating the NRA codes multiple times. Ironically, one of the charges was that the shops sold “unfit” poultry. They were accused of allowing customers to select chickens, refusing inspections by regulators, selling chickens to unlicensed purchasers, keeping prices “too low,” and even “competing too hard.” The Schechter brothers were found guilty and sentenced to serve a short prison sentence.

When the case was argued before the Supreme Court, the justices engaged in several questions that elicited much laughter from the spectators. When Justice James Clark McReynolds asked about the NRA codes and whether the customer would have to “take the first chicken that comes to hand,” the audience howled. Then, McReynolds inquired to great laughter: “Well suppose however that all the chickens have gone over to one end of the coop.” Perhaps the humorous reaction demonstrated how much NRA regulations impeded the daily operations of thousands of businesses and seemed excessive almost to the point of ridiculous.

In *Schechter Poultry Corporation v. U.S.* (1935), the Supreme Court unanimously ruled that the regulations of the NIRA were unconstitutional. The Court reasoned that the NRA rules, regulations, and codes had unconstitutionally exceeded congressional authority to regulate interstate trade under the Commerce clause by regulating business transactions within a state. Moreover, the Court held that Congress had unconstitutionally delegated its legislative authority to the executive branch. Chief Justice Charles Evans Hughes wrote the opinion and argued that “extraordinary conditions do not create or enlarge constitutional power.”

Later that day, Justice Louis Brandeis met with two of Roosevelt’s advisers and told them: “This is the end of this business of centralization, and I want you to go back and tell the president that we’re not going to let this government centralize everything. It’s come to an end.”
FDR held a press conference at Hyde Park a few days later and mocked the Court’s interpretation of the Constitution in the *Schechter* decision. He said that the Court was going back to a “horse and buggy” understanding of the Constitution and interfering with his ability as president to relieve the suffering caused by the Great Depression.

The Supreme Court invalidated several other important pieces of New Deal legislation with constitutional arguments that rested on the same grounds as *Schechter*. For example, the Court declared the Agricultural Adjustment Act unconstitutional because it regulated local agriculture within the states rather than interstate commerce.

The Supreme Court took the constitutional principles of separation of powers, enumerated powers, limited government, and federalism seriously in the *Schechter* decision. For several decades leading up to 1937, when the Court reversed itself and took a much more expansive view of the Commerce Clause, the Supreme Court had curbed federal attempts to regulate business within the constitutional confines of the Commerce Clause.


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**Justice Louis D. Brandeis (1856-1941)**

**Guest Essayist: Daniel A. Cotter**

**Louis Brandeis: First Jewish Justice of the Supreme Court**

Until 1916, the United States Supreme Court had never had a Jewish justice. That changed on January 28, 1916, when Louis Brandeis, the “People’s Lawyer,” was nominated to the highest court in the land by President Woodrow Wilson. Brandeis served for almost twenty-three years and authored several significant opinions during his time on the Supreme Court.

**Early Life and Career**

Brandeis was born in Louisville, Kentucky on November 13, 1856, to Adolph and Frederika Brandeis (nee Dembitz), Jewish immigrants from Prague. His father was a successful grain merchant in Louisville, Kentucky. Brandeis attended public schools in Louisville, graduating from Louisville’s Male High School at the age of fourteen. When his family relocated to Europe in 1872, Brandeis studied for two years at the Annen Realschule in Dresden, Germany. Brandeis returned to the U.S. in 1875 and was admitted to Harvard Law School without a college degree at the age of 18. According to Harvard, Brandeis graduated with the highest grade point average in the law school’s history, blazing a meteoric trail as he graduated at the age of twenty.

Upon graduation, he moved to St. Louis, Missouri, but did not like it and moved to Boston. Shortly after returning to Boston, he was appointed as a law clerk to the Chief Justice of the Massachusetts Supreme Court, Horace Gray. Brandeis established a firm in Boston with his
friend and classmate, Samuel Warren. The firm has been in continuous practice since 1879 and
is now known as Nutter McClennen & Fish. Brandeis had a broad practice, which allowed him to
advocate for a number of progressive social causes.

Brandeis’ practice included counseling and advising a number of businesses, including
railroads. Although he preferred acting as a counselor and advisor, Brandeis also litigated and
argued cases before the Supreme Court.

In the early 1880’s, he became an Instructor at Harvard Law School and helped found
the Harvard Law Review in 1887. In 1890, he and his partner Warren wrote a paper, “The Right
to Privacy,” published in the Law Review that was to have a profound effect on the body of
jurisprudence going forward.

In 1908, Brandeis represented Oregon in a Supreme Court case challenging that state’s law
limiting working hours for women. In Muller v. Oregon, Brandeis submitted what became
known as the “Brandeis Brief,” a legal brief that relies more on scientific and social data than
legal citations. (Thurgood Marshall and his team used the “Brandeis Brief” style effectively
in Brown v. Board of Education.) The brief was seen as revolutionary and helped Brandeis
persuade the Court to uphold Oregon’s law as constitutional.

He became Chair of the Arbitration Board dealing with the New York garment worker’s strike,
working tirelessly to effectuate a resolution to the matter. From 1912-1916, he served as
President Woodrow Wilson’s economic advisor and, in 1914, he published a book, Other
People’s Money and How the Bankers Use It, generally critical of the banking industry.

Brandeis took on a number of causes in his practice, including attacks on monopolies, attacks on
big corporations and on mass consumerism. Combined with his refusal to accept payment for
what he deemed “public interest” cases, Brandeis became known as the “People’s Lawyer.” He
was instrumental in creating a new life insurance system in Massachusetts and later in life
became very involved as a leader in the Zionist movement.

Becoming a Justice

On January 28, 1916, President Wilson nominated Brandeis to the Supreme Court as an
Associate Justice. (Previously, Wilson planned to nominate Brandeis as Attorney General or
Secretary of Commerce, but backed down after a number of complaints were registered by
conservative businessmen.) His confirmation was controversial, and led the Senate Judiciary
Committee to conduct its first public hearing on a Supreme Court nominee. Four months after his
nomination, on June 1, 1916, Brandeis was confirmed by a 47-22 vote. Much of the fight was
based on his radicalism and his having taken on big business so aggressively. (Some historians
attribute much of the opposition to anti-Semitism.)

Brandeis proved to be an effective justice, writing many notable majority opinions, but he often
dissented, especially in First Amendment cases. For example, in Schaefer v. United
States (1920), a case in which the Supreme Court held the Espionage Act constitutional in a case
against several defendants who had published allegedly false reports and statements in a German
language paper, Brandeis dissented, stating:
The constitutional right of free speech has been declared to be the same in peace and war. In 
peace, too, men may differ widely as to what loyalty to our country demands, and an intolerant 
majority, swayed by passion or by fear, may be prone in the future, as it has been in the past, to 
stamp as disloyal opinions with which it disagrees.

Other major opinions written by Brandeis include Whitney v. California (1927, concurring) 
(“Fear of serious injury cannot alone justify suppression of free speech and 
assembly”); Olmstead v. United States (1928, dissenting) (“[The makers of the Constitution] 
sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations” 
and “Experience should teach us to be most on our guard to protect liberty when the 
Government’s purposes are beneficent”); and, Erie Railroad Co. v. Tompkins (1938) (there is no 
“federal general common law” in cases involving diversity jurisdiction). Erie was the last of his 
major decisions. On February 13, 1939, he retired from the bench and on October 5, 1941, he 
died in Washington, DC.

Conclusion

According to www.historynet.com, Louis Brandeis is one of the nine greatest justices who have 
served on the Supreme Court; the site groups Brandeis with Justices William Brennan and Oliver 
Wendell Holmes as the “Three Unyielding Contrarians.” His pointed and passionate dissents in 
the areas of privacy and free speech eventually became the majority view. His commitment to 
areas of public rights and his efforts in the Zionist movement produced a rich legacy. He set the 
path for future Jewish justices to sit on the Supreme Court, including current justices Elena 

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John Marshall Law School, where he teaches SCOTUS Judicial Biographies. The article 
contains his opinions and is not to be attributed to anyone else.

Carter v. Carter Coal (1936)

Guest Essayist: Gennie Westbrook

George Lafayette Carter was a reclusive Virginia industrialist who became a millionaire through 
business developments based on mining in what became known as the Mountain Empire, 
encompassing parts of Tennessee, Virginia, Kentucky, and West Virginia. By the time of his 
death in 1936, he had built his fortune through extensive coal field purchases, founding 
umerous businesses including Carter Coal and Iron Company. George L. Carter and his wife, 
Mayetta Wilkinson Carter, had only one child, James Walter Carter. James managed his father’s 
businesses beginning in 1933.

By 1933, the low point of the Great Depression, the unemployment rate was about 25%, and 
industrial production was less than half of what it had been in early 1929. In response to the 
widespread economic collapse, Congress enacted the New Deal, a series of laws intended to 
repair the economy. Unemployment, low wages, and brutal working conditions had sparked 
labor unrest, strikes, and violence among coal miners. As part of the New Deal, Congress
enacted the Bituminous Coal Conservation Act of 1935, also called the Guffey Coal Act. The law was intended to stabilize the chaotic coal industry by declaring it to be a public utility and establishing national standards that would apply to almost every detail of the industry. The complex components of the law provided for price-fixing to appeal to the coal operators, guaranteed wages, job retraining, and collective bargaining to appeal to the labor unions, and regional commissions to supervise planning and ensure compliance. The law also provided for a 15% tax to be charged to the coal operators, but those who agreed to comply with the extensive regulations would receive a rebate amounting to 90% of the tax they paid. Congress based its authority for the sweeping law on the Interstate Commerce Clause of Article 1, Section 8, Clause 3, which gives Congress the power to regulate commerce that crosses state lines.

Upon the enactment of the law, James Walter Carter, president of the Carter Coal and Iron Company, immediately filed suit to stop his company from paying the excise tax and prevent its compliance with the law’s other provisions. He maintained that the Guffey Act was an overreach of Congress’s constitutional powers. The law, Carter argued, violated the Tenth Amendment because its provisions are outside of the specific enumerated powers of Congress and therefore a power reserved to the states. Further, Carter believed the 15% tax violated the Fifth Amendment because it was not actually a tax, but a penalty against any operators who refused to accept the regulations, depriving them of their property without due process.

The Franklin D. Roosevelt administration argued that uninterrupted production and distribution of bituminous coal at a fair price was in the national interest. Moreover, the relationships among the public, producers, owners, and employees were so fractured by the Great Depression’s desperate conditions that it was necessary for the federal government to stabilize the industry for the general welfare of the nation.

Carter v. Carter Coal (1936) raised important issues related to federalism and the constitutional limits on the power of the federal government. The central question of the case was whether the Interstate Commerce Clause authorizes Congress to regulate labor relations and all phases of the production and commercial activity related to coal within a state, due to its importance to the nation as a whole.

In a 5 to 4 decision, Justice George Sutherland wrote for the majority that Congress had, indeed, exceeded its constitutional limits, and the Guffey Act was unconstitutional. He wrote,

“Every journey to a forbidden end begins with the first step…it may be said that, to a constitutional end, many ways are open, but to an end not within the terms of the Constitution, all ways are closed.”

Justice Sutherland warned of the slippery slope inherent in such a sweeping increase in the federal government’s power. When the federal government begins crafting policies outside of its enumerated powers, the states begin to lose their identity and their responsibilities.

In addition, “production and manufacture of commodities are not commerce.” Such matters as wages, hours, working conditions, and the bargaining that surrounds them, are local business decisions and examples of production, not commerce. The commerce that Congress has authority
to regulate, Justice Sutherland explained, is only the selling and shipping of commodities across state lines.

In Justice Benjamin Cardozo’s dissent, he pointed out that the law had not yet gone into effect, and coal mine operators who might become injured by the Guffey Act could properly challenge the act only when they had actually been harmed by it. He wrote of those challenging the law, “To adopt a homely form of words, the complainants have been crying before they are really hurt.”

Justice Cardozo took a pragmatic approach. He showed that almost all of the coal in question was indeed intended for interstate commerce, and he was not persuaded of the logic of the majority’s division between production and commerce. He stressed that the problems of the coal industry, which stretched across numerous states, could not be solved by laws at the state level. He wrote that, in the weeks leading up to passage of the act, coal miners’ unions had repeatedly threatened strikes that would shut down the supply of “a fuel so vital to the national economy.”

Already the industry had experienced “bankruptcy and waste and ruin alike for capital and for labor. The liberty protected by the Fifth Amendment does not include the right to persist in this anarchic riot. When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry.”

After winning his case before the Supreme Court, James Carter managed the businesses he had inherited until 1946, when he sold Carter Coal Company to Youngstown Sheet and Tube Company. One biographer writes that he sold the company during a nationwide strike involving the creation of a health and retirement fund for the mine workers, “because he refused to submit to union domination.”

The Carter case was decided in May, 1936. Later that year, President Franklin Roosevelt enjoyed a landslide re-election to a second term. Frustrated with the Supreme Court’s resistance to the New Deal, Roosevelt proposed to add up to six new justices to the Court, which he believed would give him a majority of justices who agreed with his approach to economic stabilization. This proposal, or “Court-packing Plan,” as it became known, was politically unpopular with Republicans, and even with many Democrats, as it was seen as an attempt to manipulate the constitutional system of checks and balances. The Senate rejected Roosevelt’s judicial reorganization plan, but two justices came to the liberal side and soon FDR had opportunity to fill vacancies on the Court. Just one year after the Carter decision in which the Tenth Amendment was interpreted as a limit on the Interstate Commerce Clause, the Supreme Court reversed this construction in National Labor Relations Board v. Jones and Laughlin Steel Corp. (1937) In that case, the Court ruled 5-4 that Congress can use the Commerce Clause not only to regulate commerce itself, but also any activity that affects commerce. Under this expanding vision of the Commerce Clause, Congress enacted increasingly far-reaching legislation over a variety of issues until 1995, greatly extending the reach of the federal government.

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National Labor Relations Board v. Jones And Laughlin Steel Company (1937)

Guest Essayist: Joerg Knipprath

After his landslide reelection victory in 1936, President Franklin Roosevelt delivered a message to Congress on February 5, 1937, that decried the alleged, but fictional, congestion of judicial dockets due in part, he explained, to the incapacity of aged or infirm judges. He proposed a law that would allow him to appoint up to six new Supreme Court justices in addition to the current number, one for each justice over age 70. He repeated the gist of what came to be known as his Court-packing plan in a “Fireside Chat” to the American people on March 9, 1937.

On March 29, 1937, in West Coast Hotel v. Parrish, the Supreme Court, by 5-4, upheld the constitutionality of a Washington State minimum wage law for women, a result that favored policies of both the Roosevelt administration and its labor allies. To do so, Chief Justice Charles Evans Hughes’s opinion overturned an on-point precedent from 1923 that had been reaffirmed in the Court’s preceding term. Two weeks later, in National Labor Relations Board v. Jones & Laughlin Steel Company and two companion cases, the Court upheld a key piece of New Deal legislation, the controversial National Labor Relations (Wagner) Act. Again, the vote was 5-4,
and, again, the opinion was written by Hughes. This time, the majority had to reject its interpretation of Congress’s power to regulate interstate commerce that it had maintained as recently as the previous year. A month thereafter, on May 24, in yet another 5-4 vote, the Court in two cases (Stewart Machine Company v. Davis and Helvering v. Davis) upheld the Social Security Act through a broad reading of Congress’s powers to tax and spend. Justice Benjamin Cardozo wrote the opinions. He, too, had to repudiate the holding of a precedent from the prior term. Most peculiar was that two of those discredited recent cases were authored by Justice Owen Roberts, who now joined the majority in each of the 1937 opinions.

The close timing of FDR’s attack on the judiciary with the Court’s sudden flood of pro-New Deal decisions prompted wide speculation that the justices had buckled under the political pressure in what was termed “the switch in time that saved nine,” a play on a traditional homespun advice. More recently, scholars have raised doubt about the accuracy of that claim. The man at the heart of the matter, Roberts, had told the other justices in December, 1936, of his decision to vote in favor of the minimum wage law. That date was well before Roosevelt’s speeches. Moreover, there was evidence in other cases in the mid-1930s that Roberts and Hughes were moving towards more accommodation of New Deal-type laws. Last, Roosevelt’s proposal was seen as a blatant attack on the judiciary and denounced immediately even by many of his allies. Business groups were joined by organized labor and agricultural associations in criticizing the plan. Polls showed that a majority of Americans opposed it even in February and March, and that it hurt the popularity of the President and the political standing of the Democratic Party. Powerful Democrats in Congress announced opposition. The justices, who read the newspapers, were keenly aware of the measure’s unpopularity, so it is unlikely that Roberts was swayed by it.

Of these cases, the most instrumental in the long run in expanding the power of the general government and threatening the traditional structure of federalism, was Jones-Laughlin. There, the National Labor Relations Board (NLRB) had determined that the company was engaged in “unfair labor practices affecting [interstate] commerce,” in breach of the Wagner Act. The allegation rested on the company having fired ten union organizers, thereby violating the statute’s prohibition of discrimination and coercion based on an employee’s membership in a labor union or participation in labor organizing.

The Chief Justice described at length the company’s size and its impact on a major national market. It was the fourth largest steel producer in the United States. As a highly integrated enterprise, it operated at several levels of the market, namely, raw material extraction, manufacture of pig iron, refining of steel, finishing of steel products, and warehousing and sales of its products. It owned mines of iron ore and coal, as well as limestone properties needed for steel manufacturing. Some of these mines were out of state. It operated railroads, steamships, and barges. It had sales offices in twenty cities and a Canadian subsidiary. Three-fourths of its product was shipped out of state. The incidents alleged took place at its manufacturing plant in Aliquippa, Pennsylvania, where 10,000 employees worked. The Court also noted that over a half-million worked nationwide in the production of steel or its raw materials.

Adopting the Court’s reasoning from decades before in U.S. v. E.C. Knight Co., the company argued that manufacture was not commerce and that the discharge of the employees had occurred in its local, not interstate, activities. The interstate aspects of its operation, such as the carrying of
raw materials to the plant, had ended when they were deposited in the factory’s yards. Then, the local manufacture of the steel had occurred. Once that was completed, the transformed products came to rest and were sold independently as orders were received.

The government responded that the manufacture of steel at the Aliquippa plant was but one step in the stream of commerce that began with extraction of raw materials and culminated in sale and delivery of finished products to customers. The “stream [or current] of commerce” theory was a metaphor by Justice Oliver Holmes in a 1905 case to get around E.C. Knight and uphold federal regulation of a stockyard monopoly. Such stockyards could be regulated even if local manufacturing plants could not, Holmes concluded, because the former represented a temporary stop in transporting animals in a continuous movement from their origins on ranches to their final destiny in slaughterhouses.

Hughes disregarded the company’s production-commerce distinction as well as the government’s reliance on the stream of commerce theory. Instead, what mattered was the effect a local activity had on interstate commerce. “Although activities may be intrastate when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens or obstructions, Congress cannot be denied the power to exercise that control.” Hughes thus laid out two theories for Congress to reach any local activity, 1) if the regulated activity or evil has a sufficient effect on interstate commerce or 2) if the regulation of the local activity is necessary and proper to regulate interstate commerce. Both approaches have been used to uphold the increasingly expansive application of the Commerce Clause.

In Jones-Laughlin itself, Hughes examined the history of labor strife resulting from employers’ refusals to permit employee organizing. He characterized the steel industry as “one of the great basic industries of the United States, with ramifying activities affecting interstate commerce at every point.” Thus, considering the size of the company and the nature of its connection to interstate commerce, a labor stoppage would have an immediate and paralyzing effect on interstate commerce in steel.

In Jones-Laughlin, Hughes may have focused on the company’s size and the significance of the steel market to justify the reach of Congress’s commerce power. More telling was his use of the “commerce-affecting” approach in the two companion cases. In particular, in NLRB v. Friedman-Harry Marks Clothing Co., the same doctrine was applied to retaliatory firing by a Richmond company whose operation was not “integrated” at different market levels and which was much smaller than the steel giant, though it did sell outside Virginia. The clothing manufacturer employed only 800 people out of the 150,000 working at 3,300 such establishments nationwide.

In dissent, Justice James McReynolds took note of the lack of actual effect on interstate commerce shown. As to the clothing manufacturer, its business was so small that closing it would not materially affect relevant interstate commerce. However, even in Jones-Laughlin, only ten men out of ten thousand were fired. “The immediate effect…may be to create discontent among all those employed and a strike may follow, which, in turn may result in reducing production, which, ultimately, may reduce the volume of goods moving in interstate commerce.”
[Emphasis added.] No facts were shown as to any of this. McReynolds concluded that management of a manufacturing plant is distinct from commerce and can be regulated by the states. Congress cannot gain that power because of “some vague possibility of distant interference with commerce.”

After *Jones-Laughlin*, Congress’s use of the Commerce Clause ballooned while the interstate component became increasingly remote. In *NLRB v. Fainblatt* (1939), the Court upheld application of the same statute to a small-scale garment factory that sold only in-state, because a labor dispute might have a slight disruptive effect on interstate commerce. In similar vein, the Court upheld the constitutionality of federal laws enacted under the Commerce Clause in areas other than labor law. Prominent among them was the notorious case *Wickard v. Filburn* (1942), which upheld the Second Agricultural Adjustment Act’s detailed marketing scheme for wheat farmers. Although Filburn consumed most of the wheat he produced, his production exceeded his allotment, and he was subject to a fine. Justice Robert Jackson opined that Congress sought to prevent depressed prices caused by overproduction. Even if Filburn’s excess production alone had a negligible effect on the interstate market in wheat, the aggregate effect of all farmers’ production had a substantial effect on that market. This “aggregation of evils” theory is, of course, tautological.

In addition, the Court endorsed using the Commerce Clause broadly to regulate local activities for purposes other than preventing disruption to interstate commerce. Thus, Congress could regulate wages and hours of employment in *U.S. v. Darby Lumber Company* (1941), prohibit race discrimination in hotels in *Heart of Atlanta Motel v. U.S.* (1964) and restaurants in *Katzenbach v. McClung* (1964) through the Civil Rights Act of 1964, and criminalize the production of marijuana for personal use in *Gonzales v. Raich* (2005).

It is difficult to discern what today restricts Congress’s legislative power, considering the expansive reading the Court has given the Commerce Clause alongside other clauses that are also supposed to define, i.e., limit, that power. The justices have repeatedly paid lip service to the theory of limited legislative power. Chief Justice John Marshall long ago set the tone when he declared that the enumeration of Congress’s powers presupposes something not enumerated. Hughes in *Jones-Laughlin* voiced similar fealty to the distinction between national and local commerce. But even as they purported to fret about the structure of federalism in theory and words, the justices excused almost every erosion of that structure in practice and effect. A rare exception to that trend was *National Federation of Independent Business v. Sebelius* (2012), the ObamaCare decision, where the Court found that Congress could regulate under the Commerce Clause only if someone has engaged in an activity but could not compel someone to act. While notable, the decision is feeble as a limit on Congress’s powers.

The Court initially resisted the constitutional revolution demanded by the New Deal. But the Court cannot hold back a political tide. Eventually it yields to the election returns and the political facts on the ground. So it was in 1937, as Chief Justice Hughes and Justice Roberts changed constitutional course, even as the dissenters correctly foresaw the massive accretion of power to the general government that is still with us. Using a farming analogy, President Roosevelt claimed that the Court was not pulling in the same direction as the other two horses, so that the driver—the American people—were unable to get their field plowed. But several
generations of Americans have decided that a large bureaucratic welfare state is the crop they want to cultivate, and the Court has long since joined the team.

National Labor Relations Board v. Jones and Laughlin Steel (1937) Supreme Court decision: https://www.law.cornell.edu/supremecourt/text/301/1

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National League of Cities v. Usery (1976)

Guest Essayist: Nick Dranias

National League of Cities v. Usery: “I’m Not Dead”

As the Left often does, once they are out of national power, they rediscover the power of state sovereignty. Ironically, they are using it to resist the new administration’s federal immigration policy in formally the same way as did the Right during the early days of the Obama administration—albeit in service of an opposite outcome.

Granted, the Left did their best to destroy the principle of state sovereignty as a check on federal power when they controlled Washington, DC, but perhaps constitutionalists should let bygones be bygones. After all, the Right can hardly claim to be fully consistent on the principle of state sovereignty when they control DC. Rather than revisit past disputes, constitutionalists should seize the moment of cross-ideological support for state sovereignty. We should enlist the Left in a mutual spirit of opportunism to fully revive the not quite dead forty-one year old Supreme Court case of National League of Cities v. Usery.

Why? Because a robust Tenth Amendment is absolutely essential to preserving the Constitution’s establishment of a limited federal government. Fully resuscitated, there would be no more powerful bulwark of the Tenth Amendment principles—and the Constitution—than Usery.

Usery involved a direct clash between federal and state power. Congress removed an exemption for state employees under the Fair Labor Standards Act and presumed to directly regulate the wages, hours and benefits of state employees. Under the FLSA, the federal government was essentially empowered to dictate the terms under which states hired their employees. Of course, in practical effect, the power to determine the terms of employment is equivalent to the power to determine how states operate and who states could hire. This amendment to FLSA thus effectively established the principle that Congress could completely obliterate the operational
reach of state sovereignty under the Commerce Clause because States can obviously only exercise their sovereignty through employees. This was a rather radical notion even for the 1970s. Its implications for effective dissolution of our “compound Republic” were readily apparent.

The defenders of the amendment to FLSA nevertheless relied on the usual Commerce Clause plus Necessary and Proper Clause plus Supremacy Clause arguments: that the aggregate effects of state employment policies affect interstate commerce; thus, regulating state employment policies is a convenient means of regulating interstate commerce; therefore, Congress can regulate and override contrary state employment policies under the Supremacy Clause. This tried and true argument had been winning Supreme Court cases in the private sector ever since the 1942 case of *Wickard v. Filburn*, which uncorked the Commerce Clause power through the Necessary and Proper Clause to regulate unsold, untransported, wholly intrastate self-consumed wheat. The fact that this argument was extended to the public sector posed no reason for pause. Why? Because state sovereignty had been taking body blows even before *Wickard* popped the lid on the Commerce Clause. In the 1941 case of *United States v. Darby Lumber Co.*, the Court breezily declared that the Tenth Amendment was a “mere truism,” by which the Court meant the Tenth Amendment meant nothing.

Such were the spoils of FDR’s threat to pack the Supreme Court with his acolytes after the Court dealt his New Deal program a series of near-fatal blows in the 1930s.

But in *Usery*, the usual formula for federal power expansion failed. The Court finally discovered the limits of straight-faced argumentation. Justice William Rehnquist wrote in the majority opinion that Congress could not regulate states in their traditional functions that are “essential” to their “separate and independent existence.” The majority decided that federal powers could not displace core aspects of state sovereignty because the Tenth Amendment guaranteed the preservation of a system of dual sovereignty in which state sovereignty was meant to check and balance federal power. The Court declared unequivocally that if federal laws “directly displace the States’ freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Article 1, Section 8, Clause 3.” Accordingly, the Court ruled that a federal law violates principles of state sovereignty when it 1) regulates states as states, 2) concerns attributes of state sovereignty; and 3) directly impairs a state’s ability to restructure integral operations in areas of traditional government functions.

In short, the *Usery* majority recognized that the power to regulate state employment was effectively the power to destroy the state, which the Constitution simply did not allow. Score 1 for the Tenth Amendment. At that time, it was the first real win for state sovereignty in nearly forty years.

Sadly, it didn’t take long for the Court to backtrack. Fewer than 10 years later, the Court declared the *Usery* test unworkable when one Justice Harry Blackmun abandoned the Usery majority for a new majority in *Garcia v. San Antonio Metropolitan Transit Authority*. The new majority appeared to overrule *Usery* completely, declaring that the defense of state sovereignty should be mounted from within the political process at the federal level—in Congress—not within the court system.
Fortunately, Usery was not quite dead yet. With the addition of a few new Justices like Justice Antonin Scalia, Clarence Thomas and, yes, Anthony Kennedy, Usery would start feeling a lot better. Most famously, in *New York v. United States* and *Printz v. United States*, the Court would prohibit Congress from “commandeering” states in the exercise of federal powers—and the Court’s prohibition on “commandeering” in New York and Printz was not a standalone constitutional axiom.

In *New York*, the prohibition on commandeering was expressly made an extension of the first principle that the Constitution is designed to prevent the dangerous concentration of power in any one government to “reduce the risk of tyranny and abuse.” *Printz* specifically emphasized that “the power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States.” As held in *Printz*, when a “Law . . . for carrying into Execution” the Commerce Clause violates the principle of state sovereignty, it is “merely [an] act of usurpation” which “deserves to be treated as such.” That rationale logically extended beyond the specific holdings in *New York* and *Printz* because a prohibition on federal commandeering is necessary, but not sufficient, for a meaningful division of power within our system of federalism.

As explained in *Alden v. Maine*, the Supreme Court is now committed to enforcing the principle of state sovereignty that “[t]he States ‘form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.’” And that the federal power has no power to threaten the State’s existence as a state. As more recently held in *Bond v. United States*, our system of dual sovereignty denies “any one government complete jurisdiction over all the concerns of public life.”

Under current precedent, federal courts routinely patrol the boundaries between state sovereignty and federal power without deferring to Congress. Such fully-engaged judicial review has been further buttressed by cases that have repeatedly applied heightened scrutiny even to federal actions that have invoked the 14th Amendment’s Enforcement Clause to override state sovereignty (where, if anything, the principle of state sovereignty is less secure).

The current rule of law whereby courts enforce the Tenth Amendment is the correct one. It is entirely appropriate for courts to continue to review claims of federal power independently and without deference to Congress when the principle of state sovereignty is at stake. The judicial disengagement embraced by the *Garcia* majority in rejecting *Usery* cannot be reconciled with the fact that states as states have not been represented in Congress since the ratification of the 17th Amendment. Congress simply cannot be entrusted with exclusive authority to protect our system of dual sovereignty. Nor should it be entrusted with such power. As passionately emphasized by Justice Powell in his dissent to the holding of *Garcia*:

> “The Framers believed that the separate sphere of sovereignty reserved to the States would ensure that the States would serve as an effective “counterpoise” to the power of the Federal Government…. [F]ederal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties.”
Trusting the federal political process to protect state sovereignty is like entrusting the fox to guard the henhouse. The principal claim of Garcia—that Usery’s enforcement of the Tenth Amendment is unworkable—has been all but fully repudiated by the modern Court’s own jurisprudential record. The only thing missing from that record is an express recognition that Usery is very much alive. Now that the Left has stopped beating the Tenth Amendment to death, we should join forces in amici briefs and principled litigation to achieve that recognition.


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Wickard v. Filburn (1942)
Guest Essayist: Daniel A. Cotter

In 1938, Congress passed the Agricultural Adjustment Act of 1938 (the “1938 Act”), which it enacted to address and correct provisions of the Agricultural Adjustment Act of 1933 for farm subsidies that the Supreme Court had found unconstitutional. The 1938 Act established marketing quotas and price controls. Roscoe Filburn, a farmer in Ohio, admittedly sowed twelve acres of wheat more than he was permitted under the 1938 Act, but none of it was sold on the open market. Filburn was fined $117.11 for violating the 1938 Act. Filburn sued, challenging the penalty. The main issue before the Supreme Court was whether wheat that Filburn used for personal consumption was subject to the quotas imposed by the 1938 Act and whether local commerce could be regulated by the Federal government under the Commerce Clause of the United States Constitution.

Background of the Case

Under the 1938 Act, the Secretary of Agriculture was authorized to set a quota for wheat production to balance supply and demand. The 1938 Act also made price support mandatory for corn and cotton and set quotas for a number of other agricultural products, such as tobacco. In a previous case, Mulford v. Smith, 307 U.S. 38 (1939), the Supreme Court upheld the tobacco quotas set by the 1938 Act.

Filburn was a small Ohio farmer who planted a small plot of winter wheat to feed his chickens and cattle and to make into flour for his family’s consumption. In 1941, Filburn planted beyond his quota allotment resulting in 239 extra bushels of wheat. The 1938 Act authorized a penalty of $.49 per bushel, resulting in the $117.11 penalty assessed against him.
The Controversy

Filburn contested the fine, arguing that Congress had no authority to regulate commerce that was not interstate in nature. The Ohio District Court permanently enjoined the Secretary of Agriculture from enforcing the penalty against Filburn, and the government appealed.

The Supreme Court Decision

The Supreme Court unanimously held that the wheat quota authorized by the 1938 Act was constitutional under Article I, Section 8 of the United States Constitution, which provides Congress with the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” The opinion, written by Justice Robert Jackson, rejected the argument that the Commerce Clause did not apply to activity that was asserted to be local only. Jackson stated that wheat intended for consumption by Filburn and not marketed nevertheless had an impact on interstate commerce so could be regulated by the Federal government. The Court held:

It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices. One of the primary purposes of the Act in question was to increase the market price of wheat, and, to that end, to limit the volume thereof that could affect the market. **It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions.** This may arise because being in marketable condition such wheat overhangs the market, and, if induced by rising prices, tends to flow into the market and check price increases. **But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce.** The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon. This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.

It is said, however, that this Act, forcing some farmers into the market to buy what they could provide for themselves, is an unfair promotion of the markets and prices of specializing wheat growers. It is of the essence of regulation that it lays a restraining hand on the self-interest of the regulated, and that advantages from the regulation commonly fall to others. The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability, or fairness, of the plan of regulation, we have nothing to do.

*Wickard v. Filburn*, 317 U.S. 111 (1942), 128-129 (Emphasis added.)
Jackson referred to the decision of Chief Justice John Marshall in *Gibbons v. Ogden*, expressing Marshall’s position that the Commerce Clause powers were extremely broad, stating:


*Id.* at 120.

**Conclusion**

The *Filburn* decision was a landmark one because it significantly expanded the reach of the Commerce Clause and began a period of the Supreme Court permitting Congress extensive powers under the Commerce Clause. The Supreme Court deferred to Congress in its use of the Commerce Clause until the 1990s, when the Supreme Court began to narrow the extent of Congress’ power under the Commerce Clause.

Wickard v. Filburn (1942) Supreme Court decision 9-0:
https://supreme.justia.com/cases/federal/us/317/111/#annotation

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**Garcia v. San Antonio Metropolitan Transit Authority (1985)**

**Guest Essayist: Joerg Knipprath**

In 1976, Americans celebrated a bicentennial, the anniversary of a revolution against an intrusive, heavy-handed, and unresponsive national government. Repeated petitions and remonstrances by the people’s elected local representatives had been dismissed and ignored by the political elite who controlled that far-away national government, and who considered the people ignorant bumpkins. Among the causes of revolution listed in the published indictment of that elite in 1776 had been the chief executive’s use of his quill to veto beneficial laws; his failure to enforce laws properly enacted; his actions and obstructions that clashed with pressing immigration issues; his expansion of uncontrolled bureaucracies, when he “erected a multitude of New Offices, and sent hither swarms of Officers to harass our People, and eat out their substance”; his policies that failed to secure the frontier and protect the inhabitants there against violence by marauders; and his encouragement of “domestic insurrections” that threatened social peace. Yet that chief executive had not acted alone. The legislature of that distant government had passed unconstitutional laws, such as those that overrode the people’s own local laws and altered fundamentally the constitutional relationship between the national government and theirs.

In response, the people acting through their states had declared independence and, after a war, had gained peace and recognition, again acting through their states. They also had formed a “perpetual union,” better to protect themselves against foreign danger and to pursue objects of
common benefit. After a few years, they had revised their arrangement “in Order to form a more perfect Union.” But theirs was a federal union. The constitutional arrangement divided sovereignty between a general government the people had created and their home states, with the former given specific tasks, while the latter retained all residual powers. The resultant structure had both “national” and “confederal” features as detailed by James Madison in No. 39 of The Federalist. The Supreme Court described this arrangement as “an indestructible Union, composed of indestructible States” in 1869 in Texas v. White.

While each might be indestructible, the constitutional boundaries between the general government and the states shifted markedly over two centuries. The original framework of dual sovereignty brought a creative (and, apropos of the Civil War, sometimes destructive) tension to constitutional interpretation and American politics. The Civil War and the Reconstruction Era Amendments (13th to 15th) enhanced the national government’s constitutional position at the expense of the states. However, even those amendments did not give Congress general authority to legislate. As the Supreme Court affirmed in The Civil Rights Cases in 1883, these amendments do not supplant the essence of the federalism summarized in the 10th Amendment, that powers not delegated to the United States are retained by the states.

The erosion of the states’ status relative to Congress began with the Progressive Era in the early 20th century, but occurred more profoundly with the New Deal in the 1930s. As the Supreme Court effectively abandoned traditional federalism jurisprudence, Congress expansively used its powers to tax, spend, and regulate interstate commerce, enhanced further through broad application of the necessary and proper clause. As well, the virtual disappearance of the “non-delegation” doctrine from constitutional analysis fostered the explosion of bureaucratic rule in the modern administrative state. On a different field, the more frequent reliance by Presidents on the Constitution’s vague executive powers even in quotidian matters also shifted power to the growing national capital. The essence and reality of federalism changed so fast that Justice Harlan Fiske Stone could write dismissively in U.S. v. Darby Lumber Co. in 1941 that the 10th Amendment “states but a truism”—one of a much-weakened federalism.

So far did this corrosion of structural federalism go that Congress, relying on the Commerce Clause, amended the Fair Labor Standards Act (FLSA) and applied wage and overtime regulations to certain employees at state and local schools and hospitals. The Court in 1968 in Maryland v. Wirtz agreed, just as it had done in Darby Lumber regarding private firms. Justices William Douglas and Potter Stewart dissented, arguing that the law was a serious invasion of state sovereignty. When the arch-New Dealer Douglas warns of the threat of the “National Government devour[ing] the essentials of state sovereignty,” something is truly amiss.

Perhaps recalling the reasons for the celebrations in 1976, the Court in National League of Cities v. Usery overturned, by 5-4, the 1974 amendments of the FLSA that further extended national wage and hour standards to almost all state and local government employees. As before, these amendments were based on Congress’s seemingly unbounded power to regulate interstate commerce. Justice William Rehnquist concluded, however, that the essential sovereignty of the states limited even Congress’s enumerated powers. Here, Congress unconstitutionally interfered with integral operations of “traditional governmental functions.” The 8-year-old Wirtz case was expressly overruled.
The Bicentennial was barely over when the Court got cold feet over its newly re-found federalism. In several opinions, the justices began to backtrack from the constitutional federalism of *National League of Cities* to the “congressional federalism,” as Douglas had called it, of the previous decades. That path culminated in *Garcia v. San Antonio Metropolitan Transit Authority*, a 5-4 decision in 1985. The case revisited the FLSA’s wage and hour provisions, this time to determine a municipal transit system’s status as a traditional government function. Justice Harry Blackmun declared the “traditional government function” test unworkable as a line between state and national authority. A related older test had sought to distinguish between (protected) governmental and (unprotected) proprietary functions of state. The latter would be those functions commonly done by private individuals, and which, if done by the state in a particular instance, Congress could reach. Blackmun deemed that test unworkable, as well. Since the Court had long recognized Congress’s power to legislate wages and hours under the Commerce Clause, and since Blackmun disregarded structural federalism, the transit system was subject to the FLSA. *National League of Cities*, nine years old, was overruled.

Blackmun did not stop there. He announced that judicial review in this area was altogether unnecessary, since the political process protected against Congressional acts that undermined state sovereignty. As an example, he discussed the significant amount of funding for mass transit that the states and cities had received from Congress. He further characterized this political solution as evident from the Constitution’s text and the writings of *The Federalist*. He observed that “the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself….The States were vested with indirect influence over the House of Representatives and the Presidency by their control of electoral qualifications and by their role in Presidential elections….They were given more direct influence in the Senate, where each State received equal representation and each Senator was to be selected by the legislature of his State.” For Blackmun, on a constitutional level, the states were mere adjutants of the national government.

Other than a brief reference to the 17th Amendment and a prompt dismissal of its impact, Blackmun’s analysis fails to address the significant changes that have occurred since the Convention of 1787 and the cited writings of Madison. The impact of the 17th Amendment, which provides that Senators are elected by the voters, not by the state legislatures, cannot be easily dismissed. The Senators’ electoral constituencies no longer are the legislatures that represent the state governments in their sovereign capacities, but the states’ voters. This gives Senators incentive to enhance their political influence by increasing the influence of the central government over the states. Moreover, the states’ control over voter qualifications, which in 1787 was essentially unrestricted, has been severely curtailed by the 15th, 19th, 24th, and 26th Amendments, as well as by the Supreme Court’s creative constitutionalism under the 14th Amendment’s Equal Protection Clause. The growth of the national government in relation to the states, measured by the increase in respective budgets, also tells a tale of divergent expansion beginning during the Progressive Era. Perhaps the timing is coincidental, but it is likely that these changes in the states’ control over the electoral process affected this trend.

Justice Lewis Powell wrote the main dissent. He accused the majority of mere lip service to the principle of federalism. He pointed out that Senators and Representatives, once elected, are members of the federal government. Powell could not foresee that, a decade later in another
case, *U.S. Term Limits, Inc. v. Thornton*, a five-member majority of the Court would emphasize that very point to strike down an Arkansas term limit amendment. Similarly, the fact that states have some hypothetical control over the selection of presidential electors does not make the modern Presidency a bulwark of state sovereignty. As to Blackmun’s reasoning that Congress gave the states funding, Powell declared that the states’ “role in our system of government is a matter of constitutional law, not of legislative grace.” Put another way, states as courtiers seeking handouts from the Congressional sovereign is not the Framers’ federalism.

Justice Rehnquist, the author of *National League of Cities*, wrote a brief dissent and concluded acidly, “I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court.” His remark proved to be prophetic. Seven years after *Garcia*, the federalism worm turned in *New York v. U.S.* (1992), reinforced in its reasoning by *Printz v. U.S.* (1997). Neither case overruled *Garcia*. However, in *New York*, Justice O’Connor, writing for 6 members, effectively limited *Garcia* to scenarios where the state is acting in a proprietary rather than a sovereign capacity. This was precisely the distinction that Blackmun had rejected in his *Garcia* opinion.

*New York* and *Printz* are William Rehnquist’s vision of a revitalized federalism made real by the Supreme Court. Rehnquist cobbled together the narrow majority that so unexpectedly produced *National League of Cities*. Though he lost *Garcia*, he continued his quest when he became Chief Justice and gained new allies that replaced the older New Deal-nursed generation of justices. With O’Connor, a former state legislator and judge, Antonin Scalia (the author of *Printz*), Anthony Kennedy, and Clarence Thomas, Rehnquist had a generally dependable majority to advance a more robust constitutional federalism. The strategy bore fruit not only in the cases mentioned, but also in the strengthening of the states’ immunity from suit by protecting it against Congressional curtailment in *Seminole Tribe v. Florida* (Rehnquist) and *Alden v. Maine* (Kennedy), restricting Congress’s powers under the commerce clause and the 14th Amendment in *Lopez v. U.S.* (Thomas) and *U.S. v. Morrison* (Rehnquist). There was also a powerful pro-federalism dissent by Thomas in *U.S. Term Limits, Inc.*, when Kennedy abandoned his usual collaborators.

The Rehnquist Court’s “New Federalism” appears to have carried forward to the Roberts Court, although three of that earlier majority have left, and John Roberts as well as Samuel Alito were picked more for their background as defenders of executive powers. Neil Gorsuch, if confirmed, is said to have a strong philosophical commitment to a vital federalism. In *New York*, Justice O’Connor emphasized what has been written too often to count, from the early debates on the Constitution to today: “The Constitution does not protect the sovereignty of the States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between the federal and state governments for the protection of individuals. Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”
An expert on constitutional law, and member of the Southwestern Law School faculty, Professor Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums, and serves as a Constituting America Fellow. Read more from Professor Knipprath at: http://www.tokenconservative.com/.

LABOR

In re Debs (1895)

Guest Essayist: Gary Porter

Obstruction of Commerce & the Mail

“Neither snow nor rain nor heat nor gloom of night (nor Pullman Strike) stays these couriers from the swift completion of their appointed rounds.” This (slightly altered) saying, an inscription found on the General Post Office in New York City, is widely regarded as the motto of the U.S. Postal Service. It is not, at least not officially, but you get the drift: nothing will be allowed to prevent delivery of the U.S. mail.

First, let’s get this out of the way: In jurisprudence,” in re:” is used to indicate that a certain proceeding may not have designated litigants or that the case is otherwise uncontested. You will often see the term used in case citations of probate and bankruptcy proceeding and sometimes in consolidated cases. The term essentially means “in the matter of”, “the petition of”, “the application of”, etc.

In the late 1800s, industrialist George Pullman wanted to make railroad cars as efficiently as possible. He built a model factory and a model community on the Southside of Chicago to house his workers. The workers rented the homes from the Pullman Palace Car Company (PPCC); ownership was not permitted.

Even though the intent was a modern, model community, the company essentially owned the town and ran things the way it saw fit, to include setting utility rates and rents. In response to a severe depression (the Panic of 1893) the Company began laying off workers and lowered wages 25% for those who remained; but it did not reduce their rents, leaving the unemployed and even those who remained at work, scrambling for survival. The company refused to enter arbitration; the workers called for a strike.
Enter Eugene V. Debs, founder of the American Railway Union (ARU), whose members were largely unskilled workers. Workers at PPCC were not initially unionized so Debs brought in ARU organizers and signed up many of the disgruntled. A local strike at the factory was largely ineffective, so Debs took the effort national; at its peak the strike involved upwards of 250,000 workers in 27 states (29 railroads). Striking workers refused to handle trains carrying Pullman cars; unfortunately for the strikers, some of these trains also carried U.S. mail.

Even though other railway unions of skilled workers such as engineers, firemen and conductors, did not support the strike, it nevertheless severely disrupted the nation’s interstate commerce. Debs was pilloried in much of the press; the New York Times called the strike “a struggle between the greatest and most important labor organization and the entire railroad capital.”

Illinois Gov. John P. Altgeld sent in the Illinois militia to quell rioting. A federal injunction ordering the strikers back to work was ignored and President Grover Cleveland called in 2,500 federal troops to stop the increasing violence. On July 7, 1894, the day of greatest looting and violence, Illinois National Guardsmen fired into the mob. Over the course of the strike, 30 strikers were killed and 57 were wounded. Property damage exceeded $80 million.

Debs was directed by a federal judge to stop the obstruction of railways (and thus interstate commerce) and to end the strike; when he refused, he was arrested on federal charges, including conspiracy to obstruct the mail.

In 1894, in an effort to mend fences with organized labor, President Grover Cleveland and Congress designated Labor Day as a federal holiday. Cleveland signed legislation into law six days after the end of the strike.

Although ably defended by none other than the famous Clarence Darrow, on December 14, 1894, U.S. circuit court judge William A. Woods ruled that Debs and the others were in contempt of court for violating the original injunction. The defendants were sentenced to six months in prison.

Upon appeal, the question for the Supreme Court was whether the federal government had general authority to use force to prevent obstructions to interstate railroads and whether the courts could support such efforts through the expedience of injunctions rather than through the more formal processes of a criminal prosecution.

On May 27, 1895, the Supreme Court upheld the government’s use of the injunction against the strike. Justice Brewer delivered the unanimously (9–0) decision.

“It must be borne in mind that this [injunction] was not simply to enjoin a mob and mob violence. It was not a bill to command a keeping of the peace; much less was its purport to restrain the defendants from abandoning whatever employment they were engaged in. The right of any laborer, or any number of laborers, to quit work was not challenged. The scope and purpose of the bill was only to restrain forcible obstructions of the highways along which interstate commerce travels and the mails are carried.”

There are two other statements from the syllabus of the case I find of interest: “The government of the United States has jurisdiction over every foot of soil within its territory, and acts directly
upon each citizen…. In the exercise of [the commerce clause and postal service] powers, the
United States may remove everything put upon highways, natural or artificial, to obstruct the
passage of interstate commerce, or the carrying of the mails.” One wonders whether this
includes protesters who have shut down an interstate highway. Hmmm.

Following his release from jail in 1895, Debs became a committed advocate of socialism and in
1897, helped launch the Social Democracy of America, a forerunner of the Socialist Party of
America. Debs ran for president in 1900 for the first of five times as head of the Socialist Party
ticket.

In re Debs, 158 U.S. 564 (1895) Supreme Court decision:
https://supreme.justia.com/cases/federal/us/158/564/case.html

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Justice David J. Brewer (1837-1910)
Guest Essayist: Daniel A. Cotter

David J. Brewer: Foreign Born Justice Who Sat with His Uncle

David J. Brewer was born on June 20, 1837, in Smyrna, Asia Minor (today Turkey), the fourth of
six Supreme Court Justices born outside the United States. Brewer sat on the Court with his
uncle, Stephen J. Field, to date the only relatives to serve contemporaneously, with Brewer
serving twenty years on the Court before his death in 1910.

Early Life and Career

Brewer was born to Emilia Brewer (nee Field) and Reverend Josiah Brewer, who oversaw a
school for Greeks in Smyrna at the time. When Brewer was a young boy, his father returned
with his family to the United States to become chaplain of St. Francis Prison in Wethersfield,
Connecticut. Brewer’s mother was the sister of Stephen J. Field, who had accompanied her and
the reverend to Smyrna.

Brewer attended college at Wesleyan University, then transferred to Yale University, where he
graduated Phi Beta Kappa. Upon graduation from Yale, Brewer studied law at the office of
another uncle, David Field (who later prepared the code of civil procedure known as The Field
Code). Brewer also completed a one-year course at Albany Law School before being admitted to
the New York bar. After a short stint prospecting for gold, Brewer moved to Leavenworth,
Kansas, where he established his law practice. Brewer quickly became a judge in the Kansas state courts and also served one year as the city attorney for Leavenworth. In 1870, Brewer became a Judge on the Kansas Supreme Court, where he served fourteen years before President Chester A. Arthur appointed him to the Eighth Circuit Court of Appeals. Brewer served five years in that capacity before President Benjamin Harrison nominated him to fill a vacancy on the Supreme Court.

**Supreme Court**

President Harrison nominated Brewer on December 4, 1889, to fill the vacancy created by Justice Stanley Matthew’s death. On December 18, 1889, by a vote of 53 to 11, the Senate confirmed Brewer, and he joined his uncle, Stephen J. Field, as the 51st Justice of the U.S. Supreme Court.

Brewer sat on the Court until his death on March 28, 1910. To date, he is the only Justice nominated from the State of Kansas. And together, the Brewer-Field uncle/nephew duo served more than fifty-four years combined on Court.

During his time on the Court, Brewer was a strong defender of the rights of women and minorities, including the protection of Chinese and Japanese immigrants. Brewer was also a contributor to the doctrine of substantive due process. In *Muller v. Oregon* (1908), Brewer wrote for a unanimous Supreme Court upholding restrictions on the working hours of women, stating:

> Then follow extracts from over ninety reports of committees, bureaus of statistics, commissioners of hygiene, inspectors of factories, both in this country and in Europe, to the effect that long hours of labor are dangerous for women, primarily because of their special physical organization. The matter is discussed in these reports in different aspects, but all agree as to the danger.

At the time, the decision and rationale were seen as being protective of and defending women’s rights, but the rationale in *Muller* has since been dismissed.

Brewer also wrote the unanimous decision in *In Re Debs* (1908), upholding the power of the United States Government to enjoin a strike against the United States Postal Service. In *United State v. Ju Toy* (1905), a case in which the Supreme Court conceded its power to judicially review immigration matters, Brewer dissented, stating:

> Banishment of a citizen not merely removes him from the limits of his native land, but puts him beyond the reach of any of the protecting clauses of the Constitution. In other words, it strips him of all the rights which are given to a citizen. I cannot believe that Congress intended to provide that a citizen, simply because he belongs to an obnoxious race, can be deprived of all the liberty and protection which the Constitution guarantees, and if it did so intend, I do not believe that it has the power to do so.

Brewer had earlier dissented in another Chinese exclusion case, *Fong Yue Ting v. United States* (1893), which upheld the Geary Act extending the Chinese Exclusion Act and required United States citizens of Chinese dissent to obtain certificates of residency or face deportation even if no other crime was committed. Brewer stated:
I rest my dissent on three propositions: first, that the persons against whom the penalties of section 6 of the act of 1892 are directed are persons lawfully residing within the United States; secondly, that, as such, they are within the protection of the Constitution, and secured by its guaranties against oppression and wrong; and third, that section 6 deprives them of liberty, and imposes punishment without due process of law, and in disregard of constitutional guaranties, especially those found in the 4th, 5th, 6th, and 8th articles of the amendments.

Brewer left to attend to his daughter’s unexpected death in Leavenworth, Kansas, on the day *Plessy v. Ferguson* was argued, and did not participate in that decision.

Brewer was the author of three books during his time on the Court – *The Pew for the Pulpit* (1897), *The United States: A Christian Nation* (1905), and *United States in the Cause of Peace* (1909).

**Conclusion**

Brewer’s legacy as a Supreme Court Justice is one of defending various minority rights, primarily in dissent. He served on the Court until his death at the age of 72. All told, Brewer served almost fifty years on the bench at both the state and federal level.

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**Holden v. Hardy (1898)**

**Guest Essayist: Gennie Westbrook**

During the late nineteenth and early twentieth centuries, the industrial revolution transformed the American landscape, culture, economy, and relationships between workers and management. The transformation brought significant gains in prosperity for both workers and management, but it also meant laborers worked long hours in dangerous conditions in factories and mines. Workdays of ten to twelve hours were common, with reduction of wages during economic slumps. There was no job security, and lack of safety features led to frequent grisly accidents caused by hazardous working conditions. Workers organized labor unions to bargain collectively for improvements in pay and other working conditions. Management almost always resisted the labor union demands, and each side worked to influence laws in its favor. The United Mine Workers Union was founded in 1890, followed by several other unions organized throughout the 1890s. Also throughout the 1890s, strikes, uprisings, and sometimes violent confrontations between labor and management broke out as workers attempted solidarity in pursuit of better wages, shorter hours, and safer working conditions. Management responded to these initiatives by firing labor union leaders, hiring strike-breakers, intimidating workers, and using political influence to block any lasting legal reforms.
Beginning at least by the 1830s, workers in some American industries had advocated the eight-hour day. This objective became a rallying point for the diverse labor organizations; even if they could not agree on other issues affecting workers, they agreed that eight hours at work was enough. The eight-hour movement accelerated in the decades following the Civil War. In 1884, the Federation of Organized Trades and Labor unions issued a resolution that all work days should be limited to eight hours.

In 1896 the Utah legislature enacted the first hours-limiting legislation based on hazardous working conditions in the western United States. Spearheading the effort was Tom Kearns, a wealthy mine owner, banker, and newspaperman in Park City, Utah. An unlikely advocate for worker interests, Kearns had started as an impoverished miner who struck it rich. Deeply aware of the dangers of mine work as well as the power of workers’ votes in his upcoming campaign for the U.S. Senate, he sponsored the law providing that “the period of employment of workingmen in underground mines or workings shall be eight hours per day, except in cases of emergency where life or property is in imminent danger.” The law also protected workers in smelting in the same way.

That year, Albert F. Holden, owner of the Old Jordan Mine in Bingham Canyon in Salt Lake County, Utah, faced charges for violating the new law with respect to two employees. He required miner John Anderson to work ten-hour days, and he required William Hooley to work twelve hour days. Sheriff Harvey Hardy arrested Holden for these violations. Holden argued that the Utah law restricted his constitutional rights, as well as those of his employees, to make contracts. He maintained that the law also deprived him of both property and liberty without due process. He testified that his employees had voluntarily contracted with him for those working conditions. He also argued that the statute was unconstitutional because it was class legislation which singled out managers in the mining industry, depriving them of equal protection of the laws. The trial court found Holden guilty and fined him fifty dollars, which he refused to pay. Therefore, he was sent to jail for fifty-seven days. He initiated a habeas corpus petition against Sheriff Hardy.

Holden appealed his conviction to Utah’s Supreme Court. That court unanimously found that the law complied with Utah’s constitution, particularly its specific article providing for laws to protect the health and safety of industrial employees. The court explained that in mining and smelting operations there was no doubt that exposure to poisonous gases and dust in “prolonged effort day after day…will produce morbid, noxious, and often deadly effects in the human system.” The court noted that “breathing of pure air is wholesome, and the breathing of impure air is unwholesome.” Regulation of hours was necessary. “Twelve hours per day would be less injurious than fourteen, ten than twelve, eight than ten. The legislature has named eight.” Addressing Holden’s complaint that the law was class legislation discriminating against him because of the nature of his business, the court ruled that the class in question was only those subject to “the peculiar conditions and effects attending underground mining and work in smelters…” It was not necessary to extend the 8-hour-day protection to persons engaged in less hazardous work. The decision was based on the need for government regulation of the extremely unsafe work of smelters and miners, not a general ruling regarding the legitimacy of the principle of an eight–hour workday.
Holden then appealed the decision to the U.S. Supreme Court, arguing once again that the Utah law’s limitation of the freedom of contract violated due process provisions of both the Utah and the U.S. Constitution. Just as had been the case in state court, the U.S. Supreme Court upheld the Utah law because of the hazardous working conditions in the mines. Justice Henry Billings Brown wrote for the Court in the 6-2 decision, acknowledging the importance of freedom of contract, but noting that the state’s police power to protect the health, safety, or morals of the citizens imposes certain limits on that freedom. Significantly, the Court concluded that there was a reasonable, factual basis for the legislature’s judgment that mining was so dangerous as to justify state regulation.

The proprietors of these establishments and their operatives do not stand upon an equality… their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules, and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority.

In upholding a state law because the Supreme Court’s majority saw reasonable, factual evidence of danger in the workplace, this decision established the principle that the federal government has the authority to regulate the working conditions of at least some workers. In succeeding years, state laws in other states also limited hours of work for employees in mining and smelting operations: Montana (1901); Arizona and Nevada (1903); Idaho and Oregon (1907).

In 1905 the U.S. Supreme Court would hear a case based on a similar controversy. The New York legislature, citing concerns for health and safety due to unsanitary conditions in bakeries, had enacted a law that limited hours of labor for bakery employees. Justice Rufus Peckham, one of the dissenters in Holden, wrote the majority opinion in Lochner v. New York, overturning the New York law. This time, the majority in the 5-4 decision ruled that the state law in question was an unconstitutional limit on freedom of contract because, in the Court’s judgment, the baking business was not an unhealthy trade. Thus the Court began the Lochner Era, becoming the final authority over all kinds of state regulations for the next thirty-two years.

Holden v. Hardy (1898) Supreme Court
decision: https://supreme.justia.com/cases/federal/us/169/366/

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Lochner v. New York (1905) Guest Essayist: Tony Williams

Making up Rights?: Lochner v. New York (1905)

In April 1901, Utica, New York bakeshop owner, Joseph Lochner, was arrested for allowing one of his few employees, baker Aman Schmitter, to work more than sixty hours in a week. A grand jury indicted Lochner for violating a New York bakeshop law regulating work hours. In February 1902, he was tried, convicted, and fined fifty dollars for his misdemeanor crime.

The law in question that Lochner was criminally penalized for violating was the New York Bakeshop Act (1895) that the state legislature passed unanimously. The law primarily prevented employers from either allowing or requiring employees from working more than ten hours in a day or sixty hours in a week. The laws also mandated a variety of other sanitation provisions for bakeshops to protect the health of workers and consumers.

The New York legislature passed the act during a period of reform known as progressivism, which was a movement for the state and national governments to regulate business for the public interest and to achieve social justice. The legislature passed this law because “muckraking” journalists exposed the long working hours and possible threats to public health in large, crowded urban areas such as New York City. The conditions of the bakeries were mainly connected to their location in the damp, dirty basements of urban tenements where immigrants lived in extreme squalor. An alliance of progressive reformers, public health commissioners, and members of the Journeymen Bakers’ and Confectioners’ International Union of America lobbied successfully for the passage of the bill.

Henry Weismann was one of the leaders of the bakers’ union who helped steer the bill through the legislature. He soon became disgruntled with the union and resigned. He opened two bakeshops of his own, worked with the Retail Bakers’ Association, and became a lawyer. Weismann took on Lochner’s case and defended him against the prosecution under the very law that Weismann had helped guide through the state legislature.
Weismann argued that Lochner’s Utica clean and airy bakery was not a threat to public health nor did Lochner coerce his employee to work unusually long hours that endangered his life like mining or factory work. Weismann further argued that the state had illegitimately exercised its “police powers” regulating the health, safety, welfare and morals of its citizens.

The Supreme Court announced its decision on April 17, 1905. In the 5-4 decision read by Justice Rufus W. Peckham, the majority of the Court invalidated the New York Bakeshop Act as a violation of “liberty of contract.” The law “necessarily interferes with the right of contract between employer and employees, concerning the number of hours which the latter may labor in the bakery of the employer.” The Court argued that it was not “substituting the judgment of the Court for that of the legislature.” The majority reasoned that the state simply could not regulate anything that it wanted within its borders especially when it violated an essential liberty of individuals.

Justice John Marshall Harlan dissented and argued that the Court should not have declared the law unconstitutional unless it was

“plainly, palpably, beyond all question, inconsistent with the Constitution.” He asserted that the Court “expanded the scope of the Fourteenth Amendment far beyond the original purpose, and brought under the supervision of the Court matters which belonged exclusively to the legislative departments of the states.”

Justice Oliver Wendell Holmes also dissented and maintained that the will of state legislatures should be upheld unless they infringed upon the fundamental principles of American law and the Constitution. He argued that the decision reflected the popular idea of the time of Social Darwinism, or survival of the fittest in the private economy. He wrote that, “A constitution is not intended to embody a particular economic theory.” Holmes thought the Court was creating a new fundamental right not actually in the written text of the Constitution.

The Lochner decision was a highly controversial case and remains so in arguments over jurisprudence in law schools and law journals. Indeed, the period from after the Civil War to the New Deal is known as the “Lochner era” for its supposed conservative jurisprudence protecting property rights and advancing Social Darwinism. Moreover, it has even become a verb—to “Lochnerize”—used when criticizing judicial activism and advancing rights not found in the Constitution.

The decision found its origins in the Slaughter-House Cases (1873), in which Justice Stephen Field dissented and advanced the argument the Due Process Clause of the Fourteenth Amendment protected “the liberty of citizens to acquire property and pursue happiness,” and the “right to pursue an ordinary trade or calling.” The idea of “substantive due process” instead of merely “procedural due process” continues to be controversial because it has led both a conservative and liberal Court to advance rights such as liberty of contract or the right to privacy not found in the Constitution. Each side criticizes substantive due process as “judicial activism” when it disagrees with the outcome and right articulated.

Supporters of the Lochner decision argue that the Supreme Court posited a natural law right consistent with the ideals of the Declaration of Independence and constitutionalism. The
Constitution does not specifically protect the liberty of contract but the Contract Clause does protect the sanctity of contracts from being impaired.

Critics of the *Lochner* decision have attacked it from different sides of the ideological spectrum. Conservatives worry about going beyond the text of the Constitution to protect rights under substantive due process because it has resulted in decisions such as *Roe v. Wade* (1973). Liberals criticize the decision for being an example of a Social Darwinist court that invalidated government regulation of the economy or protected property rights until the New Deal revolution in 1937 when the Court permitted much greater regulation under the Commerce Clause.

The *Lochner* decision raised as many issues as it settled especially related to the principle of federalism. The Court advanced the principle of liberty of contract and restricted the police powers of the state, but upheld state regulation of working hours in mining or women’s labor in other cases before and after *Lochner*. Moreover, over the course of the twentieth century, the Court increasingly used substantive due process to invalidate the will of the state legislatures even when almost all restricted an action the Court believed to be an essential constitutional right of individuals. This seminal case and its consequences will continue to be debated.


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### Adair v. United States (1908)

**Guest Essayist: State Representative David Eastman**

**Can Congress Discriminate Against Non-Union Members?**

In 1898, Congress passed the Erdman Act, making it a crime to fire an employee for belonging to a union. Because the Constitution does not expressly give the federal government the power to regulate employment, Congress limited the law to apply only to employees involved in interstate commerce, thereby taking advantage of a clause in Article I, Section 8 of the Constitution, which states:

> “The Congress shall have power…To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes;”

When the Constitution was first written, the power to regulate commerce between states was given to the federal government to prevent states from taxing and regulating one another. If this power had not been given to the federal government, Virginia would have been able to tax any goods traveling by land between the northern states and the southern states, and Delaware would have been able to tax goods that landlocked Pennsylvanians wanted to get to port. In short order, each of the states would have been at each other’s throats. To avoid this, it was determined in the Constitution that states would not have that power.
In 1906, eight years after Congress passed the Erdman Act, Mr. O.B. Coppage was employed as a fireman by the Louisville and Nashville Railroad Company. At that time, the term “fireman” referred not to a firefighter, but to an employee whose job it was to shovel coal into a locomotive engine, and Coppage belonged to a union called the Order of Locomotive Firemen. William Adair threatened to fire Coppage if he did not leave the union, and then fired him when he refused. Adair was convicted of violating the Erdman Act and fined $100. He appealed the conviction, and his case was heard by the Supreme Court in the case *Adair v. U.S.* (1908).

The opinion of the Court was delivered by Justice John Marshall Harlan, who was then well known on the Supreme Court for his principled stands against racial discrimination in other cases. He saw this case as fundamentally involving discrimination as well, but not racial discrimination. He wrote, “the court has reached a conclusion which, in its judgment, is consistent with both the words and spirit of the Constitution and is sustained as well by sound reason.”

In the case, the U.S. attorney general tried unsuccessfully to defend the 1898 law that protected union members from being fired. He argued that the law was passed in response to The Great Railroad Strike that took place in Chicago in 1894, and that Congress passed the law to protect interstate commerce from being interrupted by future strikes.

The Supreme Court responded that it could not seriously consider that Congress would give privileges to some Americans (union members) over other Americans (non-union members) in response to threats, without impugning the dignity of Congress as an independent branch of government, and that it would not presume that union members would illegally threaten to interrupt the freedom of commerce among the several states any more than non-union members would.

In other words, the Court stated very diplomatically that someone extorting special favors out of Congress by threatening to break the law goes against the spirit of the Constitution, and is certainly not an acceptable reason to deprive some Americans of their equal rights under the Constitution and U.S. laws.

The Court noted that the Erdman Act attempted to discriminate in only one direction. It made it a crime to fire an employee for belonging to a union, but it did not make it a crime to fire an employee for not belonging to a union. If it could make such a law, Congress would logically also have the power to compel railroad companies to hire only union workers, or conversely, it would have the power to compel railroad companies to hire only non-union workers. Because such a power was obviously repugnant to the Constitution, the Court found the law to be an unconstitutional violation of liberty.

Quoting from a law textbook, Justice Harlan observed for the Court:

“It is a part of every man’s civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice. With his reasons neither the public nor third persons have any legal concern.”
In restating the words of Thomas McIntyre Cooley, Justice Harlan was not only quoting the former Chief Justice of the Michigan Supreme Court, but also the charter member and first president of the Interstate Commerce Commission (the quotation is from Cooley’s textbook “The Wrongs which Arise Independently of Contract”).

Justice Harlan concluded:

“it is not within the functions of government — at least in the absence of contract between the parties — to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another.”

Because there was no contract between the employee and the employer in this case, either were free to leave at any time. The Court found that in

“all such particulars the employer and the employe [sic] have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.”

Accordingly, the Court declared that the law prohibiting an employer from firing a union member was an unconstitutional violation of the right to liberty and to property, which are both protected by the 5th Amendment.

Later Supreme Courts have since relaxed their defense of the liberty and property rights of Americans, and now support the federal government exercising much greater power over employment and other aspects of American society, even in cases when there is only a negligible impact on interstate commerce.

Adair v. United States (1908) Supreme Court decision: https://www.law.cornell.edu/supremecourt/text/208/161

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Coppage v. Kansas (1915)

Guest Essayist: Gennie Westbrook

During what Mark Twain called the Gilded Age at the end of the nineteenth century, American commerce grew exponentially and the American economy became the largest in the world. Wealthy industrialists organized their businesses to maximize efficiency and profits, contributing to an increase in buying power for all segments of American society and drawing millions of immigrants from around the world to the United States for opportunity. Workers, toiling long hours in dangerous conditions, sought to organize themselves, too, forming labor unions to
bargain collectively for better wages and working conditions. The early attempts at labor solidarity found only very limited success as management blocked their efforts through strike-breaking and intimidation. Conflicting interests between labor and management led to confrontations and violence in several major industries in the intermittent recessions that occurred in the latter decades of the 1800s.

Some employers tried to prevent disruptions and strikes by requiring prospective employees to sign an agreement, called a yellow dog contract, not to join a union. In the 1898 Erdman Act, Congress made it illegal for an employer to fire a worker for being a member of a labor union, but owners of interstate railroads believed the law was an unconstitutional interference with their liberty of contract. Louis Adair, of the Louisville and Nashville Railroad Company, challenged the Erdman Act by firing a railroad worker who joined a union. In _Adair v. United States_ (1908) the U.S. Supreme Court ruled in favor of the railroad, basing the decision on the Fifth Amendment’s due process clause. In the majority opinion in the case, Justice Harlan wrote, “So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee.” Justice Harlan explained that the Erdman Act violated the contract rights of employers engaged in interstate commerce, and was outside of Congress’s commerce power.

State governments in the early twentieth century also enacted laws regulating labor conditions and protecting the right of workers to join labor unions, but employers believed those laws interfered with their liberty of contract. In the _Adair_ decision the Supreme Court invalidated a federal law designed to protect labor unions; would state laws meet the same fate? The central question was whether it was constitutional for a state to prohibit employers from banning their employees from joining a union.

In 1909 the Kansas legislature enacted a law prohibiting employers from requiring employees to sign anti-union contracts. T.B. Coppage, Superintendent of Frisco Lines, a railway company in Fort Scott, Kansas, imposed a yellow-dog contract on his employees in 1911. When one of Coppage’s employees refused to sign the new contract and declined to withdraw from the Switchmen’s Union, Coppage fired him. Coppage argued that liberty of contract fell under the Fourteenth Amendment’s substantive due process clause, and protected his right to hire workers under any conditions that both parties found acceptable, including the yellow dog contracts.

The state argued that the 1909 law was a constitutional exercise of the state’s policy to protect the privileges and immunities of citizens by preventing a coercive practice of employers who sought to deprive them of the benefits of union membership.

The U.S. Supreme Court majority held that the Kansas law prohibiting yellow-dog contracts threatened employers’ rights of liberty and property, and was unconstitutional because it violated the Fourteenth Amendment’s due process clause. Workers had the right to join labor unions, but had no inherent right to do so and still remain employed by a business operator who was unwilling to employ union members. Justice Mahlon Pitney delivered the opinion of the Court in the 6-3 decision. He wrote,
The Fourteenth Amendment, in declaring that a state shall not “deprive any person of life, liberty or property without due process of law,” gives to each of these an equal sanction; it recognizes “liberty” and “property” as co-existent human rights.

The rights of personal liberty and private property supported a liberty of contract requiring that workers and employers have the right to work out their own conditions of contracts of employment. The state could not use its police power to equalize the bargaining power of unions by limiting the liberty of contract of employers.

In dissent, Justices Day, Hughes, and Holmes believed that the Kansas law was a justifiable regulation to address the difference in bargaining power between employers and employees, because it prevented coercive practices by management. As Justice Day wrote, the law “put limitations upon the sacrifice of rights which one man may exact from another as a condition of employment.”

Taken together, the Adair and Cuppage decisions meant that the Constitution’s protection of liberty and property allowed employers to require their workers to refrain from union membership, and neither federal nor state laws protecting the right of workers to join a union were constitutional. This interpretation of the law stood until the New Deal Court reversed these precedents.

During the New Deal era, new state and federal legislation recognized the right of laborers to join unions, and the 1935 National Labor Relations Act essentially outlawed yellow dog contracts. Frustrated with what he saw as the Supreme Court’s interference in several essential economic regulations to counter the Great Depression, President Franklin Roosevelt had proposed the appointment of additional justices to the Court, expecting that this “court-packing plan” would give him a pro-New Deal majority. Within a week of Roosevelt’s proposal in 1937, the Court heard oral argument in National Labor Relations Board v. Jones and Laughlin Steel Corp. This time Justice Hughes was in the majority, writing the opinion in the Court’s 5-4 ruling that the NLRB’s protection of the right of workers to join unions was constitutional. Justice Holmes rejected a liberty-of-contract approach and explained that the law’s protection of labor unions was a legitimate use of the Commerce Clause (Article 1, Section 8, Clause 3) because it could prevent crippling strikes that would interfere with interstate commerce.

The Cuppage decision was part of the “Lochner Era” in which the Court generally protected property rights and curtailed state and federal economic regulations. The Court allowed the free market to decide, and management often hired employees with anti-union contracts to prevent labor disruptions. During the New Deal, the Court reversed this line of precedent in 1937 and allowed the different levels of government to intervene in the employer-employee relationship to strengthen the interests of organized labor unions and individual workers. During both eras, the Court struggled with defining the boundaries of constitutional regulatory power of the government in private enterprise.

Cuppage v. Kansas (1915) Supreme Court decision: https://supreme.justia.com/cases/federal/us/236/1/case.html

Sources Consulted
Justice Mahlon Pitney (1858-1924)
Guest Essayist: Richard Epstein

Mahlon Pitney was appointed to the United States Supreme Court by President William H. Taft in 1912, and served there for ten and one-half years until his retirement in December, 1922. He is generally regarded as a footnote in the annals of American Supreme Court justices. But for the ten years that he was on the Court, he was in my view a powerful intellect who often bested both Justices Holmes and Brandeis on the many occasions when their views clashed.

Why then his neglect? The answer: Supreme Court history is winner’s history and Pitney was on the wrong side of history, even if he was on the right side of the intellectual debate. The judicial heroes of the progressive era running roughly from 1900 to 1933 were justices like Brandeis and Holmes whose judicial philosophy and decisions prefigured the New Deal triumphs. Pitney in contrast was a systematic classical liberal who took great pains to defend strong property rights and limited government, on the correct ground that this approach would advance human liberty and human prosperity. State intervention should be regarded as an evil until it is shown to be a good.

Perhaps the most distinctive opinion that he wrote on this subject was his oft-reviled 1915 opinion *Coppage v. Kansas*, which held that it was unconstitutional infringement of liberty of contract under the Due Process Clause of the Fourteenth Amendment for Kansas to make it a criminal misdemeanor for an employer to insist that his employees not join a union so long as they continued to work for the employer. Pitney then doubled down on this position two years later in *Hitchman Coal v. Mitchell*, held that any union that sought to induce a worker to breach that contract of employment by joining, or even promising to join, a union while remaining on his job.
These two decisions provoked an enormous uproar at the time, including dissents by Holmes in *Coppage* and Brandeis in *Hitchman Coal*, on the ground that they were largely subversive of the rights of workers to engage in collective bargaining. The Holmes/Brandeis position slowly worked itself into law during the 1930s, with the passage of such pro-labor statutes as the Norris-LaGuardia Anti-Injunction Act of 1932, the National Labor Relations Act of 1935, and the Fair Labor Standards Act of 1938, all of which were unconstitutional under Pitney’s views.

So why is Pitney right, and Holmes and Brandeis wrong? The answer relates to the relationship between competition and monopoly. Pitney thought that competition had a preferred constitutional status relative to monopoly in all areas of economic life, a proposition that both Holmes and Brandeis denied. Pitney thus recognized that ordinary contracts for employment would produce gains from trade for both sides, and that the strongest protection for any worker lay in his ability to obtain alternative employment. Even the threat of quitting would impose market discipline on employers, which it did, so that real wages rose during the period, even if mutually advantageous contracts could, and often did produce greater disparities in wealth between the employer and employee. But those increased differentials were a byproduct of successful exchanges, so that it is no accident indeed that the so-called *Lochner* era between 1870 and 1940 represents, as Robert Gordon demonstrates in his book *The Rise and Fall of American Growth*, the greatest period of economic growth in American history—without properly acknowledging the legal framework that helped make that innovation possible.

On this view, Pitney rightly understood that antitrust legislation directed toward monopolization counted as an important limitation on freedom of contract. Indeed, it was exactly on this ground that he defended the so-called “Yellow Dog” contract that prevented unions from recruiting workers while they owed a duty of loyalty to their current employer. This contract was a private means whereby employers could blunt the monopoly power of unions, which received its first major legislative boost with the passage of Section 6 of the Clayton Act of 1914 that immunized unions (and agricultural agreements) from the antitrust, even though both had been covered by it under the earlier case law, most notably *Loewe v. Lawlor*, decided in 1908.

The great defect in the position championed by Holmes and Brandeis is that they were too indifferent to the risks of monopoly power in labor markets. For Holmes, part of the logic was to help the workman to secure a fair contract, which required “an equality of position between the parties in which liberty of contract begins.” That point is flatly wrong. So long as there is no coercion, liberty of contract lets workers improve their positions by voluntary agreement, which is what happened during this period. Brandeis, for his part, misunderstood the reach of the tort of inducement of breach of contract, which covered both workers who secretly joined unions while remaining their employer’s employee or merely promised to do so when called out. As Pitney, himself a master of equity jurisprudence noted, workers could strategically wait to join a union until the time that their collective withdrawal from service had its maximum effect. Any sensible reading of the basic contract between an employer and employee would preclude that result.

In the end, these and other fallacious arguments took their toll on labor markets, so the current law now institutionalizes labor monopoly power by giving exclusive rights to bargain and strong protection against outside competition through minimum wage and overtime
regulations. The huge strike wave that took place after World War II was a direct consequence of the massive instability that unionization introduced into law markets. Today, global competition and the rise of small specialized firms with rapid labor turnover have diminished union power in the private sector. But 100 years after these key decisions, Pitney clearly outduded his two major intellectual rivals on matters of the highest political and theoretical importance.

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MONEY AND FINANCE

Sturges v. Crowninshield (1819) And Ogden v. Saunders (1827)

Guest Essayist: J. Eric Wise


Shortly after the first person mixed her labor with a thing and called it “mine,” some person furnished property to another, together with an obligation to return it. With that, the problems of debtor and creditor were born.

Adequate rules governing debtors and creditors, and restructurings of their debts, have ever been an essential feature of a happy society. When Moses gave law to a people just emerged from slavery and an itinerant life in the desert, their property was limited to what could be carried (mostly tents) and what could follow (livestock). Yet, Moses saw the future of commerce in the Promised Land and wisely included, at the behest of a Higher Authority, a Jubilee Year every seven years, during which debts would be discharged and slaves freed.

Aeneas narrowly escaped the bloody debts of Troy, and his Roman descendants would provide creditors with inhumane rights over liberty and lives of delinquent debtors. Perhaps no lesser threat had the power to compel a debtor to pay, where payment was possible. Still Rome in its wisdom saw fit to mitigate this sanction.
The Roman *Cessio Bonorum*, or surrender of goods, provided for the voluntary surrender of all of a debtor’s property to creditors, whereupon the *physical person* of the debtor was discharged. Free from imprisonment and death, the debtor’s obligation remained. Creditors could reach the fruits of the debtor’s future labors until payment in full, a condition only modestly distinguishable from slavery.

The problem of who owned what and the associated problem of the collection of debt drove key aspects of the severity of the law of debtor and creditor. Where communications and records are primitive, laws define property mainly by possession and the general knowledge of the community. When Norman conquerors in 1179 recorded the ownership of real property in the Domesday Book, juries assembled the data by a survey conducted *in situ* in towns and villages. To determine who owned what, the juries simply asked. Once recorded in the Domesday Book, there was no right of appeal.

But the limits of recordation and the use of conveyances might obscure interests in land, and for personal property, if an owner did not volunteer title, detection could be difficult. The ease of concealment of property meant the primary means of debt collection – and the basic structure of debtor-creditor law – would continue to be the imprisonment of the debtor.

*Cessio Bonorum*, like so many things Roman, survived the death of the Roman Empire, but Anglo-Saxons were not without innovations in law. The inability to discharge a debtor from the obligation of repayment, as Moses had provided through the Jubilee, rendered an insolvent debtor a useless person, without incentive for productivity. Anglo-Saxon law in time (in 1705, to be precise) made available a discharge of obligation in cases where there was no fraud or misdeed. *Cessio Bonorum* came to be considered an “insolvent law” in contradistinction to a “bankrupt law.” An “insolvent law” discharged the *person of the debtor*; a “bankrupt law” discharged the *obligation of the debtor*.

When the Articles of Confederation of the United States failed in 1787, its inability to deal with the deep recession that followed the Revolutionary War was a chief feature of national incompetence. A multiplicity of debt-burdened states fashioned a quilt of laws affecting debts, breeding uncertainty and impeding commerce. Indeed, one of the first tests of the new government was a rebellion in 1786 of languishing debtor-farmers in Massachusetts known as Shays’ Rebellion. Sagging under the weight of many limitations, the Articles gave way, and the convention brought forth a new Constitution.

To remedy the particular defect of the Articles relating to debts, the Constitution inserted the national government into, and limited the states interference in, the relationship of debtors and creditors. Article I, Section 8 of the Constitution includes among the enumerated powers of Congress the power “To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.” Article I, Section 10 provides “No State shall . . . pass any . . . Law impairing the Obligation of Contracts.”

Two landmark cases, *Sturges v. Crowninshield, 17 U.S. 122 (1819)* and *Ogden v. Saunders, 25 U.S. 213 (1827)*, established the relative power of the federal government and the states with respect to insolvent and bankruptcy laws. *Sturges* and *Ogden* together established that the United States’ bankruptcy power is not exclusive. A state may adopt a bankruptcy law so long as any
exercise of that power does not conflict with any law of the United States establishing a uniform system of bankruptcy, and the law does not impair any obligation of contracts. *Sturges* and *Ogden* established that a state bankruptcy law does not impair the obligation of contracts, except where a state passes such law after the contract has arisen, on the theory that a contract incorporates existing state law at the time of formation. *Ogden* further established that a discharge could only apply as between citizens of the state granting the discharge.

These rulings therefore preserved for states only the rump of bankruptcy power. Bankruptcy thus has been preeminently the domain of federal law. The Bankruptcy Reform Act of 1978, as amended, is now the remedy nearly universally sought for distressed debtors and their creditors. A chapter 11 case under the United States Bankruptcy Code, Title 11 U.S.C., consists in its simplest terms of—

(i) an injunction barring creditor action,

(ii) court supervision of the debtor,

(iii) the proposal of a plan organizing creditors by classes,

(iv) solicitations of creditors to vote to support the plan,

(v) limitations of holdout power permitting consent by less than unanimous approval and less than all classes, and

(vi) confirmation of a plan and a discharge of debts.

The purpose of chapter 11 is the preservation of value of a debtor’s business to maximize the recovery of all creditors, who in the absence of protections of the debtor would figuratively tear the debtor limb from limb, reducing the overall recovery for all creditors. The Bankruptcy Code also provides for a liquidation (chapter 7), personal reorganization (chapter 13) and municipal reorganization (chapter 9).

The potency of the bankruptcy power and prohibition on the state impairment of contracts has never been more evident than in recent years. When Treasury Secretary Henry Paulson determined not to extend the “window” for overnight borrowing to Lehman Brothers in September of 2008, Lehman Brothers filed for chapter 11 bankruptcy, triggering a meltdown of global financial markets.

A wave of debtors filed petitions in bankruptcy, eventually even General Motors, an institution once synonymous with the welfare of the United States. With the financial markets in catastrophic distress, General Motors had to look to Treasury to finance in its chapter 11. The conversion of that debt into equity of new General Motors stained the struggling enterprise with the nickname “Government Motors” until Treasury disposed of its interest.

Yet, despite the trillions of dollars at stake, the crisis of 2008 was navigated using the enormous bankruptcy power of the United States through the rules established by the Bankruptcy Code in an orderly, and above all, peaceful, manner. There are worthy particular discontents over the
intrusions of the federal government in the financial crisis of 2008. Nonetheless, the success of the federal bankruptcy power and its expression in the Bankruptcy Code, and indirectly the scheme established by *Sturges* and *Ogden*, is remarkable.

Moses doubtless would agree.

*Sturges v. Crowninshield* (1819) Supreme Court decision: https://supreme.justia.com/cases/federal/us/17/122/

*Ogden v. Saunders* (1827) Supreme Court decision: https://supreme.justia.com/cases/federal/us/25/213/

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### The Legal Tender Cases (1870)
**Guest Essayist: Kevin Walsh**

The legal tender controversy involved Supreme Court decisions that spanned a decade and a half beginning in 1870 with *Hepburn v. Griswold* 75 *U.S. 603* (1870), in which the Legal Tender Act of 1862, 12 Stat. 345, making United States Treasury notes legal tender, was invalidated on constitutional grounds. In Hepburn, Chief Justice Salmon P. Chase, who as secretary of the Treasury during the Civil War was a key player in the Legal Tender Act’s passage, held for the majority that congressional authorization of the notes (also referred to as “fiat currency” or “greenbacks”) to be used as legal tender violated the Fifth Amendment Due Process Clause protecting property.

Hepburn was followed a year later with the Legal Tender Cases (hereinafter referred to as Knox-Parker), 79 *U.S. 457* (1871), which reversed Hepburn by upholding the tender act as a legitimate exercise of national legislative power in a wartime emergency. There were two controlling questions: Was the Legal Tender Act constitutional when applied to contracts made before passage of the act; and, secondly were they valid as applicable to debts contracted since their enactment?

Invoking the logic of Chief Justice John Marshall in *McCulloch v. Maryland*, 17 *U.S. 316* (1819), the Knox-Parker decision asserted that Congress was authorized to make greenbacks legal tender in payment of debts, that it was a “necessary and proper” exercise of power. The 1884 case of *Juilliard v. Greenman*, 110 *U.S. 421* (1884), conclusively settled the legal tender controversy by ruling that Congress possesses the authority to make treasury notes legal tender both in peacetime and wartime.

The initial Legal Tender Act of 1862 was a desperate measure undertaken by Congress to provide financing for the Civil War. The legislation provided that greenbacks were to be, “lawful money and a legal tender in payment of all debts, public and private, within the United States.” The notes depreciated substantially in terms of gold prices and had the effect of fulfilling contracts with a currency of greatly reduced value. Creditors suffered because the basis of the original contracts had been undermined by the inflationary tendencies of greenbacks. Many
creditors believed that the legal tender legislation constituted an impairment of the obligation of contracts. They were on shaky constitutional ground, however, given the fact that the prohibition on contract impairment did not extend to the federal government. Article I, Section 10 of the Constitution forbids states from passing any “Law impairing the obligation of Contracts,” but includes no such prohibition against Congress.

One should look to the Convention debates for insights regarding legal tender, bills of credit, and more generally the extent to which Congress had authority over matters of monetary policy. Indeed, twelve days after the Convention delegates refused to prohibit Congress’ power to emit bills of credit, the Convention met to debate the question of state coinage and legal tender. The delegates agreed that the states would be prohibited expressly from making anything but gold and silver a legal tender, and from emitting bills of credit.

In perhaps the most important interpretation of the “Bill of Credit Clause” prior to the legal tender controversy, Chief Justice Marshall confirmed in Craig v. Missouri, 29 U.S. 410 (1830), that “the people declared in their constitution, that no state shall emit bills of credit.” Joseph Story echoed like sentiments just three years later in his Commentaries, when the practice of emitting bills of credit (as authorized by Congress) had become quite common. He noted that the language of the Constitution makes clear that the prohibition was directed at state issues, not federal ones. There is no Supreme Court precedent (before the Hepburn ruling) enunciating a comparable prohibition on Congress.

Inferences can be drawn from the constitutional provisions dealing with congressional powers by taking into account historical evidence regarding inclusion and exclusion of certain expressions. One recalls the remark regarding silent aspects of the Constitution made by James B. Thayer when he wrote that the “sagacious policy of silence, rather than positive grant or positive prohibition, as regards the power and duty of the Union, was resorted to on several occasions (Thayer, p. 78).

Subsequent constitutional interpretation and statutory construction during the early years of the republic yielded, to some extent, answers to questions regarding the distinction between language that expressly prohibits and that which impliedly confers power on the legislature. Indeed two lasting principles of construction were established even before 1801. First, doubtful cases were to be resolved in favor of constitutionality, and second congressional statutes were to be construed if possible in a manner consistent with the Constitution.

Hepburn v. Griswold, the case in which the tender act was initially struck down by the Supreme Court in 1870, was only the seventh decision holding congressional legislation unconstitutional. Its abrupt overruling a mere 15 months later in Knox-Parker following a change in personnel on the Court, called into question the extent to which judicial decisions could be plausibly regarded as based on law rather than politics. In fact, on the day Hepburn was decided, President Ulysses Grant nominated two justices to the Court, William Strong and Joseph Bradley. Both of these justices voted to reverse the Hepburn decision a year later in the Knox-Parker decision.

The law-politics distinction, first elaborated by the Marshall Court, had been carefully nourished throughout the remainder of the antebellum period, most notably in the development of the doctrine of “political questions.” One could make the same argument for a law-economics
distinction. In the Knox-Parker decision, the Court rejected the political, economic and philosophical speculations made in Hepburn which bemoaned the “horrors of unredeemed paper currency” experienced by the Framers. By logical extension, the Court rejects the proposition that it is proper for judges to determine the economic dimensions of monetary policy? Because political questions are controversies that the U.S. Supreme Court has traditionally regarded as nonjusticiable and inappropriate for judicial resolution, they typically require judicial deference to the political branches for resolution.

One must naturally ask why there was such a dramatic shift in the Court’s interpretation of constitutional language. In 1870, the Court declared unconstitutional the congressional action to make greenbacks legal tender and then reversed itself a year later. Was the Hepburn decision the result of naked judicial activism or merely a flawed interpretation of the Constitution? Was the Knox-Parker “do over” the legitimate correction of flawed interpretation, or the result of Grant’s court-packing?

Though current literature does not generally accord landmark status to the Legal Tender Cases, judicial politics took on perhaps a new tone and anticipated in many important respects how the Court was going to deal with Reconstruction politics and post-Reconstruction legal development.


References


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Pollock v. Farmer’s Loan And Trust Co. (1895)
Guest Essayist: Robert Lowry Clinton

Pollock v. Farmer’s Loan & Trust Company, 158 U. S. 601 (1895), arose when a stockholder of the company sued to prevent the company from voluntarily paying a tax on its profits. The tax had been assessed pursuant to an act of Congress that levied a tax of two percent per year on incomes over $4,000.00. The act, known as the Wilson-Gorman Tariff Act of 1894, was very
broad in scope, and was initially designed to lower tariff rates in response to the Panic of 1893. Evidently many additions and exceptions were added to the bill before its final passage, and President Grover Cleveland, initially supportive of the measure, ultimately allowed the law to be passed without his signature.

Pollock contended that the provisions in the act that levied a tax on the income generated by real estate and municipal bonds held in trust by the company violated Article I, Section 9 of the Constitution, which provides that “No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census of Enumeration herein before directed to be taken.” The census “herein before directed to be taken” refers to Article I, Section 2, Clause 3 of the Constitution, which provides that “Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . .” It was uncontroversial at the time that taxes on land and things affixed to land (e.g., buildings, livestock, etc.) were “direct” taxes and were thus subject to the rule of apportionment, which meant that Congress would have to specify a sum to be raised in each state commensurate with its population. Pollock’s contention was that the income produced by real property (e.g., rent) amounted to a tax on the property itself and thus was also “direct” and subject to the rule of apportionment.

In truth, the constitutional distinction between direct and indirect taxes had never been made perfectly clear by the Supreme Court, though it had been generally thought that indirect taxes were those the burden of which may be shifted to a third party (such as the consumer in a sales transaction). Indirect taxes, such as duties, imposts and excises, are not subject to the rule of apportionment but are rather subject to the rule of uniformity provided in Article I, Section 8 of the Constitution, which requires that “all Duties, Imposts and Excises shall be uniform throughout the United States.” Pollock argued that, in case the Court ruled that the income tax was an “indirect” tax, then it was invalid because it was not applied uniformly, thus violating Article I, Section 8.

In the end, the Court ruled in a 5-4 decision that the tax on “the rents and income of the real estate of the defendant company, and of that which it holds in trust, and on the income from the municipal bonds owned or so held by it,” was an unapportioned direct tax within the meaning of Article I, Section 9 and therefore unconstitutional. Though the Court did not rule on the uniformity issue, Justice Field, who supplied the crucial fifth vote in the case, laid much stress on it in his concurring opinion. Field regarded the act as “class legislation” which singled out a particular group (those with incomes over $4,000.00) for taxation and exempting the rest. On the other side, the dissenting opinions argued that the taxing power was plenary and that the Court’s decision represented a serious intrusion on the power of Congress to determine the scope of its own authority.

The Pollock decision has often been criticized as an example of the turn-of-the-century Court’s eagerness to safeguard private wealth and constitutionalize laissez-faire capitalism. However, a careful reading of the opinions in the case suggests that this is an overly simplistic view, reflecting perhaps the biases of contemporary progressives who champion consolidation of national power at the expense of state authority and individual rights. In truth, Chief Justice Fuller’s opinion for the Court is a plausible originalist reading of founding-era attitudes on the
issue of taxation. The constitutional prohibition of unapportioned direct taxes was clearly an effort by the Founders to prevent federal encroachment on state authority by protecting states with small populations and large land areas (mainly in the South) from exploitation by states with larger populations and hence with more representatives in Congress—in other words, from a particular form of taxation without representation.

Likewise, Justice Field’s concurring opinion, at least from the standpoint of a century steeped in Lockean/Jeffersonian natural law principles, constitutional originalism, and a healthy respect for state and local autonomy, is equally plausible. Taxes, according to the Constitution, are either direct or indirect. There is no middle ground. If the income tax was direct, it was unapportioned and thus violative of Article I, Section 9. If it was “indirect” and not uniformly applied, it was violative of Article I, Section 8. The modern, hypercritical view of the Court’s decision in Pollock results less from a serious encounter with the issues in the case than from an ongoing triumphalist progressive revision of our constitutional history, fueled by lust for ever-increasing national power.

In any event, the dissenters carried the day in the last analysis, as the Pollock decision was overturned in 1913 by the adoption of the Sixteenth Amendment, which provided that “The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.” Whatever one thinks of the wisdom of the People’s decision in that regard, the Pollock case should retain more than merely historical interest, in view of the subsequent exponential growth of the national government and the concomitant growth of an arguably overreaching federal taxing authority.


References


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DUE PROCESS OF LAW AND DEFENDANTS’ RIGHTS

Ex Parte Vallandigham (1864) And Ex Parte Milligan (1866)
Guest Essayist: Gennie Westbrook

Article 1 Section 9, Clause 2 of the U.S. Constitution enshrines the “Great Writ,” a protection against arbitrary imprisonment that dates back at least to the Magna Carta of 1215: “The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.” The writ provides that, when government holds a suspect in custody, he has the right to be taken before a judge who determines whether there is good cause for the arrest, and must be released if there is no legitimate reason for government to hold him.

President Abraham Lincoln faced a quandary regarding this protection during the Civil War. In the earliest days of the war, Lincoln ordered the military to arrest anyone between Washington and Philadelphia suspected of subversive acts or speech, explicitly suspending writs of habeas corpus. Virginia and other southern states had seceded, Maryland seethed with secessionist sentiment, and it was vital to the survival of Washington, D.C. that Maryland remain in Union hands. Lincoln was severely criticized for his limited suspension of habeas corpus, but he believed this step was essential to carry out his oath of office to defend the Constitution during the time of rebellion and imminent invasion. Lincoln knew that only Congress had the authority to suspend habeas corpus, but Congress was not in session as the war began, and he submitted his action to congressional approval. In his July 4, 1861 message to Congress, he asked, “Are all the laws but one to go unexecuted, and the government itself go to pieces lest that one be violated?” Congress endorsed the presidential action. Lincoln expanded the suspension throughout the United States in 1862, and Congress formally suspended the protection with the Habeas Corpus Act of 1863.

Estimates of the number of civilians arrested by military authorities during the Civil War range from 13,000 to 38,000, most of them in the border states between the Union and the Confederacy where agents on both sides sought to push the border states to their respective sides. For example, John Merryman, a prominent Baltimore businessman and vocal secessionist, was arrested and charged with treason for supporting the Confederacy. He demanded that he be released from prison and charged in open court, claiming his right to have the charges against him heard by a civilian judge, not by a military commission. The Supreme Court was not sitting at the time, but Chief Justice Roger Taney, directly presiding over Merryman’s habeas corpus case in circuit court, ordered that Merryman be set free. He ruled that only Congress, not the president, has authority to suspend habeas corpus, and that, even if Congress so ordered, Merryman’s case must be heard in civilian court since he was not in the military. Lincoln ignored Taney’s order in ex parte Milligan, but the Court was powerless to enforce its ruling against the administration.

Clement Vallandigham, another prominent citizen, was a former member of the U. S. House of Representatives from Ohio and leader of the Copperhead Democrats who opposed Lincoln and
demanded immediate peace with the South. On May 1, 1863, Vallandigham made a public speech at Mount Vernon, Ohio. He charged that the Civil War was “a war for the purpose of crushing out liberty and erecting a despotism,” “a war for the freedom of blacks and the enslavement of whites,” that “the war could have been honorably terminated months ago,” and that Ohio General Order 38 restricting free speech was “a base usurpation of arbitrary authority.” He urged his listeners “to refuse to submit to such restrictions on their liberties.” By this time, President Lincoln had extended the suspension of habeas corpus throughout the nation and authorized local officials to arrest anyone disloyal to the Union. A week after his speech, Vallandigham was arrested at his home during the night.

He was charged before a military court with “declaring sympathy for the enemy” and “treasonable utterance.” The government argued that opposition speech in wartime threatened the security of the nation and was not worthy of constitutional protection. Vallandigham maintained that the Constitution guaranteed him the freedom to express his opinions. He also contended that the military commission had denied him due process, had no authority over him as a civilian, and that he was entitled to a jury trial. The military tribunal sentenced him to imprisonment until the end of the war, and Vallandigham appealed the ruling to the Supreme Court. In 1864, in ex parte Vallandigham, the Court unanimously refused to hear Vallandigham’s case, saying that it had no jurisdiction over military commissions.

Though Lincoln insisted that the power to suspend habeas corpus was essential in wartime, he believed that speeches such as Vallandigham’s posed no actual threat to the Union. He stressed to his commanders to exercise careful discretion in assuring that a threat was “manifest and urgent,” before making an arrest, but ultimately he deferred to their judgment. In order to keep Vallandigham from becoming a Copperhead martyr in public opinion, Lincoln commuted his sentence and banished him to the Confederacy. Soon Vallandigham made his way to Canada, where he ran for governor of Ohio, but he lost in a landslide of pro-Union sentiment in the state. Lincoln allowed him to travel freely in the United States, and Vallandigham ran unsuccessfully for several political offices in the post-war years. He returned to his law practice in Ohio and died in 1871.

Lambdin Milligan was a lawyer living in Indiana, and, like Vallandigham, an outspoken critic of the Lincoln administration’s war policy. Concurrent with the arrests of some other Indiana Copperhead leaders, Milligan was arrested at his home in October 1864 in connection with a plot to release and arm Confederate prisoners in northern prison camps. The government accused Milligan of working with a secret organization to aid the Confederacy and charged him with treason. He was tried before a military tribunal, convicted, and sentenced to be hanged in May, 1865. Milligan appealed to civilian courts, challenging his conviction by a military proceeding. Though battles raged in other parts of the country, Indiana was not a military district, Milligan was not connected with the military, and was not engaged in hostile actions against the U.S. when arrested. After Lincoln’s assassination and the end of the war, President Andrew Johnson postponed the execution to give the Supreme Court time to hear the case.

In 1866, Justice David Davis wrote the Court’s unanimous opinion that Milligan’s trial by military commission was unconstitutional, and he must be released. Justice Davis famously wrote,
The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism…

Justice Davis explained that as long as the civilian courts are operating, which they were in Indiana at the time of Milligan’s arrest, the right of civilians to a jury trial must be maintained.

[The Founders knew that] trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong. Knowing this, they limited the suspension to one great right, and left the rest to remain forever inviolable.

Released from prison, Milligan sued those who had been involved in his incarceration, but his jury awarded him only five dollars. He returned to his law practice for the next 25 years, and he died in 1899.

The Supreme Court’s rulings in *ex parte Vallandigham* and *ex parte Milligan* set a long-standing pattern regarding wartime cases. During war, with the very real dangers of sabotage, desertion, draft evasion, insurrection, espionage and other threats to the survival of the republic, the Supreme Court tends to defer to the elected branches and their willingness to narrow constitutional protections of rights. For example, in Vallandigham’s 1864 case, the Supreme Court declined to interfere with the president’s wartime policy and refrained from passing judgment regarding his conviction by military tribunal. According to the Constitution, the president is commander in chief, and the war-making power belongs to Congress. The judiciary has no role in the prosecution of a war. Once the war is over, the Court tends to restore a stricter interpretation of the rights of individuals, as in Milligan’s case, returning to a more robust commitment to civil liberties and protection of the rights of the accused. This pattern of judicial interpretation is seen throughout the military conflicts of the twentieth century and remains controversial with the terrorism-related cases of the twenty-first.

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Chicago, Milwaukee And St. Paul Railroad v. Minnesota (1890)
Guest Essayist: Richard E. Wagner

*Chicago, Milwaukee and St, Paul Railroad v. Minnesota,* 134 U.S. 418 (1890) became a landmark case in establishing a new direction for government regulation of business, though that new direction gave way to the coming of the New Deal. Prior to the *Chicago, Milwaukee* decision, courts had pretty much deferred to legislatures in deciding whether legislation passed constitutional muster. For the most part, courts would not inject themselves into controversies regarding the legislative regulation of business. This changed with the *Chicago, Milwaukee* decision.

This change began to take shape in June 1887, when the Minnesota legislature established a state Railroad and Warehouse Commission to regulate the rates that railroads could charge for carrying and storing freight. The Commission had three members appointed by the Governor and confirmed by the Senate, and it was given the final authority over the rates that railroads and associated enterprises could charge. Accordingly, it was impossible to complain about Commission decisions except by complaining to the Commission.

All the same, a long-standing piece of Constitutional wisdom asserts that no person should be a judge in his or her own cause. This wisdom is the basis of our Constitution’s division and separation of political power among multiple branches of government and between states and the federal government. While there are strong grounds for thinking that the original constitutional vision of separating and dividing political power has frayed over the duration of the Republic, the wisdom of separating and dividing power surely remains as valid as it ever was.
The Chicago, Milwaukee, and St. Paul Railroad had been charging 2.5 cents per gallon to carry milk along some of its routes and 3 cents to carry milk along other routes. The Commission ruled that the Railroad must charge 2.5 cents along all its routes. When the Railroad refused to do this, the state asked the Minnesota Supreme Court to direct the Railroad to comply with the Commission’s demand, which the Court did.

At this point, the Railroad challenged the constitutionality of the Minnesota Court’s ruling, arguing that the regulation violated the due process clause of the 14th Amendment. In April 1888, the Minnesota Supreme Court upheld its ruling in favor of the Commission over the Railroad. When the Minnesota Supreme Court denied the Railroad’s request that the Court reconsider its ruling, the Railroad brought the case to the U. S. Supreme Court in January 1890.

On March 24, 1890, the Court ruled in favor of the Railroad. With this decision, state legislatures lost their power to have the final word regarding the regulation of business. A state legislature could no longer create a Commission to regulate business, and declare that the Commission’s judgment was the final word in the matter. Such regulations were now subject to third-party review.

It’s easy enough to understand why legislatures might want to exempt their actions from judicial review. Who wouldn’t want to have that power? It’s also easy enough to understand why the American Constitution established a system of separated and divided powers. The Founders recognized that any group of people might pursue their interests at the expense of other people. People were not exempt from this capacity simply because they held political office; indeed, holding such office could well increase that capacity. The only remedy for this feature of human nature was to separate and divide political power so that the use of such power requires concurrence among different political bodies.

The decision in *Chicago, Milwaukee* represented some recapturing of the Founder’s constitutional wisdom, though perhaps representing only an incomplete recapturing. Due process is generally thought to be an antidote to the arbitrary exercise of power by some political official. It might be, though it need not be. Even in the presence of some procedure that conforms to popular images of due process, regulation can serve as an instrument through which politically dominant interests can impose their desires on other portions of society. For instance, it’s surely notable that the Commission required the railroad to reduce its 3-cent rate to 2.5 cents when it could alternatively had required the railroad to increase its lower rate to 3 cents.

Due process reflects the wisdom that no person should be able to serve as a judge in his or her own cause. Had the Minnesota legislature established some appeal to some alternative authority, the due process requirement might well have been met. Yet the railroad commission and this alternative, judicial-like body might both have been comprised of opponents to the commercial interests of railroads, in relation to the pro-farmer or Granger interests that were strongly in play at the time.

In other words, the entity to which the appeal is lodged could be a close cousin in its values to the entity that issued the regulation, in which case a due process requirement might have little bite to it. Our Constitutional Founders recognized that the possession of political power was likely to bring out the worst in people, while recognizing all the same that such power and its use
was necessary for well-working societies. *Chicago, Minnesota* gave some though perhaps incomplete recognition to this two-sided nature of political power.


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**Meyer v. Nebraska (1923) And Pierce v. Society of Sisters (1925)**

**Guest Essayist: Joerg Knipprath**

In *The Republic*, Plato designed his ideal society as one in which the wives and children of the Guardians (the ruling elite) would be held in common. This would prevent the corrosive societal effects of nepotism that result when parents raise their children and, due to their natural affinity, seek to secure wealth and status for their offspring at the expense of the common welfare. The children would be reared by officials of the State: “The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter.” There was also the eugenicist angle: “[B]ut the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.” The “children of gold,” though, would undergo rigorous, State-controlled training to prepare them for their leadership role.

Whether Plato’s prescriptions in *The Republic* were blueprint or warning has been the subject of much debate. What is correct, however, is that some critics saw in the emerging public school education of the turn of the 20th century a potential realization of the Platonic system. The current of eugenics for racial improvement that underlay some Progressive ideas did not lessen the critics’ alarm. There was a difference, of course, in that American education steered by a professional teaching corps employed by the State was to reach all classes, especially the decidedly non-elite children of immigrants. Waves of immigration from Southern and Eastern Europe and from Mexico had triggered concern about assimilation of these groups, with their customs, religion, and language alien from those of the dominant American culture. Education in State-controlled institutions would have a homogenizing effect and create “Americans” out of disparate groups by inculcating common values and language. Unlike today’s Progressives, that era’s were decidedly opposed to ethnic tribalism. Presidents Theodore Roosevelt and Woodrow Wilson were particularly pungent in their denunciations of “hyphenated Americans.” The latter declared, “Any man who carries a hyphen about with him carries a dagger that he is ready to plunge into the vitals of this Republic whenever he gets ready.”

In contrast, medieval natural law writers, such as Thomas Aquinas, considered it a duty arising out of the nature of humans to care for their offspring. Presumably, that includes the duty to educate the offspring consistent with their abilities, in order to allow them to achieve the Greek *arete*, excellence. To perform this natural duty parents have the natural right to control their children’s upbringing within the family.
The Supreme Court addressed these conflicting positions in two cases, *Meyer v. Nebraska* (1923) and *Pierce v. Society of Sisters* (1925). *Meyer* involved a law, adopted in 1919, that prohibited the teaching of a foreign language to a child who had not completed the 8th grade. Meyer, a private-school teacher, taught German to a 10-year-old. Meyer appealed his conviction, and the state supreme court upheld the law in a very instructive opinion. That court excluded Latin, Greek, and Hebrew from the law, as not “within the spirit or the purpose.” The state court lauded the law’s “salutary purpose”:

The language that worried Nebraska was German. The population of Omaha, Nebraska, in World War I was almost 60% German-American.

“The Legislature had seen the baneful effects of permitting foreigners, who had taken residence in this country to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety....To allow the children of foreigners...to be taught from early childhood the language of the country of their parents was to...naturally inculcate in them the ideas and sentiments foreign to the best interests of this country....The obvious purpose of this statute was that the English language should be and become the mother tongue of all children reared in this state.”

The Court, per Justice James McReynolds, ruled that the law violated the 14th Amendment by interfering with Meyer’s liberty to pursue his calling as a teacher and with the parents’ right to hire him to teach their children. McReynolds did not object to the state’s goal of improving the quality of its citizens and fostering “a homogeneous people with American ideals.” Still, “a desirable end cannot be promoted by prohibited means.” The state could constitutionally compel school attendance, prescribe the curriculum of public schools, and even require that instruction be in English. But it could not ban the teaching of German: “Mere knowledge of German cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable.” Indeed, this ban conflicted with the American people’s traditional high regard for education and the acquisition of knowledge.

The state attempted other justifications: There were only so many subjects that a young child could be taught because he has a short attention span and must have time to play. Also, citizens
rarely think it is important to teach foreign languages before completing eighth grade. McReynolds swatted those claims away as pretense, because no other subjects were restricted under the statute. Moreover, “It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age.”

McReynolds pointedly rejected Plato’s design and the Spartan system of training boys in barracks under official supervision: “Although such measures have been deliberately approved by men of great genius their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest ….” The liberty protected by the 14th Amendment includes “not merely freedom from physical restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home, and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”

McReynolds, Woodrow Wilson’s former attorney general and a man who, based on the recollections of his colleagues, might generously be described as a “curmudgeon,” sounds like an early 20th century Anthony Kennedy writing a paean to personal liberty. Noteworthy is that the reincarnation of this substantive due process jurisprudence over the past several decades has been pressed into service to protect personal autonomy mostly for sexual matters. Forgotten is McReynolds’s equally strong defense against government intrusion of rights to contract and property that also define one’s autonomy. As a staunch supporter of free-market policies, he supported “liberty” in a more libertarian manner than courts have done since the New Deal. Seemingly quaint, too, is McReynolds’s stylistic fusing of marriage, establishing a home, and bringing up children. Today, the Court, mirroring the socially libertine, economically welfarist culture, treats these activities as entirely discrete choices, not as an essentially bound aggregate.

Justices Oliver Wendell Holmes, Jr., and George Sutherland dissented. Presumably, Holmes as a Progressive was not as convinced as McReynolds that the Constitution precluded Plato’s policy to form the child as the state saw fit. Sutherland generally voted with McReynolds, but his parents immigrated to Utah from England when he was a child, so he may have been influenced by contemporaneous events and the fact that English was advantaged over German.

Pierce v. Society of Sisters addressed a similar constitutional issue but arose from different political currents. Most immigrants in the latter half of the 19th century were Catholics, German Lutherans, or Jews. Like German-Americans, Catholics established schools in many cities. Their dissatisfaction with the emerging public schools in the 19th century was that those schools taught American-style Protestantism. A nativist backlash was emboldened by President Ulysses S. Grant’s call, in 1875, for a constitutional amendment to end any government support of sectarian schools and to separate forever church and state. The proposed amendment was sponsored by Congressman James Blaine of Maine. It passed overwhelmingly in the House, but failed to get the required two-thirds vote in the Senate. Over the next several decades, “Little Blaine Amendments” were adopted by most states. They prohibited direct, and in some cases indirect, government aid to religious schools.
Nativist sentiment and patriotic fervor in the 1910s led to a revival of the Ku Klux Klan. In Oregon the group became sufficiently powerful to have members elected to the legislature in 1922 and to help elect the governor. In the same election, the voters adopted an initiative that required all children to attend public school. The initiative was intended to eliminate Catholic schools. It was unique to Oregon and went further than either the state Blaine amendments or the Nebraska anti-language law to restrict parental control. The Society of Sisters and the Hill Military Academy challenged the initiative’s constitutionality. The Society ran elementary and high schools, junior colleges, and orphanages. The schools taught the same subjects as Oregon public schools, but also religion. The Academy was a for-profit elementary, college preparatory, and military training school. Once more emphasizing that the child “is not the mere creature of the state,” McReynolds, this time writing for a unanimous Court, overturned the initiative because the liberty on which our governments are based “excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only.”

Both cases are relevant today. Although the right to have one’s children educated in private schools has not been challenged, a more difficult issue arises for parents who wish to home-school their children. It is remarkable that the Oregon law in effect before the 1922 initiative permitted home-schooling as an exemption to compulsory public school attendance. The Court has always approved a state’s authority to require that children be educated and to set the parameters of that education. Home schooling is protected in all states of the Union, but prohibited in most countries. Germany, for example, has claimed that home-schooling would promote the growth of unassimilated, parallel societies. This is the same argument made in favor of the English-only and the compulsory public school laws in Meyer and Society of Sisters, and today has filtered into the debate over charter schools and education vouchers. If the right to educate one’s children outside formal public or private schools were restricted, the same liberty argument would be made, as well. The constitutional resolution is more uncertain.

The constitutionality of the state Blaine amendments has recently come before the Supreme Court. In Trinity Lutheran Church v. Pauley, the Supreme Court this term will review the constitutionality of a section of the Missouri constitution that prohibits direct or indirect aid to religious institutions. Officials denied a grant to a Lutheran pre-school to resurface its playground with recycled tires under a state program that provided such funds for that purpose. Missouri claims that its constitution merely respects the command that there must be no establishment of religion. But its action goes further than the Supreme Court has required. The Court has upheld many forms of neutral assistance to religious schools (direct aid) and to the parents of children in such schools (indirect aid), at least as long as such aid is facially neutral and available, regardless of the religious nature of the school. The school claims that the state discriminated against religious groups, thereby violating the Court’s long-held position that the Establishment Clause does not permit hostility to religion. On the other hand, the Court in Locke v. Davey (2004) upheld the right of a state to exclude students studying to become pastors from receiving state scholarships. A decision should come this summer.

Pierc e v. Society of Sisters (1925) Supreme Court decision:  

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Palko v. Connecticut (1937)  
Guest Essayist: Robert Lowry Clinton

Palko v. Connecticut resulted from the appeal of a capital murder conviction. Palko was charged with killing a police officer during the commission of an armed robbery. Although he was charged with first degree murder, he was convicted of second degree murder and sentenced to life in prison. The state of Connecticut appealed the sentence, alleging that the trial judge had failed to admit relevant testimony and given erroneous instructions to the jury. The state supreme court ordered a retrial, at the conclusion of which Palko was convicted of first degree murder and sentenced to death. Palko appealed the second conviction and sentence in the state courts but lost, after which he petitioned the United States Supreme Court, arguing that the second trial amounted to double jeopardy in violation of the Fifth Amendment of the United States Constitution, which provides that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb.” Palko argued further that protection against double jeopardy was an essential ingredient of the due process of law guaranteed by the Fourteenth Amendment, which provides that no state may deprive a person of life, liberty or property without due process of law. This amendment, designed primarily to safeguard the rights of newly-freed slaves, had been adopted in the aftermath of the Civil War in 1868.

Thus the main issue raised by Palko’s contention was the applicability of the federal Bill of Rights to the states. A little background is in order here. The issue was raised for the first time before the Supreme Court in the 1833 case of Barron v. Baltimore. In that case, the owner of a wharf beside a creek had his business destroyed by the city of Baltimore’s paving of its streets. Barron claimed that the city should compensate him for his loss because of a provision in the Fifth Amendment which provided that no property should be taken for public use without payment of “just compensation.” The Court ruled unanimously (per Chief Justice Marshall) that the limitations on government in the Bill of Rights restricted the national government only, and were not designed to apply to the states.

There the matter stood until 1897, when the Court decided Chicago, Burlington and Quincy Railroad v. Chicago. In that case, tracks owned by the railroad company had been paved over by the city of Chicago and the company sought compensation for the damage. The Court ruled that
the compensation provision of the Fifth Amendment, though not applicable directly against the
states, was nonetheless an essential component of the due process of law guaranteed by the
Fourteenth Amendment—which does directly limit states. Then in the 1920s and 1930s, several
additional cases were decided by the Supreme Court that held provisions in the Bill of Rights to
be applicable against the states, at least in certain circumstances. These provisions included the
First Amendment’s protections of freedom of speech and freedom of the press, and the Sixth
Amendment’s guarantees of the right to counsel and impartial juries.

As may easily be seen from the foregoing observations, by 1937 the issue of the relation between
the federal Bill of Rights and the states had been thrown into serious confusion. Justice Benjamin
Cardozo, writing for an 8-1 majority in Palko, attempted to resolve the confusion by dividing the
protections afforded by the Bill of Rights into two categories. Acknowledging that some of the
provisions of the Bill of Rights had already been “brought within the Fourteenth Amendment by
a process of absorption,” Cardozo reasoned that this was because some of the provisions in the
Bill of Rights were more fundamental than others. In this category were placed those protections
that must be regarded as “implicit in the concept of ordered liberty,” without which “neither
liberty nor justice would exist.” Included here are, for example, freedom of thought and speech,
which Cardozo and his colleagues regard as “the matrix, the indispensable condition, of nearly
every other form of freedom.” Likewise, the Sixth Amendment right to counsel must be
considered essential to justice in some circumstances, such as when ignorant or illiterate
defendants are refused the aid of counsel in criminal trials.

On the other hand, some provisions in the federal Bill of Rights do not, according to the Palko
Court, rise to the highest level of fundamentality. For example, the Court reasoned that, though
the right to a trial by jury, or to a grand jury indictment, or to immunity from compulsory self-
incrimination “may have value and importance,” they are “not of the very essence of a scheme of
ordered liberty.” They “might be lost, and justice still be done.” Unfortunately for Palko, the
Court ruled that the Fifth Amendment protection against double jeopardy fell into this second,
non-fundamental category, had not been “absorbed” by the Fourteenth Amendment’s due
process clause, and thus did not bind the states.

Also unfortunately, Cardozo’s attempt to rationalize the “absorption” of certain Bill of Rights
provisions into the Fourteenth Amendment did not have the result he had hoped for. It is clear
that his main purpose in the Palko opinion was to set forth a limiting principle that would strike
an acceptable balance between state autonomy and federal standards in cases involving
individual rights. His rationalizing principle was designed to distinguish clearly between rights
so essential to liberty and justice that any legal order without them would be barbaric, and rights
that are considered valuable in our own legal order but would not render us uncivilized if we
didn’t have them. Consider, for example, jury trials, which are widely used in the United States
and other nations influenced by the traditions of English common law, but hardly at all in nations
whose legal traditions are Roman in origin.

Although the principle might have been clear to Justice Cardozo, it never became clear to the
Court, and the Palko opinion ended up generating the doctrine of “selective incorporation,”
according to which the Court—for the next three decades—applied provision after provision in the
federal Bill of Rights against the states through the Fourteenth Amendment’s due process clause
on a case-by-case basis. Palko itself was explicitly overruled in 1969, when, in Benton v. Maryland, the Court held that the double jeopardy provision of the Fifth Amendment was applicable to the states via the Fourteenth Amendment. The Benton decision signaled the triumph of the wholesale intrusion on state authority that Cardozo had tried to prevent.


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References


CRIMINAL LAW

Furman v. Georgia (1972)

Guest Essayist: State Representative David Eastman

Is the Death Penalty Cruel and Unusual Punishment?

_Furman v. Georgia_ was another 5-4 decision by the United States Supreme Court; meaning, that if any one of the nine justices on the Supreme Court had changed their mind, the result would have been very different. The case dealt with three men who had been convicted in either Georgia or Texas. Two of the men were convicted of rape. The third was convicted of murder. All three men were given the death sentence following separate jury trials.

The three men appealed their sentences to the Supreme Court and argued that the death penalty violated the 8th Amendment, which prohibits “cruel and unusual punishments”, and the 14th Amendment, which provides that states may not deprive a person of life “without due process of law” or deny any person “the equal protection of the laws”. Because each of the men
were minorities, and because the cases dealt with similar circumstances, the Supreme Court heard them as one case.

The question the court decided was more specific than simply whether the death penalty was constitutional. As four of the justices pointed out, the Constitution specifically includes the death penalty in the 5th Amendment (referred to in the Constitution as a “capital” crime). Rather, the court sought to answer the question of whether or not the death penalty had been applied fairly in the cases of the three men. In other words, had the three men been discriminated against in a way that a white person convicted of the same crime, and under the same circumstances, would not have been.

In each of the cases, the death penalty had been decided by a jury. The jury was able to impose the death penalty or impose some other penalty such as life in prison. After looking at a large number of cases, the Supreme Court concluded that, statistically, juries were more likely to give the death penalty to certain minorities “whom society is willing to see suffer though it would not countenance general application of the same penalty across the board.”

Because juries had relative freedom on whether to assign the death penalty or not, and because wealthy defendants had access to better legal resources that could influence that freedom and thereby avoid the death penalty, the Court decided that it was unfair to apply the death penalty in these types of cases.

In ruling this type of discrimination to be unconstitutional, the Court relied upon an earlier ruling from 1958, in which it determined that the 8th Amendment to the Constitution “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” This notion allowed some members of the court to argue that the death penalty should be banned permanently, and in all cases.

The four justices who disagreed with the ruling in *Furman v. Georgia* pointed out that, only one year earlier, the Supreme Court had defended the very same power of juries to determine the circumstances in which a death sentence was appropriate. They also argued that, under the Constitution, the legislature was the appropriate branch of government to change the laws based on any “evolving standards of decency”.

A fundamental tenant of the Declaration of Independence is that government derives its just powers from the consent of the governed and that any power the government takes without consent is unjust. The people consent to such changes in law through their elected representatives, which they can remove or replace at the next election. There is no similar way for the people to consent to changes in law that are accomplished by the Supreme Court because justices are not elected, and are appointed to the Supreme Court for life. At least, that was the wisdom of the Founders.

When the Bill of Rights was adopted, the 8th Amendment was written to ensure that it would be illegal for the government to engage in torture. “Cruel and unusual punishment” referred to torture and other punishments which were already illegal at the time. By discovering “evolving standards of decency” within the Constitution, and then periodically updating the Constitution in
keeping with those evolving standards, the Supreme Court was really borrowing power from the legislative branch of government.

In speaking for the four justices who disagreed with *Furman v. Georgia*, Chief Justice Burger explained that if the Supreme Court “were possessed of legislative power” he would personally be in favor of getting rid of the death penalty. But the Constitution gave all legislative power to Congress, therefore the Supreme Court did not have the authority to get rid of it.

Borrowing power from the other branches is a temptation that every branch of government has experienced at one time or another, and the Supreme Court is no exception. Because that temptation will always be present, it is important that each of the branches of government carefully guard the powers that the Constitution has delegated to them, and that the people know the Constitution and are able to quickly identify when one branch begins to encroach on the power of another.

*Furman v. Georgia* (1972) Supreme Court decision: [https://www.law.cornell.edu/supremecourt/text/408/238](https://www.law.cornell.edu/supremecourt/text/408/238)

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CIVIL RIGHTS

**Dred Scott v. Sandford (1857)**

*Guest Essayist: Daniel A. Cotter*

Dred Scott was born into slavery in Virginia around 1799, but was moved to Missouri where he was sold to Dr. John Emerson, an army surgeon. Given Dr. Emerson’s military career, he moved frequently and took Scott with him. Eventually, Dr. Emerson moved with Scott to the State of Illinois and the Territory of Wisconsin, both free territories. While in the Wisconsin Territory, Scott married Harriett Robinson, another slave who was also sold to Dr. Emerson. In 1838, Dr. Emerson married Eliza Irene Sandford from St. Louis. In 1843, Dr. Emerson died shortly after returning to his family from the Seminole War in Florida. His slaves continued to work for Mrs. Emerson and were, as was common at the time, occasionally hired out to others. In 1846, Dred and Harriet Scott each filed suit in St. Louis to obtain their freedom, on the basis that they had lived in a free state and territory, and the rule in Missouri and some other jurisdictions at the time was “once free, always free.” When the suit reached the Supreme Court of the United States, the main issue presented was whether slaves had standing to sue in federal courts.

**Background of the Case**
Numerous precedents in Missouri case law, including *Rachael v. Walker* (1837) established the legal principle of “once free, always free.” The judge declared a mistrial when the case was heard in 1847, and when it was retried in 1850, the St. Louis court ordered Dred Scott free — the Scotts agreed that only Dred’s case would proceed in order to save money and avoid duplicate efforts and all parties agreed that the outcome of Dred’s case would also apply to Harriet. In *Scott v. Emerson* (1852), the Missouri Supreme Court decided against Scott, reversing the lower court decision, and noting that Missouri law would not be subject to outside anti-slavery arguments. By its decision, the Missouri Supreme Court overturned the long-held principle of “once free, always free.” The Missouri Supreme Court explained its decision in stark terms and why it was overruling precedents:

Times are not now as they were when the former decisions on this subject were made. Since then not only individuals but States have been possessed with a dark and fell spirit in relation to slavery, whose gratification is sought in the pursuit of measures, whose inevitable consequences must be the overthrow and destruction of our government.

**The Controversy**

Seeking to have the Supreme Court of the United States opine on the legality of Missouri’s invalidation of the “once free, always free” principle, Scott’s attorneys filed a new suit in federal court, *Dred Scott v. John F. A. Sanford* (Sanford’s name was misspelled due to a clerical error).

The United States District Court for the District of Missouri directed the jury to consider the question of whether Scott was free or a slave based on Missouri law. Based on the *Emerson* decision, the jury found that Scott was a slave.

**The Supreme Court Decision**

Scott appealed to the Supreme Court. Initially, the Supreme Court was inclined to affirm the Missouri Supreme Court decision based on *Strader v. Graham* (1851), a decision of the Supreme Court allowing the Court to affirm a state supreme court decision without hearing it on the merits. However, some of the justices suggested that the Supreme Court address issues that until then remained unresolved, including those that Sanford’s attorneys raised during the federal lawsuit, such as Scott’s ability to sue in federal court and whether a black person could be a citizen of the United States. The main issue before the Supreme Court was whether Scott had ever been free.

Delivered on March 6, 1857, the Court, by a 7-2 decision, held that blacks were not and could not be citizens of the United States and, as a result, Scott lacked standing to sue in federal courts. The Court also found that Scott had never been free, finding that Congress exceeded its authority when it forbade or abolished slavery in the territories, invalidating the Missouri Compromise. Having found a lack of standing, this second issue should not have been addressed by the Court. Chief Justice Roger Taney wrote for the majority:

In discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits and the rights of citizenship as a member of the Union.
It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a State and yet not be entitled to the rights and privileges of a citizen in any other State. For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights. But this character, of course, was confined to the boundaries of the State, and gave him no rights or privileges in other States beyond those secured to him by the laws of nations and the comity of States.


**Conclusion**

The _Dred Scott_ decision is a landmark decision because it answered questions regarding slavery that the Court had not previously addressed. It is also one of the most infamous decisions, furthering the great divide facing the nation regarding the question of slavery and moving the country further down the path toward the Civil War. The _Dred Scott_ decision undermined the prestige of the Supreme Court and legal scholars consider it to be the worst decision ever issued by the Supreme Court. The _Dred Scott_ decision was overturned when the Civil War ended and the Civil War Amendments were ratified.

_Dred Scott v. Sandford_ (1857) Supreme Court decision 7-2: [https://supreme.justia.com/cases/federal/us/60/393/#annotation](https://supreme.justia.com/cases/federal/us/60/393/#annotation)

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_Dred Scott v. Sanford (1857) (Part 2)_

**Guest Essayist: Tony Williams**

**Arrogance & Injustice in the _Dred Scott v. Sandford_ (1857) Case**

In the 1850s, the United States was deeply divided over the issue of slavery and its expansion into the West. The northern and southern sections of the country had been arguing over the expansion of slavery into the western territories for decades. The Missouri Compromise of 1820 had divided the Louisiana Territory at 36°30′ with new states north of the line free states and south of the lines slave states. The territory acquired in the Mexican War of 1846 triggered the sectional debate again. In 1850, Senator Henry Clay of Kentucky engineered the Compromise of 1850 to settle the dispute. But, in 1854, the Kansas-Nebraska Act permitted settlers to decide whether the states would be free or slave according to the principle of “popular sovereignty.” Pro and anti-slavery settlers rushed to Kansas and violence and murder erupted in “Bleeding Kansas.” Meanwhile, southern talk of secession was in the air, and observers warned of civil war.
The United States faced this combustible situation when Chief Justice Roger B. Taney sat down in late February 1857, to write the infamous opinion in the case of *Dred Scott v. Sandford* that would go down as a travesty of constitutional interpretation and one of the greatest injustices laid down by the Supreme Court.

Dred Scott was a slave who had been owned by different masters in the slave states of Virginia and Missouri. Dr. John Emerson was an Army surgeon who was stationed at a fort in the free state of Illinois for three years and brought Scott with him. Emerson then moved to the free Wisconsin Territory. Scott accompanied his owner and even married another slave. Emerson moved back to Missouri and brought his slaves just before he died. Scott sued Emerson’s widow for his freedom because he had lived in Illinois and Wisconsin, where slavery was prohibited.

Southern and Northern state laws and courts had long recognized the “right of transit” for slaveowners to bring their slaves while traveling through free states/territories or remaining for brief stays. However, they also recognized that residence in a free state or territory established freedom for slaves who moved there. In fact, Missouri’s long-standing judicial rule was “once free, always free.” Many former slaves who had returned to Missouri after living in a free state or territory had successfully sued in Missouri courts to establish their freedom. The Dred Scott case made its way through the Missouri and federal courts, and finally reached the Supreme Court.

Taney and the other justices heard oral arguments from the attorneys in February 1856. The justices met in chambers but simply could not come to a consensus. They asked the lawyers to re-argue the case the following December, which delayed the decision until after the contentious presidential election that allowed the Court to maintain the semblance of neutrality. But, Justice Taney sought to remove the issue from the messy arena of democratic politics and settle the sectional dispute over slavery in the Court.

After hearing the case argued for a second time, the justices met in mid-February 1857 to consider the case. They almost agreed to a narrow legal opinion that addressed Dred Scott’s status as a slave in a free state. However, they selected Chief Justice Taney to write a more expansive opinion. He used the opportunity to write an opinion that would avert possible civil war.

On the morning of March 6, Taney read the shocking opinion to the Court for nearly two hours. Taney, speaking for seven members of the Court, declared that all African-Americans—slave or free—were not U.S. citizens at the time of the founding and could not become citizens. He asserted that the founders thought that blacks were an inferior class of humans and “had no rights which the white man was bound to respect,” and no right to sue in federal court. This was not only a misreading of the history of the American founding, but a gross act of injustice toward African Americans. Taney could have stopped there, but he believed this decision could end the sectional conflict over the expansion of slavery. He declared that the Missouri Compromise was unconstitutional because Congress had no power to regulate slavery in the territories despite Article IV, section 3 giving Congress the “power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.” Therefore, slavery could become legal throughout the nation. Finally, Taney pronounced that Dred Scott,
despite his residence in the free state and territory that allowed other slaves to claim their freedom, was still a slave.

The *Dred Scott* decision was not unanimous; Justices Benjamin Curtis and John McLean wrote dissenting opinions. Curtis’s painstakingly detailed research in U.S. history demonstrated that Taney was wrong on several points. First, Curtis convincingly showed that free African-Americans had been citizens and even voters in several states at the time of the founding. Further, Curtis pointed out that by settled practice Congress did indeed have power to legislate regarding slavery. Curtis provided evidence that Congress had legislated with respect to slavery more than a dozen times before the 1820 Missouri Compromise.

The *Dred Scott* decision was supposed to calm sectional tensions in the United States, but it worsened them as northerners expressed great outrage, and southerners doubled down on the Court’s decision that African Americans had no rights and Congress could not regulate slavery’s expansion. Indeed, the Court’s decision greatly exacerbated tensions and contributed directly to events leading to the Civil War. Instead of leaving the issue to the people’s representatives who had successfully negotiated important compromises in Congress to preserve the Union, Taney and other justices arrogantly thought they could settle the issue.

Taney’s understanding of American republican government was that only the white race enjoyed natural rights and consensual self-government. Abraham Lincoln continually attacked the decision in his speeches and debates. He had a different understanding of American principles than Taney. Lincoln stood for a Union rooted upon natural rights for all humans. He did not believe that the country could survive indefinitely “half slave, half free.” He argued that the Declaration of Independence “set up a standard maxim for free society” of self-governing individuals. Lincoln also opposed the *Dred Scott* decision because of its impact on democracy. If the Court’s majority gained the final say on political decisions, Lincoln thought “the people will have ceased to be their own rulers.” Justice Curtis wrote that slavery itself is “contrary to natural right.” Chief Justice Taney’s reasoning in the *Dred Scott* decision sought to justify laws protecting slavery, but the injustice of those laws was evident to his contemporaries.

Dred Scott v. Sanford (1857) Supreme Court decision:  
https://supreme.justia.com/cases/federal/us/60/393/case.html

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**Ex Parte Merryman (1861)**  
**Guest Essayist: Allen Guelzo**

On April 27, 1861, President Abraham Lincoln took one of the most dramatic steps ever taken by an American chief executive, and suspended the privilege of the writ of *habeas corpus*. He did so, under a provision in Article 1, section 9 of the Constitution: *The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public*
Safety may require it. But the rationale for the suspension, as well as the significance of the suspension itself, caused the most profound constitutional conflict in American history.

Habeas corpus means, literally, to “have the body” – it requires government officers to deliver an arrested person to a court of law so that the court may review the justice of that person’s imprisonment. As such, habeas corpus prevents executive or legislative authorities from apprehending and incarcerating individuals merely on political whim, without charges or without judicial hearings. In Anglo-American jurisprudence, habeas corpus was as old (and probably older) than Magna Carta. The great English jurist, Sir William Blackstone, considered habeas corpus as the principal protection any subject enjoyed from “confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten.” The American Founders wrote their provision for habeas corpus directly into the Constitution, and Alexander Hamilton, in The Federalist, lauded “the establishment of the writ of habeas corpus” since “the practice of arbitrary imprisonments, have been, in all ages, the favourite and most formidable instruments of tyranny.” The first legislation adopted by the new federal Congress in 1789 provided that “the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment.”

Nevertheless, habeas corpus has always had its limits. Any third party may petition the courts for a writ, but no court is compelled to issue it. Nor does the issue of a writ necessarily guarantee that the party for whom it is issued will be set free – only that their detention will be reviewed by a court. Moreover, the Constitution describes habeas in the passive – it shall not be suspended, unless – and fails to specify by whom the suspending may be done. The suspension clause had originally been part of Article 3, among the functions of the judiciary, but was moved by the Constitutional Convention’s committee on style to Article 1, as if to emphasize that this was a legislative function (a gesture confirmed by Chief Justice John Marshall, in ex parte Bollman in 1807).

With the outbreak of the American Civil War in April, 1861, habeas corpus at once became an issue, as anti-government mobs in the streets of Baltimore attacked Massachusetts and Pennsylvania militia passing through the city, en route to the defense of Washington, D.C, and sabotaged railroad and telegraph communications. The civil authorities in Baltimore were unable or unwilling to arrest rioters, and it was unclear whether local judges or juries would have convicted them even if arrests had taken place. In order to protect communication between Washington and the rest of the country, President Lincoln announced the suspension of the writ along the corridor from Washington to Philadelphia on April 27th, and authorized the U.S. military to begin arresting rioters and saboteurs.

Among those arrested was a Maryland landowner and militia officer, John Merryman, who was taken from his home in Cockeysville on May 25th and imprisoned at Fort McHenry. The next day, Merryman’s brother-in-law and lawyer travelled to Washington to petition Chief Justice Roger B. Taney for a writ of habeas corpus, which Taney, who was unsympathetic to the Lincoln administration, issued. The military commandant of Baltimore, Maj. Gen. George Cadwalader, was summoned to present Merryman in U.S. district court in Baltimore. On May 27th, however, Cadwalader refused Taney’s summons, citing the president’s suspension of the
writ. Taney then issued a contempt citation on May 28th, which Cadwalader also ignored. Five days later, Taney released a comment on the case, known as *ex parte Merryman*.

The technical status of the comment has always been the first issue in *ex parte Merryman*, since Taney issued it in his co-capacity as a federal circuit judge, but prefaced it as being issued from his U.S. Supreme Court chambers as though it were the product of a full hearing before the Supreme Court. In it, Taney charged that Merryman’s arrest was irregular purely on its face, “upon vague and indefinite charges, without any proof, so far as appears. Under this order his house is entered in the night; he is seized as a prisoner, and conveyed to Fort McHenry, and there kept in close confinement.” But just as serious in Taney’s eyes was Lincoln’s assumption that he, and not Congress alone, had the authority to suspend *habeas corpus*. “Congress is of necessity the judge of whether the public safety does or does not require it; and its judgment is conclusive.” But even if Lincoln had some sort of authority of suspend the writ, it could only be a military authority for a military necessity, and could not extend to civilians like Merryman: “There was no danger of any obstruction or resistance to the action of the civil authorities, and therefore no reason whatever for the interposition of the military.”

Lincoln might have appealed *ex parte Merryman* to the full Supreme Court. Instead, he chose to ignore Taney’s comment as having no legal standing, and only replied to Taney in a message he drafted for Congress when it met in special session on July 4, 1861. Lincoln argued that he was obligated by the presidential oath to see that the laws were faithfully executed. If the only means for doing so was a suspension of the writ and the arrest of Merryman, then he would be culpable for not having taken such a step. “Are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?,” Lincoln asked. “Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?” Besides, the Constitution’s provision for suspension of the writ, even though it occurs in Article 1, does not actually specify who was to do the suspending – merely that rebellion, invasion or endangerment of “the public Safety may require it.” And certainly, Lincoln observed, the situation in April and May of 1861 provided “a case of rebellion” in which “the public safety does require the qualified suspension of the privilege of the writ.” True, he might have turned to Congress first for an authorization; but Congress was not in session, and the “public Safety” had been sufficiently endangered by the Baltimore riots that Congress might easily have been prevented from meeting at all.

Lincoln was seconded in his response to Taney by Attorney General Edward Bates (on July 5th), by Philadelphia jurist Horace Binney in *The Privilege of the Writ of Habeas Corpus under the Constitution* (1862) and by Harvard law professor Joel Parker in *Habeas Corpus and Martial Law: A Review of the Opinion of Chief Justice Taney, in the case of John Merryman* (1862). Congress eventually confirmed Lincoln’s suspension of the writ in the Habeas Corpus Act of March 3, 1863, and Lincoln went on to suspend the writ in several other locales, eventually extending the suspension to the entire country and defending the suspension in his public letter of June 12, 1863, in reply to Erastus Corning. Nevertheless, the suspension of the writ continued to be contested in *ex parte Vallandigham* (1863) and *ex parte Milligan* (1866). Merryman was released to civil jurisdiction on July 13, 1861, and attempted unsuccessfully to sue General Cadwalader for wrongful imprisonment in 1864.

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Chief Justice Roger B. Taney (1777-1864)
Guest Essayist: Daniel A. Cotter

Supreme Court Chief Justice John Marshall, the fourth Chief Justice, served thirty-four-and-a-half years in that role. Roger B. Taney, who succeeded Marshall, served for twenty-eight-and-a-half years, including during almost the entirety of the Civil War. (Marshall and Taney are, respectively, the first- and second- longest serving Chief Justices.)

Early Life and Career

Roger B. Taney was born in Calvert County, Maryland, on March 17, 1777. He was born and raised Catholic by his parents, Michael and Monica. At the time, American Catholics represented a distinct religious minority. Until Taney was fifteen years old, his education consisted of private schools and tutors. At the age of fifteen, he entered Dickinson College, obtaining his B.A. in 1795. Taney chose a career in law and read law at the law office of Jeremiah Townley Chase, a chief justice of the General Court of Maryland. In 1799, Taney was admitted to the bar.

Taney was elected to the Maryland House of Representatives in 1799, and served one term before returning to private practice. He married Francis Scott Key’s sister in 1806 and had a large family of seven children. Considered one of the promising young lawyers in Maryland, Taney fluctuated between governmental service and private practice over the course of his career. He was a Jacksonian Democrat.

After building a very successful law practice, Taney was elected Attorney General of Maryland in 1827. In 1831, he resigned from his state position first to become Secretary of War, then U.S. Attorney General. Taney expressed his anti-abolitionist views in two opinions as U.S. Attorney General. In 1833, Jackson made a recess appointment of Taney to Secretary of the Treasury. However, the Senate formally rejected Taney’s nomination when back in session, at least in part due to the divisive nature of his views on slavery, and Taney returned to private
practice in Maryland. Taney has the distinction of being the first Cabinet nominee to be rejected by the Senate.

Nomination to Supreme Court

A defiant Jackson next nominated Taney in January 1835 for the position of Associate Justice to replace Gabriel Duvall, who was retiring. The Senate rejected the nomination and the position remained open for more than one year. When John Marshall died after a stage coach accident on July 6, 1835, Jackson submitted Taney’s name for Chief Justice on December 28, 1835. Taney was confirmed by the Senate on March 15, 1836, after a long and heated opposition. The fact that Jacksonian Democrats took control of the Senate after the 1834 elections was a key distinction between this final nomination and Taney’s previous nominations for federal office and likely led to his long-awaited successful confirmation. Taney took his seat on March 15, 1836, the same day he was confirmed, and would preside until his death on October 12, 1864.

The Taney Court

The Taney Court issued a series of decisions that substantially narrowed the role of federal government in economic regulation matters. Unlike Marshall, he and other Jackson Supreme Court appointees favored the powers of the states over the powers of the federal government. The Taney Court also issued opinions in a number of noteworthy cases, such as the Charles River Bridge and Amistad cases. However, the Taney Court is remembered primarily for the 1857 decision in Dred Scott v. Sandford, holding by a 7-2 margin that Congress had no authority or power to prevent the spread of slavery into federal territories and that, at the time of the country’s founding, African Americans were not United States citizens nor was such citizenship contemplated. One justice, Benjamin Robbins Curtis, was so upset by the decision that he left the bench.

Conclusion

Roger Taney’s legacy will always be tied to the Dred Scott decision. When the U.S. House of Representatives passed a bill in 1865 to commission funds for a bust of Taney to be placed in the Supreme Court along his predecessors, Senator Charles Sumner argued against it, calling the Dred Scott decision “more thoroughly abominable than anything of the kind in the history of the courts.” Despite his dissent in the Dred Scott decision, however, Justice Curtis referred to Taney as a “man of singular purity of life and character.” Justice Antonin Scalia, in his dissent in Planned Parenthood v. Casey, referring to Taney’s “great Chief Justiceship,” apparently agreed with Curtis.

Taney, the twenty-fourth justice and fifth chief, was the first of thirteen Catholic justices. Currently, five justices are Catholic.

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Roger B. Taney was born and raised on a southern Maryland tobacco plantation. He attended Dickinson College and received a classical education before reading law under Jeremiah Chase, one of three judges on the state’s General Court. He passed the bar exam and married the sister of his close friend, Francis Scott Key. He entered politics and won a seat in the Maryland House as a Federalist. He supported the War of 1812 and broke with the Federalists over their opposition to the war. He adopted Jeffersonian views that would lay the foundation for the rise of the Democratic Party.

Taney disapproved of slavery earlier in his life and worked hard to improve the lot of African Americans. He had been a slave holder who privately manumitted, or voluntarily freed, his slaves and even provided financial support for the elderly slaves. In the state legislature, he supported efforts to protect free blacks against illegal capture and being forced into slavery.

In 1819, the lawyer defended the right of free speech for Jacob Gruber, an abolitionist preacher who attacked slavery. In his summation to the jury in Gruber’s 1819 trial for “inciting slaves to rebellion,” Taney called slavery “a blot on our national character” and thought that “every real lover of freedom confidently hopes that it will...be gradually wiped away.” Taney hoped that with an appeal to the “language of the Declaration of Independence, every friend of humanity will seek to lighten the galling chain of slavery.” He seemed to hold relatively enlightened views about slavery and race, and believed in justice based upon the rule of law and American principles.

In the 1830s, Taney joined the Democratic Party, and, after serving as the Maryland Attorney General, was appointed U.S. Attorney General under President Andrew Jackson. He became an advocate of states’ sovereignty and reversed his earlier stance on the rights of slaves and the immorality of slavery. Attorney General Taney offered the president an opinion on a case dealing with forcing free blacks into slavery in South Carolina. He defended the right of states to enforce their own laws and asserted in an 1832 opinion that, “The African race in the United States even when free are everywhere a degraded class, and exercise no political influence.” He went on, “They were not looked upon as citizens by the contracting parties who formed the Constitution,” and were “not supposed to be included by the term *citizens*.” It was an ominous declaration when Taney replaced the deceased John Marshall as Chief Justice of the Supreme Court in March 1836.

Over the next decade, the furor over slavery dominated national politics, though Taney scrupulously avoided public comment as the impartial Chief Justice. But, on the bench, Taney reversed his earlier moral stance on the evils of slavery and its contradiction with the ideal of the Declaration of Independence. Moreover, he did not just want to leave the issue to the states, as was constitutionally correct, but his vision increasingly became one that excluded African Americans, free or slave, from some share in the American republic.

Taney increasingly sided with southerners and such politicians as Stephen Douglas who adopted a morally relative view of slavery and sought to block congressional authority over slavery in the
territories despite clear constitutional authority and historical precedents such as the Northwest Ordinance, the Missouri Compromise, and the Compromise of 1850. Meanwhile, Taney privately expressed his political opinion that, “The South is doomed, and that nothing but a firm united action, nearly unanimous is every state can check Northern insult and Northern aggression.” He in effect supported a Union in which one race was kept in an inferior position and critics of slavery were effectively silenced. Thus, when the attorneys reargued the Dred Scott case in the Supreme Court chambers in the basement of the U.S. Capitol, Taney listened with these thoughts in mind.

In the Dred Scott v. Sandford (1857) case, Taney wrote the majority opinion, holding that blacks, free or slave, were not considered citizens (despite much evidence to the contrary) at the time of the founding and could never be citizens. In addition, in a sweeping use of judicial fiat, he declared the Missouri Compromise to be unconstitutional. Taney intended for the case to settle the fierce sectionalism that was dividing the Union and pushing it toward secession and Civil War, but the decision only inflamed sectional tensions further.

Taney’s view on slavery and federal power helped shape President Abraham Lincoln’s executive actions on slavery during the Civil War. Most notably, Lincoln crafted the Emancipation Proclamation as a war measure in which he could free the slaves in states then in rebellion against the United States. Lincoln knew that that executive authority would expire at the end of the war and that Taney would reverse much of the freedom that African Americans had won. However, the Thirteenth Amendment forever banned slavery from the United States and made the question academic. To some degree, so did the death of Chief Justice Roger B. Taney in late 1864.

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The Slaughterhouse Cases (1873)
Guest Essayist: Joerg Knipprath

Presiding over a trial in the federal Circuit Court in Corfield v. Coryell (1825) to recover a seized vessel, Supreme Court Justice Bushrod Washington took the occasion to ponder the expansive scope of the Privileges and Immunities Clause of Article IV of the Constitution. Because the clause is to facilitate interstate comity and harmony, it protects citizens traveling from one state to another against having the host state abridge their rights compared to those enjoyed by its own citizens, simply on account of the visitors’ out-of-state status. Not all rights are equally important, so Washington attempted a definition. The rights were those “which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments.”

Years later, in 1866, Congress adopted the Civil Rights Act as part of the Congressional Reconstruction program to protect the “civil [non-political] rights and immunities” of the newly freed slaves in the South against discrimination on the basis of race or prior condition of servitude. The Act protected the rights of all citizens “to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal
property, and to [have] the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments.” The “citizens” in the Civil Rights Act were defined as “all persons born in the United States and not subject to any foreign power, excluding Indians not taxed.”

The law’s sponsor, Senator Lyman Trumbull of Illinois, claimed that Congress could pass the Act through its power under Section 2 of the 13th Amendment to eradicate badges and incidents of slavery. Other members of Congress were unsure and decided that another amendment was needed to “constitutionalize” the Act. That became the task of the Joint Committee on Reconstruction.

The product was the 14th Amendment, whose provisions must be read as incorporating the gist of the Act and, more broadly, other aspects of Congressional Reconstruction. Section 1 of the Amendment directly addressed the substance of the Act, as the Amendment’s sponsors, Representative John Bingham of Ohio and Senator Jacob Howard of Michigan, assured their respective chambers. Sections 2 through 4 reflected broader reconstruction policies, while Section 5 gave Congress power to enforce the Amendment against states for violations. Once the Amendment was approved by the requisite number of states, Congress used its Section 5 power in 1870 to re-adopt the Act, thereby mooting any doubts as to its constitutional basis.

Section 1 of the Amendment first defines citizens as anyone “born or naturalized in the United States and subject to the jurisdiction thereof.” That fixes one’s status both as a citizen of the United States and of the state where one resides. The definition both builds on and rejects Chief Justice Taney’s approach in *Dred Scott v. Sandford*. Taney had found that it was a function of the federal government to define United States citizenship through the power over naturalization. State citizenship was irrelevant to determine national citizenship. In both the Act and the Amendment, Congress embraced Taney’s view.

However, Taney had also written that only the free inhabitants of the states had formed the Constitution and, thus, were U.S. citizens, a status they passed to their descendants. Beyond that, the federal government had failed to accord Blacks (free or slave) that status. The Act and, then, the Amendment negated Taney’s conclusion. The Amendment also distinguishes between national and state citizenship, as Taney had done. However, it rejects Taney’s strict parallelism that the two forms were mutually independent. Instead, it substitutes a concentric definition under which state citizenship is separate, but also derived from, national citizenship. There has been much controversy, especially recently, about “subject to the jurisdiction thereof” as that might apply to people born in the United States to parents who at the time were not legal permanent residents. Again, the Act’s definition (“not subject to any foreign power”) should provide authoritative meaning.

The same section also declares that no state shall “abridge the privileges and immunities of citizens of the United States; nor…deprive any person of life, liberty, or property without due process of law; nor deny to any person…the equal protection of the laws.” The structure clearly reflects the objectives of the Act, and much debate focused on the parallels thereto, especially as to the civil rights, privileges, and immunities people had as “citizens of the United States.” The due process clause addresses the Act’s goal that Blacks should have the same procedural
protections and legal rights in court as Whites, such as to sue and testify. Those rights had been curtailed or denied to free Blacks as well as to slaves, even in Northern states. The equal protection clause manifests the Act’s policy to bring Blacks within the literal protection of a state’s law enforcement structure that some states had withdrawn from them in the face of Klan violence, and to assure that the same criminal punishments applied as for Whites.

As to the scope of “privileges and immunities,” both Representative Bingham and Senator Howard repeatedly insisted that the phrase incorporated all Bill of Rights protections as attributes of national citizenship, even if state constitutions did not provide such protections. This position would overrule the opinion by Chief Justice John Marshall in *Barron v. Baltimore* (1833), which had held that the Bill of Rights only limits the national government. Further, in a potentially massive expansion of protected rights well beyond those specifically mentioned in the text of the Constitution, Howard and others referred approvingly to Justice Washington’s elaboration in *Corfield* as a source. Trumbull had made the same points earlier in the debates over the rights protected under the Act. While the Amendment would recognize these rights as broadly belonging to all American citizens, state citizenship would define their particulars because states would retain their traditional control over the applications of those rights.

After the adoption of the 14th Amendment, it was only a matter of time before the Supreme Court would become involved in its interpretation. One of those early cases arose from a challenge to an 1869 Louisiana law that granted a 25-year monopoly to a company to operate slaughterhouses in and around New Orleans. While the historical corruption of Louisiana politics always arouses suspicion when exclusive franchises are awarded, the law was presented as addressing public health issues that arose with large-scale butchering of animals in growing cities. Independent butchers, who had to use this monopoly’s facility to process the livestock they purchased, claimed that the state violated the right to perform their trade, protected under the 13th and 14th Amendments and the 1866 Act.

The Supreme Court, by 5-4, rejected their claims in the *Slaughterhouse Cases* (1873). Justice Samuel Miller reviewed in detail the history of the amendments that revealed their purpose to be to establish basic protections for the newly freed slaves, not to benefit White tradesmen. He quickly dismissed the 13th Amendment claim, because having to pay the monopoly was not in any way like the legal status of slavery. Nor was it “involuntary servitude.”

Miller then parsed Section 1 of the 14th Amendment and determined that only rights, privileges, and immunities connected to national citizenship are protected. Compared to the broad range of rights under state citizenship, those rights are limited. They include the right to move from one state to another, to have access to federal offices, to have free access to seaports to conduct foreign commerce, and to have the protections of the federal government when in another country. The text of the Constitution provides at least some other such rights, such as the privilege of the writ of habeas corpus. Whatever their scope, those privileges and immunities do not include the right to be free from regulation of one’s trade, a matter traditionally for state law.
The opinion summarily rejected the claim that the substance of the law deprived the butchers of their liberty and property without due process of law. Finally, Miller denied that the law violated the equal protection clause, because history showed that the “existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause ….” Miller’s interpretation reflected the conservative view that the Reconstruction Era Amendments did not nationalize law and did not upset the traditional federalism of a limited constitutional domain for the national government and broad reserved powers for the states.

Two dissents are noteworthy. Justice Stephen Field wrote that only national citizenship matters. The “fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States.” State citizenship is purely ministerial. States may affect the practical exercise of those rights, but cannot control their existence. As to the substantive meaning of those rights, Field adopted Washington’s expansive definition in Corfield as those that “belong to the citizens of all free governments.” Among those “must be placed the right to pursue a lawful employment in a lawful manner.” This interpretation alone was consistent with the language of the 1866 Act and its intimate relation to the adoption of the 14th Amendment. It was also textually consistent as it ascribed the same content to “privileges and immunities” in the 14th Amendment and in the interstate context of Article IV that had been at issue in Corfield.

If Miller’s narrow view of rights of national citizenship were correct, the 14th Amendment would be a “vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage,” Field wrote dismissively. Citing English common law and statutes against monopolies, the decree against monopolies of 1776 by Louis XVI, and the Declaration of Independence, Field exalted the right to pursue one’s happiness by engaging in any established trade or occupation, subject only to restraints that equally affect all others. He quoted approvingly from Adam Smith’s Wealth of Nations, “The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable.” To hinder that was a “plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him.” Most important, this right belonged to everyone, not just the freedmen. As established, Louisiana’s monopoly was not necessary for the public health and was merely a pretense for a grant of an exclusive privilege.

Justice Bradley also dissented. He generally echoed Field, but also proposed another solution: “In my view, a law which prohibits a large class of citizens from adopting a lawful employment…does deprive them of liberty as well as property, without due process of law. Their right of choice is a portion of their liberty; their occupation is their property.” Bradley’s due process rationale turned out to be crucial. Because the Supreme Court held in Paul v. Virginia in 1869 that corporations (or other artificial “persons”) are not “citizens,” they are not protected under the privileges and immunities clauses. The due process clause more broadly protects “persons,” so corporations (and aliens) could use it as a constitutional shield against state laws.

The emerging business interests were looking for constitutional protection against what they viewed as substantively arbitrary and intrusive state legislation. The identification of property
with liberty regarding economic enterprise in the *Slaughterhouse* dissents resonated with the ethos of individualism and the free enterprise orientation of Americans at the time. More specifically, Adam Smith’s “liberty of contract” that Field mentioned became 14th Amendment dogma for a generation with cases such as *Allgeyer v. Louisiana* (1897) and *Lochner v. New York* (1905). The Court did not deny the states’ police power to legislate for the health, safety, morals, and welfare of the people, but it provided the justices with a tool to strike down what they perceived as senseless, often paternalistic, laws that impinged on freedom of choice. At the very least, as Field had implied in his dissent, legislatures had to provide more than a pretext for the law and had to show that the law clearly and narrowly advanced the alleged state interest.

Today, Miller’s narrow definition of the incidents of national citizenship make the privileges and immunities clause of limited constitutional utility. Instead, the Court has used substantive due process to incorporate certain Bill of Rights protections against the states and to protect selected aspects of “privacy” from governmental abridgment. Any restriction on such rights must meet the Court’s “strict scrutiny” that it is the least onerous way to achieve a compelling government interest. The controversies may be modern and the due process doctrine different, but today’s nationalized “rights jurisprudence” traces a direct line back through *Lochner*, the *Slaughterhouse* dissents and the Reconstruction-era debates to Justice Washington and *Corfield*.

The Slaughterhouse Cases (1873) Supreme Court decision: [https://supreme.justia.com/cases/federal/us/83/36/case.html](https://supreme.justia.com/cases/federal/us/83/36/case.html)

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**Justice Stephen J. Field (1816-1899)**

*Guest Essayist: Joerg Knipprath*

It is an understatement to describe Stephen Johnson Field as a giant among Supreme Court justices. He served more than 34 years on the Court, longer than any but Justice William Douglas. He authored 544 opinions, exceeded only by Justice Samuel Miller. He and his fellow justices during the 1880s, including Miller, Joseph Bradley, and John Marshall Harlan composed what, collectively, was likely the most intellectual bench in Supreme Court history.

Field’s heritage and life are exceptional. He was the son of David Dudley Field and Submit Dickinson, both with roots directly traceable to early New England Puritans. Best-known among his eight siblings were David Dudley Field, Jr., a prominent New York attorney who led the...
movement to codify the common law that became the “Field Codes”; Cyrus Field, a businessman who founded the Atlantic Telegraph Company to lay the first transatlantic telegraph cable in 1858; and Henry Martyn Field, a leading Presbyterian minister and author of popular travel books. One of his sisters, Emilia Field Brewer, had a son David, who became a judge for 48 years, 20 of them on the Supreme Court. Eight of those years on the Court, Brewer served with his uncle Stephen.

After practicing law in New York, Field moved to California during the Gold Rush in 1848 to do the same in the mining community, Marysville. Within a decade, in 1857, he was elected to the California Supreme Court. Field served as chief justice from 1859 to 1863, replacing David Terry, who had to leave the state because he killed his former friend, U.S. Senator David Broderick, in a duel. Field also was challenged to a duel (by another judge), but neither combatant fired his gun. There were other physical confrontations. In 1851, at the state Democratic Party convention, Field attempted to throw a man through a window. He only half succeeded before others pulled him away. The man carried ten proxies Field had been given by delegates to vote for his nomination for a state senate seat. The man had sold the proxies to receive a political favor for a partner, and Field lost the nomination by two votes. To deal with potential adversaries, Field wore a specially-made coat with deep pockets to contain two pistols he could fire through those pockets. He also carried a bowie knife. He later recollected wryly, “I found that a knowledge that they were worn generally created a wholesome courtesy of manner and language.”

A pro-Union Democrat, Field was appointed to the U.S. Supreme Court by President Abraham Lincoln in 1863 as a tenth justice. Congress had temporarily increased the number of Supreme Court justices to ten as a result of the 5-4 decision in the Prize Cases. That litigation challenged the constitutionality of Lincoln’s blockade of the Confederate States because there had not been a declaration of war. Though the Court sustained Lincoln’s authority, the closeness of the vote alarmed Congress, especially as one of the Justices in the majority, James Wayne, was a Southerner whose loyalty to the Union war effort was seen as less than solid. As it was likely that the lower federal courts in the North would uphold Lincoln’s actions, even a tie in the Supreme Court would be enough. Lincoln gave Field the nod through the influence primarily of California’s governor Leland Stanford and of Field’s brother David Dudley Field, Jr., who had helped to organize the Republican Party and to secure Lincoln’s nomination in 1860.

Another reason for Field’s appointment was that Lincoln wanted to tie California to the Union. There was the geographical isolation of the state, the relative strength of pro-Confederate sentiment, especially in the southern part, and the need to have someone on the Court with experience to sort out the legal confusion from conflicting land titles exacerbated by the Treaty of Guadalupe Hidalgo that ended the Mexican War and with knowledge of mining law in cases arising out of the Gold Rush. Field had written those mining laws and had experience dealing with the associated legal issues from his roles as attorney, politician, and judge in California.

Field’s main contribution to the jurisprudence of the time was his strong belief in the freedom of contract as property and the right to property as a person’s fundamental liberty. This coincided with the flowering of free enterprise capitalism and the perceived need of the business interests for protection from regulatory laws passed by increasingly assertive state legislatures. At the
same time, Field was suspicious of capitalist interests that sought to harness state legislatures to preserve their position against competition.

There are several opinions that stand out among the many he wrote. In 1867, he wrote for the Court in *Cummings v. Missouri* and *Ex parte Garland*. Both cases involved loyalty oaths, state and federal, respectively, which required persons in certain professions to attest that they had not fought for the Confederacy, been a member of its government, or even expressed sympathy for it. Field held that these oaths, established after the Civil War, were unconstitutional bills of attainder and *ex post facto* laws. More important, he incorporated the principles of the Declaration of Independence into the Constitution when he opined that people have inalienable rights to life, liberty, and the pursuit of happiness, and that “all avocations, all honors, all positions are alike open to everyone” in that pursuit of happiness. This foreshadowed Field’s later views of the fundamental nature of the right to pursue a calling, his inclination to nationalize fundamental rights, and his resort to extraconstitutional sources to define them.

All three of those aspects of Field’s jurisprudence were on display in his dissent, joined by Chief Justice Salmon Chase and Justices Joseph Bradley and Noah Swayne, in the *Slaughterhouse Cases* (1873). Louisiana had granted a monopoly license to a company to establish a slaughterhouse in New Orleans and vicinity that would rent space to butchers. The purpose was to moderate the pollution by animal waste of drinking water taken from the Mississippi River. That pollution was connected to several cholera outbreaks in the city. The butchers challenged the monopoly as violating the 13th and 14th Amendments. They hired as their attorney former Supreme Court Justice John Campbell, who had resigned his seat on the Court to join the Confederacy. Campbell argued that the language of the 14th Amendment was race-neutral, so that it protected not only the newly-freed slaves, but all persons.

The Court, per Justice Samuel Miller, read the 14th Amendment as restricted by its historical context and the debates in Congress. Thus, it applied only to the newly-freed slaves and the rights, privileges, and immunities protected were those of national citizenship. As most rights were fixed by states within the structure of American federalism, such rights attributable to national citizenship were narrowly defined. The butchers were not freedmen, and their right to pursue their calling was not a right of national citizenship.

Field’s dissent agreed with Campbell. The 14th Amendment was not textually limited to race. As to the protected rights, Miller’s restrictive view was not supported by the Congressional debates and would make the amendment a “vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage.” Instead, the amendment protected fundamental rights that belong to each “as a free man and a free citizen” and “do not derive their existence from [a state’s] legislation and cannot be destroyed by [a state’s] power.” Referring once more to the language of the Declaration of Independence, he claimed that the 14th Amendment “was intended to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator, which the law does not confer, but only recognizes.” To pursue a calling, free from restriction by monopoly, was such a right. Field quoted approvingly from Adam Smith’s *Wealth of Nations*, “The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable.” Louisiana’s law was a “plain violation of this most sacred property. It is a manifest
encroachment upon the just liberty both of the workman and of those who might be disposed to employ him.”

Miller was concerned that Field’s view of the amendment would “fetter and degrade the State governments by subjecting them to the control of Congress.” Further, it would “constitute this court a perpetual censor upon all legislation of the States.” As a Democrat, Field opposed Congressional Reconstruction, so he supported Miller’s pro-federalism stance to limit Congress’s powers. However, he saw no problem in Miller’s second objection.

Field’s judicial nationalism that the 14th Amendment protected the right to pursue a calling and the liberty of contract more generally, and that the courts were the proper forum to protect those rights against state legislatures eventually gained a majority on the Court in *Allgeyer v. Louisiana* (1897) and *Lochner v. New York* (1905). In *Allgeyer*, Field lived to see his arguments vindicated, albeit under the due process clause, one month before he sent his letter of resignation to President William McKinley.

Another major area of controversy, politically and constitutionally, was Chinese immigration. At the national level, this involved the scope of Congress’s power to control immigration and the degree of deference Congress was owed by the Court. At the state level, discriminatory laws, particularly from California—and even more specifically, San Francisco—required the Court to apply the 14th Amendment outside its original protection of Blacks. On both levels, Field trod a meandering path, sometimes holding for the Chinese, but then veering in the other direction. This gave him little credit from either side on these issues, but roused such hostility to him that it eventually doomed his aspirations to the Presidency.

Congress suspended Chinese immigration for ten years in 1882, and, in 1888, passed a law refusing re-entry to Chinese workers who had left the country even if they had an identity card entitling them to re-enter. The second law violated a treaty between China and the United States. A Chinese citizen was denied re-entry to the United States despite having the requisite card. He argued that the 1888 law violated the treaty and his vested right to return.

In the *Chinese Exclusion Case (Chae Chan Ping v. U.S.)* (1889), Field, writing for a unanimous Court, rejected the claims. The opinion broadly upheld Congress’s power and the right of a nation to control entry by aliens. Whether or not a treaty was properly disregarded was a political question not for the courts. Moreover, the Court could look only at the statute itself:

> “This Court is not a censor of the morals of other departments of the government; it is not invested with any authority to pass judgment upon the motives of their conduct. When once it is established that Congress possesses the power to pass an act, our province ends with its construction and its application to cases as they are presented for determination.”

Looking at American practice and that of foreign nations against Americans, Field wrote,

> “Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens, it would be to that extent subject to the control of another power.”

In language that would make current cosmopolitans recoil in horror, Field declared,
“To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us….If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects….Its determination is conclusive upon the judiciary.”

A significant constitutional case that involved Field, but one where he recused himself, was In re Neagle (1890). The case arose out of the climax to a long-running plot straight out of Hollywood. One cannot do the matter justice in an essay, and it is presented in great detail in the late Professor Carl Brent Swisher’s definitive biography of Field. The case involved feuding judges, a wealthy “Silver Senator” from Nevada, an attractive young woman of “free manners,” intimate assignations, a disputed marriage contract, a large financial estate, acts of intrigue and violence, and, finally, a purported attempt to assassinate Field—not the first, it should be said.

As word got out about the potential plot, President Benjamin Harrison, acting on the request of the Attorney General and the U.S. Attorney in San Francisco, appointed Marshal David Neagle as Field’s bodyguard. There was no clearly applicable federal law, so that the President acted on his inherent constitutional powers. When California wanted to prosecute Neagle for murder in killing Field’s alleged assailant, former California Supreme Court justice David Terry, Neagle’s defense hinged on the President’s authority to appoint him. To no one’s surprise, the Court upheld the President’s power to protect the “peace of the United States” under his constitutional duty to take care that the laws be faithfully executed. What is mildly surprising is that two justices dissented because no statute of Congress permitted the appointment.

Field has been described as stubborn and vindictive, as well as brilliant and ambitious. Examples and stories to support those opinions are too numerous to relate. A couple will give the sense in addition to those already discussed. Field always had political ambitions, from his first election as mayor of Marysville, shortly after his arrival in California, to his brief stint in the state assembly, to his unsuccessful campaigns for the California state senate and for the United States Senate. In 1880, he became a candidate for the Democratic nomination for President. However, at the party convention, his best showing was 65.5 votes out of 728, with only 6 out of 12 from California. Indeed, the state convention had pointedly refused to endorse him due to the unpopularity of his votes in cases where he had held in favor of the Chinese and in the state party’s view of him as a “railroad” or “corporation” judge. His biographer, Professor Swisher, attributes Field’s loss to the justice’s overdeveloped self-confidence and his failure to recognize that he was not a “man of the people.” Field’s time on the Court made him ideologically rigid rather than politically flexible, and with a tendency to register forcefully his dissents, rather than adapt to majority consensus. In 1884, the state’s Democratic convention voted overwhelmingly to oppose his candidacy for the nomination, should he seek it. He refrained.
In early December, 1869, a delegation of justices, including Field, had been sent to the aging Justice Robert Grier, whose mental acuity was declining, to persuade him to resign. Grier resigned, effective two months later. Many years thereafter, in 1895, as Field’s mental faculties became feeble, the justices sought to persuade him to resign. Field, however, had set it in his mind to serve longer than any previous justice. The Court delegated the task to Justice Harlan, the senior associate justice after Field. Harlan approached Field in the justices’ robing room, where Field was sitting, apparently oblivious to his surroundings. Harlan gradually awakened him and asked if he did not remember that day when he had been sent to persuade Grier to resign and what had been said to Grier. Field became suddenly alert, and, with eyes blazing, shouted, “Yes! And a dirtier day’s work I never did in my life!” He then closed his eyes, again at rest. That was, as later told by Harlan to Justice Charles Evans Hughes, the end of the effort to get Field to resign. Field stayed on the Court two more years and met his longevity target.

An expert on constitutional law, and member of the Southwestern Law School faculty, Professor Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums, and serves as a Constituting America Fellow. Read more from Professor Knipprath at: http://www.tokenconservative.com/.

Civil Rights Cases (1883)
Guest Essayist: Gennie Westbrook

The Thirteenth Amendment to the U.S. Constitution, ratified in 1865, outlawed slavery throughout the United States. The Fourteenth Amendment, ratified in 1868, defined citizenship and prohibited the states from violating equal protection and due process of law for all persons. During Reconstruction following the Civil War, states of the former Confederate States of America were required to ratify these amendments before readmission to the Union, and as long as Union troops occupied the defeated South, the rights of African Americans were somewhat protected. Once Reconstruction formally drew to a close in 1876, however, freedmen and their descendents lost these constitutional legal protections and were unable to put into effect their rights to life, liberty, and property.

Though specific restrictions varied from state to state and even from community to community, a patchwork system based on Black Codes imposed racial segregation across the South in the years immediately following the Civil War. In the North, African Americans suffered from an informal system of de facto segregation. Economic opportunities for African Americans were extremely limited throughout the country. In the South the crop lien system and sharecropping kept both freedmen and poor whites in a persistent state of indebtedness, and in the North racist hiring practices often permitted African Americans only the most menial jobs. Injustice against blacks was widespread because of the persistent attitude of white supremacy among many whites. The New York Herald expressed the prevailing assumption: “The white man—the man of the
superior race—will always have the ascendancy.” Lincoln’s former Secretary of the Navy, Gideon Welles, wrote in 1871, “Thank God slavery is abolished, but the Negro is not, and never can be, the equal of the White. He is of an inferior race and must always remain so.”

Against this background of injustice, the U.S. Congress had enacted its first civil rights law, the Civil Rights Act of 1866. It guaranteed citizenship and the same rights enjoyed by white citizens to all males “without distinction of race or color, or previous condition of slavery or involuntary servitude.” President Andrew Johnson vetoed the law, and Congress overrode the president’s veto. This 1866 law became the precursor to the Enforcement Act of 1870 and, later, the modern United States Code Sections 1981 and 1982.

The Civil Rights Act of 1875 went a step further than the 1866 law, outlawing racial discrimination in most public places. It stated “All persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances [transportation] on land or water, theaters, and other places of public amusement . . . and applicable alike to citizens of every race and color.” A regulation of private conduct, it prohibited all persons from denying on the basis of race any person’s equal access to such facilities.

In five cases that originated in Kansas, California, Missouri, New York, and Tennessee, African Americans sued businesses that either denied them service outright or allowed access only to segregated facilities. They argued that the discrimination they faced in hotels, theatres, and railroad accommodations violated the 1875 law. The business owners argued that the Civil Rights Act of 1875 was an unconstitutional infringement on their property rights to run their businesses as they wished. The Supreme Court combined the similar cases in order to consider the constitutionality of the 1875 law.

In an 8-1 decision, the Court’s majority ruled that the 1875 law was unconstitutional. Justice Joseph P. Bradley wrote for the majority, implementing a narrow interpretation of the Thirteenth and Fourteenth Amendments. Bradley explained that racial segregation in hotels, railroad cars, and theaters—the kinds of public places that would later be called “public accommodations”—was an example of private discrimination. The Fourteenth Amendment only prohibited state abridgement of individual rights, the Court held, not abridgement by private individuals. The 1875 law was not authorized by the Fourteenth Amendment because it regulated private behavior.

Turning his attention to the Thirteenth Amendment, Justice Bradley wrote that it outlawed slavery itself, and segregated or “whites only” facilities were not “badges or incidents of slavery.”

It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to guests he will entertain, or as to the people he will take into his coach or cab or car; or admit to his concert or theater, or deal with in other matters of intercourse or business…When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and
when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men’s rights are protected...Mere discriminations on account of race or color were not regarded as badges of slavery...

Justice John Marshall Harlan of Kentucky, who had briefly been a slaveholder, wrote the lone dissent, arguing against the majority’s narrow interpretation of the Thirteenth and Fourteenth Amendments. He noted that the entire purpose of the Civil War Amendments was to empower Congress to legislate to prevent racial discrimination. Otherwise,

that race is left, in respect of the civil rights under discussion, practically at the mercy of corporations and individuals wielding power under public authority…

What I affirm is that no state, nor the officers of any state, nor any corporation or individual wielding power under state authority for the public benefit or the public convenience, can, consistently either with the freedom established by the fundamental law, or with that equality of civil rights which now belongs to every citizen, discriminate against freemen or citizens, in their civil rights, because of their race, or because they once labored under disabilities imposed upon them as a race. The rights which congress, by the act of 1875, endeavored to secure and protect are legal, not social, rights…

The Supreme Court declined to further the constitutional principle of equality. Soon, southern legislatures enacted Jim Crow segregation laws, codifying white supremacy and discrimination. When those laws were challenged, the Supreme Court officially endorsed segregation and gave its stamp of approval to a doctrine of “separate but equal” in Plessy v. Ferguson (1896). In that case, Justice Harlan once again wrote a powerful dissent. Not until the Civil Rights Movement of the 1950s and 1960s would the Supreme Court counteract these unjust precedents and begin to support the constitutional principle of equality in the United States in cases such as Brown v. Board of Education (1954), and Jones v. Alfred H. Mayer Co. (1968).

Civil Rights Cases (1883) Supreme Court

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Plessy v. Ferguson (1896)
Guest Essayist: Daniel A. Cotter

In 1890, Louisiana passed the Separate Car Act which required railroads to provide separate accommodations, including separate cars, for blacks and whites. A group of Creoles and blacks in New Orleans formed a committee, the Citizens’ Committee to Test the Constitutionality of the Separate Car Law, to challenge this law. Homer Plessy, whose light-colored skin made him appear to be white but was classified as “colored” under Louisiana law because he was one-eighth black, agreed to bring a test case on behalf of the Committee. He bought a first class ticket and boarded a train in New Orleans in a “whites only” car. Plessy was arrested by a detective who had been hired by the Committee to ensure that Plessy would be charged with violating the Separate Car Act. The Louisiana court found Plessy guilty of violating that Act and Plessy sought Supreme Court review of that ruling. The Supreme Court heard the case, with the main issues being whether the Separate Car Act violated the Thirteenth and Fourteenth Amendments to the Constitution and whether the Separate Car Act labeled blacks with a badge of inferiority.

Background of the Case

The Separate Car Act was an example of the Jim Crow laws passed in the post-Civil War South. Because the Louisiana Supreme Court had previously ruled that the Separate Car Act was not implicated by interstate commerce, Plessy bought a ticket for a train trip solely within Louisiana. Plessy was arrested, and the judge in Plessy’s case held that Louisiana had the power and authority to regulate railroads while they operated within the state. The Louisiana Supreme Court upheld Plessy’s conviction and sentence to pay $25, holding that the Thirteenth and Fourteenth Amendment did not apply.

The Controversy and the Supreme Court Decision

Plessy appealed to the Supreme Court, arguing that his rights under the Thirteenth and Fourteenth Amendments were violated. The Supreme Court, by a 7-1 decision, rejected Plessy’s arguments and instead held that the Thirteenth Amendment applied only to actions seeking to reintroduce slavery and was not intended to apply to other distinctions based on color. Justice Henry Billings Brown wrote for the majority:

This amendment was said in the Slaughterhouse Cases, 16 Wall. 36, to have been intended primarily to abolish slavery as it had been previously known in this country, and that it equally forbade Mexican peonage or the Chinese coolie trade when they amounted to slavery or involuntary servitude, and that the use of the word “servitude” was intended to prohibit the use of all forms of involuntary slavery, of whatever class or name. It was intimated…that this amendment was regarded by the statesmen of that day as insufficient to protect the colored race from certain laws which had been enacted in the Southern States, imposing upon the colored race onerous disabilities and burdens and curtailing
their rights in the pursuit of life, liberty and property to such an extent that their freedom was of little value; and that the Fourteenth Amendment was devised to meet this exigency.


Justice Brown then turned to the Fourteenth Amendment question, again rejecting Plessy’s argument. Brown noted that the Fourteenth Amendment was intended to ensure that the equality of the two races was enforced “before the law,” stating:

[I]t was said generally that its main purpose was to establish the citizenship of the negro, to give definitions of citizenship of the United States and of the States, and to protect from the hostile legislation of the States the privileges and immunities of citizens of the United States, as distinguished from those of citizens of the States.

The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.

*Plessy*, 163 U.S. 537 at 543-44.

Brown found that lawful separation of the races did not equate with finding one race inferior:

We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other’s merits, and a voluntary consent of individuals.

*Plessy*, 163 U.S. 537 at 551.
Justice Brown relied on prior rulings supporting school segregation and compared the segregation required under the Separate Car Act to school segregation, and supported segregation in both instances. The Supreme Court’s decision in Plessy did not engender much criticism at the time it was issued. The Court in Plessy applied the same rationale to the Thirteenth and Fourteenth Amendments as it had in other settings involving blacks. Only Justice John Marshall Harlan dissented and argued that the “separate but equal” mandate was a violation of the Thirteenth and Fourteenth Amendments. Harlan asserted the Thirteenth Amendment was intended to apply to all “badges of slavery or servitude” and that the “Constitution is color-blind, and neither knows nor tolerates classes among citizens,” concluding:

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case.

Conclusion

The Plessy decision is a landmark decision that upheld the “separate but equal” doctrine, which would remain the law of the land for almost sixty years until 1954, when the Supreme Court issued its unanimous decision in Brown v. Board of Education. Harlan, the lone dissenter, was ultimately proved correct.

Plessy v. Ferguson (1896) Supreme Court decision 7-1: (with Justice Brewer not participating) https://supreme.justia.com/cases/federal/us/163/537/#annotation

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Justice John Marshall Harlan (1833-1911)
Guest Essayist: Daniel A. Cotter

John Marshall Harlan: The Great Dissenter

John Marshall Harlan served more than thirty-three years on the Supreme Court, the sixth longest term in the Court’s history. During his long tenure, Harlan became known as “The Great Dissenter,” signing more than 300 dissenting opinions from 1877-1911. Harlan’s grandson, John Marshall Harlan II, would later also serve on the Supreme Court.

Early Life and Career

Harlan was born at Harlan’s Station, near Danville, Kentucky, to Elizabeth (nee Davenport) and James Harlan. Harlan’s family was a prominent slave-owning family. Harlan’s father had served as a United States Representative from Kentucky and also in various political roles at the state level. Harlan attended Centre College, graduating with honors in 1850. Harlan’s dad wanted his son to follow in his footsteps as a lawyer, but rather than working directly as an
apprentice at his dad’s practice, Harlan first attended Transylvania University before finishing his legal studies at his dad’s firm.

Harlan served as state adjutant general for eight years, from 1851 to 1859, when he resigned after being elected as county judge for Franklin County, Kentucky. After Abraham Lincoln became president in 1860, Harlan advocated for Kentucky to remain in the Union. In 1861, he formed and led a Union infantry regiment, the 10th Kentucky infantry, withdrawing and returning home in 1863 when his father died.

Upon his return, Harlan successfully ran for the position of Attorney General of Kentucky, where he served the next four years. In 1867, Harlan moved to Louisville, where he formed a law firm partnership. In addition, politics took up much of Harlan’s time, and in both 1871 and 1875, he unsuccessfully ran for governor.

Harlan’s positions on slavery evolved during his career. He was against secession, but also supported slavery and opposed the Emancipation Proclamation and the Thirteenth Amendment, the latter on the grounds it infringed on state sovereignty.

**Supreme Court**

President Ulysses S. Grant nominated Harlan to the Court on October 16, 1877, to fill the vacancy created by Justice David Davis’ resignation to become a United States Senator. On November 29, 1877, the Senate unanimously confirmed Harlan, and he took his seat the same day as the 44th Justice of the U.S. Supreme Court and second from Kentucky.

Harlan sat on the Court until his death on October 14, 1911. During his time on the Court, Harlan was a prolific writer, penning more than 1,100 decisions in his almost 34 years. Harlan often was alone in dissent. For example, in the landmark decision, *Plessy v. Ferguson* (1896), only Justice Harlan dissented and argued that the “separate but equal” mandate was a violation of the Thirteenth and Fourteenth Amendments. Harlan asserted the Thirteenth Amendment was intended to apply to all “badges of slavery or servitude” and that the “Constitution is color-blind, and neither knows nor tolerates classes among citizens,” concluding:

> In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case.

In an earlier case reviewing the Civil Rights Act of 1875, Harlan was also the lone dissenter. In the *Civil Rights Cases* (1883), the Court held that the Civil Rights Act was unconstitutional because Congress had no authority under the Fourteenth Amendment to regulate private conduct and the Thirteenth Amendment abolished only slavery. In his powerful dissent, Harlan concluded:

> My brethren say that when a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men’s rights are protected. It is, I submit, scarcely just to say that the colored race has been the special favorite of the laws. What
the nation, through congress, has sought to accomplish in reference to that race is, what had already been done in every state in the Union for the white race, to secure and protect rights belonging to them as freemen and citizens; nothing more. The one underlying purpose of congressional legislation has been to enable the black race to take the rank of mere citizens. The difficulty has been to compel a recognition of their legal right to take that rank, and to secure the enjoyment of privileges belonging, under the law, to them as a component part of the people for whose welfare and happiness government is ordained. At every step in this direction the nation has been confronted with class tyranny, which a contemporary English historian says is, of all tyrannies, the most intolerable, ‘for it is ubiquitous in its operation, and weighs, perhaps, most heavily on those whose obscurity or distance would withdraw them from the notice of a single despot.’ To-day it is the colored race which is denied, by corporations and individuals wielding public authority, rights fundamental in their freedom and citizenship. At some future time it may be some other race that will fall under the ban. If the constitutional amendments be enforced, according to the intent with which, as I conceive, they were adopted, there cannot be, in this republic, any class of human beings in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant. The supreme law of the land has decreed that no authority shall be exercised in this country upon the basis of discrimination, in respect of civil rights, against freemen and citizens because of their race, color, or previous condition of servitude. To that decree—for the due enforcement of which, by appropriate legislation, congress has been invested with express power—every one must bow, whatev- ever may have been, or whatever now are, his individual views as to the wisdom or policy, either of the recent changes in the fundamental law, or of the legislation which has been enacted to give them effect.


Harlan also dissented in other types of cases, including a famous dissent in *Pollock v. Farmers’ Loan and Trust Co.* (1895), in which the majority found unapportioned federal taxes unconstitutional.

**Conclusion**

According to [www.historynet.com](http://www.historynet.com), John Marshall Harlan is one of the nine greatest justices who have served on the Supreme Court; the site groups Harlan with Justices Hugo Black and Joseph Story as the “Three Towering Visionaries.” His pointed and passionate dissents in the areas of the Fourteenth Amendment and in separate not being equal eventually became the majority view. His most famous dissent was in *Plessy*, which would remain the law of the land for almost sixty years until 1954, when the Supreme Court issued its unanimous decision in *Brown v. Board of Education*. Harlan, the lone dissenter, was ultimately vindicated.

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The Insular Cases (1901)
Guest Essayist: Joerg Knipprath

A large mural in the Capitol Building in Washington is titled “Westward the Course of Empire Takes Its Way.” It was painted by Emanuel Leutze in 1861 as a representation of Manifest Destiny, the optimistic world view of 19th century Americans that the country inevitably would be settled from the Atlantic Ocean to the Pacific. Manifest destiny was not a strategy or even a policy, but a slogan that represented an aspiration. It was the emergence of an American Empire. It might be a republic in form, but it would be an empire in expanse, wealth, and glory. The term was frequently used even by good American republicans, such as Thomas Jefferson, James Madison and John Marshall, when discussing their political philosophy.

Among the political elite not all shared the vision of a march across the continent. Jefferson may have justified his purchase of Louisiana territory by satisfying himself that enough land was acquired to realize for the next two centuries his ideal of a large agrarian republic. But their enthusiasm for continental expansion flagged as sectionalism and slavery came to dominate national debate. The Whigs opposed the annexation of Texas, and the Mexican War. They wrapped themselves in the mantle of virtuous republicanism by characterizing the latter as a war of conquest and the imposition of American rule against the consent of the governed in the occupied territory. In reality, their opposition to Manifest Destiny was more basic. The Whigs’ political center was in the North. The territory at issue in the 1840s was mostly in the South, increasing the likelihood that future slave states would be carved out of it and give the “peculiar institution” an extended lease on life.

In 1893, Frederick Jackson Turner proposed his influential theory that the movement of the American frontier shaped the American character and political structure. That movement across the continent ended in 1890. Soon the issue became whether expansion would continue beyond the Golden Gate, and how that would affect national character and political structure. The national debate erupted with the proposed annexation of Hawaii in the early 1890s that was rejected by President Cleveland. The matter came to a head with the Spanish-American War.

It was a very popular war. To some, it represented a catharsis of the emotional wounds lingering from the Civil War, as men from North and South fought together. To others, it represented the idea, traceable to Thomas Jefferson, that the United States had a duty to spread liberty across the continent and abroad. Still others viewed the war more broadly as a duty to bring progress and civilization to backwards races. Rudyard Kipling’s poem, “The White Man’s Burden,” was his somber perspective of the Spanish-American War.

Opponents’ arguments were generally of two sorts. One group opined that, whatever the merits of the earlier continental expansion, that destiny had been achieved. The new variety was colonialism, pure and simple, and not befitting a republic. The arguments made by the Whigs against the Mexican War a half-century earlier were resuscitated: Republics do not conquer other lands and do not impose a government without consent of the governed. Though those assertions do not bear the weight of history, they appealed to American idealism and republican virtue.
The other group emphasized the folly of nation-building and trying to graft Western values and American republicanism onto alien cultures who neither wanted them nor were sufficiently advanced to make them work. Both groups could take their cue from John C. Calhoun, who, in 1848, had orated against the fanciful proposal to annex all of Mexico, “We make a great mistake in supposing that all people are capable of self-government. Acting under that impression, many are anxious to force free Governments on all the people of this continent, and over the world, if they had the power. It has been lately urged in a very respectable quarter, that it is the mission of this country to spread civil and religious liberty over all the globe, and especially over this continent — even by force, if necessary. It is a sad delusion. None but a people advanced to a high state of moral and intellectual excellence are capable in a civilized condition, of forming and maintaining free Governments ….” Calhoun’s argument in part was racial, not just cultural, and the anti-imperialists in 1898 echoed those views. At least as a warning against excessive idealism and expeditionary zeal, those views still have currency.

The war was a smashing military success, and the question became what to do with the peace. The anti-imperialists now argued that, with the United States having taken control of these new territories, the Constitution applied, *ex proprio vigore.* “The Constitution follows the flag,” became the slogan. Neither President William McKinley, who had been a reluctant warrior, nor Congress had a clear political policy. As it turned out, the Constitution provided no clear principle. The eventual settlement was neither unabashedly imperialist nor the opposite.

In a series of cases called the *Insular Cases,* the Supreme Court over two decades attempted to hammer out the constitutional ramifications of the United States’ limited foray into colonialism. The first of these was *Neely v. Henkel* (1901), in which the Court unanimously agreed that the Constitution did not apply in Cuba because the declaration of war against Spain promised independence to the people as soon as American forces had pacified the island, a promise kept in 1902. Thus, effectively, Cuba was already a foreign country not under the umbrella of the Constitution. The Philippine people were also promised independence, a process that took several decades, due to military exigencies. Thus, the Constitution did not apply there, at least not *tout court,* as the Court affirmed beginning in *Dorr v. U.S.* (1904).

More muddled was the status of Puerto Rico, where social, political, and economic conditions did not promise an easy path. There was no promise of independence. Rather, the peace treaty expressly stated that Congress would determine the political status of the inhabitants. In 1900, Congress passed the Foraker Act, which set up a civil government patterned on the old British imperial system with which Americans were familiar. The locals could elect an assembly, but the President would appoint a governor and executive council. The Act also imposed duties on the export of oranges and sugar from the island to protect American growers.

Alexis de Tocqueville wrote, “There is hardly a political question in the United States which does not sooner or later turn into a judicial one.” As a corollary, matters of profound constitutional importance may arise out of mundane disputes. The constitutional status of Puerto Rico was litigated at length and with great divergence of opinion in *Downes v. Bidwell* in 1901. Downes imported oranges and was charged by the customs inspector in New York, Bidwell, with the import duty under the Foraker Act. Downes sued to recover the duty. He claimed that the statute was unconstitutional because Article I, Section 8, of the Constitution requires that all
duties must be uniform throughout the United States and, further, because Article I, Section 9, provides that vessels bound from one state shall not be required to pay duties in another. Bidwell responded that Puerto Rico was not a state and was not part of the United States. The Supreme Court, by 5-4, rejected Downes’s argument and upheld the duty. The opinion was written by Justice Henry Brown. However, the concurring opinion by Justice Edward White for himself and, effectively, three others, eventually became controlling law. Chief Justice Melville Fuller, joined by three others, dissented. Justice John Marshall Harlan also wrote a separate dissent.

All opinions went through lengthy discussions of constitutional text, history, and precedent. The crux of the issue ultimately was the meaning of the term “United States.” In their respective opinions, Brown and White agreed that the Constitution was formed by the people in the states. Beyond that, Brown asserted that Congress has plenary power in Article IV, Section 3, of the Constitution to admit new states and to make rules for territories belonging to the United States. Those territories belong to the United States but are not of the United States. Historical practice going back to the re-enacted Northwest Ordinance of 1787 showed that Congress legislated the nature and scope of rights of the territory’s inhabitants. As a general rule, then, the Constitution would not apply to territories, except to the extent that Congress specified through an organic act that established territorial governance.

Congress’s power was not completely boundless. Brown acknowledged certain “natural rights” in the Constitution that Congress could not violate. Among those were rights to personal liberty, property, free exercise of religion, and freedom of speech. Those rights were protected because they are universal to all humans, not because they happened to be listed in the Constitution. Here, the peace treaty with Spain had promised to protect religious freedom, but, even if it had not, the inhabitants’ natural right to its exercise would still have protected them. The right not to pay an import duty was not such a right.

Justice White disagreed with Brown as to what constituted the “United States.” The term included the states, to be sure, but also those “incorporated” territories that Congress set on a path to eventual statehood. Thus, the Old Northwest had been territory incorporated within the United States by the Treaty of Paris, which ended the Revolutionary War. This process of incorporation occurred during every expansion of the United States to the Pacific.

Congress, according to White, had absolute discretion to decide whether, and under what conditions, territory became incorporated. Mere acquisition, even by treaty, did not automatically make the territory part of the Union. However, if a treaty stipulated favorable conditions to incorporate the territory, and Congress did not repudiate those conditions, incorporation became effective. Until then, aside from certain “natural rights,” the inhabitants enjoyed only those rights that Congress chose to recognize. Once incorporation was done, however, the Constitution applied fully to those inhabitants except to the degree that document specifically excluded them. An example of the last would be that only states are represented in the Senate.

To retain flexibility for Congress as well as future courts for what was so fundamentally a political decision, White left ambiguous the specifics of how incorporation occurred. There might be specific language that showed Congress’s intent. Beyond that, the intent might be divined by considering contiguousness of the acquired territory to existing states, distance from
the United States, and differences of race, culture, religion, and language. With Puerto Rico, unlike Louisiana, there was specific treaty language that left the future status open. Further, the various factors such as culture and language also weighed against incorporation. Therefore, the Constitution did not apply, as such, and the duty on imports from Puerto Rico was upheld.

The dissents of Chief Justice Fuller and Justice Harlan rejected the idea that Congress could decide whether or not the Constitution applied. Congress itself was a creature, not a creator. Thus, everything Congress did was controlled by the Constitution, including its power to make rules for territories. Harlan objected to the creation of official second-class status for the territories and their inhabitants. He protested that the idea that Congress could govern territories anywhere in the world as mere colonies was “wholly inconsistent with the spirit and genius as well as with the words of the Constitution.”

The Court’s or, more specifically, Justice White’s “incorporation” theory soon became majority doctrine, in part because White became Chief Justice in 1910. In *Dorr v. U.S.* (1904), *Dowdell v. U.S.* (1911), and–unanimously–*Board of Public Utility Commissioners v. Ynchausti & Co.* (1920), the Court declared that the Philippines were not incorporated territory, so none other than the Constitution’s basic natural rights protections such as against cruel and unusual punishment applied.

The *Insular Cases* remain important. In 2008, in *Boumediene v. Bush*, Justice Anthony Kennedy applied them to buttress his conclusion that unlawful enemy combatants held at Guantanamo Naval Base were protected under the Constitution. The United States had practical sovereignty due to a treaty, though formal sovereignty remained with Cuba. Kennedy did not claim that Guantanamo was “incorporated” into the United States, but founded his opinion on the historic use of the writ to protect fundamental personal liberty. He left open which, if any, constitutional rights the detainees could claim. His analysis is best understood as a version of the “natural rights” exception the *Downes* majority accepted.

The *Insular Cases* removed constitutional challenges to popular political initiatives of overseas expansion ratified by the election of 1900. The popular American humorist Finley Peter Dunne’s fictional Irish bartender, Mr. Dooley, explained it well, “No matter whether th’ constitution follows th’ flag or not, th’ Supreme Coort follows th’ election returns.”

The *Insular Cases* (1901) Supreme Court decision with a focus on *Downes v. Bidwell* (1901), for example: [https://supreme.justia.com/cases/federal/us/182/244/case.html](https://supreme.justia.com/cases/federal/us/182/244/case.html)

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A Memorial Day Message by Constituting America Founder & Co-Chair Janine Turner

Constituting America first published this message from Founder & Co-Chair Janine Turner over Memorial Day Weekend, 2010, the inaugural year of our organization. We are pleased to share it with you again, as we celebrate our 7th birthday!

On this Memorial Day weekend, I think it is appropriate to truly contemplate and think about the soldiers and families who have sacrificed their lives and loved ones, and given their time and dedication to our country.

Sometimes it is beyond reach to put ourselves in someone else’s shoes and feel, to the most heightened sense, what it would be like to say goodbye to our loved ones for perhaps the last time. Do we take the time to feel empathy for the soldier who has to walk away from his family – mother, father, wife, husband, daughter, son – to be potentially killed out in the field – to die away from family – in perhaps some distant land, in enemy territory, on foreign soil? How frightening this would be.

It is difficult in our daily lives that are hectic with work, pressures, commitments and family responsibilities to really pause to think about the sacrifice our men and women in uniform have made and are making to protect us. Our men and women in uniform were and are the brave, the special, the few and the truly great patriots. Without these soldiers, we, America and Americans, would not be here – plain and simple. The air we breathe, the land we walk, the sky we sketch, the country we call home, is because of the sacrifices of our men and women in uniform.

No matter which war they called their own, they all fought the enemy, whether near or far, whether boots were on the ground, in the air or on the sea, whether the enemy was present or premeditating. As Alexander Hamilton expressed in Federalist Paper No. 24, “cases are likely to occur under our governments, as well as under those of other nations, which sometimes render a military force in the time of peace, essential to the security of the society.” Thus, an actual battle or a state of ready alert has served the same purpose – the enemy was to know and knew that he would not prevail against men and women who had the Divine right of liberty in their soul, passion in their hearts and the supreme strength of military readiness.

Memorial Day is the day to set aside time and sit down with our children and teach them about our wars and war heroes. It is a time to teach them about the Revolutionary War and the reasons why we fought it. They should know about the soldiers who walked barefoot in the snow, leaving the stain of their blood on the ice and about those soldiers who died miserable deaths as POWs in the stifling bowels of the British ships at sea. They should know about heroes such as Paul Revere, Israel Putnam and Nathan Hale who said, “I only regret that I have but one life to lose for my country.”

We should take a moment during our Memorial Day weekend, and everyday, to pray for our men and women in uniform. We should teach our children about those who served in the War of 1812 when the British returned, how they burned down the White House and how President James Madison’s wife, Dolly Madison, ran to save the portrait of President George Washington.
They should know about the Civil War, why we fought it and how thousands of our soldiers died from a new type of bullet that shattered their bones. They should know about the horrors of slavery, how it had permeated the world throughout history and yet how, according to William J. Bennett, “the westerners led the world to end the practice.” They should know about how Americans fought Americans claiming hundreds of thousands of soldier’s lives.

They should know about World War I and how the soldiers lined up in rows, one after the other, to be shot or stabbed by swords. They should know about World War II and the almost inconceivable bravery of the soldiers who ran onto the beach to endure the battle of Normandy, which claimed thousands of American lives. They should understand what history has to teach us about the mistakes in politics that bred the tyrants who led millions to slaughter. As Publius teaches us, we should not rule with reason but upon the strong foundation of the lessons of history.

They should know about the Korean War, the Vietnam War and the Communist Regimes that ripped the souls from its people. They should know that our soldiers did not fight or die in vain in Korea or Vietnam because even though the enemy was physically in their field, the enemy’s propaganda permeated and thus threatened our field.

They should know about the soldiers who stood on alert during the Cold War and their willingness to die. (My father was a West Point Military graduate and served in the Air Force. He was one of the first to fly twice the speed of sound, Mach II, in the 1960’s. He flew the B-58 Hustler and was ready to die on his mission to Russia when his country called him to do so.) The cold war was won by the ready willingness of our brave soldiers in uniform and a country who was militarily prepared.

A prepared state is a winning state. Alexander Hamilton wrote in Federalist Paper No. 24, “Can any man think it would be wise, to leave such posts in a situation to be at any instant seized by one or the other of two neighboring and formidable powers? To act this part, would be to desert all the usual maxims of prudence and policy.”

Today, we fight in Iraq and Afghanistan (as of original publication date, May, 2010). We fight the insurgencies at our borders most especially in Arizona, Texas and California and we fight an elusive enemy that is creeping into our fields. They are creeping both from abroad with violence and from within with the slow usurpation of our founding principles. Alexander Hamilton warns in Federalist Paper No. 25, “For it is a truth which the experience of all ages has attested, that the people are commonly most in danger, when the means of injuring the rights are in the possession of those of whom they entertained the least suspicion.”

A strong and honest government based on the Constitution and ruled by the people through the Constitutional Republic will prevail but only if we, as citizens, know about it and only if our children are raised on the fruits of this knowledge. As Alexander Hamilton states in Federalist Paper No. 25, “It also teaches us, in its application to the United States, how little rights of a feeble government are likely to be respected, even by its own constituents.”

Wars are fought physically and wars are fought mentally. As civil servants we must be alert to the enemy that is amongst us. Alexander Hamilton states in Federalist Paper No. 25, “…every
breach of the fundamental laws, though dedicated by necessity, impairs that sacred reverence, which ought to be maintained in the breast of rulers towards the constitution of a country…”

On this Memorial Day weekend, we begin our mission with an education of the thesis and basis of our country – what we fight for – the United States Constitution and the wisdom, freedoms, righteousness and structure that it upholds.

May God bless all of our service men and women past, present and future, who have fought valiantly for these principles.

God Bless,
Janine Turner
Memorial Day, 2017

**Jones v. Alfred H. Mayer Co. (1968)**
**Guest Essayist: Gennie Westbrook**

In the *Civil Rights Cases* of 1883, the Supreme Court had ruled 8-1 that the Civil Rights Act of 1875, outlawing racial discrimination in most public places, was unconstitutional. The owners of businesses such as railroads, theatres, and hotels could impose segregation in their facilities, or they could refuse to serve African Americans altogether. The Court adopted a narrow reading of the Civil War amendments, ruling relative to the Thirteenth Amendment that such segregation was not a “badge or incident of slavery,” and that the protections of the Fourteenth Amendment applied against state action, not against private behavior. African Americans endured legal, economic, and social discrimination, as well as brutal and systemic racial violence with little hope of relief for the next seven decades.

By 1948 the tide had begun to turn when President Harry Truman ordered integration in the U.S. armed forces. In 1954 the Supreme Court outlawed segregation in public schools. In 1955 civil rights activist Rosa Parks sparked the Montgomery, Alabama bus boycott that resulted more than a year later in desegregation of the city’s buses. In 1957 Dr. Martin Luther King, Jr. spearheaded organization of a civil rights movement with nonviolence and civil disobedience at its heart. In the face of ruthless racially motivated violence and continuing intimidation, the movement took direct action to fight for racial justice with the “sit-ins” and “freedom rides,” and made significant gains. In 1964 the poll tax was outlawed, and that same year President Lyndon Johnson signed a Civil Rights Act, with a Voting Rights Act the following year.

These gains against legal (*de jure*) segregation, however, did not touch the *de facto* segregation that existed in most neighborhoods across the country. In 1917 the Supreme Court had unanimously overturned a Louisville, Kentucky ordinance that required residential segregation by race in neighborhoods. However, restrictive covenants in which residents in a neighborhood contracted not to sell property to racial or ethnic minorities were prevalent across the country until the Court ended their contractual enforceability in the 1950s. The issue became especially
widespread during the twentieth century as African Americans moved to Southern cities and the North in a series of migrations from the rural South.

A related issue brought *Jones v. Alfred H. Mayer Co.* to the Supreme Court. Real Estate developer Alfred H. Mayer built a planned community, Paddock Woods, next to a golf course north of St. Louis. Joseph Lee Jones, an African American, and his wife Barbara, who was white, had been saving their money to buy a new suburban home. When they toured Paddock Woods in 1965, they made an offer to purchase the house and lot they had selected. Mayer refused the Joneses’ offer, explaining his “general policy not to sell houses and lots to Negroes” in this particular community. Mayer sold homes to blacks, but when he did so in white neighborhoods, he lost business. The Joneses filed suit against the real estate developer, saying that his policy violated the Civil Rights Act of 1964, and the Thirteenth and Fourteenth Amendments. In addition, they maintained that his policy violated the 1866 Civil Rights Act, which had become United States Code Sections 1981 and 1982: “[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.” Further, they sought an injunction against Mayer’s selling the property they planned to buy, hoping it would still be available once the courts ruled in their favor. According to Alfred Mayer’s friends and family, he actually welcomed the Joneses’ suit as a test case, hoping that, as one of the largest real estate developers in the area, he could lead out in desegregating the real estate market. When Mayer quietly donated money to the Greater St. Louis Committee for Freedom of Residence, he included this note with his check: “I hope I will lose this case.”

Judge John Keating Regan, who presided over the case in U.S. District Court, dismissed the Joneses’ case, writing, “The legal right to purchase property does not...carry with it a corresponding obligation on the part of the owner to enter into a contract of sale against his will.” He rejected the U.S. Code Section 1982 claim. The federal courts, he wrote, had established in a number of cases that the civil rights protections contained in this statute were directed against government activity, which was not involved in the Joneses’ dispute between a willing buyer and an unwilling seller. After losing at the District Court level and again at the Circuit Court level, the Joneses appealed the case to the Supreme Court.

The question before the Court was two-fold. First, does the law asserting that “[a]ll citizens ... shall have the same right ... [to] purchase... real and personal property” apply to sale by private parties? Second, does Congress have the constitutional power to prohibit all racial discrimination, private and public, in the sale and rental of property?

The case was argued before the Supreme Court April 1-2, 1968. On April 4, Dr. Martin Luther King, Jr. was assassinated in Memphis, Tennessee, and racial frustration and despair swept across the country in a massive wave of violent rioting. Lyndon Johnson called for all Americans to reject violence and racism, and he called on Congress to expedite enactment of the stalled Civil Rights Act of 1968, also called the Fair Housing Act. Congress did so, and President Johnson signed the law on April 11. This new law had no impact for the Jones couple themselves, because their case concerned events that had predated its enactment.
At the end of its term in June of that year the Court ruled 7-2 that U.S. Code Section 1982 did indeed protect the Joneses’ right to purchase the property. Justice Potter Stewart wrote for the majority, “We hold that § 1982 bars all racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment.” Reviewing the legislative history of Section 1982, Stewart explained that

>The Thirteenth Amendment authorized Congress to do more than merely dissolve the legal bond by which the Negro slave was held to his master; it gave Congress the power rationally to determine what are the badges and the incidents of slavery and the authority to translate that determination into effective legislation…Whatever else they may have encompassed, the badges and incidents of slavery that the Thirteenth Amendment empowered Congress to eliminate included restraints upon those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.

In Justice Harlan’s dissent, he disagreed with the majority’s interpretation of Section 1982, pointing out that the words of the statute convey a right to equal status under the law, not an “absolute right enforceable against private individuals.” He also reviewed the legislative history of the Civil Rights Act of 1866, concluding that “the civil rights bill was intended to apply only to state-sanctioned conduct, and not to purely private action.” Further, he explained that the Court should have declined to decide this case in the first place since Congress had enacted the Fair Housing Act. Justice Harlan maintained that this new law, containing explicit fair housing stipulations, provided even more protection against racial discrimination than that which could result from the Joneses’ isolated case.

Joseph and Barbara Jones had won their victory in the Supreme Court, but they never got their dream home. By the time the decision was announced in 1968, the specific Paddock Woods house they wanted had been sold to another buyer, and the price of similar homes in the area had escalated beyond what they could afford. “Discouraged by long court delays,” they bought a less expensive home in another neighborhood. In Jones, the Court more broadly defined the social conditions that resulted in “badges and incidents of slavery” than the 1883 Court had done in the Civil Rights Cases, and demonstrated the Court’s willingness to strike a blow against racial discrimination in housing.

Despite the legal victory and important civil rights gains, housing in St. Louis and in many other cities remained segregated. University of Chicago professor Gerald N. Rosenberg has written, “Court decisions have resulted in little appreciable change in housing discrimination.” The civil rights movement was highly successful in tearing down the edifice of legal segregation, but it achieved more mixed results in attacking the badges of de facto racial inferiority and segregation in the United States.


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**United States v. Carolene Products Co. (1938)**

**Guest Essayist: William Morrisey**

*United States v. Carolene Products Co.* 304 U. S. 144 (1938)

If you concede the constitutionality of the administrative state, where does that leave citizens’ liberties? That is, if you claim(some might say pretend) that the United States Constitution authorizes unelected, tenured officials the power to frame, enforce, and adjudicate laws you grant a privilege that looks very much like the abrogation of the Constitution’s separation of powers, brushing aside Thomas Jefferson’s maxim that the accumulation of these powers in one set of hands is the definition of tyranny. Under these circumstances, how will citizens’ liberties be protected? Who will do it? This is the question addressed in the *Carolene Products* case—specifically, in the fourth footnote to the majority opinion, written by Justice Harlan Stone. It has been described as the most famous footnote in the history of the Court.

The decision makes no sense, however, without an understanding of the political climate in which it came about. After the 1929 stock market crash, the Great Depression caused an unprecedented economic and political crisis in the United States and around the world. What made the Great Depression “great” was its sheer extent and duration. Americans had seen bank ‘panics’ and economic downturns before. But these events hadn’t lasted long, and the men who were thrown out of work as a result of them received relief from local governments, charities, and family members. The scale of the Great Depression overwhelmed these local supports.
To the astute politician, crisis means opportunity, and there was no more astute politician in the country than New York’s Governor Franklin D. Roosevelt, the Democratic Party nominee opposing beleaguered President Herbert Hoover in the 1932 election. Speaking to the Commonwealth Club in San Francisco, Roosevelt delivered the rhetorical masterstroke of the campaign. “The day of enlightened administration has come,” he announced. His cousin Theodore had tried to meet the problem of overbearing financial and industrial power by busting the trusts, FDR said, but that didn’t work. A steadier means of control was needed. In justifying his proposed new regime of “enlightened administration,” he slyly distorted the Declaration of Independence, saying,

“The Declaration of Independence discusses the problem of Government in terms of a contract. Government is a relation of give and take, if we would follow the thinking out of which it grew. Under such a contract rulers were accorded power and the people consented to that power on consideration that they be accorded certain rights. The test of statesmanship has always been the redefinition of those rights in terms of a changing and growing social order.”

Notice that FDR makes no mention of the Laws of Nature and of Nature’s God endowing certain unalienable rights to all men, who are created equal with respect to these rights. FDR defines rights as purely civil, arising from human agreement—consent formalized in a contract or written constitution. Government no longer secures rights we already have, as human beings; rights are “accorded” to us by, well, ourselves by means of a contract between rulers and ruled. This implies that there is one class, the rulers, and another class, the rest of us, instead of one sovereign people, under God.

As one might suspect, Roosevelt had someone, and something, very specific in mind when it came to a statesman who would redefine Americans’ rights “in terms of” social change. Given the Depression, “We must restrict the operations of the speculator, the manipulator, even the financier. I believe we must accept the restriction as needful, not to hamper individualism but to protect it.” As it happened, Herbert Hoover had published a book in 1923 titled American Individualism, a statement of the ‘old’ individualism founded on equal, unalienable rights and the Constitutional rights which secured the property which enables us to secure our lives, fortunes, and happiness. But when “private initiative has failed,” Roosevelt now replied, the federal government should “assume the function of economic regulation as a last resort.” In his 1933 Inaugural Address, the triumphant new president called upon Congress to grant him executive powers “similar to those necessary in time of war.” With such executive powers in hand, power exercised by an administrative state lodged within the executive branch and staffed initially by Roosevelt appointees, who would enjoy lifetime tenure, the American republic could truly be said to have changed from the commercial and democratic republic of the Founders to what Aristotle and Cicero would have recognized as a ‘mixed’ regime, consisting of an elected, bicameral legislature but also an increasingly kinglike presidency and an obviously ‘aristocratic’ administrative apparatus, soon to be called a ‘meritocracy.’ Throughout his four terms in office, Roosevelt often cast his revolution as ‘conservative’—an effort to preserve individual rights, capitalism, and constitutionalism under conditions of crisis in an industrialized society which had left the agrarian way of life Jefferson loved far behind. This of course assumed that the existing regime and its constitution could not have sustained American rights.
FDR had cooperation from New-Deal Democrats in Congress, elected with him in the 1932 landslide. The centerpiece of the New Deal legislative agendum was the National Industrial Recovery Act of 1933, which gave the President the power he’d requested to fight the economic ‘war.’ Not only did this cede legislative power to the presidency and ‘his’ bureaucracy, it also gave corporations and trade associations substantial influence over the regulations enacted by the National Recovery Administration, even as it left the enforcement of those regulations to the federal government. Although President Hoover had experimented with a much weaker version of this arrangement, the NIRA initiative began the extensive collaboration between presidents, federal administrative agencies, major corporations and labor unions seen to this day.

But not without initial resistance from the Supreme Court, which ruled the NIRA unconstitutional on the grounds that executive power must not expand by legislative-branch delegation of lawmaking power to presidents or administrative boards. To FDR’s dismay, even the progressive-liberal justices Benjamin Cardozo, Louis Brandeis, and Harlan F. Stone concurred. In prefaces to the several volumes of his collected papers, published a few years later, Roosevelt told his side of the story. “Commencing in 1935, and running down to the election of 1936, there came a line of decisions from the Supreme Court (and from the lower Federal Courts) which so limited the powers of the Federal Government and the powers of the State Governments to obtain the legitimate objectives for which the people voted at the polls in 1932 and 1934, that all real progress toward those objectives began to appear impossible.”

“Legitimate” means “lawful,” but of course that was the point in question. Since the Supreme Court says what the law is, Roosevelt moved to change the Court in order to change how it defined the supreme law of the land. In this, he and his fellow-Democrats were quick to decry “government by judiciary,” and a Depression-weary electorate responded by returning Roosevelt and his allies to power in 1936 in an even bigger landslide than the one which had brought them into office four years earlier.

Thus fortified, in his 1937 Message to Congress Roosevelt pounced. “The vital need is not an alteration of our fundamental law”—Constitutional amendment might be time-consuming and politically risky—“but an increasingly enlightened view with reference to it—that is, “a liberal interpretation” or “broad interpretation” of the law itself. Or, as he put it rather more boldly in the 1941 preface to the sixth volume of his collected papers, “For two decades [that is, beginning in the second term of the Wilson Administration] the Supreme Court of the United States had been successfully thwarting the common will of the overwhelming majority of the American people; and had been diverting the functions and philosophy of government into channels which run counter to the thought of progressive opinion throughout the modern civilized world,” laying its “dead hand” on the “whole program of progress,” and indeed acting like a “super-legislature.”

To fight back on behalf of American public opinion and progressive world opinion, FDR proposed his soon-to-be-notorious “Court-packing” plan, which would have empowered the president to appoint an additional Justice (up to six) for every member of the Court aged 70 or older. This would have given him the new appointments he needed to uphold New Deal legislation. Comparing the three branches of the federal government to a three-horse team, one of which stubbornly pulled in the wrong direction, he took his case to the people in a March 1937 Fireside Chat.
He lost. Having waved away the Founders’ idea that the separation of powers presupposes not a team of horses all going in the same direction, but a system of checks and balances designed to moderate the actions of any one branch, or any two branches acting in coordination, FDR didn’t anticipate how sharply even an economically beleaguered American public might turn against a president who, effectively having acquired substantial legislative powers from a docile Congress, also proposed to take control of the judicial branch, too. Constituent mail to Congress ran 8-1 against the proposal, and even many of the old Progressives, allies of Wilson from two decades back, deserted him on this one. In desperation, Roosevelt struck a deal with John L. Lewis, head of the United Mine Workers, obtaining his support for Court-packing legislation in exchange for an agreement to tolerate strikers who illegally occupied the property of mine owners against whom they were striking. Even this support wasn’t enough; the legislation failed to pass Congress.

But, as it happened, it was enough, substantially if not formally. A few weeks after the Fireside Chat, the Court upheld a Washington State minimum wage law in *West Coast Hotel v. Parrish.* Decisions sustaining the National Labor Relations Act followed. New Dealers happily recalled a turn-of-the-century quip by the Irish-American humorist Finley Peter Dunne, who’d written “The Supreme Court follows the election returns.” Even more famously, they alleged, “A switch in time saves nine,” although the Court-packing plan had hurt them more than it had helped in the ‘court’ of public opinion. For himself, several years later FDR exulted, “The Court began interpreting the Constitution instead of torturing it.” Unless they had changed their tune “there is grave doubt whether [our democracy] could have survived the crisis which was bearing down upon it from within, to say nothing of the present [1941] threat from abroad.” Whereas freedom of contract’s “old unrealistic meaning” had stifled New Deal progressivism, its new and supposedly realistic meaning was that “liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morale, and welfare of the people.”

The Court had legitimated presidential and administrative lawmaking over the head of Congress, a legitimacy earlier granted by Congress itself. From now on, the United States had what amounted to a new regime.

Having tacitly ceded its power to pronounce on the constitutionality of a substantial swath of cases—those relating to contracts and other property rights—the Court needed to find a new role for itself. What would it do in the new (indeed New-Deal) administrative state? The answer came in 1938 with its decision in *United States v. Carolene Products.* A 1923 federal law had banned “filled milk”—a substance consisting of skimmed milk thickened with vegetable oil to make it seem like whole milk or cream. The Filled Milk Act of 1923 had been enacted at the behest of dairy farmers who objected to prices for their product being undercut with a cheaper and, as they claimed adulterated product. Carolene Products, a producer of filled milk, sued the federal government, charging that Congress had gone beyond the power of the interstate commerce clause in regulating the contents of an item sold commercially, rather than regulating the processes of commerce itself.

The Court ruled that the interstate commerce clause should be interpreted broadly, allowing federal regulation of interstate commerce so long as there was a “rational basis” for such a law—
for example, the protection of the public health. Up to then, public health issues had been the province of the state governments, their powers in this area taken to be covered by the Tenth Amendment. No longer.

But more significantly, in the fourth footnote to the opinion, Justice Stone served notice that the clauses in the Constitution which entailed “a specific prohibition” against government interference—as for example the First Amendment’s stipulation that Congress shall make no law restricting freedom of speech or religion—would be protected by the Court. This protection would extend to the protection of “discrete and insular minorities”—religious, national, or racial—against any law which “tends seriously to curtail the political processes ordinarily to be relied upon to protect minorities.”

The Court thus ceded very broad powers over property to the president, the administrative state, and the Congress via a “broad” or “liberal” interpretation of the interstate commerce clause, as FDR had urged. It reserved for itself cases in which this much more powerful and centralized state might infringe on the political and civil rights of the citizens it ruled. In the decades to come, especially after the Second World War (which saw a serious breach of the civil rights of Japanese Americans upheld by the Court), civil rights cases increasingly preoccupied the justices, as they attempted to protect those rights against encroachment by the large and ever-expanding New-Deal state. At the same time, the Court availed itself of the power FDR had himself urged upon it—the power to interpret the Constitution broadly—to each states’ powers regarding civil rights, consumer protection, and a plethora of matters not directly involving property rights. The third horse of the governmental team now pulled (usually) in tandem with its partners in the direction of what the Founders would have regarded as an oxymoron or contradiction in terms: liberal statism.


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United States v. Carolene Products Co. (1938) (Part 2)
Guest Essayist: Robert Lowry Clinton

United States v. Carolene Products Co. 304 U. S. 144 (1938)

This case belongs to a string of cases dating from the late nineteenth century involving substitute or imitation dairy products. Carolene Products arose from a controversy over “Milnut,” a beverage made from mixing skimmed milk with another product that is not milk fat (usually vegetable oil, in this case, coconut oil). In 1923, Congress passed the Filled Milk Act, which prohibited the transportation of filled milk in interstate commerce. Despite the fact that congressional investigators concluded that filled milk was not harmful in itself but was
problematic only when falsely labelled and marketed as real milk, the statute nonetheless
declared that filled milk was “an adulterated article of food, injurious to the public health,” and a
“fraud upon the public.”

In 1934, a federal district court in Illinois declared the Filled Milk Act unconstitutional on the
ground that the act exceeded the authority of the national government by encroaching on the
reserved powers of the states. The court reasoned that Congress was really trying to exercise
local police powers which were the appropriate domain of the states. The district court also
concluded that the act violated the Fifth Amendment’s prohibition against taking private property
without due process of law, since banning the product outright when it had been found inherently
harmless deprived its owners of their property without providing adequate judicial recourse in
individual cases.

The government appealed the district court’s ruling to the Supreme Court and the Court reversed
the lower court’s decision, upholding the act. The Court’s decision was based largely on the
earlier cases of The Hebe Co. v. Shaw, 248 U.S. 297 (1919), in which the Court upheld a state
law prohibiting the manufacture or sale of a product deemed harmless (skimmed milk mixed
with coconut oil), McCray v. United States, 195 U.S. 27 (1904), in which the Court upheld a
punitive tax on yellow oleomargarine, and Powell v. Pennsylvania, 127 U.S. 678 (1888), in
which the court upheld a state law prohibiting the sale of imitation or adulterated butter, cheese
or other milk products.

In its Carolene Products opinion, the Court (per Justice Stone) reasoned that danger to the public
may exist “where an inferior product, like appellee’s, is indistinguishable from a valuable food of
almost universal use, thus making fraudulent distribution easy and protection of the consumer
difficult.” In such circumstances, the decision as to whether consumers would be best protected
by adequate labelling requirements or outright prohibition “was a matter for the legislative
judgment and not that of courts.” In conclusion, the Court declared that “regulatory legislation
affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the
light of the facts made known or generally presumed it is of such a character as to preclude the
assumption that it rests upon some rational basis within the knowledge and experience of the
legislators.”

The case itself has usually been treated as routine and insignificant by most scholars, except for
the famous and gratuitous “Footnote Four” attached to the quoted passage above. After
articulating the “rational basis” test for cases involving “ordinary commercial transactions,”
Justice Stone went on to add (in the footnote) that there “may be narrower scope for operation of
the presumption of constitutionality when legislation appears on its face to be within a specific
prohibition of the Constitution, such as the first ten amendments,” or when legislation “restricts
those political processes which can ordinarily be expected to bring about repeal of undesirable
legislation,” or when legislation is “directed at particular religious . . . or national . . . or racial
minorities.” Such cases, which may involve “prejudice against discrete and insular minorities,”
call for “more searching judicial inquiry,” and the legislation under review in these cases thus
may be “subjected to more exacting judicial scrutiny.”
The rationale underlying the Court’s dictum in Footnote Four was later developed into a wholesale overthrow of the Court’s turn-of-the-century jurisprudence of laissez-faire, in which the Court closely scrutinized legislation allegedly infringing property rights and contractual freedom. Henceforth, legislation affecting economic matters would be presumed constitutionally valid, while legislation affecting the rights of “discrete and insular minorities” would be subjected to “more exacting judicial scrutiny,” thus reversing the presumption. This move opened the door to the Court’s modern jurisprudence featuring protected or semi-protected classes, group rights and identity politics, multiple tiers of “scrutiny” for legislation affecting different groups and, more generally, enhanced judicial control of American society and culture in some of its most important dimensions.

Largely because of Footnote Four and its subsequent development by the Court, the Carolene Products case represents a major turning point not only in the Court’s constitutional jurisprudence, but also in the balance of power in the constitutional system. Both federalism (the distribution of power between the national government and the states) and the separation of powers (the distribution of power between the three branches of the national government) have been profoundly affected by the decision.

First, the Court’s cavalier dismissal of the district court’s argument that the Filled Milk Act intruded upon the traditional power of the states to protect public health and safety was probably not justified. In the original constitutional design of the Founders, the balance of power between state and nation is in a perpetual tension that is never to be fully resolved. Yet throughout the 1930s, the so-called “police powers” of the states, reserved to the states by the Tenth Amendment, had come under increasing attack because of the Great Depression and the popular demand for greater intervention in economic affairs by the national government. The Court itself had come under attack for its initial opposition to many of the Roosevelt administration’s New Deal measures. Consolidated national power was all the rage.

Second, perhaps little noticed at the time, the Court itself was moving to enhance its own authority vis-à-vis the other branches of the national government. The previous year, the Court had decided Palko v. Connecticut (1937), in which the Court had developed a rationale for overturning state laws found to contravene provisions in the federal Bill of Rights that were deemed so “fundamental” by the Court as to be “implicit in the concept of ordered liberty.” The result of the Palko opinion was to open the door to federal Bill of Rights challenges to state laws—thereby weakening the power of states to govern their own citizenries, and to increase the Court’s discretion in the determination of what constitutional issues qualify as “fundamental”—thereby enhancing its own power vis-a-vis the other branches of government.

The ultimate effect of Footnote Four is similar to that of Palko v. Connecticut. While Palko formulates a rationale for enhanced judicial discretion in Bill of Rights cases as applied to the states via the Fourteenth Amendment, whenever the Court deems such rights to be sufficiently “fundamental,” Footnote Four provides a rationale for enhanced judicial discretion in cases involving rights that the Court considers so “fundamental” as to warrant departure from traditional standards of deference to legislative judgment, widening the scope of its discretion to national laws in addition to those of the states. It is on the basis of this rationale that the Court
has overturned traditional American practices ranging from school prayer and bible-reading to traditional marriage, all at the behest of the famous footnote’s “discrete and insular minorities.”

United States v. Carolene Products Co. (1938) Supreme Court decision: 

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And Cooper v. Aaron (1958)
Guest Essayist: Tony Williams

Brown v. Board of Education of Topeka (1954)

In December 1952, African-American lawyer Thurgood Marshall appeared before the Supreme Court representing a seven-year-old black girl from Topeka, Kansas named Linda Brown who had to ride the bus to her segregated black school instead of walking to the neighborhood school. Marshall and other NAACP Legal Defense Fund lawyers were there for three days of oral arguments in five consolidated cases dealing with segregated schools. Three hundred spectators packed the hearing room while four hundred anxiously waited in the corridors.

In postwar America, approximately 11.5 million students attended segregated schools that kept whites and blacks apart. Segregated schools were an essential anchor in the Jim Crow system of segregation and denied equal opportunity to African Americans. The Supreme Court had decided that “separate, but equal” segregated facilities were constitutional in Plessy v. Ferguson (1896).

The NAACP initially focused on desegregating higher education. In Sweatt v. Painter (1950) and McLaurin v. Oklahoma State Regents (1950), the Court ruled that separate facilities for African-American students in law school and graduate school were unequal. Marshall and the Legal Defense Fund then decided to challenge segregation in elementary and secondary education.
In 1951, the NAACP and several courageous African Americans brought suit against segregated schools. Blacks who took a stand were physically intimidated, lost their jobs, and lost their homes. In Clarendon County, South Carolina, twenty plaintiffs sued in *Briggs v. Elliott* that the black and white schools had massive discrepancies in spending and facilities.

In Prince Edward County, Virginia, a sixteen-year-old junior named Barbara Johns organized a student strike of 450 students protesting segregation. The resulting case was *Davis v. County School of Prince Edward County*. *Gebhart v. Bulah* was filed in Delaware where a white mother, Sarah Bulah, drove her adopted black daughter to a one-room school house because she could not ride the school bus that stopped in front of her house for the white school.

In Washington, D.C., black parents boycotted the schools in 1948, and the NAACP filed a suit on behalf of a twelve-year-old student, Spottswood Bolling, Jr., who went to a vastly inferior segregated school. *Bolling v. Sharpe* was a unique case because the Fourteenth Amendment only applied to the states, not the District of Columbia. The lawyers had to argue the case on the grounds of the Due Process Clause of the Fifth Amendment.

The five cases would eventually be consolidated under *Brown v. Board of Education*. The NAACP lawyers altered their goal from equalizing separate white and black schools to desegregating schools to attack the foundation of segregation itself.

Thurgood Marshall presented these arguments when he faced off against John W. Davis, former congressman, solicitor general, and 1924 Democratic presidential candidate, representing South Carolina in oral arguments before the Supreme Court. Marshall argued that segregation violated the Equal Protection Clause of the Fourteenth Amendment, which read, “No state shall…deny to any person within its jurisdiction the equal protection of the laws.” Davis countered that the Fourteenth Amendment was obscure when it came to segregation especially in schools. He pointed out that both the Freedmen’s Bureau and the nation’s capital had segregated schools at the time the Amendment was ratified during Reconstruction. Moreover, the Supreme Court itself made *Plessy v. Ferguson* the law of the land for the previous six decades.

The Court was deeply divided over the decision, and several justices had great doubts about Marshall’s arguments. Some thought the southern legislatures could equalize the schools under *Plessy*; others accepted the uncertain protections of the Fourteenth Amendment. Some justices wanted to exercise judicial restraint and wanted to defer to the state legislatures on the issue of segregation and schools. All were concerned about how desegregating the schools would be received and how it would be implemented. The best majority the Court could muster at this point would be 5 to 4, maybe 6 to 3, in favor of desegregating.

In June 1953, the Court was so unsure that the justices ordered the case to be reargued later that year in December. In September, Chief Justice Vinson died. President Eisenhower appointed governor of California, Earl Warren, to the bench as Chief Justice. The hearings lasted three days again, and the extended conference negotiations began a few days later. The new Chief Justice saw *Brown* as a moral issue and tried to build a consensus for a unanimous opinion because it would have greater authority in face of the anticipated backlash. However, the justices were still divided over the constitutional issues for months. On May 15, 1954, the Court was unanimous on the consolidated *Brown* case.
Two days later, Chief Justice Warren read the unanimous opinion in *Brown v. Board of Education*. While the outcome of the case was a landmark advance in the struggle for black equality and civil rights, the opinion rested on curious and even shaky grounds. First, the Court admitted that it was unsure whether the Fourteenth Amendment applied to segregated schools. The arguments were “inconclusive” and “cannot be determined with any degree of certainty.”

Second, the Court made the shocking claim that the black schools were equal to white schools and therefore met the “separate but equal” standard established by *Plessy*. The black and white “schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other ‘tangible’ factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.”

The Court instead based the decision on the argument that to separate them “solely because of their race generates a feeling of inferiority.” Rather than the Constitution, the decision hinged upon social science findings related to doll studies. The Court argued that the studies showed that black children played more with white dolls than black dolls because they felt inferior. However, the studies actually showed the opposite—that black children preferred dolls of their own race especially in the segregated South. The study only studied sixteen southern children who were just six to nine years old and thus less likely than older children to have suffered the ill effects of segregated schools. In short, the Court’s decision rested on perilous social science findings.

Finally, the Court asserted that, “Separate educational facilities are inherently unequal.” Therefore, the plaintiffs were “deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.” One year later, *Brown II* dealt with implementation of the desegregation of public schools across the country, which included millions of students and dollars. It asserted, somewhat vaguely, that schools had to desegregate with “all deliberate speed.”

Some Southerners engaged in a “massive resistance” campaign in which they refused to follow the decisions. Some public schools closed rather than desegregating and many whites fled to private academies. Nevertheless, desegregation in southern schools enjoyed slow but steady growth in the coming years. *Brown* helped to stimulate the Civil Rights Movement culminating in the Civil Rights Act (1964) banning segregation in all public facilities, and the Voting Rights Act (1965), which outlawed racially discriminatory voting restrictions. But, the case had a more complicated history, and the opinion rested on more curious grounds, than we normally think.


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Chief Justice Earl Warren (1891-1974)  
Guest Essayist: Daniel Cotter

Earl Warren: The Governor from California Becomes The 14th Chief Justice

Nine chief justices and nearly 120 years separate John Marshall from Earl Warren. While each chief has influenced the Supreme Court and helped to shape its history, Warren and Marshall are often mentioned together as the greatest of the 17 chiefs. This column explores Earl Warren’s career and his Supreme Court tenure and legacy.

Early Years

Warren was born in Los Angeles, California, to Mathias H. Warren, a Norwegian immigrant, and Crystal (nee Hernlund). Mathias worked at the Southern Pacific Railroad for many years, until he was fired for participating in a strike. Mathias moved the family to Bakersfield, California, where Earl grew up and attended the local public grade school and high school. Warren graduated from the University of California, Berkeley in 1912 with a B.A. in political science, and then entered the Berkeley School of Law, where he graduated in 1914. Warren admittedly was a mediocre student.

Upon admission to the California bar, Warren joined the Associated Oil Company for a year, then went into private practice at the Oakland firm of Robinson & Robinson. In August 1917, at the height of World War I, he joined the United States Army, where he became a Lieutenant. After his discharge in 1918 and up until his retirement from the Supreme Court in 1969, Warren devoted his career to government service.

For one year, Warren served as a clerk of the Judicial Committee of the California State Assembly, then became Deputy City Attorney for Oakland, California. He was subsequently appointed as the Deputy District Attorney for Alameda County, CA, eventually becoming the District Attorney in 1925. Warren was re-elected to three four-year terms.

In 1938, Warren was elected Attorney General of California and held that position for one term. While Attorney General, he was supportive of the internment of California residents of Japanese descent and issued the orders implementing the practice. Warren and California acted on reports from the military of the threats Japanese purportedly posed to U.S. security. Colorado Governor Ralph Carr was the only governor to refuse such action and it cost him his position. Warren said in his 1977 memoirs that he “deeply regretted” his actions.

In 1942, Warren successfully ran for Governor of California. The state’s voters loved him; Warren is the only governor in California’s history to be elected to three consecutive terms. His
1946 election was remarkable in that the Republican governor was nominated to run on all three tickets: Republican, Democratic and Progressive.

In 1948, Warren made his debut on the national stage when he was nominated for Vice President of the United States as running mate for Presidential nominee Thomas Dewey. Dewey’s loss to President Truman was the only electoral defeat in Warren’s career. In 1952, he expected to be nominated as the Republican candidate for President. However, on the train ride to the Republican National Convention in Chicago, Warren learned of backroom dealings by California Senator Richard Nixon, who changed his support from Warren to Dwight D. Eisenhower.

Historians assert that when Eisenhower won, Warren made a deal with Eisenhower to be appointed to the Supreme Court when the next vacancy occurred. When Chief Justice Vinson died, Warren reminded the President of their deal. Ike balked at first, arguing the deal was for an Associate Justice opening, but Warren would not accept that argument. Warren began serving on September 30, 1953 as a recess appointment; the Senate confirmed the appointment by voice vote on March 1, 1954.

Chief Justice

The first case Warren heard as Chief was *Brown v. Board of Education*, which had been argued to the Court earlier in 1953, but the justices asked for a rehearing to address specific questions. The Court was divided over the case, and Associate Justice Felix Frankfurter used the rehearing to buy the Court time. In the interim, Vinson died and Warren replaced him. After the rehearing, Warren, who had supported the integration of Mexican-American students into California schools while governor, masterfully worked the justices in conference and throughout the process of the Court arriving at its decision. At early conference meetings, he held off a “straw poll” vote of the justices while arguing that racial segregation violated the United States Constitution. Eventually, he convinced all justices to join the opinion, with Stanley Reed from Kentucky being the final justice to join. In the famous unanimous decision, Warren wrote:

> We conclude that, in the field of public education, the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.


Although Warren was not considered a legal “scholar” in the mold of justices such as Frankfurter, he was a skilled coalition builder who found ways for the justices to reach common ground. The Warren Court tackled a host of watershed cases, dealing with racial equality and discrimination, voting rights, criminal procedure and other vital issues. Underlying many of the Warren Court’s notable decisions is the principle that rights established by the Constitution generally apply to the states and their residents. Among these rulings were:
• Brown v. Board of Ed. of Topeka;
• Loving v. Virginia (1967), striking down prohibitions on interracial marriage;
• Baker v. Carr (1962), holding that legislative apportionment (“one man, one vote”) was a justiciable issue as opposed to a political question, allowing federal courts to adjudicate redistricting disputes;
• Miranda v. Arizona (1966), requiring that individuals interrogated by police be notified of their right to counsel and protection against self-incrimination under the Fifth Amendment; and,
• Gideon v. Wainwright (1963), holding that the Sixth Amendment right to counsel in criminal cases extends to defendants in state courts.

The Brown decision and some of the criminal rights cases led to the appearance of “Impeach Warren” billboards in Southern states and to Warren being burned in effigy by protesters.

Conclusion

The Warren Court was a very active court and set new courses in many areas. Warren’s sixteen years on the Court and the landmark decisions during his tenure put him at the top of the Chief Justices’ list, right after Marshall. According to www.historynet.com, Earl Warren is one of the nine greatest justices who have served on the Supreme Court; the site groups Warren with Chief Justices Charles Evans Hughes and John Marshall as the “Three Game Changers.” It is hard to argue with that categorization.

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Guest Essayist: Gennie Westbrook

The 1950s and 1960s saw significant gains for civil rights of African Americans. In the 1950s, the U.S. Supreme Court ordered public schools desegregated and the non-violent civil rights movement led by Dr. Martin Luther King, Jr. kept the continuing disadvantages faced by African Americans in the public eye. In the 1960s, federal laws protecting civil rights, voting rights, and housing rights began to chip away at the injustices resulting from racial prejudice and discrimination. In the 1970s the movement continued, focusing on additional perplexing questions related to the constitutional principle of equality in employment and college admissions.


Prior to the 1964 Civil Rights Act, Duke Power Company in Draper, North Carolina, had long maintained segregated hiring policies for whites and blacks. Blacks were hired for menial jobs and paid much less than whites. Job promotion was available only within the segregated
divisions. Title VII of the 1964 Civil Rights Act, which prohibited racial discrimination in hiring, took effect on July 2, 1965, and on that date, Duke Power implemented a new policy for hiring, promotion, and transfers. Applicants for jobs in all but the lowest level classifications were required to have high school diplomas and to make acceptable scores on two different aptitude tests.

Willie Griggs, and fourteen other African American employees of Duke Power Company, applied for promotions within the company. Griggs had not graduated from high school and did not pass the tests for promotion. The company offered him the opportunity to complete his high school work or to retake the tests, but he believed the company’s policy violated Title VII of the Civil Rights Act of 1964 because it discriminated against blacks. In 1960s North Carolina it was unlikely that blacks would have completed high school. Further, the Court reviewed evidence that employees who had neither taken the tests nor completed high school demonstrated satisfactory work performance.

The Supreme Court ruled against Duke Power, holding that Title VII “proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.” The Court focused not only on discriminatory intent, but also on disparate impact of the law’s effect. The Court unanimously held that when an employment practice has the effect of excluding African-Americans or other racial minorities, the employer must show that the practice fulfills a genuine business need and is a valid measure of an applicant’s aptitude for the job. Duke Power could not meet this standard. The 1991 Civil Rights Act codified the “disparate impact” rule first implemented in Griggs.

Regents of the University of California v. Bakke (1978)

Administrative agencies enforcing Title VII and related executive orders developed policies that gave preferential treatment in hiring and college admissions to members of racial minorities. Rather than applying the traditional liberal principle that people are entitled to have government protect their rights equally without regard to race, these affirmative action programs sought to remedy past discrimination by achieving a given racial balance. Allan Bakke, who sought admission to the University of California Medical School at Davis, charged that the university’s affirmative action program discriminated against whites. The medical school used a “set-aside” program in which sixteen of 100 positions in the incoming class were designated for African American, Asian, Latino, and Native American students. Admission standards were lower for students seeking entry in this special program, and Bakke had higher scores on the entry criteria than any of the sixteen students admitted under the special program.

In Regents of the University of California v. Bakke (1978), the question for the Court was whether UC-Davis’s special admissions program violated Title VI of the Civil Rights Act of 1964, which forbade racial or ethnic preferences in programs supported by federal funds, as well as whether the program violated equal protection of the law under the Fourteenth Amendment.

The Court ruled in a 5-4 decision that a university may consider race among many other factors in admissions decisions, but a racial quota such as that used by UC-Davis was unconstitutional. Justice Lewis Powell wrote the majority’s decision that the university’s interest in promoting a diverse student body would permit the consideration of race, but four justices asserted that any
racial considerations violated the 1964 Civil Rights Act. The opinions did not offer much guidance for universities in crafting their affirmative action plans, other than the ruling that quotas would not pass constitutional muster. The same objection, that affirmative action plans violated equal protection, was the foundation of related cases involving the University of Michigan in 2003: *Grutter v. Bollinger* and *Gratz v. Bollinger*. In those cases the Court once again gave a stamp of limited approval to affirmative action in university admissions, as long as the plan is narrowly tailored and does not rely on a mathematical formula.

**United Steelworkers of America v. Weber (1979)**

In *USWA v. Weber*, the high Court considered for the first time the use of affirmative action in employment. In an effort to make job opportunities more equitable, Kaiser Aluminum Company and United Steelworkers of America entered into a collective bargaining agreement in 1974 to implement an affirmative action plan. Prior to that year, the labor union had denied blacks training opportunities to enter the skilled trades. In the new agreement, Kaiser and the union drew up a new plan for two seniority lists of applicants for training and advancement, one for blacks and one for whites. Fifty percent of new trainees would be selected from each list. This pattern would be in place in each of Kaiser’s plants until the proportion of African Americans in skilled jobs approximated the racial composition of the local community.

Brian Weber, a white unskilled Kaiser employee in Gramercy, Louisiana, was passed over for admission to the training program in favor of several African Americans who had less seniority than he did. He charged that the selection system violated *Title VII* of the Civil Rights Act of 1964, which reads in part, “It shall be an unlawful employment practice for any employer … to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.”

In a 5-2 decision, the Court decided in favor of the affirmative action plan. Opinions in this case deftly summarize the controversy surrounding affirmative action. Justice William Brennan wrote for the majority, explaining that it was important to look beyond the explicit plain language of the law and consider its intent, which was, according to their review of the legislative history, to guarantee rights to minorities. The Kaiser/labor union plan was a voluntary agreement among private parties to implement a temporary process for eliminating a persistent racial imbalance. Congress “did not intend to prohibit the private sector from taking effective steps” to achieve the goals of *Title VII*.

Justice William Rehnquist wrote a sharp dissent, in which Chief Justice Warren Burger joined. He wrote, “Taken in its normal meaning, and as understood by all Members of Congress who spoke to the issue during the legislative debates … [*Title VII*] prohibits a covered employer from considering race when making an employment decision, whether the race be black or white… Congress outlawed all racial discrimination, recognizing that no discrimination based on race is benign, that no action disadvantaging a person because of his color is affirmative.”

**Fullilove v. Klutznick (1980)**
In the Public Works Employment Act of 1977, Congress provided four billion dollars in federal grants for local public works projects, along with a stipulation that at least ten percent of the federal money be used to purchase goods or services from Minority Business Enterprises (MBEs). The law defined MBEs as businesses which are “owned and controlled by one or more persons who have been deprived of the opportunity to develop and maintain a competitive position in the economy because of social or economic disadvantage.” H. Earl Fullilove led a group of contractors, the New York Building and Construction Industry Board of Urban Affairs, who filed suit against the Secretary of Commerce, Philip M. Klutznick to challenge this law. The contractors believed that the MBE “set aside” provision in the law violated the Equal Protection Clause of the Fourteenth Amendment.

Six justices voted to uphold the law, though their reasoning differed widely, and the case resulted in five different written opinions. Three of the justices agreed with Chief Justice Warren Burger’s opinion that “Congress need not act in a wholly colorblind fashion...[the set-aside provision] was a reasonably necessary means of furthering the compelling governmental interest in redressing the discrimination that affects minority contractors.” It was not an inflexible quota as had been rejected by the majority in the Bakke decision, and, if Congress had desired to do so, it could have used its power under the Commerce Clause (Article 1, Section 8, Clause 3) to regulate the way the federal funds were spent. One result of the Court’s decision was that similar affirmative action laws were enacted at all levels of government, though some were later struck down.

In the Fullilove decision, Justice Potter Stewart dissented, and Justice William Rehnquist joined him in reasoning that the MBE set-asides represented an unconstitutional return to a rule of preference like that of Plessy v. Ferguson, “based on lineage...a government of privileges based on birth.” Government endorsement through law of privilege based on race, regardless of its good intentions, merely perpetuated a harmful focus on race. Any law that gives preference to some citizens on the basis of color or ancestry is inconsistent with the Constitution’s standard of strict race neutrality.

The legality of set-aside plans, like most aspects of affirmative action, continued to be controversial. In a series of cases including Adarand Constructors v. Pena (1995), the Court curtailed the set-aside programs, ruling that such policies are subject to strict scrutiny. This means that for any law challenged as disadvantaging a suspect classification (pinpointing a specific race, national origin, or religion) the government must pass a three-point test. The law must further a compelling government interest, must be narrowly tailored to meet that interest, and must use the least restrictive means to carry out that interest.

Into the twenty-first century, the Supreme Court continues to adjudicate the highly controversial questions related to affirmative action. On one hand, proponents argue that it is still necessary to provide a remedy for historic discrimination because African Americans still do not have equal opportunity. On the other hand, opponents argue that achieving the goal of a color-blind society and system of law is contradicted by remedying discrimination through additional racial discrimination. The Supreme Court has tried to thread a fine line between those opposing beliefs.


**Sources Consulted**


Backgrounder on the court judgment of the *Regents of the University of California v. Bakke* Case [https://usa.usembassy.de/etexts/democrac/41.htm](https://usa.usembassy.de/etexts/democrac/41.htm)
The Adarand Case: Affirmative Action and Equal Protection [source]

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Guest Essayist: Tony Williams

“A Puzzle Inside an Enigma: Untangling Affirmative Action”

In *Regents of the University of California v. Bakke* (1978), the Supreme Court invalidated fixed quota systems for affirmative action as a remedy for historic racism, but decided that using race as a factor in college admissions was constitutional. It was a confusing decision with a 4-4-1 vote with the justices all concurring in part and dissenting in part (and resulting in a 5-4 decision). *Bakke* did very little to settle the constitutionality of affirmative action or even to clarify the issue—indeed, it only confused the issue further.

In the early 1980s, the city council of Richmond, Virginia passed a law creating the Minority Business Utilization Plan. It required contractors who worked on public projects with the city to subcontract at least thirty percent of their contracts to minority-owned businesses. The minority-owned businesses were defined as companies owned by at least fifty-one percent minorities including any African Americans, Native Americans, Asians, Hispanics, or Eskimos. It was a five-year plan, and the city could grant waivers in cases where contracts failed to meet the standard after due diligence. The city council was trying to achieve the general goal of “promoting wider participation by minority business enterprises in the construction of public projects.”

The J.A. Croson Company obtained a contract for plumbing fixtures for the city jail, and hiring a minority-owned subcontractor for the job would amount to seventy-five percent of the contract. Moreover, an interested minority-owned business (Continental) did not submit a bid in time before the company asked for a waiver. Continental finally submitted a late bid, but it was seven percent higher than the market price and would have raised the cost of the project by nearly $8,000.

J.A. Croson Co. refused to use Continental because it submitted a bid that was three weeks late and raised the cost of the project too high. Richmond denied J.A. Croson Co. the waiver and ordered it to re-bid the contract with minority-owned subcontractors. The company therefore sued the City of Richmond. Moreover, the lawyers for the company argued that there was no evidence of any past specific discrimination against minorities in the Richmond construction industry.
The case hinged on the Equal Protection Clause of the Fourteenth Amendment that read, “Nor shall any state...deny to any person within its jurisdiction the equal protection of the laws.” In the Bakke case, the Court had been deeply divided over the application of that Amendment as well as Title VI of the Civil Rights Act of 1964 with four justices arguing that affirmative action injured whites.

In Richmond v. J.A. Croson Co. (1989), the majority decided, by a vote of 6-3, that the plan violated the Equal Protection Clause of the Fourteenth Amendment. Justice Sandra Day O’Connor argued that section 5 of the Fourteenth Amendment held that, “Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.” In Fullilove v. Klutznick (1989), the Court permitted a ten-percent set aside program at the federal level. In Richmond, however, the majority opinion held that the states did not have the power to enforce the provisions of the Fourteenth Amendment. Therefore, Justice O’Connor introduced the principle of federalism into the decision.

Moreover, the Court also applied the principle of jurisprudence called “strict scrutiny” to determine the constitutionality of the Richmond affirmative action program. The Court set this high standard to be reached for any race-conscious program including affirmative action cases because of danger of racial discrimination towards any race. The Court ruled against Richmond in part because of strict scrutiny, though it did little to clarify the principle as applied to affirmative action.

Justice Antonin Scalia wrote a concurring opinion that used the dissent by Justice Harlan in Plessy v. Ferguson (1896) that made segregation legal, in which he argued for a color-blind Constitution. Scalia also argued that affirmative action programs remedied past injustice through injustice.

Three justices—Justice Thurgood Marshall, Justice William Brennan, and Justice Harry Blackmun—dissented from the majority opinion. They argued that affirmative action programs were still necessary to remedy past discrimination, especially as they provocatively pointed out, in the former Confederate capital. The state, therefore, had a compelling interest in creating the set-aside program.

The decision in Richmond v. J.A. Croson Co. (1989) banned a state affirmative action program that chipped away at affirmative action but did not rule the idea unconstitutional. It contributed to muddying the controversial issue even more. The disputes among the justices were representative of the continuing popular contention over the issue.


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Establishment Clause:

**Abrams v. United States (1919)**

Guest Essayist: Joerg Knipprath

“Congress shall make no law…abridging the freedom of speech, or of the press ….” Though there is some debate over its original meaning, the First Amendment is commonly thought to have prohibited administrative prior restraint on public speaking or writing. Still, a speaker or publisher was responsible for the consequences of his words. If the words were, broadly speaking, directed to incite people against the established authority of the government, it was common to punish such spoken words as sedition and printed words as seditious libel.

An early test of the scope of the First Amendment was the Sedition Act of 1798, which criminalized spoken or written words of “a false, scandalous and malicious [nature]…against the government of the United States, or either house of the Congress of the United States, or the President of the United States.” Though the Act has achieved a certain infamy, in some respects it was ahead of its time. Unlike English common law, it permitted truth as a defense—although that might be difficult to show when political opinion is the base of the charge—and allowed the jury, rather than the judge, to determine whether or not the speech was seditious.

Jefferson’s partisans were the typical targets of Sedition Act prosecutions, and Jefferson objected that the Act violated the First Amendment. But, as historian Leonard Levy well showed, that objection was based on concerns that the law exceeded Congress’s powers in the structure of federalism, rather than fastidiousness about liberty. While he pardoned the ten Republicans convicted under the Act, and Congress eventually remitted their fines, the notably thin-skinned Jefferson privately urged his political supporters at the state level to prosecute his opponents. In *People v. Croswell* (1804), for example, a Republican New York prosecutor went after a Federalist publisher, who was defended by Alexander Hamilton. Jefferson himself also approved the attempted prosecution by federal officials of Federalist editors under a federal common law of seditious theory that the Supreme Court rejected on federalism grounds.

Sedition-type prosecutions of dissenters continued during and after the Civil War, sometimes even through military commissions, as in *Ex parte Vallandigham* (1864), where a former Congressman was prosecuted for vitriolic pro-Confederate sympathizing. As to freedom of speech claims more generally, American courts adopted the English common law approach summarized by William Blackstone in the late 18th century, that speech and writings could be punished if they tended to harm the safety or welfare of the public. To punish a speaker for an injurious act, it was crucial to show a proximate causal connection between the speech and the act so that “speech was brigaded with action.” Justice Oliver Holmes, Jr., accepted this “bad tendency” rationale in *Patterson v. Colorado* (1907) to uphold a conviction of a Senator from Colorado who had published editorials in his newspaper ridiculing the state supreme court.
Twelve years later, the Supreme Court decided two cases that marked the beginning of change in free speech doctrine by the Supreme Court, *Schenck v. U.S.* and *Abrams v. U.S.* The first case involved a prosecution under the Espionage Act of 1917 for attempting to interfere with the military recruiting effort during World War I. The second involved prosecution for anti-war leaflets in violation of the Sedition Act of 1918, which was a series of amendments to the Espionage Act. Determined to squelch opposition to the war and to stoke patriotic fervor, the Wilson administration launched many such prosecutions.

In *Schenck*, Justice Holmes, writing for a unanimous Court, upheld the conviction of a Socialist Party member for mailing to potential draftees a flyer titled “Long Live the Constitution” and “Assert Your Rights.” The circular’s earnest tone was tamer and more intellectual than typical editorials in today’s mass newspapers, focusing on parsing and analysis of constitutional language and on patriotic slogans to urge men not to submit to the draft. The most inciting passages, other than the second title, were “Do not submit to intimidation” and “If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain.”

Holmes noted that, even if the First Amendment addressed more than the historical core of prior restraint, it did not protect “falsely shouting fire in a theatre and causing a panic.” The government could prohibit an attempt to obstruct the draft. It can also prohibit speech that is so closely connected to that obstruction as functionally to constitute such an attempt. He then set forth the test for banning harmful speech: “The question in every case is whether the words used are used in such circumstances and are of such a nature to create a clear and present danger that they will bring about the substantive evils that Congress may prevent.” This “clear and present danger” test defined the causal relationship between the defendant’s speech and the harm. That causal connection was one of “proximity and degree,” and, if met, also showed the defendant’s intent to bring about the harm.

There was also the matter of whether the incitement actually had to obstruct the draft. Holmes reasoned, that, since the speech was on the level of an attempt, success was not required, as long as the speaker intended to achieve the violation. Finally, Holmes made the point, often wished away by legal elites today, that war changes things. There is no formal suspension of the Constitution in war time, but, in weighing the “circumstances” under which the words were spoken, the government may well consider the greater danger that might emanate from refusal to obey the draft during war than peace.

After *Schenck*, the question arose whether Holmes’s “clear and present danger” test was merely a clever restatement of the common law’s bad tendency test, or a new, more speech-protective test. What exactly was the requisite “proximity and degree”? Holmes was not known as a particularly strong defender of free speech. Moreover, he had a reputation never to let clear legal analysis substitute for a clever turn of phrase. It is generally thought that the *Schenck* test was just a slogan, not a substantive departure from precedent. Not long after *Schenck*, however, Holmes met with Harvard’s Professor Zechariah Chaffee, Jr., a well-known advocate of much-expanded scope for the First Amendment. Their conversation had a profound effect on Holmes, as shown in his soon-to-follow *Abrams* dissent.
During the war, the defendants in Abrams had distributed circulars (some by throwing them out a window) that were alleged, among other similar counts, to violate the amended Espionage Act by containing “disloyal, scurrilous and abusive language about the form of government of the United States.” The culprits, Russian immigrants who styled themselves anarchists or socialists, had written one circular that condemned German militarism, accused President Woodrow Wilson of cowardice and hypocrisy, and, in the most damning passage, urged, “The Russian Revolution cries: Workers of the World! Awake! Rise! Put down your enemy and mine!” The other, written in Yiddish, referred to “His Majesty, Mr. Wilson,” ranted against the war effort as murdering Germans and Russians, and appealed to Russian emigrants and other workers in munitions and armaments factories to go on general strike and challenge the government. It concluded by threatening, “Woe unto those who will be in the way of progress. Let solidarity live!” Other articles, that, curious to say, were not made part of the indictment, called Wilson “Our Kaiser” and urged that, to save the Russian Revolution, the allied armies must be kept busy at home. They also threatened that, if the United States moved against the Russian Revolution, the authors and others pledged to use arms and to create sufficient disturbances to keep those armies at home.

The defendants were convicted of conspiracy to violate several sections of the Espionage Act, basically of seditious libel and incitement to resist the American war effort. They were sentenced to twenty years’ imprisonment. Though the messages seem no more militant than the opposition to government policies voiced on cable television channels and by certain members of Congress today, and the insults to Wilson are tame and quaint by the standards of today’s discourse, the Court, per Justice John Hessin Clarke upheld the convictions, 7-2. Using Schenck as authority, Clarke concluded that the defendants had the requisite intent to incite revolution and defeat the government’s military plans.

Abrams is better known for Holmes’s dissent. He disagreed with the majority about the Espionage Act’s requirement of intent and urged that, like other attempts where success eludes the actor, the challenged language had to be sufficiently clear to show a specific intent to achieve the harm. Abrams’s speech was too unclear and the likelihood of success too remote. More important was his analysis of the First Amendment where he explained what he meant by proximity and degree in Schenck. “It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned.” He declared, “I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force.” That meant, of course, that he disagreed with his own previous jurisprudence.

There was also a remarkable ultimate paragraph, in effect a manifesto through which Holmes declared his separation from the common law and explained his new jurisprudence.

“[W]hen men have realized that time has come to upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.”
This was the essential Holmes. There was the metaphysical skeptic who did not believe in inherent Truth as natural law philosophers or the writers of the Declaration of Independence did. At least, the limited human mind could not discover such speculative Truth. There was the normative positivist, for whom there were only “truths,” those ideas that are true because a sufficient number of people accept them as such. There was the Social Darwinsist emphasizing competition in the free market of ideas where the fittest survives. “That idea wins because it is true,” is replaced by “That idea is true because it wins.” Only if there was “market failure” in the exchange of ideas could the government step in, where the words were uttered under circumstances that “they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.”

Of course, the newly-converted Holmes was glaringly wrong about his “theory of our Constitution,” historically or philosophically. Holmes himself had declared in dissent in *Lochner v. New York* (1905) that the Constitution embodied no particular economic or social theory.

Holmes’s tightened “immediacy” test provided a glimpse of an incipient revolution in First Amendment doctrine. Another glimpse had been provided by Judge Learned Hand in *Masses Publishing Co. v. Patten*(1917). The company challenged Patten, the local post master, for refusing to mail what Patten claimed were anti-war magazines with text and cartoons that violated the Espionage Act. Hand, then sitting as a district judge, held for the company, opining that speech is only unprotected under the First Amendment if it urges action. Merely teaching or advocating ideas is protected: “[T]o assimilate agitation…with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government.” Some advocates of broad free speech protections preferred Hand’s approach because it seemed to focus on the speaker’s words, the only thing he could control directly, whereas the clear and present danger test considered circumstances and probabilities over which the speaker had no control.

Both tests long remained glimpses. The Court, applying the old “bad tendency” measure for clear and present danger, upheld convictions under the Espionage Act and its amendments, typically over lawyerly dissents by the methodical Justice Louis Brandeis joined by Holmes. In similar vein, the Court generally deferred to state legislatures in their definitions of dangerous speech involving criminal anarchy and syndicalism. Even as it extended protections to other areas of speech, such as artistic and religious speech, not until *Brandenburg v. Ohio* (1969) did the Court construct today’s general framework to determine whether speech is outside the First Amendment. In that case, the Court combined Hand’s focus in *Masses Publishing* on the inciting nature of the words with elements of the clear and present danger test, as formulated in Holmes’s dissent in *Abrams*. Since *Brandenburg*, the government may punish speech only if it is “directed to inciting an imminent evil, and the circumstances are such that the evil likely will result.”


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Justice Oliver Wendell Holmes, Jr. (1841-1935)
Guest Essayist: Daniel A. Cotter

Justice Oliver Wendell Holmes, Jr. (1841-1935): The Oldest Justice at Retirement from the Supreme Court

I, Justice Oliver Wendell Holmes, Jr., after serving as a Massachusetts Supreme Court judge for twenty years, was nominated to a vacancy on the Supreme Court of the United States and served for almost thirty years on the highest court in the nation, retiring at age 90. Justice Holmes took his seat on the United States Supreme Court in 1902, at the age of 61, becoming the 58th Justice of the Supreme Court, and one of the most quoted justices in the Supreme Court’s history as well as one of the best known of the justices.

Early Life and Career

Holmes was born in Boston, Massachusetts on March 8, 1841, to Oliver Wendell Holmes, Sr., a doctor and prominent writer, and Amelia Lee Jackson, an abolitionist. Holmes grew up among a wide swath of intellectuals, as his family was friends with Henry James, Ralph Waldo Emerson and other prominent writers. Holmes received his early education in private schools, then attended Harvard College (now University), receiving his A.B. in 1861, returning from the Union Army to participate in graduation ceremonies. In the spring of 1861, Holmes enlisted in the Massachusetts militia at the beginning of the Civil War. Holmes became a Captain in the 20th Massachusetts Volunteer Regiment. During the Civil War, Holmes was injured in action three times and also suffered from dysentery. In 1864, his commission ended, and Holmes returned home.

Holmes then enrolled in Harvard Law School, receiving his LLB in 1866 and soon passed the bar. He joined a small firm in Boston and began his career in private practice, focusing on commercial law and maritime law. In addition to his legal work, Holmes began to write and lecture on law, serving as an instructor in constitutional law at Harvard College from 1870 to 1871. From 1870 to 1873, Holmes was the Editor of the American Law Review. Holmes also prepared a new edition of Kent’s Commentaries.

In 1881, Holmes published a book, The Common Law, which remains in print. The book was a collection of his essays and lectures, in which he described common law as evolving in tandem with society, rejecting the “formalist” theories of other legal philosophers. In fall 1882, Holmes became the Weld Professor of Law at Harvard Law School, an endowed position. However, shortly thereafter, a vacancy on the Supreme Judicial Court of Massachusetts opened when a justice resigned. The governor of Massachusetts, whose term was ending, was permitted to
replace the resigning justice, provided he did it within a matter of hours. Holmes was suggested to the governor by Holmes’ law partner. Holmes agreed to the appointment and was sworn in on December 15, 1882. Holmes immediately resigned from his professorship without advance notice, which was a source of friction between Holmes and the Harvard Law School faculty going forward.

In 1897, Holmes published his essay, “The Path to Law,” in the Harvard Law Review. This essay expounded on his views of the common law, told from the view of a practitioner dealing with his client.

Following the death of the Massachusetts Supreme Court Chief Justice in 1899, Holmes became Chief Justice of that court. Holmes’ reputation as a jurist and a scholar grew based on his work on the court and his ongoing publications and speeches.

**Supreme Court**

Holmes served as Chief Justice of the Massachusetts Supreme Court for just over three years. On August 11, 1902, President Theodore Roosevelt nominated Holmes as an Associate Justice of the Supreme Court to fill a vacancy opened by the retirement of Justice Horace Gray. Holmes would be the first of three Justices nominated by Roosevelt and was one of the first instances where a Supreme Court justice was selected by a president without regards to the nominee’s political views. Although Holmes was initially appointed during a congressional recess, Roosevelt resubmitted the nomination on December 2, 1902, and Holmes was approved by the United States Senate by voice vote two days later. Holmes took his oath on December 8, 1902.

Holmes served on the Court for almost thirty years. Holmes is known for his pithy opinions, which have been frequently quoted over the years. In *Otis v. Parker*, his first opinion as a Justice of the Supreme Court, Holmes reiterated his views on the common law, holding that due process provided some protections to the people, but not to economic interests as they were not protected by the common law.

Holmes also was the drafter of the decision in *Schenck v. United States* (1919), which upheld Schenck’s conviction for violations of the Espionage Act after distributing pamphlets protesting the United States’ involvement in World War I. Holmes wrote his famous statement on First Amendment rights in *Schenck*: “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”

Holmes earned the nickname, “The Great Dissenter,” often disagreeing with his colleagues, even though in nearly thirty years, he only wrote 72 separate dissents compared to almost 900 majority opinions. It is the quality, rather than the quantity, of Holmes’ dissents that earned his reputation. Holmes’ dissents are known for their forcefulness and logic, and in the arenas of substantive due process and free speech, his dissents eventually became the Court’s positions. His most notable dissents include his opinions in *Lochner v. New York* (1905) (disagreeing with the majority’s overturning a 60 hour workweek limitation for bakers, asserting that the majority engaged in judicial activism in their decision) and *Abrams v. United States* (1919), where the majority upheld the conviction of a number of Russian-born radicals.
under the same Espionage Act that was the basis of *Schenck*. In the *Abrams* case, Holmes did not believe the “clear and present danger” test had been met, stating that “the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”

Holmes’ 1904 dissent in *Northern Securities Co. v. United States* (his first written dissent) permanently strained his previously friendly relationship with President Roosevelt. The majority opinion in *Northern Securities* held that in interpreting the Sherman Antitrust Act, the Court could not take into account the negative impact a decision to dissolve a company would have on the business community. Holmes’ dissent, joined by three others, argued for strict interpretation of the Act to ensure constitutionality.

**Conclusion**

Holmes’ tenure on the Court spanned four Chief Justices (Fuller, White, Taft and Hughes). He wrote more opinions for the Court than any other Justice during that time. Holmes tendered his resignation in January 1932 due to failing health. Holmes’ approach to judging of allowing states to be arenas to experiment in law and politics and choosing fairly between competing forces led to decisions that at times appeared inconsistent (such as the two 1919 free speech cases, *Schenck* and *Abrams*). Holmes also issued several opinions that, contrary to his image of being a judge of “the people,” were harsh in their holdings (such as the decision upholding state sterilization of the mentally handicapped in *Buck v. Bell*, where Holmes infamously wrote, “Three generations of imbeciles are enough.”). Nevertheless, Holmes received considerable public acclaim in early biographies and a movie based on his life. Producing opinions known not only for their flowery language but also their brevity, Holmes continues to be one of the most quoted Justices in the Supreme Court’s history. According to [www.historynet.com](http://www.historynet.com), Oliver Wendell Holmes, Jr. is one of the nine greatest justices who have served on the Supreme Court; the site groups Holmes with Justices William Brennan and Louis Brandeis as the “Three Unyielding Contrarians.”

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**Guest Essayist: Joseph Knippenberg**

In *Engel v. Vitale* (370 U.S. 421 [1962]), the Supreme Court took up the question of school prayer and rejected as unconstitutional the New York state practice of beginning each school day with the recitation of the Regent’s Prayer. It was the first of a series of decisions regarding public prayer that included rejecting recitation of the Lord’s Prayer and the reading of bible verses in schools (*Abingdon v. Schempp* [1963]), rejecting invocations and benedictions at public
school graduation ceremonies (Lee v. Weisman [1992]), rejecting student-led prayer at high school football games (Santa Fe Independent School District v. Doe [2000]), implicitly and conditionally upholding a moment of silence at the beginning of the school day (Wallace v. Jaffree [1985]), and upholding prayer at legislative and other public meetings (Marsh v. Chambers [1983] and Town of Greece v. Galloway [2014]). While the Court’s doctrine has developed over time—above all, in explicitly distinguishing prayer in schools from prayer in other public settings—many of the issues and many of the problems in its jurisprudence were already evident in this first case.

At stake in Engel is a local school district’s adoption of a prayer recommended by the New York State Board of Regents: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our country.” In an opinion written by Justice Hugo Black, the Court, by a 6-1 majority, struck down this practice as “wholly inconsistent with the Establishment Clause,” even though students are not required to participate in the teacher-led prayer and could indeed be excused from the classroom during its recitation. (These, by the way, are the kinds of accommodations typically offered to students who, on First Amendment grounds, do not wish to recite the Pledge of Allegiance.)

According to Black’s opinion, the principal problem here is that the Regent’s Prayer was composed by the Regents: “[W]e think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by the government.” Because the facts of the case do not permit it, the Court cannot address the question of prayers not composed by the government recited in such settings.

To be sure, one could respond to Black that since there is no coercion involved here, no compulsion that anyone actually participate in the recitation of the prayer, this practice cannot amount to an establishment of religion. After all, one of the hallmarks of traditional establishment was just that compulsion, with fines or other punishments and civil disabilities applied to religious non-conformists. Black, however, denies that establishment requires compulsion. “The Establishment Clause,” he says, “is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.” Stated more simply, the Establishment Clause is violated by the establishment of an official religion. That certainly in Black’s mind happens when government officials compose a prayer, regardless of how “nondenominational” its words are or how voluntary its recitation is. The path from his opinion to objections to the phrases “under God” in the Pledge of Allegiance and “In God we trust” on American currency is quite short and direct.

In addition, Black suggests that whenever government puts the weight of its authority behind any religious utterance, a certain kind of pressure is sure to follow: “When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain,” so plain, it seems, as not to require any evidence or argument. Again, the path from this assertion to the “endorsement test,” first articulated in Sandra Day O’Connor’s concurrence in Lynch v. Donnelly (1984), as well as to objections to presidential proclamations
of thanksgiving and participation in prayer breakfasts and to public recognition and accommodation of religious holidays is quite short and direct.

There is perhaps no better summary of the open-ended and ultimately problematical character of Black’s understanding of the Establishment Clause than these words: “The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say….” The meaning of power and its uses are tolerably clear: government can reward with money or privileges actions that it favors and punish actions that it disfavors. But the meaning of prestige is a good bit more nebulous; we are in the realm of symbolism and amorphous, not to say subjective, psychological influence. The verbs “control, support or influence” also contain a multitude of meanings. Power can surely be used to attempt, at least, to control, perhaps dictating certain forms of worship and prohibiting others. Power can also be used to support, as when money flows from the treasury into the coffers of a church or faith-based organization. All these uses of power seem to follow pretty closely from the traditional understanding of religious establishment. As noted above, however, the conjunction of prestige and influence takes us into another realm altogether. When a president ends his speech by asking God to bless America, is he using the prestige of his office to influence people? When a session of the Supreme Court opens, as both Justices Douglas (concurring) and Stewart (dissenting) note, with the words “God save the United States and this Honorable Court,” is this prayer (for that is literally what it is) taking advantage of the prestige of the Court to influence all who pay attention to it? We have here the foundations of all the secularizing jurisprudence and legal argumentation that has occupied the federal courts in the past more than fifty years.

I will conclude by briefly examining the historical argument Justice Black uses to buttress his understanding of the Establishment Clause. To begin with, he supports his criticism of the governmental composition of the Regent’s Prayer by recurring to the English experience with the Book of Common Prayer, disputes over the contents of which “threatened to disrupt the peace of that country….?” This is what led many to flee England for the colonies, where (“an unfortunate fact of history,” he notes) they frequently reproduced the very religious establishment they had left behind. Of course, this history by itself does not teach us anything about the Regent’s Prayer, for the element of coercion is omnipresent in the one and only questionably present (if one is persuaded by the influence argument) in the other.

When he turns explicitly to the American history, Black relies very heavily on the Virginia experience, where the battle over establishment pitted James Madison and Thomas Jefferson, on one side, against Patrick Henry and John Marshall, on the other. Quoting extensively from Madison’s Memorial and Remonstrance, he suggests that those arguments illuminate the meaning of the Establishment Clause. One problem, of course, is that the clause prohibits the establishment of a national religion, leaving entirely intact state establishments. Indeed, as Professor Steven D. Smith has persuasively argued, the Establishment Clause was intended not to disestablish any church anywhere, but simply to preserve state arrangements from any sort of federal interference. While Madison and Jefferson might as individuals agree with Black, it is not at all clear that the members of Congress who voted for the Bill of Rights and those in the state legislatures who voted to ratify those amendments believed that they were doing anything
other than preventing the federal government from establishing—in the old fashioned sense, with some sort of real coercion—a national religion. In fact, the very same Congress that proposed the Bill of Rights to the states repassed the Northwest Ordinance, which asserted, first, that “the fundamental principles of civil and religious liberty…form the basis whereon these republics, their laws and constitutions are erected,” second, that “[n]o person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments, in the said territory,” and, third, that “[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.” In other words, that first Congress understood the principles of religious liberty to be perfectly consistent—contra Madison and Black—with public support for religion in the schools.

In his lone dissent, Justice Potter Stewart insists that

“the Court has misapplied a great constitutional principle. I cannot see how an ‘official religion’ is established by letting those who want to say a prayer say it. On the contrary, I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation.”

Adhering to the traditional understanding of establishment, he suggests that the majority’s much more expansive reading of that clause runs the risk of abandoning our history and our heritage. It certainly opened the door to a lot more litigation, as plaintiffs challenged—sometimes successfully and sometimes unsuccessfully—occasions on which the people, in public, acknowledged their religion.

Perhaps it is time for us—informed by a more complete and more nuanced understanding of our religious, political, and constitutional heritage—to revisit these issues in such a way as to permit communities to come to their own understandings of how they wish to express and accommodate the people’s religion or religions.

Engel v. Vitale (1962) Supreme Court decision:

Everson v. Ewing (1962) Supreme Court decision:

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Guest Essayist: Tony Williams

“Almighty God, we beg Thy blessings upon us, our parents, our teachers, and our country:” Engel v. Vitale (1962)

In the Everson v. Board of Education of Ewing Township (1947), the Supreme Court decided that it was constitutional for the state of New Jersey to reimburse parents for the cost of bus
transportation, even to a parochial school. In rendering the decision, the Court attempted to use evidence from the nation’s founding to prove that there was a “wall of separation between church and state.”

Justice Hugo Black drew directly from Thomas Jefferson’s Letter to the Danbury Baptists in which President Jefferson wrote: “I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should “make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” thus building a wall of separation between Church & State.” It is noteworthy that he referred to the national Congress in the First Amendment, and not the states. Jefferson knew it was constitutional for the states to have official churches because the Bill of Rights did not apply to the states. Indeed, Massachusetts was the last of the original states to disestablish its official church in 1833.

Thomas Jefferson and James Madison supported disestablishment and idea of the natural right of freedom of conscience. But, other founders supported a closer connection between church and state even though they supported religious liberty. Patrick Henry supported a bill in Virginia for limited public support of religion to promote civic virtue. In his Farewell Address, one of the most important state papers of the founding, George Washington warned:

And let us with caution indulge the supposition that morality can be maintained without religion…reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle. It is substantially true that virtue or morality is a necessary spring of popular government.

The “incorporation” doctrine applied the Bill of Rights to the states with the Fourteen Amendment. This became the basis for the Supreme Court taking up Establishment Clause cases in local public schools in *Everson* and then *Engel*. What had been an issue related to the principle of federalism now became a national issue. The Court also chose to use Jefferson’s letter as the basis for its jurisprudence in the founding understanding of the First Amendment rather than other important founding documents.

In November 1951, the New York Board of Regents adopted a prayer for public schools in the state. The prayer was prepared by an ecumenical board of rabbis, priests, and ministers. It was intended to be a non-denominational prayer consistent with the recognition of a Creator in the Declaration of Independence. It read, “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, and our country.”

In 1958, the Herricks school district on Long Island introduced the prayer into their schools. The prayer was voluntary and students could either be excused from reciting the prayer or from the classroom altogether while the prayer was said. A total of twenty-eight families with thirty-nine children (.01 percent of students) requested the exemption and received it. Most of the parents were satisfied, but a few sought to fight the practice altogether.

One of the fathers, Steven Engel, was angered when he discovered his son, Michael, saying the prayer in class. He reprimanded his son and sent an irate letter to the school board, claiming that the prayer caused “rancor and bitterness” between people of different faiths. Eleven parents sued
and were represented by a lawyer, William Butler, from the New York American Civil Liberties Union (ACLU).

In August 1959, the trial judge determined that the prayer was constitutional because it was voluntary and non-sectarian. In addition, he decided that school prayers were considered constitutional at the time of the ratification of both the First and Fourteenth Amendments. Butler was not discouraged because his aim was to bring the case to the U.S. Supreme Court to ban school prayer throughout the country, not just in New York. As it was, the New York Supreme Court Appellate Division affirmed the decision of the trial court. The appellate court decided that the American system of government was deeply rooted in a belief in a Supreme Being. Moreover, schoolchildren recognized this in countless ways including reciting the Pledge of Allegiance, singing patriotic songs, and studying the New York Constitution.

Justice Hugo Black was eager for the Supreme Court to hear an appeal and admitted he wanted to ensure that the justices would strike down school prayer. “I want to know what these guys do before I vote to take it.” Chief Justice Earl Warren thought the prayer was as constitutional as reciting the Pledge of Allegiance, but the Court agreed to hear the case. Oral arguments proceeded in early April 1962. The plaintiffs argued that the prayers were “coercive” and “Christian” that violated the constitutional rights of atheists. The defendants countered that the prayers were non-compulsory and non-denominational. They resulted in no harm and were just as constitutional as the prayers that opened the Supreme Court.

The decision in Engel v. Vitale was announced on June 25, 1962. The Court ruled by a margin of 6-1 that the school prayer was unconstitutional. Justice Black wrote the opinion and argued that the Court did not need to find any direct evidence of coercion, though he reasoned that the prayer was indirectly coercive even if it were voluntary. The school prayer was unconstitutional because it acted to “establish an official religion.” Justice William Douglas wrote a strong concurring opinion, writing that not only the prayer but the Pledge of Allegiance, “In God We Trust” on U.S. currency, and military chaplains were unconstitutional. Douglas also thought the students and other “captive audiences” were forced to participate in the prayers, and thus they were unconstitutional.

Justice Potter Stewart was the lone dissenter who thought that a prayer that was voluntary and non-denominational did not establish an official religion. In addition, he pointed out that the divine supplications made in presidential oaths, the opening of congressional and Supreme Court sessions, the Pledge of Allegiance, and many other examples were “deeply entrenched and highly cherished spiritual traditions of our Nation,” and thus part of America’s “civil religion.”

The Engel v. Vitale (1962) decision had a fundamental impact shaping how the Court interpreted schools and prayer under the Establishment Clause of the First Amendment. Over the next several decades, the Court would ban similar non-denominational and voluntary prayers at graduation ceremonies and football games among other venues. The issue continues to be part of America’s culture war over values.

Everson v. Ewing (1962) Supreme Court decision:  

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Freedom of Speech:

Guest Essayist: Jeffrey Sikkenga

The late 19th and early 20th Centuries saw the passage of a number of state and federal laws allowing prosecutions for political speech that advocated or implied violence against government. In 1917 and 1918, for example, Congress passed the Espionage Act, the first major federal law against seditious speech since the Sedition Act of 1798.

One of the prosecutions under the Espionage Act led to the 1919 case of Schenck v. US, in which Justice Oliver Wendell Holmes declared that free speech does not protect words that are “used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.” This was the famous “clear and present danger” test, which was built on the metaphor of a “marketplace of ideas” in which a speaker has the right to communicate any idea if the listener has to have the time to think about the idea before acting and if, under the circumstances, society can afford for people to think about the idea. Despite upholding Mr. Schenck’s conviction, Justice Holmes thought that this was a new and broader view of free speech.

Six years later, however, the Supreme Court backed away from the “clear and present danger” test in deciding the case of Gitlow v. New York (1925). The case involved Benjamin Gitlow, who was arrested, prosecuted, and convicted by New York in 1919 under its Criminal Anarchy Act of 1902. Gitlow was convicted for publishing The Left Wing Manifesto, a pamphlet that, among other things, called for “political mass strikes” and “revolutionary mass action” to “overthrow and destroy organized parliamentary government”. It ended by calling “the proletariat of the world to the final struggle”. Gitlow appealed his conviction to the Supreme Court, which ruled 7-2 in favor of New York.

The case is important for two reasons. The Court declared unambiguously for the first time (though without much argument) that under the Fourteenth Amendment’s “due process” clause, the First Amendment’s protection of freedom of speech applies against state governments like New York as well as the federal government. In this respect, Gitlow expanded First Amendment protections. At the same, the Court held that Gitlow’s speech was not immune from prosecution because the First Amendment does not protect any speech that is “inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace”. The Court believed that a speaker has no right to try to offer harmful ideas to any listener under any circumstances.
According to the Court, there is no “marketplace” for ideas that have a bad tendency. Throughout the 1930s and 1940s, the Supreme Court (and lower federal and state courts) continued to use the “bad tendency” test in evaluating free speech cases.

Starting in the 1950s, however, the Supreme Court began to shift toward Justice Holmes’ “clear and present danger” test through a series of cases involving the communication of communist ideas. Using Holmes’ test, the Court decided that the mere abstract advocacy of overthrowing the US government cannot be punished, but it also held that under the circumstances of the Cold War, the danger of communicating communist ideology was so great that no one had the right to even try to form a communist political party in the United States.

In the 1960s, the Supreme Court started to move toward a broader view of the “clear and present danger” test, culminating in the 1969 case of Brandenburg v. Ohio. Clarence Brandenburg was a Ku Klux Klan member who was arrested, prosecuted, and convicted by the State of Ohio for declaring at a Klan rally that “there might have to be revengeance” against white officials who “sell out” the Caucasian race. When Brandenburg appealed to the U.S. Supreme Court, it unanimously struck down his conviction because political speech can only be banned if it is “an incitement to imminent lawless action, and likely to produce such action”.

This narrower interpretation of the “clear and present danger” test shifts from punishing the speaker for what he says toward holding the listener accountable for how he reacts to what is said, except under very narrow circumstances when the speaker is inciting the listener to imminent lawless action. Even this broader view of free speech was not enough for two justices (Justices Black and Douglas), who argued that all of the Court’s tests for freedom of speech – “bad tendency”, “clear and present danger”, “imminent lawless action” – should be scrapped in favor of unrestricted political speech.

Since the Brandenburg decision in 1969, the Supreme Court has moved ever further toward the views of Justices Black and Douglas. The Court now openly embraces the idea that the First Amendment protects a completely “robust, wide-open, and uninhibited” marketplace of ideas in which government cannot punish a speaker for communicating any political idea to a listener, subject only to reasonable regulations of the time, place, and manner of the speech.


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Guest Essayist: Gennie Westbrook

Benjamin Gitlow and Clarence Brandenburg would seem to have had little in common, but each was responsible for bringing a case that resulted in an important revolution in interpreting the meaning of free speech.

Benjamin Gitlow was born in New Jersey in 1891, the son of Russian Jewish immigrants. His family soon moved to New York, where they earned a meager living and often hosted discussions supporting the labor movement. The Gitlow family approved of the Bolshevik Revolution in Russia and believed the worldwide communist revolution would usher in relief from grinding poverty. As a child, Gitlow heard many accounts of Tsarist abuse of the Russian people, and developed an affinity for socialism. When he was eighteen, Gitlow joined the Socialist Party and soon held various positions of leadership within the group. He, like most Socialists, opposed World War I and in 1917 was one of ten Socialists elected to the New York State Assembly on an anti-war platform. Thereafter, Gitlow’s philosophy moved left and along with two others, he established the Communist Labor Party. Gitlow became editor and business manager for The Revolutionary Age, the party’s newspaper, which published the Left Wing Manifesto and other historical analysis detailing the philosophy of communism. These materials affirmed that “massed action of the proletariat is the only means of overthrowing the capitalistic State.” In November 1919, Gitlow was arrested for publishing these documents, which the government charged had advocated the overthrow of the U.S. government by force. Gitlow later wrote, “I was the first Communist in the United States to be prosecuted for the advocacy of Communism.”

Gitlow and his associates had run afoul of New York’s 1902 Criminal Anarchy Law, which had been enacted in the aftermath of the assassination of President William McKinley by anarchist Leon Czolgosz in 1901. The law made it a felony to advocate the overthrow of government “by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means,” and had been applied in only one minor case prior to Gitlow’s.

Prompted by an influx of poor immigrants from eastern Europe, economic difficulties, labor unrest, and a series of bombings by suspected anarchists, a Red Scare swept the United States after the end of World War I. In 1919 search warrants were issued for a raid of communist and socialist organizations in New York, yielding “many tons of seditious and anarchist literature.” Chief City Magistrate William McAdoo wrote,

The Manifesto itself declares that this is the golden opportunity of the red revolutionists. Is this not a call to action for those who are sworn to uphold the laws of their country? … Liberty of speech! It is the very breath and soul of every American; it is the essence of our republicanism and we guard it with such jealousy that we have hitherto tolerated its abuse into a license which now threatens our institutions. Are there no limits to liberty of speech? Can these men openly state that they intend to destroy the state, murder whole classes of citizens, rob them of their property, and then escape under the plea of liberty of speech?
At trial, Gitlow was represented by attorneys Clarence Darrow and others provided by the National Civil Liberties Bureau, which soon changed its name to American Civil Liberties Union (ACLU). They argued passionately that the anarchy laws violated the First Amendment’s guarantees of free speech and press. Further, they contended for the first time that these First Amendment guarantees protecting against national laws also applied against state laws by the Fourteenth Amendment’s protection of life, liberty, and property in the Due Process Clause. It took the jury about 45 minutes to find Gitlow guilty, and he was sentenced to prison. He began serving his term, but was released in 1922 to appeal his conviction.

Clarence Darrow was not involved in Gitlow’s appeals, but ACLU attorneys pressed the constitutional issue: “whether the statute, as construed and applied in this case, by the State courts, deprived the defendant of his liberty of expression in violation of the due process clause of the Fourteenth Amendment.”

Justice Edward T. Sanford wrote in a 7-2 decision in 1925 that Gitlow’s attorneys were right—the Due Process Clause of the Fourteenth Amendment requires the states to protect the First Amendment’s guarantees of free speech. This case was the beginning of the development of “incorporation,” a fifty-year process to selectively include certain rights that the states must protect as fundamental liberties based on the Fourteenth Amendment’s Due Process Clause. However, the majority also ruled that the Left Wing Manifesto went further than the expression of abstract doctrine because it advocated and urged “revolutionary mass action [to] overthrow and destroy organized parliamentary government.” Although the majority agreed with the principle that government at all levels must protect fundamental liberties, the Court ruled that Gitlow’s pamphlet could be “a revolutionary spark,”—too dangerous to allow—and the decision upheld Gitlow’s conviction. He briefly returned to prison, but New York Governor Alfred E. Smith pardoned him and he was released in December of 1925.

Justices Holmes and Brandeis dissented, holding to a more robust interpretation of free speech: "Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us, it had no chance of starting a present conflagration.” This approach called for punishment of action, not expression.

Later, Gitlow visited Russia, and in 1928 he ran for Vice President of the U.S. on the Communist Party ticket. In his autobiography, Gitlow wrote, “My break with Stalin in 1929 forced me to reexamine in a critical way the activities and tenets of the Communist movement. My break with Communism, however, did not come suddenly…” During Hitler’s rise to power, Gitlow became convinced that autocracy, regardless of its philosophical justification, deprived people of their freedom and “their most valuable possessions.” He publicly denounced communism in 1939 and became a popular anti-communism writer and speaker in the 1940s and 1950s. He died in 1965.

Another landmark case, Brandenburg v. Ohio (1969) also addressed the limits of free speech. Clarence Brandenburg was a 48 year-old television repair shop owner in Arlington Heights, Ohio, and a leader in the Ohio chapter of the Ku Klux Klan. He invited a Cincinnati television news crew to video a meeting to be held on a nearby privately-owned farm in late June, 1964. The resulting video, which was aired on local news, shows a hooded and robed speaker delivering a rambling address filled with racial epithets to twelve members of the Ku
Klux Klan gathered in the meadow. In the video a cross is burning and some of the audience members, but not the speaker himself, are visibly armed. The speech included this statement: “We’re not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance (sic) taken…” The remarks included plans for a July 4 march on Washington D.C. in less than a week, and stated that “[African-Americans] should be returned to Africa and the Jew returned to Israel.”

Soon after the video was aired, a tip led to the arrest of the speaker, Clarence Brandenburg, and he was charged with violation of Ohio’s 1919 Criminal Syndicalism statute. This law prohibited advocating “crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform,” and assembling “with any society, group, or assemblage or persons formed to teach or advocate the doctrines of criminal syndicalism.” In a short trial Brandenburg was found guilty, fined, and sentenced to prison. Needing free legal assistance to plan his appeal of the conviction, Brandenburg agreed to accept the help of the ACLU. Attorney Allen Brown, wrote, “Clarence had to make a deal with the devil,” because Brandenburg despised the ACLU’s philosophy and causes. Ohio appellate courts quickly upheld the conviction, and the U.S. Supreme Court accepted the case to decide whether the Ohio law was an unconstitutional restriction on free speech.

The government’s position was that the law, which was similar to laws in many states, was constitutional, and Brandenburg’s speech had clearly advocated violence. Since Brandenburg had invited the press to the event, he undoubtedly wanted to stir widespread participation in the activities he had in mind.

In a unanimous per curiam opinion first drafted by Justice Abe Fortas and later edited and completed by Justice William Brennan, the Court overturned the syndicalism statute and crafted a new test to be employed in free speech cases. They ruled that “Freedoms of speech and press do not permit a State to forbid advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” Even speech advocating illegal behavior was protected unless it was intended to, and likely to, result in immediate harm. Each part of the new rule was important. The Supreme Court ruled that, even though he vaguely advocated violence against the Congress, President, and the Supreme Court itself, the First Amendment protected his speech. Regardless of Brandenburg’s intent, a speech that fails to even articulate a call to action before twelve people on an Ohio farm was unlikely to stir imminent harmful behavior. This decision implemented a remarkably robust protection of free speech and ended the clear and present danger test that had undergone numerous revisions in the previous fifty years. As a result, federal and state laws that restricted subversive speech were invalidated and the United States adopted a very high level of protection for political expression. In his concurring opinion in Whitney v. California (1927) Justice Louis Brandeis wrote, “fear of serious injury cannot alone justify suppression of free speech and assembly...the remedy to be applied is more speech, not enforced silence.” The Brandenburg test of free speech brought interpretation of the principle into line with the rule advocated by Brandeis decades earlier.


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Chief Justice William Howard Taft (1857-1930)

Guest Essayist: Daniel A. Cotter

**Chief Justice William Howard Taft (1857-1930): The Only Former President to Serve on the Supreme Court of the United States**

When Chief Justice Edward White died in May 1910, President Warren G. Harding immediately turned to former President William Howard Taft, who had appointed White to the Supreme Court, to succeed White. Taft served on the Supreme Court for just less than ten years until his
resignation on February 3, 1930. Charles Evans Hughes, another justice whom Taft had
appointed to the Supreme Court, replaced Taft as Chief Justice, serving in that role from 1930 to
1941. This column explores William Howard Taft’s career and his Supreme Court tenure and
legacy.

Early Years

Taft was born on September 15, 1857, in Cincinnati, Ohio, to Alphonso Taft, a lawyer and judge
who had served in President Ulysses S. Grant’s cabinet as Attorney General, and Louise (nee
Torrey). Taft’s parents were demanding of their sons and Taft worked very hard at school to
achieve good grades. Taft attended Woodward High School in Cincinnati, then Yale College,
where he graduated second in his class. After graduating from Yale, Taft obtained his LLB from
Cincinnati Law School, and then easily passed the bar exam. During law school, Taft worked
for a local newspaper, where he covered the courts, and read law at his father’s law office.

Upon graduating from law school in 1880, Taft became the Assistant Prosecuting Attorney for
Hamilton County, Ohio. Taft’s ambition was to become a Supreme Court justice. He did that
and much more in his varied career. He remains the only person to lead both the Executive and
Judicial branches of our Federal government.

He practiced law in Cincinnati after his years as prosecutor until he became a judge of the Ohio
Superior Court in 1887. He then became U.S. Solicitor General and is the only former holder of
that position to become President. In 1892, he was appointed to the U.S. Court of Appeals for
the 6th Circuit and during part of that tenure, also served as a Professor of Law and Dean at the
University of Cincinnati. In 1901, he became the Governor-General of the Philippines and then
Secretary of War. (He and James Monroe are the only presidents to also have been Secretary of
War.)

In 1908, when President Theodore Roosevelt did not run for a third term, Taft easily won the
Republican nomination for president against the Democratic nominee, William Jennings
Bryan. Bryan campaigned on a progressive platform against political privilege, using a slogan,
“Shall the People Rule?” Taft adopted some of Bryan’s reform positions to appeal to liberals
and progressives. During the campaign, Roosevelt inundated Taft with advice and guidance,
fearing that Taft would lose to Bryan. Taft tended to ignore Roosevelt’s advice. Taft won with
51.6% of the popular vote and 321 Electoral College votes to Bryan’s 43.0% of the popular vote
and 162 Electoral College votes.

In 1909, Taft became President. Taft was said to hate the presidency and was a reluctant
politician, preferring law to politics. One legal legacy he left during his Presidency was his
appointment of six Justices to the Supreme Court, the most by any President in our nation’s
history except for Franklin Delano Roosevelt (eight) and George Washington (ten). Although
Taft was best friends with President Teddy Roosevelt, Taft broke with Roosevelt on a variety of
issues and the two becoming alienated over the course of Taft’s four years. During those four
years, Taft and Roosevelt led the conservative and progressive wings, respectively, of the
Republican Party. In 1912, unhappy with how Taft had governed the country and due to
differences on antitrust and conservation issues, Roosevelt ran for President again as nominee of
the Progressive Party. With Roosevelt and Taft splitting the Republican and Progressive Party vote, Woodrow Wilson won the election, making Taft a one-term President.

Taft then served as President of the American Bar Association for the bar year, 1913-14 and was the Kent Professor of Constitutional Law at Yale University from 1913-21. On June 30, 1921, Harding nominated Taft to the Chief Justice position on the Supreme Court, and the Senate confirmed Taft by voice vote with only 4 Senators voting against his nomination.

When Taft was confirmed, he achieved his lifelong professional goal of becoming a Supreme Court justice and happily served in that position, only resigning shortly before his death in 1930. Associate Justice Felix Frankfurter once remarked to Associate Justice Louis Brandeis that it was “difficult for me to understand why a man who is so good a Chief Justice…could have been so bad as President.” Taft’s court issued a number of decisions of note, including:

• *Olmstead v. U.S.* (1928), holding that the use of wiretapped private telephone conversations, obtained by federal agents without judicial approval and subsequently used as evidence, did not violate the Fourth and Fifth Amendments;

• *Adkins v. Children’s Hosp.* (1923), holding that *Lochner* applied and that a minimum wage act passed by Congress to protect women was invalid (Taft dissented) (*Lochner v. New York* was a 1905 Supreme Court decision that found the due process clause of the 14th Amendment included a right of “freedom of contract” and invalidated limits on hours of bakery employees); and,

• *United States v. Schwimmer* (1929), holding that a pacifist seeking to become a naturalized citizen was not eligible for citizenship.

In his *Adkins* dissent, Taft disagreed with the Court’s upholding of the *Lochner* doctrine, stating, “It is not the function of this Court to hold congressional acts invalid simply because they are passed to carry out economic views which the Court believes to be unwise or unsound.” *Adkins v. Children’s Hosp.*, 261 U.S. 525, 562 (Dissent 1923). (In 1937, the Court overturned *Lochner.*)

As Chief Justice, Taft also created the Judicial Conference of the United States in 1922. In 1929, Taft convinced Congress to enact legislation to construct a permanent home for the Court. Taft charged Architect Cass Gilbert to design “a building of dignity and importance suitable for its use as the permanent home of the Supreme Court of the United States.” Taft did not live to see the completion of the new Supreme Court building, but it has been the home for the Supreme Court since its completion in 1935. Taft resigned from the Supreme Court on February 3, 1930 and died on March 8, 1930.

**Conclusion**

Taft enjoyed his time on the Supreme Court of the United States. His administrative focus on reforming the Supreme Court and improving the Supreme Court’s procedures and facilities are his most lasting Supreme Court legacy. He also has the distinction of being the only person to have been both President and a Supreme Court justice.
Dennis v. United States (1951)
Guest Essayist: State Representative David Eastman

Is Advocating the Violent Overthrow of the United States a First Amendment Right?

On June 22nd 1940, France surrendered to Germany, and the U.S. House of Representatives passed the Smith Act the very same day. It was believed that the rapid fall of France was due in no small part to subversion by communists allied with Germany. There was concern that U.S. entry into the war might lead to similar subversive plots taking place here in the United States. Most prominently, the Smith Act made it illegal to advocate the violent overthrow of the U.S. government or to form an organization for that purpose.

In 1948, the head of the Communist Party in the U.S., Eugene Dennis, along with other Communist Party leaders, were convicted of violating the Smith Act by working together from 1945 to 1948 to advocate the violent overthrow of the U.S. Government. The trial extended over nine months and generated 16,000 pages of evidence, a record at that time.

With the guilt of Mr. Dennis and his colleagues already established in the lower courts, the Supreme Court considered whether the Smith Act was in conflict with the Bill of Rights, particularly the First Amendment. The Smith Act stated, in part:

“It shall be unlawful for any person to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government…”

The history of our own war for independence did not escape the Supreme Court. Certainly the Declaration of Independence speaks of the right of the people to change or to abolish their government when, instead of securing the rights of the people, it violates those rights, and violates the reason for its existence. However, the Founding Fathers were careful not to promote anarchy, and through the Constitution gave the federal government ample authority to suppress insurrections against lawful government. The duty to “throw off” unjust government found in the Declaration of Independence is also specific. Such a duty exists when a government has taken to itself absolute power, which the Founding Fathers referred to as absolute despotism.

In Dennis v. United States, the Supreme Court explained it this way, “Whatever theoretical merit there may be to the argument that there is a “right” to rebellion against dictatorial governments [that argument] is without force where the existing structure of the government provides for peaceful and orderly change.” In other words, while the people retain the right to freely elect their representatives, and there is an orderly process in place to change the government, the people do not possess a right to simply cast the Constitution aside.
In defending the Smith Act, the Supreme Court explained, “The obvious purpose of the statute is to protect existing Government, not from change by peaceable, lawful and constitutional means, but from change by violence, revolution and terrorism.” The Court made clear to distinguish between an academic discussion of the tenants of communism—for example—and a conversation in which you attempt to persuade someone of the benefits of violently overthrowing the government. The former is protected under the Constitution; whereas the latter may be unlawful sedition.

Before First Amendment protections are forfeit, however, the Court explained that there must be a “clear and present danger” that the anticipated violence may actually take place. For example, a conversation used as part of a stand-up comedy routine would lack the “clear and present danger” needed in order to prove sedition.

However, the Court also made it clear that a terrorist attack does not need to actually take place in order for an individual to be convicted of trying to encourage someone to bring one about. The government is not obligated to wait until a terrorist attack is imminent before it intervenes to stop the attack. The government need only demonstrate that danger is present.

In *Dennis v. United States*, the U.S. Supreme Court upheld the convictions of all 11 members of Communist Party leadership. Those convicted had every intention of carrying their plans through to completion if given the opportunity, and were not entitled to First Amendment protections for their activities.

The moral of the story is this: Those trying to destroy America’s First Amendment protections through violence cannot use the First Amendment for protection as they plot to destroy the First Amendment. The Founders wisely provided many tools in the Constitution to enable us to preserve it. No one may plot to overthrow the Constitution with impunity. Congressmen can be removed, presidents and judges may be impeached, criminals may be imprisoned, and insurrections can be put down with force to ensure a republican form of government in every corner of our nation, as guaranteed by Art. IV, § Sec. 4 of the Constitution.

*Dennis v. United States* (1951) Supreme Court decision: [https://www.law.cornell.edu/supremecourt/text/341/494](https://www.law.cornell.edu/supremecourt/text/341/494)

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Justice Hugo Black (1886-1971)
Guest Essayist: Daniel A. Cotter

Hugo Black (1886-1971): The Justice with the Plain Meaning Approach

Hugo Black served more than thirty-four years on the Supreme Court, the fifth longest tenure in the Court’s history. During his time on the Court, Black developed a reputation as a justice who strongly believed the United States Constitution was to be given its plain and original meaning.

Early Life and Career

Black was born on February 27, 1886, in Ashland, a small town in Clay County, Alabama, to Marsha (nee Toland) and William Lafayette Black. Black’s family were farmers. Originally following in his brother’s footsteps, Black attended Birmingham Medical School, but left that school to attend the University of Alabama Law School, where he graduated in 1906 at the age of 20. Upon graduation, Black returned to Ashland and established a private practice, but moved to Birmingham in 1907, where he had greater success in the areas of labor law and personal injury. Black maintained his practice for the next twenty-one years, mixed with brief experiences as a police court judge and as Jefferson County Prosecuting Attorney. Black’s experience as a police court judge was his only judicial experience until he reached the Supreme Court of the United States.

In 1917, Black resigned his prosecutor position to enlist in the United States Army during World War I. He served two years in the Army, achieving the rank of Captain, but did not serve in Europe. After the war ended, Black returned to private practice, where he remained until 1927.

In 1926, Black successfully ran for the United States Senate as a Democrat, easily winning with more than 80% of the vote. In 1932 he won with an even bigger margin. As a Senator, Black was an effective investigator on Senate Committees and was appointed Chair of the Senate Committee on Education and Labor. One of the bills he sponsored eventually became the Fair Labor Standards Act, which was enacted by Congress after Black left the Senate.

At some point during his political activity in Alabama, Black joined the Ku Klux Klan, stating years later, “I would have joined any group if it helped get me votes.” It became a contentious issue in his confirmation hearings.

Supreme Court

President Franklin Delano Roosevelt nominated Black to the Court on August 12, 1937, to fill the vacancy created by Justice Willis Van Devanter’s retirement. The Senate had traditionally confirmed judicial nominees without debate since 1853, but because of concerns about Black’s alleged bigotry and rumors of his KKK involvement, his nomination was referred to the Senate Judiciary Committee. On August 16, the Judiciary Committee recommended Black’s nomination, and on August 17, the Senate voted, 63-16, to confirm Black. (At the time of the vote, the Senate did not have conclusive evidence of Black’s KKK membership.) Black took his seat on August 19, 1937, as the 76th Justice of the U.S. Supreme Court and third from Alabama.
Black sat on the Court until his retirement on September 17, 1971, eight days before his death. For the last twenty-five years on the bench, Black was the Senior Associate Justice. From the time he joined the Court, Black advocated judicial restraint and his view was that the Supreme Court’s role was limited and proscribed. Black was also considered to be a textualist and strict constructionist, and perhaps no other justice ascribing to those methods was more true to form than Black. His strict constructionist approach was most apparent in his interpretation of the First Amendment. Reading the words, “Congress shall make no law” literally, Black rejected any judicial tests that would limit free speech, asserting that no federal agency had any power to abridge First Amendment rights. In *New York Times Co. v. United States*, Black concurred, stating:

> In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government’s power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. …The word ‘security’ is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment.


Black also believed strongly in judicial restraint, and his approach to Congressional and Executive powers is fully revealed in his majority opinion in *Korematsu v. U.S.*, a case in which the Supreme Court upheld the interment of the Japanese during World War II. Black stated:

> To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and, finally, because Congress, reposing its confidence in this time of war in our military leaders — as inevitably it must — determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot — by availing ourselves of the calm perspective of hindsight — now say that, at that time, these actions were unjustified.


Black considered his opinion in *Adamson v. California* the most significant of his many decisions. *Adamson* involved the question of whether the Fifth Amendment should be incorporated through the Fourteenth Amendment to apply to the states. Black was of the view that the Bill of Rights should be incorporated in its entirety and in *Adamson*, he dissented from
the majority opinion holding that the rights of the Fifth Amendment do not apply to state courts based on the due process clause of the Fourteenth Amendment, asserting:

My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed, its submission and passage persuades me that one of the chief objects that the provisions of the Amendment’s first section, separately and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states.


Black’s adherence to judicial restraint and strict construction led to what appears to be incongruous decisions. While he issued the *Korematsu* decision for the Supreme Court, he also was part of the unanimous Court in *Brown v. Board of Education*. Black dissented from the Court’s decision in *Griswold v. Connecticut*, which held that married couples’ privacy rights invalidated contraception prohibitions, arguing that the Constitution was not a “living constitution” and that the way to change the Constitution was by amendment.

**Conclusion**

According to [www.historynet.com](http://www.historynet.com), Hugo Black is one of the nine greatest justices who have served on the Supreme Court; the site groups Black with Justices John Marshall Harlan and Joseph Story as the “Three Towering Visionaries.” His majority and dissenting opinions have been referenced frequently by subsequent Courts and justices and much of his First Amendment jurisprudence has become the majority view.

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**Freedom of the Press:**


**Guest Essayist: Gennie Westbrook**

A group of well-known civil rights leaders ran a full-page advertisement, “Heed Their Rising Voices,” in the *New York Times* on March 29, 1960. The ad described an “unprecedented wave of terror” in police attacks and other government sponsored oppression against peaceful demonstrators in Montgomery and other southern cities. The ad closed with a plea for readers to provide both moral support and financial donations to sustain the civil rights movement because America’s “good name hangs in the balance before a watchful world, the America whose heritage of Liberty these Southern Upholders of the Constitution are defending, is our America as well as theirs.”
The examples of official oppression listed in the ad were mostly correct, but there were some mistaken or exaggerated details. For example, peaceful student demonstrators from Alabama State College sang “The Star-Spangled Banner” from the steps of the state capitol in Montgomery, but “Heed Their Rising Voices” listed their song as “My Country, Tis of Thee.” The college expelled the leaders of the peaceful demonstration. Many of the students at their campus protested the expulsions, but the ad claimed that “the entire student body protested to state authorities by refusing to re-register” for the next term at the college. The piece falsely stated that “their dining hall was padlocked in an attempt to starve them into submission.”

In April, Montgomery Police Commissioner Lester Bruce Sullivan sued the New York Times for libel (publishing something that they knew was false and could cause harm), even though his name was never mentioned in the ad. Pointing to the inaccuracies and exaggerations, he maintained that, since he was in charge of the Montgomery police force, the false and critical ad about the city of Montgomery had harmed his reputation. Grover Hall, editor-in-chief of the Montgomery Advertiser, wrote that the “Rising Voices” ad had committed “crude slanders” against everyone at City Hall. Birmingham, Alabama, officials also sued the Times for libel of their city in a series of articles about race relations there. Southern officials hoped to use libel law to reduce press coverage of the civil rights movement. Other media outlets across the south faced hundreds of millions of dollars in potential damages as a result of similar lawsuits.

Sullivan’s lawsuit in November 1960 took place during the city’s celebration of the centennial of the Confederae, in the segregated courtroom of Judge Walter B. Jones. He was a determined white supremacist who displayed a Confederate flag behind the bench in his courtroom, and members of the jury were permitted to wear Confederate uniforms during the trial. Judge Jones had already decided that the ad published in the Times was libelous, and instructed the jury that they need not decide which of the challenged statements referred to Sullivan, but merely to determine if the article generally applied to Sullivan. The jury deliberated for only a couple of hours before finding that the Times owed Sullivan $500,000 for the newspaper’s damage to Sullivan’s reputation. The Alabama Supreme Court affirmed the decision in 1962, and the Times appealed the decision to the Supreme Court.

The New York Times argued that it had no intention to defame Sullivan, indeed, had never mentioned his name. The piece in question was not an article written by Times staff and subject to editorial review, but an ad place by a third party. The newspaper had no reason to believe that the ad included false statements, and a free press would be severely crippled if newspapers were required to fact-check every single criticism of every public official.

The Court issued a unanimous decision written by Justice William J. Brennan, Jr., deciding in favor of the newspaper. Brennan wrote, “[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” An important question was whether the statements that Sullivan believed attacked him had lost First Amendment protection because they were false and allegedly defamatory.
Brennan maintained that “erroneous statement is inevitable in free debate,” and even false statements must be protected in order to maintain the “breathing space” that free speech and press require. Otherwise, fears of liability would cause speakers to “steer far wide of the unlawful zone,” creating a chilling effect. The Alabama rule “compelling the critic of official conduct to guarantee the truth of all his factual assertions” would result in self-censorship “because of doubt whether it can be proved in court or fear of the expense of having to do so.” The result would “dampen the vigor and limit the variety of public debate.”

This high level of protection of free speech, however, did have limits. Public officials can recover damages for false statements that damage their reputations if they can prove that the statements were made with “actual malice; that the statement was made with… knowledge that it was false or with reckless disregard of whether it was false or not.” The forceful protection that this decision provided for freedom of speech and the press resulted in a powerful role for the press in the civil rights movement. As reporters continued to run extensive coverage of nonviolent protests and the brutal responses of officials in places like Montgomery and Birmingham, the press played a commanding role in the success of the civil rights movement.

Many analysts call this decision the most important First Amendment case in Supreme Court history. It established a high and robust protection for freedom of the press, contributing to an ethos of defense for the speech we hate. It has dominated interpretation of free press cases for more than fifty years. University of Chicago Law School professor Geoffrey R. Stone writes that the decision was “not only a triumph for free expression, it was a triumph for civil rights and racial equality as well.”


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Justice William J. Brennan, Jr. (1906-1997)
Guest Essayist: Daniel A. Cotter

Justice William J. Brennan, Jr. (1906-1997): An Associate Justice Who Led the Court and Which is Often Referred to as The Brennan Court

On July 20, 1990, Associate Justice William J. Brennan, Jr. resigned from the Supreme Court of the United States, after serving nearly 34 years (including three months with a recess appointment and two months while his nomination was confirmed). Only five justices served longer on the Supreme Court and only one justice wrote more opinions. Brennan was an election year appointment by President Dwight Eisenhower.

Early Life and Career

Brennan was born in Newark, New Jersey on April 5, 1906 to William and Agnes Brennan, both Irish immigrants. He was the second of eight children. Brennan’s father was a metal polisher who eventually rose to become Commissioner of Public Safety of Newark. Brennan was raised a Catholic, attended public high school, and graduated from the University of Pennsylvania Wharton School of Business, with a B.S., cum laude, in economics. Brennan married his wife at the age of 21 and then attended Harvard Law School, where he obtained an LLB degree in 1931.

Upon graduation from law school, Brennan practiced law in Newark at Pitney Hardin (later named Day Pitney), where he had worked as a summer clerk. (His father, who died young, had “used his connections to land his oldest son a summer clerkship” at the firm, according to biographers Seth Stern and Stephen Wermeil in their book, Justice Brennan: Liberal Champion.) Brennan’s first year at Pitney was as a clerk, as New Jersey required a year of apprenticeship before a law school graduate could take the bar exam. Brennan practiced labor law at Pitney and eventually built a successful practice at the firm.

In 1942, Brennan enlisted in the United States Army as a Major, eventually rising to the rank of Colonel. Brennan performed legal work for the Army during World War II, earning the Legion of Merit Award. In early 1946, Brennan served as a staff member of the United States Undersecretary of War. Later that year, Brennan returned to Pitney and continued his practice for the next three years. His partners added his name to the firm shortly after his return.

On January 4, 1949, New Jersey Governor Alfred Driscoll appointed Brennan to be a judge for the Superior Court of New Jersey. Despite the financial sacrifices involved in leaving the practice of law, Brennan was attracted to serving on the bench and to helping build a new court system in New Jersey. On January 27, 1949, Brennan was sworn in. Brennan was well respected by fellow judges and lawyers, and in August 1950 was promoted to serve as one of six Superior Court Appellate Division judges. Brennan served in that role until February 7, 1952, when he was appointed to serve on the newly formed New Jersey Supreme Court.
**Becoming a Justice**

On September 28, 1956, Brennan received a call from Attorney General Herbert Brownell. Brennan thought the call related to him serving on a committee for which he had previously served and was therefore curt with Brownell. When Brennan arrived in Washington, D.C., Brownell informed Brennan that President Eisenhower wanted to discuss the vacancy on the Supreme Court created by the retirement of Justice Sherman Minton. On October 15, 1956, Eisenhower made a recess appointment of Brennan to the Supreme Court in an election year and Brennan was sworn in as the 90th Justice on October 16, 1956. Eisenhower, a Republican, appointed Brennan, a Democrat, in part to appeal to Democratic voters and to show balance in appointments. Eisenhower expected Brennan to be a conservative justice based on his decisions on the New Jersey Supreme Court, but was to be surprised by the nature of Brennan’s decisions on the Supreme Court.

Eisenhower formally nominated Brennan on January 14, 1957, when the Senate returned from recess. On March 19, 1957, Brennan was confirmed with only Senator Joseph McCarthy voting no. Brennan served on the court for nearly 34 years, spanning eight presidents and three chief justices. He authored an amazing 1,360 opinions during his tenure (nearly 40 opinions per term served), seldom dissenting, and his liberal views and belief that the Constitution was an evolving document would make him a pivotal member of the Warren Court. Some constitutional scholars have referred to the Supreme Court during his early years as the Brennan Court, given his leadership and his arguments for expansion of individual rights. He was an extremely influential member of the Supreme Court during his tenure. At the dedication of the Brennan Center for Justice at New York University School of Law, Chicagoan and D.C. Circuit Judge Abner Mikva coined the term “Brennanist,” defined as “one who influences his colleagues beyond measure.” Brennan’s major opinions are too numerous to list, but include *Cooper v. Aaron* (federal judicial supremacy), *New York Times Co. v. Sullivan* (First Amendment rights regarding criticism of public officials), *Baker v. Carr* (reapportionment), and *Roth v. U.S.* (obscenity). When President Clinton awarded Brennan the Presidential Medal of Freedom in 1993, he stated that Brennan had influenced a generation of young lawyers, including Clinton.

**Conclusion**

When vacancies occur on the Supreme Court, many cite to the “mistake” made by Eisenhower in selecting Brennan, an activist justice whose views did not square with Eisenhower’s conservatism. However, his successful tenure on the Court and ability to act as a conciliator and leader on the Court are his rich legacy. Brennan is considered one of the most influential justices of the 20th century. Only a very few associate justices have their names attached to the period of their tenure—Brennan’s impact was so profound that historians still refer to the late 50’s and 60’s as the years of the “Brennan Court” and many dubbed him the “Deputy Chief.” According to www.historynet.com, William Brennan is one of the nine greatest justices who have served on the Supreme Court; the site groups Brennan with Justices Oliver Wendell Holmes, Jr. and Louis Brandeis as the “Three Unyielding Contrarians.”
PERSONAL CONDUCT AND PRIVACY

Griswold v. Connecticut (1965)
Guest Essayist: Joerg Knipprath

In June, 1961, the Supreme Court declined to rule on the constitutionality of an 1879 Connecticut law that prohibited the use of contraceptive devices for the purpose of preventing pregnancy, as well as the counseling of such use. The law applied to married and unmarried couples. However, the law had apparently only been enforced once, in 1940, in a test case, where the charges were dismissed after the state supreme court upheld the law. In the more recent challenge, Poe v. Ullman, two couples and their doctor from the Yale University Medical School sought a declaratory judgment that the statute was unconstitutional. The Supreme Court noted that there had been no threat of prosecution by the state, the statute had not been enforced in the past, and contraceptives were freely sold in Connecticut drugstores, so that the case lacked the genuine dispute required by the Constitution for federal court action. Several justices dissented, one of whom, Justice John Marshall Harlan II, would pave the way for the next challenger.

The Supreme Court’s refusal to play ball in Poe caused Planned Parenthood of Connecticut to open a clinic in New Haven in November, 1961. Estelle Griswold—the clinic’s director—and Lee Buxton (the same doctor as in Poe v. Ullman) wanted another test case. In an apparently coordinated event, they were arrested eventually for distributing contraceptives to married couples, convicted, and fined $100 each.

On appeal, the Supreme Court declared the Connecticut statute unconstitutional by 7-2. The majority in Griswold v. Connecticut (1965) was composed of opinions that demonstrate an array of jurisprudential reasoning. Justice William Douglas wrote the official opinion. Douglas averred that Connecticut’s law violated the couples’ right of privacy. Since such a right is found nowhere in the Constitution, Douglas had to use a-textual principles or find some way to tie the result to that document’s text. Douglas had been a student and, subsequently, a law professor at Ivy League Schools. There, he had absorbed the legal elite’s self-evident truths, one of which was disdain for the judicial activism of Lochner v. New York (1905). The “Lochner doctrine” applied a-textual reasoning to discover in the Constitution’s due process clauses a “liberty of contract,” which was used to strike down “progressive” legislation. The Court overturned that approach emphatically during the New Deal in West Coast Hotel v. Parrish (1937).

Thus, Douglas “decline[d] that invitation” to use Lochner, claiming that the Court did not “sit as a super-legislature to determine the wisdom, need, and propriety of laws ….” Instead, he argued, the right of privacy is to be found in the “penumbras, formed by emanations” from specific Bill of Rights guarantees. This has been dubbed the “stewpot theory” of judicial review. Like the raw
ingredients of a stew that, put together, produce a more wonderful concoction, combining parts of the First, Third, Fourth, and Fifth Amendment produced the right of privacy.

Three major problems arise with Douglas’s jurisprudence. First, under textual analysis, the specific command controls the general, and listing only specific aspects of a general principle implies that the general is not to be applied. Thus, if different laws prohibit the sale of cars, lettuce, phones, and couches, it is not to be implied that the sale of all goods is prohibited. A variation of this principle is that “an affirmation in particular applications implies a negation in all others.” Second, if the Framers understood the Constitution to protect a general right of privacy, they could have said as much. That would have protected not only the rights specified, but also that at issue in *Griswold*. Third, even if these provisions imply a general right to privacy, why would that protect using contraceptives, but not, say, smoking marijuana? The Court has repeatedly said that the mere fact that activity occurs in private does not protect it from legal control, so any answer necessarily requires reference to factors outside the Constitution’s text.

Douglas gives away the interpretive game by characterizing the right in *Griswold* as “older than the Bill of Rights ….Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.” Since it pre-dates the Bill of Rights, its status as a fundamental right cannot depend on the existence of textual snippets in those amendments. Douglas’s observation about marriage is particularly poignant. Douglas had what might be described delicately as a turbulent personal life and, at the time of *Griswold*, was dissolving his third marriage and about to embark on a romance with his future fourth wife.

Due to these jurisprudential weaknesses, the Court has not resorted to Douglas’s “penumbras” approach when addressing unenumerated rights since *Griswold*. Instead, the concurring opinions of Justices Goldberg and Harlan have proven more durable. Both defined the right as part of a person’s “liberty” protected by the due process clause of the Fourteenth Amendment against deprivation by states or localities. A parallel analysis under the Fifth Amendment’s due process clause applies if the federal government burdens such liberty. This was, clearly, the *Lochner* doctrine resurrected. Both justices ran into a familiar jurisprudential obstacle. Why would this liberty embrace the right to use (and acquire) contraceptives but not to contract for wages and hours or, as above, to smoke marijuana? There had to be a way to characterize one personal choice as liberty protected under the Constitution while the others might be personal liberties, but would not receive constitutional recognition.

Justice Arthur Goldberg argued that, “In determining which rights are fundamental, judges…must look to the ‘traditions and (collective) conscience of our people’ to determine whether a principle is ‘so rooted (there)...as to be ranked as fundamental.’” If a right is fundamental, it is a constitutionally protected liberty, and the government can restrict it only if it meets “strict scrutiny,” that is, that the law is necessary to achieve a compelling government interest. Justice Harlan urged that the liberty component of the due process clauses protects “basic values ‘implicit in the concept of ordered liberty’” and referred to his *Poe* dissent for further analysis. In *Poe*, Harlan had hearkened back to old cases that claimed that various provisions in the Constitution protect not only enumerated rights but all those “‘which are…fundamental; which…belong to the citizens of all free governments,’ …for ‘the purposes (of securing) which men enter into society,’….”
Both justices’ formulations require recourse to standards outside the Constitution’s text to define protected “liberty.” Harlan’s approach is the paradigmatic substantive due process analysis of the *Lochner* era that evokes the universalism of social contract theory and of natural law/natural rights. Presumably, “all free governments” and the “purposes [all] men enter into society” are not limited to the experience of Americans. Goldberg’s is more akin to the 19th century’s school of “historical jurisprudence” that looks to traditions that mark each culture, including its customs and law. Taken on their face, either approach requires judges to go beyond their competency as lawyers into the domain of political philosophy. Both justices claimed to avoid that by limiting relevant inquiry to American legal tradition and historical evolution.

The dissent was unpersuaded. Justice Hugo Black, joined by Justice Potter Stewart, declared, “I like my privacy as well as the next one,” but denied the power of judges to invalidate all state laws that they deem “arbitrary, capricious, unreasonable, or oppressive” or that offend their “sense of fairness and justice.” He correctly admonished his brethren that their reasoning and choice of precedents involved the same “subjective considerations of ‘natural justice’” as the *Lochner* doctrine that Douglas professed to disdain. He accused the majority that their approach amounted to imposing their personal preferences about the wisdom of particular laws and recalled Judge Learned Hand’s accusation, “[Judges] wrap up their veto in a protective veil of adjectives…to disguise what they are doing and impute to it a derivation far more impressive than their personal preferences, which are all that in fact lie behind the decision.”

No matter how earnestly and eloquently Justices Goldberg and Harlan might urge that judges are restrained in their discretion by legal tradition, Black’s powerful dissent stripped their argument of its cloak. At best, the majority would require judges to undertake a task for which they were not trained, to be philosophers or wise policy-makers, “a bevy of Platonic Guardians,” as Judge Hand had termed them. At worst, they would see themselves as a roving constitutional convention, tasked with the duty to keep a “living Constitution” in tune with the times as they saw fit. Looking at the recent jurisprudence of Justice Anthony Kennedy concerning marriage, it is difficult to find fault with Black’s critique.

There are several additional particular points that bear mention about the *Griswold* opinions. The Supreme Court has settled on the Goldberg approach of looking at legal traditions to identify whether or not a fundamental right is involved. That would entail examination of the history of state laws and judicial precedents, as well as the evolution of the English common law to determine the degree to which the activity has been regulated by law or left to the decision of the individual. However, the starting point of such inquiry involves the critical step of defining the applicable right. The *Griswold* opinions talked much about the “right of privacy,” but a lot of privacy has been subject to legal restraints historically. In some cases, the issue has been defined as the “right to be left alone,” a characterization borrowed from a throw-away dictum by Justice Louis Brandeis in a wiretapping case. That formulation is patently ridiculous, since the entirety of law as a form of social control is to infringe on the right to be left alone and to require people to do what they do not want to do or to refrain from doing that which they wish. On the other hand, defining a right narrowly, as, for example, a right of married couples to use contraceptives means that at least some statutes exist (such as Connecticut’s) that have restricted that right.
All of the opinions in the majority repeatedly mentioned the unwelcome impact the law had on marital intimacy and the traditionally protected status of the marital relationship. In his Poe dissent, Justice Harlan declared, “It is one thing when the State exerts its power either to forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.” If, then, the right is more properly described as that of a married couple to use contraceptives, it may well be that the Connecticut law was a rogue exception to law’s traditional hands-off approach to the family domain and would be unconstitutional under the “customs and traditions” analysis.

What about abortion, sexuality, and marriage? As Harlan emphasized in Poe, not only may a state through its laws seek to promote the moral soundness of its people, but every society in civilized times has done so. “The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication, and homosexual practices…form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.” Such common regulations, then, do not go against our legal traditions or violate fundamental principles of ordered liberty; indeed civilization requires them.

It is important to keep in mind how limited the Griswold holding is when read in its entirety and when compared to its later application. The right of married couples to use contraceptives and the rarity of the Connecticut law stand in stark contrast to the Court’s subsequent expansion of the right of privacy. Thus, in the abortion case, Roe v. Wade, the Court had to disregard a long history of restrictions on abortion by statutes in almost all states, as well as by the common law. Nor did the laws in Roe interfere with the conduct of marital intimacy, as such. Justice Harry Blackmun recounted the history of anti-abortion law but ignored Griswold’s “legal traditions and customs” as the test to determine whether or not the right to abort was fundamental. He merely concluded that it was.

Likewise, Justice Anthony Kennedy’s pronouncements in Lawrence v. Texas regarding homosexual sodomy and Obergefell v. Hodges regarding same-sex marriage failed to apply the Griswold framework. Instead, Kennedy pressed into service the Court’s own line of post-Griswold precedents, which had expanded the right of privacy by distorting that case’s holding. Most absurd was Kennedy’s insistence that the Court was merely defining the “liberty of all,” not imposing its own view of morality. First, holding that sexual behavior or marriage is to be left entirely to the decisions of the participants is itself a view of morality. Second, Kennedy’s notion that the Constitution apparently incorporates John Stuart Mill’s On Liberty contradicts Harlan’s exposition in Poe of the long-accepted historical authority to enact standards of morality for the community’s overall well-being.


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written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums, and serves as a Constituting America Fellow. Read more from Professor Knipprath at: http://www.tokenconservative.com/.

Roe v. Wade (1973) And
Planned Parenthood Of Southeastern PA v. Casey (1992)
Guest Essayist: Tony Williams

Before the 1960s, all states had stringent laws banning abortions. The women’s movement of the 1960s demanded access to abortion as one of the rights of women. Abortion rights activists began working at liberalizing state laws on abortion since it was a state issue in the federal system. The advocacy successfully chipped away at several laws, though by the time of Roe v. Wade in 1973, roughly forty states still had strong laws against abortion.

In 1965, an important precedent was set in Griswold v. Connecticut that paved the way for the Supreme Court to rule on Roe. In Griswold, the Supreme Court created a “right to privacy” when it ended restrictions on birth control for married couples. The Court decided that, “Various guarantees creates zones of privacy. The right of association contained in the penumbra [arc] of the First Amendment is one, as we have seen.” The Court held that the right to privacy was found in the First, Third, Fourth, Fifth, and Ninth Amendments. The Court also used the device of “substantive due process” of the Fourteenth Amendment that read, “No state shall…deprive any person of life, liberty, or property, without due process of law.” In other words, the Court utilized this clause not for due process on procedural grounds but rather on the idea that it could enunciate certain rights that were protected.

The issue of abortion was highly contentious in American society before Roe v. Wade, and the idea that the Court could settle the debate was perhaps as specious as when Justice Taney thought he resolved the slavery debate to avert Civil War in the Dred Scott case.

The case started when “Jane Roe” (later identified as Norma McCorvey) had an abortion after becoming pregnant in a failed relationship. She challenged a restrictive Texas abortion law and the case eventually made it to the Supreme Court. Justice Harry Blackmun had once served as the counsel of the Mayo Clinic in Minnesotia. After the case was first argued, Justice Blackmun wrote an unpersuasive draft opinion that failed to move a majority of the justices. Consequently, Blackmun spent a great deal of time that summer at the Mayo Clinic researching the state of medicine and social science related to abortion. After the case was reargued, Justice Blackmun wrote another opinion that persuaded a majority of the Court.

The decision in Roe v. Wade was issued in early 1973 with a 7-2 majority in favor of a constitutional right to abortion. Blackmun wrote the majority opinion and asserted, “The Constitution does not explicitly mention any right of privacy. [But] the Court has recognized that
a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution [in *Griswold*].”

Justice Blackmun created the modern trimester system in *Roe v. Wade* because the right to privacy was not absolute. He admitted that there was a human being growing *in utero* that required at least some protection. Therefore, the state governments (through the democratic process of making laws in legislatures) had a “compelling interest” at some point in the pregnancy.

The right to abortion was virtually unlimited in the first three months. Blackmun held that, “With respect to the interest in the health of the mother, the ‘compelling’ point, in the list of present medical knowledge, is at approximately the end of the first trimester.”

The next three months of the pregnancy saw the development of the baby and therefore the state’s interest in protecting the human life increased. Blackmun argued that during this stage, the fetuses were “viable” because they could live outside the womb. However, it was balanced against interests of the mother. “It follows that, from and after this point, a state may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health.” The Court would allow the states greater latitude in regulating abortions during this stage especially for the health of the mother.

Finally, during the last three months, as the pregnancy was nearly brought to term, the state had a very strong compelling interest in protecting the life of the child. Blackmun reasoned,

> “State regulation protective of fetal life after viability thus has both logical and biological justifications. If the state is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period except when it is necessary to preserve the life or health of the mother.”

Therefore, the states could severely restrict abortion after the sixth month except for a few rare cases where the life of the mother was endangered.

Justice Byron White dissented, and argued based upon the Constitution and the principle of federalism:

> “I find nothing in the language or history of the Constitution to support the Court’s judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. The upshot is that the people and the legislatures of the fifty states are constitutionally disentitled to weigh [the issue.]”

He called the decision an “exercise of raw judicial power” over an issue that should be “left with the [people].”

Justice Rehnquist also dissented, attacking the use of substantive due process that a conservative court used in *Lochner v. New York* (1905) to protect liberty of contract. Moreover, Rehnquist
argued, “Even today, when society’s views on abortion are changing, the very existence of the debate is evidence that the ‘right’ to an abortion is not so universally accepted.”

The Supreme Court legalized abortion in the United States according to the trimester framework, but it did not quell the fierce contention in American society. If anything, the issue became infinitely more divisive between the pro-life and pro-choice movements.

In 1992, the Supreme Court revisited state restrictions of abortion during the second and third trimesters. In the Planned Parenthood of Southeastern PA v. Casey (1992), the Court made the incredible statement, “We reject the trimester framework, which we do not consider to be part of the essential holding of Roe.” But, it upheld the right to abortion because “[Overruling] Roe’s central holding would not only reach an unjustifiable result under principles of [precedent], but would seriously weaken the Court’s capacity to exercise judicial power and to function as the Supreme Court of a nation dedicated to the rule of law.” In other words, the Court cannot break with precedent, even though it had done so before when Brown v. Board of Education (1954) had recently and famously overturned Plessy v. Ferguson (1896), and in several other cases, because it would weaken the legitimacy of the Court.

Roe v. Wade raised many troubling questions for the Supreme Court. The Court only made the division over abortion more contentious, and it became a central issue and litmus test in the growing culture wars. The Court also damaged the principle of federalism by overruling a vast majority of democratically-elected state legislatures. Finally, the Court’s questionable jurisprudence enunciating new rights and using social science rather than the Constitution opened its decision up to fierce criticism.


Tony Williams is a Constituting America Fellow and the author of five books including Washington & Hamilton: The Alliance that Forged America.


Guest Essayist: Daniel A. Cotter


On June 26, 2015, the Supreme Court of the United States held a special Friday session the week before end of term to announce its decision in Obergefell v. Hodges, in which the Court held that the “Fourteenth Amendment requires a State to license a marriage between two people of the same sex.” The Obergefell opinion marks the third of three June 26th Supreme Court decisions
since 2003 recognizing human rights and protections for gay people. All three were authored by Justice Anthony Kennedy, making him a hero in the LGBT community.

**Lawrence v. Texas**

In 1986, the Supreme Court held in *Bowers v. Hardwick* that sexual privacy was not constitutionally protected, upholding a Georgia anti-sodomy law. In 2003, many states still had laws on the books classifying sodomy a crime.

In *Lawrence*, the defendants challenged a Texas anti-sodomy law that classified consensual, adult anal intercourse between two individuals of the same sex as illegal sodomy as violative of the equal protections guaranteed by the Fourteenth Amendment, given that the Texas law prohibited sodomy between individuals of the same sex but not individuals of the opposite sex. The defendants had been convicted under the state statute and fined.

A three-judge Texas appellate panel overturned the lower court’s ruling, finding the law unconstitutional. The Texas appellate court decided to reconsider the decision en banc and, without oral argument, held 7-2 the law was constitutional, rejecting substantive due process and equal protection arguments. An appeal to the Texas Court of Criminal Appeals was denied. The defendants filed a writ for certiorari with the Supreme Court, asking it to review the constitutionality of the Texas law.

The Supreme Court granted certiorari and, on June 26, 2003, held in a 6-3 decision authored by Justice Kennedy that the Texas statute was unconstitutional. Kennedy wrote:

> The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime…. *Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.

With the decision, sodomy laws in Texas and thirteen other states were invalidated. Justice Antonin Scalia wrote a dissent, joined by Chief Justice William Rehnquist and Justice Clarence Thomas, objecting to the majority’s failure to apply *stare decisis* by overturning *Bowers*. Scalia also predicted in his dissent that this decision would lead to a future ruling by the Court that homosexual marriages are acceptable. Thomas also penned a dissent, calling the Texas law “uncommonly silly” but finding no general right of privacy in the Constitution. He also noted that if he were a member of the Texas legislature, he would vote to overturn the “silly” law.

Professor Laurence Tribe, a well-known Constitutional scholar, noted the significance of this decision. He commented that *Lawrence* “may well be remembered as the *Brown v. Board of Education* of gay and lesbian America.” His comments would be proved correct.

**United States v. Windsor**

In 1996, the United States Congress passed the Defense of Marriage Act (“DOMA”) which provided in its Section 3 that a federally-defined marriage was between one man and one woman. Edith Windsor and Thea Spyer were a same-sex couple living in New York who lawfully married in Canada in 2007 and were recognized in New York as legally wed after a
court decision. When Spyer died, Windsor attempted to claim the federal estate tax exemption for surviving spouses, but was barred from doing so under Section 3 of DOMA.

Windsor filed a lawsuit against the federal government seeking a refund of the estate tax she had paid, alleging differential treatment in violation of the Fifth Amendment’s Equal Protection Clause. Then-United States Attorney General Eric Holder announced that the Department of Justice would not defend the constitutionality of Section 3 of DOMA. A group known as the Bipartisan Legal Advisory Group stepped in to defend the suit. The District Court for the Southern District of New York found Section 3 unconstitutional because it violated the equal protection guarantees of the Fifth Amendment. The United States Court of Appeals for the Second Circuit affirmed in a 2-1 decision. The United States Supreme Court granted certiorari and, on June 26, 2013, in a 5-4 decision authored by Justice Kennedy found Section 3 of DOMA unconstitutional, “as a deprivation of the liberty of the person protected by the Fifth Amendment.” Kennedy wrote that the differentiating between same sex marriages and heterosexual marriages “demean the couple, whose moral and sexual choices the Constitution protects.”

Scalia again dissented, arguing that the Court had no power to decide the case, because Windsor had no injury once she received a judgment in her favor. He also noted that this decision would lead to recognition of same sex marriages, writing:

As far as this Court is concerned, no one should be fooled; it is just a matter of listening and waiting for the other shoe.

By formally declaring anyone opposed to same-sex marriage an enemy of human decency, the majority arms well every challenger to a state law restricting marriage to its traditional definition.

The decision immediately led to the federal government extending the same rights and benefits accorded to married heterosexual couples to married same-sex couples, resulting in changes to Medicaid, tax status, and employee benefits.

**Obergefell v. Hodges**

Following the decision in *Windsor*, James Obergefell and John Arthur decided to get married in Maryland on July 11, 2013. Their state of residence, Ohio, did not recognize their marriage, and the couple filed suit in federal court in the Southern District of Ohio, alleging discrimination against same-sex couples who married in another state. As Arthur was terminally ill, the couple sought a temporary restraining order requiring that Arthur’s death certificate list Obergefell as Arthur’s surviving spouse. The District Court granted the couple’s TRO motion with respect to the death certificate and then issued a further ruling holding that Ohio’s law barring recognition of same-sex marriages originating in other states was unconstitutional. A number of other lawsuits were filed in Ohio challenging the state’s refusal to recognize same-sex marriages performed legally in other states.

The Sixth Circuit reversed the District Court in a 2-1 decision, finding that Ohio’s ban on same-sex marriage did not violate the U.S. Constitution. The same-sex couples filed a petition for a
writ of certiorari with the United States Supreme Court, which was granted along with similar
writs regarding three other same-sex marriage cases challenging state laws that prohibited same-
sex marriage.

The Supreme Court heard oral arguments on April 28, 2015. Much speculation on the decision
started to percolate, with some Supreme Court observers asking if the decision would be
published on June 26, 2015. In recent years, no Friday decision announcements had been made
preceding the final week of the Supreme Court term. When the Supreme Court announced that it
would have a special rulings date on June 26, many predicted that the decision would ban the
prohibition of same-sex marriages or, at the very least, require states to recognize same-sex
marriages performed in another state.

The speculation was confirmed on June 26, 2015, when the Supreme Court announced its 5-4
decision authored by Justice Kennedy, who wrote:

> The Constitution promises liberty to all within its reach, a liberty that includes specific
> rights that allow persons, within a lawful realm, to define and express their identity.
>
> They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

Scalia dissented, asserting that the Court’s decision effectively robs the people of the liberty to
govern themselves. He noted that same-sex bans would not have been unconstitutional at the
time of the Fourteenth Amendment, and so would not be unconstitutional today.

**Conclusion**

Over a twelve year period, on June 26 each time and with Justice Kennedy writing each majority
opinion, the Supreme Court, recognized that same-sex couples enjoyed constitutional rights,
including the right to marry. The trifecta, beginning with Lawrence, overruled
the Bowers decision and changed the landscape for same-sex couples in the United States. The
date of the final ruling in the trifecta likely is no coincidence, given Kennedy’s sense of
history. These three cases are landmark decisions because they establish constitutionally
protected rights for same-sex couples. Supreme Court Justice Neil Gorsuch in his confirmation
hearings stated that the Obergefell decision is settled law on the issue, and time will tell if future
challenges are brought that the Supreme Court will hear.

Bowers v. Hardwick (1986) Supreme Court decision: 5-4

Lawrence v. Texas (2003) Supreme Court decision: 6-3
(https://supreme.justia.com/cases/federal/us/539/558/#annotation)

United States v. Windsor (2013) Supreme Court decision: 5-4
(https://supreme.justia.com/cases/federal/us/570/12-307/)

Obergefell v. Hodges (2015) Supreme Court decision: 5-4
(https://supreme.justia.com/cases/federal/us/576/14-556/)
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Justice Antonin Scalia (1936-2016)
Guest Essayist: Joerg Knipprath

During the Senate hearings on his nomination to the Supreme Court, Judge Neil Gorsuch commented, “Justice [Antonin] Scalia’s legacy will live on a lot longer than mine.” Whether or not this is a prophetic remark is too early to tell. However, Judge Gorsuch’s statement recognizes the enormous impact that Scalia has had—and will have—on American constitutional law.

Antonin Scalia had close immigrant roots. His father came from Sicily, but, as a future professor, was not of the working-class stereotype associated with such immigrants. Scalia’s mother was born of Italian immigrant parents. Antonin was an only child, which may explain why he and his wife had nine children. He graduated from Georgetown University and Harvard Law School, in both cases at or near the top of his class. After jobs in a law firm, as a law professor at the Universities of Virginia and Chicago, and in the federal government, he was appointed to the Court of Appeals for the District of Columbia Circuit, the most influential appellate court in the nation and often seen as a step to the Supreme Court. President Ronald Reagan appointed Scalia to the highest court in 1986, with unanimous approval by the Senate.

Supreme Court justices typically fall into one of three categories. There are those who view cases through a particular jurisprudential prism. They have developed a coherent constitutional philosophy that guides them. Done intellectually honestly, that philosophy does not, and should not, produce politically predictable results, “liberal” or “conservative,” as those terms might be applied to the issue of the day. This judicial philosophy is often developed in concurring or dissenting opinions, as the judge stakes out a position currently out of political or jurisprudential fashion or hews more to principle than can be accommodated for the necessary five votes for a majority opinion. Often, the fruits of the judge’s intellectual endeavors do not ripen until after his death, when changed political and social conditions produce new constitutional realities. In an analogy to baseball, the judge is playing constitutional long-ball. He may strike out more often in the short term, but when he connects, it has significant impact well beyond the immediate case. That describes Justice Scalia, who wrote more concurring opinions than any justice in the Court’s history, and who wrote more dissents than all but two. Some other justices in that mold were Stephen Field, Joseph Bradley, Oliver Wendell Holmes, Jr., Louis Brandeis, and Hugo Black. On the current Court, Clarence Thomas may turn out to fit that bill. John Marshall and Joseph Story were of the same type, but, due to the Court’s institutional infancy, their jurisprudential perspectives had immediate and, often, lasting impact.

Another type is the careful swing justice, who may or may not have a well-developed jurisprudential framework to guide his holdings. To the extent there is such a philosophy, it is often adapted to the popular mood of the time. Such a judge also may decide cases narrowly,
with only a weak connection to a broader judicial philosophy, and maneuver himself to the center of the Court’s ideological spectrum to maximize his power. The decisions and the reasoning underlying them are readily distinguishable in future cases as new facts are ever-so-slightly different. If the Court is closely balanced ideologically, it becomes “Justice X’s” Court, with arguments tailored to capture this swing vote. Using baseball again, the judge is playing small-ball to maximize his influence by repeated victories in narrowly-decided cases, but without long-term impact on the big issues of constitutional law. Justice Anthony Kennedy is the model. Among many others have been Justices Sandra Day O’Connor and Potter Stewart.

The third type is the one who provides the needed votes for the majority or additional votes for a dissent, but with limited impact on the development of constitutional law. They are not committed “centrists” or “big thinkers.” Such judges may write majority opinions even in notable cases, they may contribute to the development of non-constitutional doctrine, and they may have behind-the-scenes influence due to their avuncular personalities and lobbying skills. But their impact is too occasional and disconnected. Most judges are of that group.

For the Court to function well institutionally, the third group is essential. Having too many of the first would lead to jurisprudential battles that would impair compromise and resolution of concrete disputes. Having nine Scalias on the Court, especially representing different and, likely, clashing jurisprudential perspectives would challenge the Court’s capacity to settle conflicts between political entities, including lower courts, in specific cases and controversies. After all, federal judges cannot be simply professors of jurisprudence engaged in academic speculations.

Among Scalia’s many contributions to constitutional law is the concept of “originalism.” This is not a substantive principle but a process of constitutional hermeneutics, the interpretation of the words of the document. The process was not original—to use an apt term—with Scalia. Rather, American judges have been using this as the orthodox constitutional analysis for two hundred years. Scalia’s contribution was to resuscitate this approach after the Warren Court and the legal academy had institutionalized the “Living Constitution” methodology that envisioned the Constitution’s text as a persuasive reference, but not as authoritative. A “Living Constitution” court would read that text with the overarching objective to keep it in tune with desirable societal norms as determined by the judges. Scalia was so successful that academics debated various strands of originalism, a sure sign that an intellectual idea has “arrived.”

Originalism rests on the proposition, some might say self-evident truth, that the Constitution’s text is authoritative. Further, the text must be read as originally understood by those who created the Constitution. That includes those in the state conventions who voted on the Constitution, much as the words in a contract are determined by the understanding of the signatories. It would also consider the understanding of those who wrote and debated the drafts of the Constitution in Philadelphia, since they informed the delegates at the state conventions. Finally, it might consider the general citizenry’s understanding of such terms, as reflected in dictionaries. Although Scalia hesitated about this, some originalists argue that, in addition to formal constitutional amendment, sophisticated application of the doctrine allows for gradual evolution and adaptation of constitutional law through statutes and judicial decisions that have been accepted by the public as shown by long, unchallenged adherence. Such weight of tradition gives legitimacy to meaning. However, if the matter of unconstitutionality is in doubt, Scalia would
have the “democratic default” control and uphold the people’s choice reflected in the challenged law. His jurisprudence leaves little room for “unenumerated” constitutional rights.

A necessarily brief selection from his many important opinions provides a window into Scalia’s jurisprudence. In Printz v. U.S. (1997), Scalia wrote for a 5-Justice majority that overturned a provision of the Brady Act. In a lengthy historical analysis, Scalia found that the interim background check obligations the federal law imposed on state law enforcement officials for gun purchasers “commandeered” those officials into federal service in violation of structural federalism. The statute nullified the states’ status as “sovereigns” over their own governmental machinery. This originalist approach supported the “New Federalism” of the Rehnquist Court. Justice Thomas concurred in the result and hoped that a future Court would hold for the first time that the Second Amendment protects an individual right to own firearms for self-defense.

In D.C. v. Heller (2008), Justice Thomas’s wish came true. Heller, who carried a firearm in his job to protect federal judges, now could also keep and bear a weapon commonly used for self-defense to protect himself in his home. In another lengthy and detailed historical analysis, Justice Scalia analyzed text, English precedent, state constitutions, proposals for amendments during the adoption of the Constitution, commentary by legal writers, and actions and decisions of early Congresses and courts. As an interesting originalist counterpoint, the main dissent by Justice John Paul Stevens also used textual and historical analysis. Justice David Souter, too, had used that method in his Printz dissent, which shows the influence that Scalia’s insistence on original understanding of the text as the only legitimate approach to constitutional adjudication has had in framing the terms of the Justices’ debate.

Justice Anthony Kennedy discovered in Obergefell v. Hodges (2015) a right of same sex couples to marry as part of the liberty protected under the 14th Amendment. Scalia disagreed and excoriated the majority for what Kennedy grandiloquently called the Court’s “reasoned judgment”: “When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases….Since there is no doubt whatever that the People never decided to prohibit the limitation of marriage to opposite-sex couples, the public debate over same-sex marriage must be allowed to continue. But the Court ends this debate, in an opinion lacking even a thin veneer of law. Buried beneath the mummeries and straining-to-be-memorable passages of the opinion is a candid and startling assertion: No matter what it was the People ratified, the Fourteenth Amendment protects those rights that the Judiciary, in its ‘reasoned judgment,’ thinks the Fourteenth Amendment ought to protect. That is so because ‘[t]he generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions . . . .’ One would think that sentence would continue: ‘. . . and therefore they provided for a means by which the People could amend the Constitution,’ or perhaps ‘. . . and therefore they left the creation of additional liberties, such as the freedom to marry someone of the same sex, to the People, through the never-ending process of legislation.’ But no. What logically follows, in the majority’s judge-empowering estimation, is: ‘and so they entrusted to future generations a charter protecting the right of all persons to
enjoy liberty as we learn its meaning.’ The ‘we,’ needless to say, is the nine of us…. This is a naked judicial claim to legislative—indeed, super-legislative—power; a claim fundamentally at odds with our system of government. Except as limited by a constitutional prohibition agreed to by the People, the States are free to adopt whatever laws they like, even those that offend the esteemed Justices’ ‘reasoned judgment.’ A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.”

That paragraph captures all of Scalia’s substance and style: The resort to original understanding, the support for self-government, the distaste for judges as philosopher-kings, and the slashing, often sarcastic, rhetorical style that supporters of his jurisprudence enjoyed, but that sometimes was too barbed to promote collegiality on the Court. But Scalia was not done:

“The opinion is couched in a style that is as pretentious as its content is egotistic….Of course the opinion’s showy profundities are often profoundly incoherent….The world does not expect logic and precision in poetry or inspirational pop-philosophy; it demands them in the law.”

And in a parting shot in a footnote, he lamented,

“If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: ‘The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity,’ I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.”

Justice Kennedy was a periodic target of Scalia’s (well-deserved) barbs. Kennedy’s style is often moralistic and smug, heavy on emotion and spare on constitutional law, but predictably elitist and with a predilection for judicial supremacy. In U.S. v. Windsor (2013), Kennedy wrote for the Court in the 5-4 decision that struck down the federal Defense of Marriage Act. The basis of the ruling was unclear, as Kennedy talked alternatively about principles of federalism, equal protection, and due process. He did assert that only bare hostility or dislike could have produced the DOMA. Scalia attacked that last assertion and called the opinion “scattershot” and “legalistic argle-bargle.”

In Planned Parenthood v. Casey (1992), Kennedy wrote for a “joint” plurality opinion, “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.” He also quoted that passage approvingly in Lawrence v. Texas (2003). Scalia derided this “famed sweet-mystery-of-life” passage and concluded, “I have never heard of a law that attempted to restrict one’s ‘right to define’ certain concepts; and if the passage calls into question the government’s power to regulate actions based on one’s self-defined ‘concept of existence, etc.,’ it is the passage that ate the rule of law.”
In *Lee v. Weisman* (1992), Scalia dissented from Kennedy’s opinion for the Court in a 5-4 ruling that declared voluntary prayers at middle and high school graduation ceremonies to violate the Establishment Clause. Kennedy found that, while there was no legal compulsion to participate, peer pressure would cause the children to succumb at least to the invitation to stand, even if they did not mouth the prayer. Scalia characterized Kennedy’s analysis as “psycho-journey,” and “psycho-coercion.” He lamented that it was

“a sufficient embarrassment that our Establishment Clause jurisprudence regarding holiday displays…has come to ‘requir[e] scrutiny more associated with interior decorators than with the judiciary’ …But interior decorating is a rock-hard science compared to psychology practiced by amateurs. The Court’s argument…is, not to put too fine a point on it, incoherent.”

Scalia’s faith in the core constitutional principle of self-government also led him to reject the reliance by the Court, particularly Justices Kennedy and Breyer, on foreign practice to define the meaning of the Constitution. As foreign legislatures and, even more problematic, unelected foreign courts do not participate in American politics or culture, this democracy deficit makes irrelevant their views on what constitute “evolving standards of decency” for criminal penalties or fundamental rights for personal autonomy.

Dissenting in *Troxel v. Granville* (2000), he crystallized the difference between the role of judges and that of voters and legislators regarding metaphysical appeals to rights not specified in the Constitution:

“In my view, a right of parents to direct the upbringing of their children is among the ‘unalienable Rights’ with which the Declaration of Independence proclaims ‘all Men…are endowed by their Creator.’ And in my view that right is also among the ‘othe[r] [rights] retained by the people’ which the Ninth Amendment says the Constitution’s enumeration of rights ‘shall not be construed to deny or disparage.’ The Declaration of Independence, however, is not a legal prescription conferring powers upon the courts; and the Constitution’s refusal to ‘deny or disparage’ other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges’ list against laws duly enacted by the people. Consequently, while I would think it entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the State has no power to interfere with parents’ authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me as a judge entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right.”

An expert on constitutional law, and member of the Southwestern Law School faculty, Professor Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional
FOREIGN POLICY AND TREATY LAW

Cherokee Nation v. Georgia (1831) And Worcester v. Georgia (1832)
Guest Essayist: John Vinzant

In 1827, the state of Georgia passed several acts that affected the Cherokee Nation within Georgia's borders. Georgia extended criminal jurisdiction over crimes committed by Cherokees within the Cherokee Nation. Traditionally and legally, the Cherokee had their own criminal jurisdiction. The Georgia legislature also declared the Cherokees had no legal title to the land that the state would respect. Consequently, surveyors were dispatched with military support to begin surveying Cherokee land for development and settlement. The governor was authorized to take possession of Cherokee gold mines. All contracts made between Georgia and the Indians were voided. Georgia legislators believed the Cherokee, in light of events would leave voluntarily.

The Cherokee however, chose the path to the Supreme Court, where they declared to be "the Cherokee nation of Indians, a foreign state, not owing allegiance to the United States, nor to any state of this Union, nor any prince, potentate or state, other than their own." The Cherokee claimed the over eleven treaties signed with the United States, recognized their status as a fully sovereign independent nation, placing them beyond the reach of state jurisdiction. The legal jurisdiction seemed clear.

Chief Justice John Marshall did not consider the merits of the case and began with the jurisdictional question as laid out in Article III, Section 2 which provides federal jurisdiction over cases "between a State, or citizens thereof and foreign States..." Marshall asked "Is the Cherokee nation a foreign state, in the sense in which the term is used in the constitution?" In a very brief opinion, the answer was no. The Cherokees were not a foreign nation and could not sue. Marshall wrote:

"They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert title independent of their will, which must take effect in point of possession, when their right to possession ceases. Meanwhile they are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian."

This was no surprise. In McIntosh v. Johnson (1823), the Marshall court declared that Indians did not have full title to the land where they lived. Land belonged to the discoverer (first Europeans, then ceded to the United States). Thus: “[T]he rights of the original inhabitants were, in no instance, entirely disregarded; but were, necessarily, to a considerable extent,
impaired…their rights to complete sovereignty, as independent nations, were necessarily diminished.” The American government was the landlord and the Indian was the lessee.

Cherokee was not a unanimous case. In a 4 - 2 decision, Justices William Johnson and Smith Thompson dissented. Johnson agreed that tribes were dependent but doubted their domestic nation status. Tribes could not be any kind of nation because Johnson described them as "a people so low in the grade of organized society" they did not rise to the elevated status of a nation.

Worcester v. Georgia did not directly involve the tribe. In 1831, Samuel A. Worcester and several other missionaries from the American Board of Commissioners for Foreign Nations challenged a Georgia law prohibiting all white persons from living on or going into the Cherokee nation without a permit. Worcester and Dr. Elizur Butler refused to comply and were arrested and sentenced to four years’ hard labor. Worcester claimed Georgia’s action was unconstitutional based on three arguments: Georgia had violated federal treaties; impaired the obligation of contracts between the United States and the Cherokee; and interfered with the federal power to regulate commerce with Indians.

Worcester was a “win” for the Cherokee. Marshall pointed out the commerce clause specifically granted Congressional regulation of commerce with the Indians. Also treaties were the supreme law of the land which forbid Georgia’s actions. The long process of negotiating and making treaties merely supported the proposition that tribes were "distinct, independent, political communities."

With Worcester, Marshall refuted Johnson’s dissent and elaborated upon the concept of a “domestic dependent nation”. Tribes were a quasi-sovereign state. Marshall wrote:

"[T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence- its right to self-government- by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe."

This statement recognized that self-government was and is an inherent right of tribes. It was not surrendered when a weaker tribal government sought protection from the federal government. Tribes had a governmental relationship solely with the federal government, not the individual states and states had no jurisdiction within Indian lands.

Worcester, when read with Cherokee Nation, gives much definition to the concept of “domestic dependent nation”. While tribes under the doctrine of discovery lost some sovereign powers, they were not reduced to political ciphers. Marshall summed up the Court's support for self-governance by confirming federal power and the unique status of tribes. Indian tribes, 

"had always been considered as distinct, independent, political communities, retaining their original natural rights, as the undistinguished possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first
discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation," so generally applied to them means "a people distinct from others."

And

"the laws of Georgia can have no force, and which citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with acts of congress. The whole intercourse between the United States, and this nation, is, by our constitution and laws, vested in the government of the United States."

This strong judicial language of course, could not defeat the U.S. government’s drive for removal. Georgia refused to honor the judgment and as President Andrew Jackson would have the power of the sword over Marshall’s waxing rhetoric, the federal government did nothing to enforce it. In 1835 the Treaty of New Echota was negotiated and the Cherokee left Georgia.

Cherokee Nation v. Georgia (1831) Supreme Court decision: [http://caselaw.findlaw.com/us-supreme-court/30/1.html](http://caselaw.findlaw.com/us-supreme-court/30/1.html)


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MODERN SUPREME COURT CASES

**Gonzales v. Carhart (2007)**

**Guest Essayist: Steven H. Aden**

Vote: (5 to 4) Majority: Roberts, Scalia, Kennedy, Thomas, and Alito. Dissenters: Stevens, Souter, Ginsburg, Breyer.

*Gonzales v. Carhart* is one of those rare cases that highlights the difference an election can make to Supreme Court decision-making. While the Justices of the Supreme Court are (arguably) largely immune from political pressure because they serve for life, they are nominated by Presidents and confirmed by Senates that answer to the People. For this reason, the makeup of the Court is unavoidably a product of the political process, and this process can yield strikingly different results depending on the makeup of the bench.

*Gonzales* presented to the Supreme Court for a second time the question of the constitutionality of statutory prohibitions on “partial-birth abortion.” A partial-birth abortion is a late-gestation abortion procedure by which a physician partially delivers an intact, living infant up to the head (in the case of a breech presentation) or up to the waist (in the case of a head-first presentation)
and then kills the nearly-born infant by puncturing its skull and vacuuming out its brain. The Court had considered a Nebraska state ban on the procedure seven years earlier in *Stenberg v. Carhart* (involving the same late-term abortion provider, Leroy Carhart), and the decision yielded a contentiously split 5-4 decision that upheld the right of abortion providers to offer it. Although such bans had been adopted by thirty States and twice passed by both Houses of Congress (though vetoed both times by the President), the Court struck down the Nebraska law. The majority ruled that because the description of the procedure in the Nebraska law hewed too closely to descriptions of another abortion procedure that was not being challenged, the law thereby put legal access to abortion at risk. Justice Sandra Day O’Connor, writing a separate opinion concurring in the result, said that the state law may have been constitutional if it had included a “health of the mother” exception.

Justice Anthony Kennedy strenuously dissented, describing the partial birth abortion procedure in gruesome detail and calling the majority’s description of the method “clinically cold.” Rather than viewing the procedures from the perspective of the abortionist, Justice Kennedy said, it should have viewed them “from the perspective of a society shocked when confronted with a new method of ending human life.”

Congress responded to *Stenberg* by passing the Partial-Birth Abortion Ban Act of 2003, which prohibited the practice throughout the country and sought to shore up the deficiencies the Supreme Court found in the Nebraska statute through an extensive set of factual findings. Congress found that “[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion ... is a gruesome and inhumane procedure that is never medically necessary and should be prohibited” and that “[t]here is no credible medical evidence that partial-birth abortions are safe or are safer than other abortion procedures.” Lower courts struck down the act, and appeals courts agreed that it was unconstitutional under *Stenberg*.

But the Court’s makeup had changed in the seven years since *Stenberg*. Chief Justice John Roberts had been appointed by Republican President George W. Bush to replace Chief Justice William Rehnquist, one conservative jurist for another. While that switch likely made no difference to the outcome, the departure of moderate Justice Sandra Day O’Connor and President Bush’s appointment of conservative Samuel Alito altered the balance of the Court toward the pro-life position. This time, the Court upheld the partial-birth abortion ban, with Justice Anthony Kennedy now writing for the 5-4 majority.

The majority declined to reverse the *Stenberg* decision, preferring instead to distinguish it on the basis of the more exact language used by Congress to describe the banned procedure. Justice Kennedy began by repeating his gruesome description of the partial-birth abortion procedure set out in his dissent in *Stenberg*. Finding the description of the banned procedure sufficiently clear to encompass the prohibited partial-birth abortion procedure without also reaching the more common type of abortion procedure, Kennedy rejected the argument that the federal statute was too vague to be constitutional. In the Court’s view, the federal act furthered the government’s interest in preserving and promoting respect for human life, as Congress could reasonably conclude that “the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition.” “Whether to have an abortion requires a difficult and painful moral decision,” Justice Kennedy said. Because
“some women come to regret their choice to abort the life they once created and sustained,” the state has an interest in ensuring that such a choice is made with full information. And while the new Supreme Court majority said it assumed that the federal law would be unconstitutional “if it subjected women to significant health risks,” there was “documented medical disagreement” on this question. This “medical uncertainty” allowed the act to survive Carhart’s facial attack, the Court concluded, although in appropriate individual circumstances abortion providers were free to file “as-applied” challenges to the statute to show that the procedure was necessary in specific circumstances.

Notably, in the ten years since Gonzales, neither Dr. Carhart nor any other abortion provider in the U.S. has taken the Court up on its offer to file an as-applied suit to challenge the federal partial-birth abortion ban in circumstances specific to a patient. Partial-birth abortion remains a banned procedure under federal law in all fifty states. And Gonzales v. Carhart stands as a reminder that when it comes to Supreme Court jurisprudence, elections can and do make a difference. It remains to be seen whether President Donald J. Trump’s election in November 2016, and his appointment of conservative judge Neil Gorsuch to the Supreme Court to replace the late Antonin Scalia, will set the Court in a new direction.

Gonzales v. Carhart (2007) Supreme Court decision: https://www.oyez.org/cases/2006/05-380

Steven H. Aden has more than twenty-five years of experience defending constitutionally protected freedoms. He serves as senior counsel with Alliance Defending Freedom in its Washington, D.C., office.

Happy Independence Day!
Read The Declaration of Independence with your family and friends!

Click Here to Hear Constituting America Founder & Co-Chair Actress Janine Turner read the Declaration of Independence!

The Declaration of Independence: A Transcription

From the National Archives website:
http://www.archives.gov/exhibits/charters/declaration_transcript.html

IN CONGRESS, July 4, 1776.

The unanimous Declaration of the thirteen united States of America,

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.
We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. – That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, – That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security. – Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary for the public good. He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them. He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only. He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures. He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people. He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the dangers of invasion from without, and convulsions within. He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands. He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers. He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries. He has erected a multitude of New Offices, and sent hither swarms of Officers to harrass our people, and eat out their substance. He has kept among us, in times of peace, Standing Armies without the Consent of our
legislatures.
He has affected to render the Military independent of and superior to the Civil power.
He has combined with others to subject us to a jurisdiction foreign to our constitution, and
unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation:
For Quartering large bodies of armed troops among us:
For protecting them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States:
For cutting off our Trade with all parts of the world:
For imposing Taxes on us without our Consent:
For depriving us in many cases, of the benefits of Trial by Jury:
For transporting us beyond Seas to be tried for pretended offences
For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies:
For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments:
For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.
He has abdicated Government here, by declaring us out of his Protection and waging War against us.
He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people.
He is at this time transporting large Armies of foreign Mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.
He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their Hands.
He has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.

Nor have We been wanting in attentions to our Britsh brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.
We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

The 56 signatures on the Declaration appear in the positions indicated:

Column 1
**Georgia:**
Button Gwinnett
Lyman Hall
George Walton

Column 2
**North Carolina:**
William Hooper
Joseph Hewes
John Penn

**South Carolina:**
Edward Rutledge
Thomas Heyward, Jr.
Thomas Lynch, Jr.
Arthur Middleton

Column 3
**Massachusetts:**
John Hancock

**Maryland:**
Samuel Chase
William Paca
Thomas Stone
Charles Carroll of Carrollton

**Virginia:**
George Wythe
Richard Henry Lee
Thomas Jefferson
Benjamin Harrison
Thomas Nelson, Jr.
Francis Lightfoot Lee
Carter Braxton

Column 4
**Pennsylvania:**
Robert Morris
Benjamin Rush
Benjamin Franklin
John Morton
George Clymer
James Smith
George Taylor
James Wilson
George Ross

**Delaware:**
Caesar Rodney
George Read
Thomas McKean

Column 5
**New York:**
William Floyd
Philip Livingston
Francis Lewis
Lewis Morris

**New Jersey:**
Richard Stockton
John Witherspoon
Francis Hopkinson
John Hart
Abraham Clark

Column 6
**New Hampshire:**
Josiah Bartlett
William Whipple

**Massachusetts:**
Samuel Adams
John Adams
Robert Treat Paine
Elbridge Gerry

**Rhode Island:**
Stephen Hopkins
William Ellery

**Connecticut:**
Roger Sherman

Guest Essayist: James D. Best

District of Columbia v. Heller provided clarity to a long and quarrelsome debate about the application of the Second Amendment. The crux of the case was whether the right to “keep and bear arms” was an individual right or a collective right associated with regulated militias. The Supreme Court (5-4) ruled the Second Amendment an individual right.

Specifically, the case challenged overly restrictive gun laws of the District of Columbia.

District of Columbia law bans handgun possession by making it a crime to carry an unregistered firearm and prohibiting the registration of handguns; provides separately that no person may carry an unlicensed handgun, but authorizes the police chief to issue 1-year licenses; and requires residents to keep lawfully owned firearms unloaded and disassembled or bound by a trigger lock or similar device. Respondent Heller, a D. C. special policeman, applied to register a handgun he wished to keep at home, but the District refused.

The Second Amendment reads, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” Did the first clause merely define one of the reasons for the right or articulate a sole condition to “keep and bear arms?”

The Court held that,

The Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home

Nowhere else in the Constitution does a “right” attributed to “the people” refer to anything other than an individual right

The Court also held that

Like most rights, the Second Amendment right is not unlimited. It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose

Justice Scalia, who wrote for the majority, cited historical writing and events, used contemporaneous and current dictionaries to define words, and expounded on the relevance of
sentence structure. He based his decision on the historical context and actual language of the amendment.

the Second Amendment’s prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia

virtually all interpreters of the Second Amendment in the century after its enactment interpreted the amendment as we do.

He attacked the minority opinion with logic.

if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause

He also relied on what Cicero defined as the laws of nature.

it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right … [t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second amendment declares that it shall not be infringed

Justice Stevens, writing for the minority argued for “judicial continuity” and unwavering reliance on precedent. Further, he argued that the first phrase of the amendment was paramount.

The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia … Specifically, there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution.

Stevens argues that numerous cases have upheld the government’s power to regulate the civilian use of firearms, and thus that power can be extended nearly without limit.

The opinion the Court announces today fails to identify any new evidence supporting the view that the Amendment was intended to limit the power of Congress to regulate civilian uses of weapons.

Scalia calls the initial phrase of the amendment a prefatory (introduction), while Stevens repeatedly refers to it as a preamble. (Although he acknowledges that “the settled principle of law is that the preamble cannot control the enacting part of the statute”). Stevens further argues that “the people” is not as inclusive as in other parts of the Constitution, and even claims that the First Amendment protects collective rights. In effect, Stevens argues that individual rights are the exception in the Bill of Rights.

While the right peaceably to assemble protects the individual rights of those persons participating in the assembly, its concern is with action engaged in by members of a group, rather than any single individual. Likewise, although the act of petitioning the Government is a right that can be exercised by individuals, it is primarily collective in
nature. For if they are to be effective, petitions must involve groups of individuals acting in concert.

The Framers did not view the Bill of Rights as a list of government-guaranteed rights—individual or collective. To them, the Bill of Rights was a restraining order, one that told the government to never interfere with the natural rights of the people. The first eight amendments are filled with phrases like, “Congress shall make no law, shall not be infringed, shall not be violated, nor be deprived, shall not be required.” This is not a list of rights generously bestowed by a benevolent government, but instead a list of restrictions on government. In case they forgot something, the Framers added the Ninth and Tenth Amendments.

Over the years, the Supreme Court has set itself up as the arbiter of rights. So much so, that many people have come to view it as the grantor and guarantor of rights. Our rights will be safer if we returned to the perspective that “all men are created equal, that they are endowed by their Creator with certain unalienable Rights.”


**Vote:** (5 to 4) Majority: Roberts, Scalia, Kennedy, Thomas, and Alito. Dissenters: Stevens, Souter, Ginsburg, Breyer.

*James D. Best,* author of *Tempest at Dawn,* a novel about the 1787 Constitutional Convention, *Principled Action,* and the *Steve Dancy Tales.*

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**Guest Essayist: David Raney**

The U.S. Supreme Court’s 2008 *District of Columbia v. Heller* case considered whether the Second Amendment to the U.S. Constitution protects an individual right to possess and use privately-owned firearms.

**Historical Background**

The Second Amendment to the United States Constitution states: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” The Founding Fathers drafted and ratified the Second Amendment in order to protect the individual right of citizens to possess and carry their personal arms—most notably but not exclusively firearms. The Founders did not believe that they were creating a new right in the Second Amendment; rather, they insisted that they were simply preserving a right that predated the birth of the American Republic. The Revolutionary generation considered the right to keep and bear private arms to be a traditional right of Englishmen that they had inherited, but more importantly they recognized that this right was an extension of the natural rights enshrined in the Declaration of Independence (the rights to life, liberty, and the pursuit of happiness). Despite changes in technology and relatively recent arguments advanced by
“progressives” of various types, the words of the Second Amendment have the same meaning today as they had during our nation’s founding period.

**Background of the Case**

As of 2003, when plaintiff Dick Heller initially filed his lawsuit against the District of Columbia, D.C. law disallowed the possession of unregistered handguns and, since 1975, had prohibited the registration of most new handguns. In addition, D.C. law required that any firearms kept in one’s home be unloaded and inoperable. These draconian laws virtually banned handgun possession by private citizens. Heller, a special policeman who worked in the District, was permitted to possess a handgun in the performance of his duties, but he was prohibited from keeping the firearm in his home, which was in a crime-ridden area. Heller then brought suit against the D.C. government, claiming that the District’s virtual prohibition on private handgun possession violated his rights under the Second Amendment. A federal district court judge dismissed Heller’s lawsuit, but the U.S. Court of Appeals for the D.C. Circuit reversed the dismissal. District of Columbia officials then appealed the case to the U.S. Supreme Court.

**The Supreme Court’s Decision**

In a 5-4 ruling (with Justice Antonin Scalia writing for the majority), the Court decisively sided with Heller. It held that, “The Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.” The Court observed that the first portion of the amendment (its prefatory clause) explains the purpose of the remainder of the amendment (the operative clause) but does not restrict it in any way. Language referring to “a well regulated Militia,” the Court explained, reflected the Founders’ belief that “all males physically capable of acting in concert for the common defense” should possess privately-owned firearms and the requisite skill to use them proficiently. This “general militia” would act as a safeguard against the tyrannical rule of a standing army or select group. The Court noted further that its interpretation is supported by the amendment’s drafting history, contemporary state amendments protecting the right of individuals to keep and bear their private arms, and “interpretation of the Second Amendment by scholars, courts, and legislators, from immediately after its ratification through the late 19th century.”

The Court swept aside the ahistorical “collective right” arguments of Justice John Paul Stevens and the other dissenters who claimed, “it is the collective action of individuals having a duty to serve in the militia that the text directly protects and, perhaps more importantly, that the ultimate purpose of the Amendment was to protect the States' share of the divided sovereignty created by the Constitution.” The Court’s majority responded that the rights of “the people” protected by the Bill of Rights (such as those covered by the First, Fourth, and Ninth Amendments) are clearly individual rights, not “rights” of states (states have powers, not rights) or “collective” rights of some kind. Thus, logic dictates that the right of “the people” stated in the Second Amendment is an individual right as well.

**Aftermath**
The Court’s holdings in the Heller case applied only to the federal government and jurisdictions such as the District of Columbia that are under its direct authority. However, in the 2010 case McDonald v. Chicago, the Court applied the central tenets of Heller to state and local governments as well using the Fourteenth Amendment’s Due Process Clause. Thus, according to two clear Supreme Court precedents, the individual right to possess and use privately-owned firearms for lawful and traditional purposes must be honored by federal, state, and local units of government. Unfortunately, though, many lower courts have been reluctant to abide by the holdings in Heller and McDonald. In several cases, “progressive” judges have set aside these precedents and instead have ruled according to their own predilection. Only time will tell whether inferior courts will allow the right to keep and bear arms to assume its rightful place in the pantheon of liberties protected by the Bill of Rights.


Dr. David A. Raney is a Professor of History and holds the John Anthony Halter Chair in American History, the Constitution, and the Second Amendment at Hillsdale College. Dr. Raney writes and speaks about the Second Amendment frequently, and his teaching and research interests range widely from the early American republic through the Civil War and Reconstruction.

McDonald v. Chicago (2010)  
Guest Essayist: David Raney

The U.S. Supreme Court’s 2010 McDonald v. Chicago case considered whether the Second Amendment’s protection of the individual right to possess and use privately-owned firearms as affirmed in the Court’s 2008 District of Columbia v. Heller decision also applies to state and local governments.

Historical Background

The Second Amendment to the United States Constitution states: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” The Founding Fathers drafted and ratified the Second Amendment in order to protect the individual right of citizens to possess and carry their personal arms—most notably but not exclusively firearms. The Founders did not believe that they were creating a new right in the Second Amendment; rather, they insisted that they were simply preserving a right that predated the birth of the American Republic. The Revolutionary generation considered the right to keep and bear private arms to be a traditional right of Englishmen that they had inherited, but more importantly they recognized that this right was an extension of the natural rights enshrined in the Declaration of Independence (the rights to life, liberty, and the pursuit of happiness). Despite changes in technology and relatively recent arguments advanced by “progressives” of various types, the words of the Second Amendment have the same meaning today as they had during our nation’s founding period.
Background of the Case

In 2008, the Supreme Court ruled in District of Columbia v. Heller that the Second Amendment “protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.” The landmark decision, however, applied only to the federal government and territory under its direct authority (such as the District of Columbia); states and local units of government were not covered by the ruling. In the wake of the Heller case, Chicago resident Otis McDonald decided to challenge his city’s virtual ban on handgun possession. McDonald was a retiree who lived in a deteriorating neighborhood, and he wished to obtain a handgun for self-defense in his home. Unfortunately, Chicago law prohibited the possession of unregistered handguns and, since 1982, the city refused to allow private citizens to register such firearms. Otis sued the city, citing its violation of his Second Amendment rights. A federal district court dismissed McDonald’s lawsuit, and the U.S. Court of Appeals for the Seventh Circuit affirmed the dismissal. McDonald then appealed his case to the U.S. Supreme Court.

The Supreme Court’s Decision

In a 5-4 ruling (with Justice Samuel Alito writing for the majority), the Court decisively sided with McDonald. It declared that, in addition to the federal government, state governments and their political subdivisions must also respect the individual right to keep and bear arms enshrined in the Second Amendment. Arguing that this right is “fundamental to the Nation’s scheme of ordered liberty” and “deeply rooted in this Nation’s history and tradition,” the Court ruled that “the Fourteenth Amendment makes the Second Amendment right to keep and bear arms fully applicable to the States.” In essence, the Court held that the Second Amendment was enforceable against the states via the doctrine of “incorporation,” by which fundamental Bill of Rights protections have been applied against state governments via the Due Process Clause of the Fourteenth Amendment.

In arriving at its decision, the Court noted that one of the chief objectives of the Fourteenth Amendment was to protect freed blacks from disarmament at the hands of hostile state governments in the post-Civil War South. The historical record unambiguously supports this contention. In the aftermath of the war, southern states attempted to resurrect antebellum slave laws by enacting so-called “black codes” that, among other restrictions, prohibited freedmen from possessing arms. Framers of the Fourteenth Amendment spoke openly and frequently about the urgent need for an amendment to the United States Constitution to remedy this injustice by protecting blacks from disarmament by former rebels who wished to keep them in subjugation.

Aftermath

According to significant precedents in the Supreme Court’s District of Columbia v. Heller and McDonald v. Chicago rulings, the individual right to possess and use privately-owned firearms for lawful and traditional purposes must be honored by federal, state, and local units of government. Unfortunately, though, many lower courts have been reluctant to abide by the holdings in Heller and McDonald. In several cases, “progressive” judges have set aside these precedents and instead have ruled according to their own predilection. Only time will tell
whether inferior courts will allow the right to keep and bear arms to assume its rightful place in the pantheon of liberties protected by the Bill of Rights.

McDonald v. Chicago Supreme Court decision: https://www.oyez.org/cases/2009/08-1521

Dr. David A. Raney is a Professor of History and holds the John Anthony Halter Chair in American History, the Constitution, and the Second Amendment at Hillsdale College. Dr. Raney writes and speaks about the Second Amendment frequently, and his teaching and research interests range widely from the early American republic through the Civil War and Reconstruction.

Bush v. Palm Beach County Canvassing Board (2000)
Guest Essayist: James D. Best

The 2000 presidential election came down to who won Florida. Twenty-seven days after the election, the presidency remained undecided. Surrogates for George W. Bush and Al Gore clashed in a close-quarters fight that seemed to have no end. Both parties persisted and refused to yield. The media filled nearly every broadcast moment and column inch of newsprint with the maneuvers and shenanigans of both parties. The pursuit of minutia, gossip, and a major scoop drove wall-to-wall reporting of the countless twists, turns, and skirmishes.

The day after the November 7, 2000, Presidential election, the Florida Division of Elections reported that petitioner, Governor George W. Bush, had received 1,784 more votes than respondent Vice President Albert Gore, Jr. Under the Florida Election Code, an automatic machine recount occurred, resulting in a much smaller margin of victory for Bush. Gore then exercised his statutory right to submit written requests for manual recounts to the canvassing boards of four Florida counties.

The stakes were high … and becoming higher as time passed. Legal deadlines were missed, and then discarded. The official Electoral College vote loomed. Manual recounts had disintegrated into near chaos. Partisan squabbling literally surrounded every questionable ballot, with iconic images of officials holding up IBM-style cards to see if they could discern dimpled or hanging chads. Both sides had lawyered up—with armies of the best attorneys money could buy. To make matters increasingly stressful, the media fed the nation a never-ending stream of talking-heads, partisan spokespeople, videos of raucous demonstrations, and endless shots of closed doors meant to lock the public out. It appeared our Constitutional system was about to fail.

Two interrelated Supreme Court cases finally resolved the highly contentious 2000 election. The time span was short, only eight days, which is lightning fast for the Supreme Court.

1. On December 4, in Bush v. Palm Beach County Canvassing Board, the Court unanimously ruled to vacate (void) a Florida Supreme Court ruling, and remanded the case (sent it back) for clarification.
2. On December 12, in Bush v. Gore, the Court voted (7-2) that there was an Equal Protection Clause violation in the Florida recount and (5-4) that there was no alternative to comply with equal protection in the time remaining.

In the December 4 decision, the key issue was whether the state judiciary had the power to change election laws established by the legislature.

the court imposed a November 26 deadline for a return of ballot counts, thereby effectively extending by 12 days (the) 7-day deadline, and directed the Secretary to accept manual counts submitted prior to that deadline.

The U.S. Supreme Court vacated the Florida Supreme Court decision and asked for clarification on the basis for their decision. The state court may have overstepped its bounds because the Constitution gave states the authority to appoint electors “in such Manner as the Legislature thereof may direct.”

In light of considerable uncertainty as to the precise grounds for decision, the judgment of the Florida Supreme Court is vacated, and the case is remanded.

Many speculated that the Court “sent it back” because it was reluctant to get involved in this legal mire. The Court’s thinking may have been that time had run out and the mess would just go away if they ordered the state court to reconsider. (Electors were required to be selected by December 12 and met nationally on December 18.) If this was the Court’s hope, they were disappointed. The battle would not cease.

On December 8, 2000, the Florida Supreme Court ordered, inter alia, that manual recounts of ballots for the recent Presidential election were required in all Florida counties.

Noting the closeness of the election … there could be no question that there were uncounted “legal votes”—i.e., those in which there was a clear indication of the voter’s intent—sufficient to place the results of the election in doubt.

The Florida Secretary of State, a Republican, had already declared Bush the winner, so Bush filed an emergency application to the U.S. Supreme Court for a stay of this state court order. The Court accepted the application and ruled on December 12.

Because it is evident that any recount seeking to meet … (the) December 12 “safe-harbor” date would be unconstitutional under the Equal Protection Clause, the Florida Supreme Court’s judgment ordering manual recounts is reversed.

The ruling (7-2) that recounts violated the Equal Protection Clause was not nearly as controversial as the second decision (5-4) which stated that there was insufficient time for a Constitutional remedy. Republicans wanted the official declaration of their victory accepted as legal and binding, while Democrats wanted to recount until the gavel fell at the Electoral College in the hope of overrunning the Republican’s slight edge. Florida law required a declaration seven days from the election, so Republicans felt Democrats were changing the rules of the contest after the fact. The original margin of victory for Bush was only 1,784 votes and the margin
shrunk with each recount, thus Democrats believed Republicans were denying them the opportunity to count every vote.

The ramifications of these decisions have been huge. The Court’s rulings were used to taint Bush’s legitimacy, and the post-2000 political world has become far more partisan. Since December 12th, most analyses present the surrounding events in a sterile, legalistic manner that downplays the intense emotion of the contest. What’s glossed over is the chaos and anxiety that looked like it was going to go on forever. Someone had to stand up and call a halt to the recounts.

The ruling on December 4 was a punt, and the 7-2 Equal Protection Clause violation has been nearly forgotten. Post-election writings about the issue emphasize the 5-4 Court decision to call a halt to the recounts. In hindsight, the Court probably could have saved itself and the nation enormous heartache if it had made a definitive decision in Bush v. Palm Beach County Canvassing Board.


James D. Best, author of *Tempest at Dawn*, a novel about the 1787 Constitutional Convention, *Principled Action*, and the *Steve Dancy Tales*.

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**Crawford v. Marion County Election Board (2008)**

Guest Essayist: State Representative David Eastman

**Does the Constitution Give Americans the Right to Vote Without Photo Identification?**

In 2005, the State of Indiana passed a state law requiring that most Indiana voters who voted on Election Day would have to show government-issued photo ID before voting. The law provided an exception for those who lived in senior centers, and provided an alternate method of voting if you lost, forgot, or could not afford to get a photo ID. Note: The law also provided free state photo ID’s to those who did not already possess an Indiana driver’s license.

The Indiana Democratic Party, along with Democrat legislators and supporters, filed suit arguing that the law would result in fewer people voting, and violated an individual’s right to vote under the United States Constitution. The suit also argued that voter ID laws are “neither a necessary nor appropriate method of avoiding election fraud”.

In 2008, the U.S. Supreme Court heard the case *Crawford v. Marion County Election Board*. The case was named for Indiana State Representative William Crawford, the lead Democrat legislator who challenged the law, and election officials in Marion County, Indiana (named after Revolutionary War Hero Francis Marion, “The Swamp Fox”). The case dealt with whether or not
the 14th Amendment to the Constitution protects a right to vote without showing photo identification.

As sometimes happens, the Supreme Court decided the case, but offered no majority opinion to explain its decision. While six justices agreed that there was nothing in the Indiana Law that violated the Constitution, the six were evenly split on whether or not to maintain previous court precedent, or whether to change it.

Those filing the lawsuit wanted the Court to declare that the law was discriminatory against those who did not possess ID. Under the Indiana law, individuals without ID would have to either go out and get ID or later visit the clerk’s office and sign an affidavit verifying their identity and that they could not afford to get an ID. But as the law applied equally to all voters in Indiana, the Supreme Court did not find the law to be discriminatory. Another question was whether the photo ID requirement was merely an “inconvenience” or whether it actually violated an individual’s right to vote.

Those who opposed the law sought to draw parallels between the requirement of having ID, and having to pay a special tax before you could vote. In a 1966 case, the Supreme Court explained that the Constitution prevents a state from requiring a tax or fee in order to vote, even the nominal fee of only $1.50 that Virginia had required to discourage apathetic individuals from voting. Because such a fee did not relate to the voter’s actual qualifications, the Supreme Court explained that it violated an individual’s right to vote, no matter how low the fee was.

Photo identification, however, does relate to a voter’s qualifications. Namely, it relates to the person actually being who they say they are and being qualified to vote. The State of Indiana argued that requiring photo ID helped the state run efficient elections, helped limit election fraud, and helped maintain public confidence in the election process, thereby encouraging citizen participation in the democratic process.

Another important consideration raised by several of the justices was Art. I, § 4 of the Constitution, which provides that:

“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof…”

While Congress is empowered to make laws concerning federal elections, rather than putting election procedures directly into the Constitution, the Founders instead chose to defer to the election procedures put in place by the states. One of the benefits of recognizing state authority over state elections is that it limits the need for the Supreme Court to weigh in on what are essentially political questions that should be resolved through the political process.

Laws that relate to elections, even good laws, will likely have at least some effect on the outcome of those elections. Political parties can be expected to line up behind laws that are likely to help them in the next election and to line up in opposition to laws that may help their opponents. Every Republican legislator in Indiana voted in favor of the photo ID law and every Democrat legislator voted against it. Though the law applied equally to all voters in Indiana, the partisan undertones to the issue were very real.
In *Crawford v. Marion County Election Board*, the Supreme Court explained that just because partisan motivations contributed to the passage of a law is no reason to declare that law unconstitutional. The more important question to ask is whether a law that inconveniences voters is supported by valid, neutral reasons. In this case, the justification provided by the State of Indiana (efficient elections where fraud is discouraged and citizens are encouraged to participate in the democratic process), was more than enough to outweigh concerns that some individuals could find it more difficult to vote, or that the law might impact the success of one political party over another.

*Crawford v. Marion County Election Board* (2008) Supreme Court Decision: [https://www.law.cornell.edu/supremecourt/text/07-21](https://www.law.cornell.edu/supremecourt/text/07-21)

The Honorable David Eastman is a graduate of West Point and a former Captain in the U.S. Army. He has served at each level of U.S. government; city, county, borough, state and federal, and in each case was obliged to take an oath to support and defend the U.S. Constitution; He currently serves as a firefighter in Alaska and as a State Representative in the Alaska House of Representatives; He and his family live in Wasilla, Alaska.


Guest Essayist: Joerg Knipprath

In 2011, the Supreme Court decided *Brown v. Entertainment Merchants Association (EMA)*. A California law prohibited the sale of violent video games to minors and required labelling of content and designation of suitable users. Parents would still have the choice to buy video games deemed violent and give them to their children. The law was challenged as violating the free speech rights of minors. Without getting into the raw details, as described in the state’s brief and acknowledged by some of the justices, these games invited the players to torture, murder, and humiliate characters. The attorneys for the purveyors of this entertainment assured the justices that such displays of violence were a traditional teaching tool for America’s youth, and that, unless children have unrestricted opportunity to purchase these materials, freedom of speech would be devastated.

The Supreme Court, by 7-2, agreed that the law was an affront to the First Amendment. Justice Antonin Scalia, writing for the majority, asserted that these games’ opportunities for interactive violence were no different than reading Grimm’s fairy tales or Dante’s “Divine Comedy,” or watching Road Runner cartoons. Setting himself above the American Academy of Pediatrics and the California Psychological Association, both of which supported the law, Scalia approvingly noted that (some) research showed that there was no compelling link between such violent games and children’s behavior. The entertainment industry and all “correct” thinkers breathed a sigh of relief that another potential blow to a core freedom had been averted.

Yet, only a year earlier, the Supreme Court’s decision in *Citizens United v. FEC* produced a near-universal howling among academics and those same “correct” thinkers that the walls of the republic were in danger of tumbling. In *Citizens United*, the Court struck down--by a bare
majority--a portion of the McCain-Feingold campaign finance law of 2002. The section at issue prohibited “electioneering communications” (direct expenditures on messages that mentioned a candidate) within 30 days of a primary election or 60 days of a general election. But it did not do so for everyone; instead, the prohibition applied only to corporations (including non-profits) and unions. As was to be expected from the media-government complex, media corporations that own the major newspapers and control most television programming, also were exempted. The political movie at issue was produced by an advocacy group, Citizens United, and was to be shown on cable television through video-on-demand. It was an attack on then-candidate Hillary Clinton in 2008. Four justices dissented from the (to them) apparently incomprehensible argument that the First Amendment protects political speech and association for all, not just those selected by the government.

Presumably, in the minds of these critics of the result in Citizens United, American adults are overwhelmed by the excitement of too many political ads too close to an election and are not capable of rationally deciding for themselves how to evaluate the ads’ messages. But, going by the reach of the statute, only if the ads are produced by an organization, not by an individual or a political party. And only by a non-media organization. Rather than be bored by the avalanche of ads typical as an election approaches and tune them out, Americans will be brainwashed into supporting whatever candidate receives the most mention in ads by these select sinister organizations. Based on the Supreme Court’s reasoning in EMA, and on the critics’ reaction to that case, though, American children are fully capable of rationally deciding for themselves whether the video games’ invited acts of virtual violence are appropriate for them and will dispassionately evaluate the games’ messages. To sharpen the irony, if the movie had just contained interactive deviant brutality, it would have been like the violent video games in EMA and would have been more palatable to the critics as an exercise of protected free speech.

As President Obama did in his reaction to the case at that year’s State-of-the-Union speech, critics claimed--incorrectly--that Citizens United overturned a century of precedent against such organizational expenditures. Justice Anthony Kennedy meticulously eviscerated that argument and, along the way, endorsed the holdings of prior cases, cleared away a contrary constitutional outlier case, and affirmed the heretofore unremarkable principle that the core of the First Amendment’s free speech and press clauses is the protection of political advocacy.

Justice Scalia’s concurrence put to rest the dissent’s pseudo-originalist canard that the Framers did not intend corporations to exercise freedom of speech, by citing to numerous 18th-century educational, religious, and literary corporations and identical non-corporate associational entities that engaged in free speech activities. To underscore that point, the Court’s opinion cited a long series of cases in which the free speech rights of corporations were protected. In similar vein, Scalia showed that the free press protections at the time were not meant to apply only to media organizations as understood today. Moreover, the text of the First Amendment was clear. It mentioned speech and press, not speakers and media.

Contrary to the perception about Citizens United that the media have tried to foster, the case reflected the Court’s traditional constitutional jurisprudence about campaign financing and freedom of speech that distinguished between contributions and expenditures. Federal law initially only prohibited direct contributions to candidates by corporations. In 1947, for the first
time, Congress prohibited independent political expenditures from corporations and unions on behalf of candidates. Although the Court would not squarely reach the constitutionality of such restrictions for three decades, questions were raised about their constitutionality almost immediately, first by President Truman, then by the Court and concurring justices in *U.S. v. CIO* (1948), and, finally, by three justices in *U.S. v. Automobile Workers* (1957).

Judicial resolution of the constitutional issue did not occur until *Buckley v. Valeo* (1976). The Court made a stark distinction between contributions to candidates and independent expenditures. Contributions could be limited because of the concern over corruption and the appearance of corruption. Limitations on expenditures were struck down as unconstitutional, with only Justice White (who seems never to have met a federal law he did not like) dissenting. The specific statutory section (608(e)) in *Buckley* applied to individual, as well as corporate and union, expenditures. Some of the victorious plaintiffs were corporations. However, another section of the statute (610), the 1947 restriction on corporate and union expenditures that had been at issue in the earlier cases, was not specifically involved in *Buckley*. That section, subsequently recodified, was at issue in *Citizens United*.

Soon after *Buckley*, the Court struck down a state law that prohibited independent corporate expenditures related to referenda, in *First National Bank of Boston v. Bellotti* (1978). The Court emphasized that “the legislature is constitutionally disqualified from dictating...the speakers who may address a public issue.” Not until *Austin v. Michigan Chamber of Commerce* (1990) did the Court break from this line of precedents and uphold a restriction on corporate independent expenditures.

*Austin* rested on an “anti-distortion” theory that sought to allow government to intervene in the marketplace of speech to curb the power of wealthier speakers who might exercise a disproportionate influence in getting out their message. That theory had been roundly rejected by the Court before *Austin*, and was so, again, in *Citizens United*. Moreover, the McCain-Feingold Act’s exemption of huge media corporations from its coverage, and the exclusion of wealthy individuals, per *Buckley*, made a mockery of the anti-distortion rationale. Indeed, then-Solicitor General Elena Kagan made little effort to defend *Austin* during oral argument in *Citizens United*. *Austin* was overruled.

In *McConnell v. FEC* (2003), the Court, by 5-4, upheld restrictions both on contributions by organizations and individuals and on expenditures, including the “electioneering expenditures” addressed in *Citizens United*. The length of the 272-page opinion was matched by its convoluted analysis. There were multiple dissents, including one by Justice Clarence Thomas that characterized the statute a bit hyperbolically as the “most significant abridgement of the freedoms of speech and association since the Civil War.”

That a change of personnel can make a difference, especially, on an issue where the Court is closely divided, is evidenced in this controversy by the retirement of Justice Sandra Day O’Connor and her replacement by Justice Samuel Alito. O’Connor was part of the majority in *McConnell* in 2003. In *FEC v. Wisconsin Right to Life* (2007), the Court foretold the result in *Citizens United* by holding the restriction on electioneering communications unconstitutional where the communication was an “issue ad” and not express advocacy for or against a particular
candidate. Alito was part of the majority. Chief Justice John Roberts’s opinion stopped short of reversing McConnell, but reminded readers that “few kinds of speech can lay claim to being as central to the First Amendment as campaign speech.” Three justices would have simply overruled McConnell. One of them, Anthony Kennedy, later wrote the opinion that did that in Citizens United.

After the mis-step in Austin and the tortured opinions in McConnell v. FEC (2003), the Court in Citizens United simply has returned to its earlier jurisprudence and protected the rights of all, including individuals, associations, unions, and corporations, to participate in political discourse. Six years and two election cycles since Citizens United, the sky has not fallen. Whatever ails the electoral process, political ads about candidates rank low on the list. Contrary to the crisis-mongering of First Amendment Luddites, corporations have spent much the same as before. Indeed, individual corporations are not the largest spenders, and unions, especially public employee unions, eventually may be bigger beneficiaries of the decision. Moreover, the efforts of business, labor, and issue-oriented interest groups have been dwarfed by more the expenditures by the major parties, and by the huge sums raised directly by presidential candidates.

Repeated measures to control campaign expenditures through layers of regulation have just made matters more opaque, though the complexity of the laws and the threat of felony prosecutions have resulted in a windfall for election law attorneys. Complexity and opacity deter smaller associations from participating in the political process, as the Court noted in Citizens United, and magnify the power of wealthier actors able to maneuver through the regulatory labyrinth. One reason corporate spending has not changed much is that associated entities previously could spend unlimited “soft” money on electioneering activities (even within the time before an election) through a political action committee.

Attempting to control political spending in a country of 300 million that supposes itself to be a participatory political system, and one that prizes informed electorates, is chimerical. As former California Assembly Speaker Jesse Unruh famously declared, “Money is the mother’s milk of politics.” Citizens United is faithful to the First Amendment’s core values and brings the potential for more accountability to campaign financing.

Citizens United v. Federal Election Commission (2010) Supreme Court decision:

An expert on constitutional law, and member of the Southwestern Law School faculty, Professor Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums, and serves as a Constituting America Fellow. Read more from Professor Knipprath at: http://www.tokenconservative.com/.
Republican President Dwight Eisenhower reputedly said that appointing Chief Justice Earl Warren and Justice William Brennan were among his biggest mistakes as president as they helped usher in a wave of liberal jurisprudence at odds with Eisenhower’s conservative philosophy. Republican President George H.W. Bush might have said the same about Justice David Souter for the same reasons. Finally, Republican President Ronald Reagan would have agreed that Justice Anthony Kennedy surprisingly became a swing vote who could lean left.

Kennedy was born in California in 1936, and attended Stanford University and the London School of Economics before graduating from Harvard Law School. He practiced law and served as a law professor because being appointed to the bench—for the Ninth Circuit Court of Appeals—in 1975 by President Gerald Ford.

In 1987, Justice Lewis Powell retired from the Supreme Court. President Reagan at first appointed Robert Bork to the vacant seat, but the Senate rejected Bork after highly controversial hearings. Senate Democrats rejected his originalism and thought him too conservative, especially for what was likely to be a “swing vote” in important cases. Reagan submitted Kennedy’s nomination, and he was quickly confirmed by the Senate.

Kennedy’s opinions are not notably steeped in a particularly strong ideology. He often voted with conservative Chief Justice William Rehnquist during his tenure on the Court. Kennedy wrote the majority opinion in *Citizens’ United v. FEC* (2010), protecting free political speech by corporations which many liberals criticized. He also joined the majority in the contentious *Bush v. Gore* (2000) case in that presidential election.

On the other hand, Justice Kennedy has broken with what many consider to be conservative positions. For example, he joined the majority opinion in *Planned Parenthood v. Casey* (1992), which affirmed the *Roe v. Wade* (1973) decision allowing abortions, even though *Casey* rejected the trimester system. However, Kennedy has generally upheld restrictions on abortion and supported bans on late-term, partial-birth abortions.

Justice Kennedy has also been a supporter of gay rights and gay marriage in several Supreme Court cases. He authored the *Texas v. Johnson* (2003) decision overturning state laws criminalizing homosexual acts. In 2013, he wrote the majority opinion declaring the Defense of Marriage Act (DOMA) to be unconstitutional, and also wrote the opinion in *Obergefell v. Hodges* (2015) decision overturning bans on gay marriage in the United States.

Finally, Justice Kennedy joined with the liberal justices of the Supreme Court in ruling that local governments could seize private property for economic development in *Kelo v. City of New London* (2005).

The recent controversy involving Justice Kennedy is his possible impending retirement. He will be 81 years old, and many Supreme Court observers are speculating about his retirement. The issue is part of the polarized partisan debate because Republican President Donald Trump has already successfully placed one justice—Neil Gorsuch—on the Supreme Court. The Supreme
Court and its decisions have also generally become more politically-charged in the past five decades. Kennedy’s retirement as the “unreliable” conservative swing vote to a more consistent conservative could alter the Court’s jurisprudence on several important and controversial issues.

Whatever the respective ideological views of Justice Anthony Kennedy, he has honorably served the Supreme Court and dedicated his life to public service for more than thirty years.

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**Guest Essayist: Gennie Westbrook**

The First Amendment to the U.S. Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…” The Supreme Court has interpreted this prohibition to mean that state action that imposes restriction on the free exercise of religion is permitted only when there is a “compelling state interest in the regulation of a subject within the State’s constitutional power to regulate…” and even then, only “to prevent grave and immediate danger…”

The Supreme Court has adhered to the principle enunciated during the founding that the government would not interfere with the free exercise of religion and that churches would be free to govern their own affairs. In 1952 the Court ruled in *Kedroff v. St. Nicholas Cathedral* that “legislation that regulates church administration, the operation of the churches [or] the appointment of clergy…prohibits the free exercise of religion.” The hands-off approach of the government regarding matters of church administration is illustrated by the Court’s explanation in the *Kedroff* case: there is “a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” This independence from secular control protects the free exercise of religion and has given rise to the legal doctrine of the “ministerial exception,” which prohibits most workplace bias lawsuits by church employees.

Title VII, Section 703(a) of the Civil Rights Act of 1964 prohibits workplace discrimination “against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” The Americans with Disabilities Act of 1990 expanded employee protections to prevent workplace discrimination based on disability.

In *Hosanna-Tabor Lutheran Church and School v. Equal Employment Opportunity Commission* (2012), the constitutional question was the extent to which the “ministerial exception” applies in a dispute between an elementary school operated by a church and a teacher in that school.
Hosanna-Tabor Evangelical Lutheran Church and School in Redford, Michigan hired Cheryl Perich as a kindergarten teacher in 1999. The small faculty included two different categories of teachers: contract teachers and other “called” individuals who had completed a course at a Lutheran college in order to receive the title of commissioned ministers. Perich was hired as a contract teacher, but during her first year at work there, she completed the required coursework and received her “call” and commission. There was little difference in the job descriptions of the two groups; most taught classes in secular content and led their students in several brief prayer times each day. Perich taught kindergarten, and then third and fourth grades during her tenure with the school. She also taught a religion class, and attended a weekly chapel service with her class.

In June 2004, Perich suddenly became ill and was hospitalized, later diagnosed with narcolepsy. She took a leave of absence to receive medical care, and in January 2005, notified the school that her doctor had cleared her to return to work the following month. School administrators maintained that they had tried to save her position for a semester, but had hired a replacement teacher. They decided not to allow Perich to return to work, advising her that she should resign. Perich believed that the school refused to reinstate her because of her illness, and the dispute escalated. She threatened to sue the school for violation of the Americans with Disability Act (ADA), and at that point she was fired for “insubordination and disruptive behavior.” Supervisors explained that the reason for her dismissal was her threat to sue. This prospect violated a tenet of the church that disputes between church members should be settled internally, based on First Corinthians 6:1 (“If any of you has a dispute with another, do you dare to take it before the ungodly for judgment instead of before the Lord's people?”) and 6:4 (“Therefore, if you have disputes about such matters, do you ask for a ruling from those whose way of life is scorned in the church?”)

Perich filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging that the church had violated ADA by firing her because of her illness. The school countered that she was not fired for the illness but for disregarding her responsibility as a minister of the church to settle the dispute without appeal to outside authorities. The church maintained that the ministerial exception, then, prohibited the courts from interfering with their decision in a staffing question.

The EEOC argued that the ministerial exception applied only to ministers who hold what they called an “exclusively religious function,” and therefore was not relevant in Perich’s case, because she only spent 45 minutes a day in religious activities.

In a unanimous decision written by Chief Justice John Roberts, the Supreme Court for the first time gave its explicit approval to the ministerial exception. Once the church made its case that Perich was a minister by their definition, the decision of the church in a staffing question was not subject to review by the courts. The ruling explains that the Court was “reluctant to adopt a rigid formula for deciding when an employee qualifies as a minister,” but found persuasive the facts that Perich was formally ordained according to Lutheran practices and that she did perform important functions in teaching religious content to children. Justice Thomas wrote in his concurring opinion that the Constitution’s protection of a religious organization’s power to govern its internal affairs, “would be hollow…if secular courts could second-guess the
organization’s sincere determination that a given employee is a ‘minister’ under the organization’s theological tenets.”

Analysis of the decision indicates that employees of a church are likely to face significant obstacles in pursuing workplace bias lawsuits of various kinds. In a final footnote to the decision, Chief Justice Roberts wrote that the ministerial exception was not an absolute rejection of all such lawsuits. “District courts have power to consider [such] claims in cases of this sort, and to decide whether the claim can proceed or is instead barred by the ministerial exception.” An aggrieved worker can file a lawsuit alleging discrimination and have his day in court. But the Court’s interpretation of a robust ministerial exception in the Hosanna-Tabor case makes it harder for such an employee to prevail once the church makes the case that it considers the employee to be a minister.

This case pitted two vital American values against one another. On one hand, we have the core value of equality—that the law does not allow arbitrary discrimination. On the other hand is the core value of religious liberty—government does not dictate what it means to be a minister or how a church should carry out its mission. In this case, the entire Court declined to interfere in the founding constitutional principle of free exercise of religion.

Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission (2012) Supreme Court decision:

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Guest Essayist: John O. Tyler

Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC (2012):

Protecting Religious Liberty in American Schools

In Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission (2012), the federal government tried to force a church, against its will, to hire a minister to teach in the church's school. The US Supreme Court held that the federal government could not force the church to do so. Churches are free to shape their faith and mission under the Free Exercise clause by selecting their own ministers and religious teachers. The Establishment Clause prohibits any government involvement in their selection.

This essay briefly explains the history of important Supreme Court decisions on religious liberty in the schools before Hosanna-Tabor (2012). Many of these cases restricted the religious liberty of schools and students. This essay then explains the Supreme Court's decision in Hosanna-Tabor (2012), an important case protecting the religious liberty of schools and students. This essay concludes by briefly surveying five legal strategies, with case authorities, for protecting religious liberty under the First Amendment.

A. Before Hosanna-Tabor (2012): Supreme Court cases restricting religious liberty

The First Amendment protects religious liberty: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The first clause is known as the Establishment Clause. The second clause is known as the Free Exercise Clause.

Freedoms cannot defend themselves, and Constitutional guarantees of religious liberty are not self-enforcing. Beginning in 1962, people and organizations opposing religious liberty have filed law suits seeking to purge religious content from all schools in the United States.

These people and organizations enjoyed significant early victories in restricting religious liberty. School prayer was attacked in Engel v. Vitale (1962). Engel outlawed school prayer in public schools. Engel involved compulsory recitation of the following prayer: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our country." Justice Hugo Black, in a 6-1 decision, held that the prayer violated the Establishment Clause of the First Amendment, made applicable to the states through the Fourteenth Amendment. The prayer was a religious activity composed by government officials as part of a governmental program to further religious beliefs.

Abington School District v. Schempp (1963) and its companion case, Murray v. Curlett (1963), outlawed prayer in Pennsylvania and Baltimore public schools. Bible verses were read, without comment, followed by recitation of the Lord's Prayer. Students were excused upon parental request.
Justice Thomas C. Clark, in an 8-1 decision, held this practice violated the Establishment Clause. Justice Clark's opinion cited expert testimony that New Testament verses were "psychologically harmful" to Jewish children and "caused a divisive force within the social media of the school."

*Schempp* established the following test. If either the *purpose* or the *primary effect* of the government action advances religion, then the action is unconstitutional. The *purpose* of any government action must be secular. The *primary effect* of any government action must neither advance nor inhibit religion.

*Wallace v. Jaffree* (1985) outlawed moments of silence in public schools. *Wallace* involved an Alabama law authorizing one minute of silence "for meditation or voluntary prayer." Justice John Paul Stevens, in a 6-3 decision, found the statute violative of the Establishment Clause. The purpose of the statute was to endorse religion. The statute was not motivated by any clearly secular purpose.

*Stone v. Graham* (1980) outlawed posting the Ten Commandments in public schools. *Stone* involved a Kentucky law requiring the posting of the Ten Commandments in classrooms. The posted copies were purchased with private contributions, and the Kentucky statute recited a secular purpose: "The secular application of the 10 Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States."

The Supreme Court, in a *per curiam* opinion with three dissents, held the statute violated the Establishment Clause. Since the Ten Commandments did not confine themselves to secular matters, the law had no secular legislative purpose. Posting the Ten Commandments served no constitutional educational function. "If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments."


The Pennsylvania statute prohibited payment for any course containing "any subject matter expressing religious teaching, or the morals or forms of worship of any sect." Nevertheless, Chief Justice Warren Burger, in a 7-1 decision, held that such aid violated the Establishment Clause.

Justice Burger wrote that the Establishment Clause was designed to avoid the "three evils" of "sponsorship, financial support, and active involvement of the sovereign in religious activity." These goals required three tests. First, the statute must have a secular legislative purpose. Second, its principal or primary effect must be one that neither advances nor inhibits religion. Third, the statute must not foster "an excessive government entanglement with religion."

*Lemon* held that the Rhode Island and Pennsylvania statutes failed the third prong of fostering "an excessive government entanglement with religion." Although the state could easily ascertain the content of secular textbooks, teachers could easily and impermissibly foster religion.
Furthermore, state aid to parochial schools could lead to such political divisiveness as would "pose a threat to the normal political process."

B. Hosanna-Tabor (2012)

_Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission_ (2012) holds that Americans are free to choose their ministers and religious teachers without regard to federal discrimination laws. Churches have the sole authority to select and control those who minister to the faithful.

Hosanna-Tabor Evangelical Lutheran Church and School classified its teachers into two categories, "called" and "lay." "Called" teachers are called to their vocation by God, commissioned as ministers, and performed duties combining teaching and ministering. "Lay" teachers, on the other hand, are not even required to be Lutheran.

This case involved a "called" teacher who took a leave of absence for narcolepsy. She requested reinstatement before the school considered her ready. The teacher threatened to sue when the school denied her request. The school rescinded her call and terminated her employment for “insubordination and disruptive behavior.”

The teacher sued for reinstatement under the Americans with Disabilities Act ("ADA"). The ADA prohibits discrimination by employers based on disability. It also prohibits retaliation against individuals for opposing acts prohibited by the ADA. The school claimed a First Amendment "ministerial exception" to government regulation of its ministers.

_Hosanna-Tabor_ raised two issues. First, do federal discrimination laws govern the selection of leaders by religious organizations? Second, can the federal government compel the school to reinstate the teacher as a "called" teacher? Chief Justice Roberts, writing for a unanimous court, answered both questions "no."

The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Familiar with life under the established Church of England, the founding generation sought to foreclose the possibility of a national church. By forbidding the "establishment of religion" and guaranteeing the "free exercise thereof," the Religion Clauses insured that the federal government, unlike the English crown, would have no role in filling ecclesiastical offices.

The First Amendment also provides that government may not hamper freedom of religion and expression when their exercise is harmless to others and to the state. _West Virginia State Board of Education v. Barnette_ (1943) involved a West Virginia statute that required every student, on pain of expulsion, to salute the flag and recite the pledge of allegiance. The _Barnette_ plaintiffs
were Jehovah's Witnesses who considered the salutes a form of idolatry prohibited by Exodus 20:3-5. The issue in *Barnette* was whether compulsory flag salutes violate the freedom of religious belief under the Fourteenth Amendment.

The *Barnette* Court found they do. The state may "require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guarantees of civil liberty, which tend to inspire patriotism and love of country." Compulsory flag salutes and pledges, however, go beyond instruction and study. They compel students to declare a belief.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein." Constitutional rights may be denied only in the presence of grave and immediate danger to interests that the state may lawfully protect. Freedom of religion and expression may not be hampered when their exercise are harmless to others and to the state.

**The second strategy is that government may not substantially burden the free exercise of religion by individuals or their businesses.** *Burwell v. Hobby Lobby Stores, Inc.* (2014) evaluates the federal government's power to coerce business owners to violate their religious beliefs. Hobby Lobby is a closely held for-profit corporation whose owners hold sincere Christian beliefs that life begins at conception. "Obamacare" regulations required Hobby Lobby to provide coverage for four forms of contraception that destroy fertilized human eggs. Hobby Lobby refused to comply. The federal government imposed a $475 million annual fine to coerce compliance contrary to the owners' religious beliefs.

The Religious Freedom Restoration Act of 1993 ("RFRA") provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." As amended by the Religious Land Use and Institutionalized Persons Act of 2000, RFRA covers "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."

Obamacare regulations required Hobby Lobby to provide coverage for twenty methods of contraception. Hobby Lobby objected to four methods that kill fertilized eggs by preventing their attachment to the uterus. The controlling issue in the case was whether Hobby Lobby, a closely held "for profit" corporation, was a protected "person" under the under Religious Freedom Restoration Act.

Justice Samuel Alito, in a 5-4 opinion, held that Hobby Lobby was a protected "person" under the Act. Justice Alito relied on the Dictionary Act, 1 U.S.C. § 1, that provides: "In determining the meaning of any Act of Congress, unless the context indicates otherwise, the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." [Emphasis added]. Hobby Lobby, as a corporation, was clearly a "person" under the Religious Freedom Restoration Act.
The third strategy is that government may not discriminate against religious speech and activities. The Freedom of Speech Clause of the First Amendment prohibits government from engaging in "viewpoint discrimination" against religious activities. Government must afford religious activities the same opportunities it affords secular activities. Two cases establish this principle.

The first case, *Lamb's Chapel v. Center Moriches Union Free School District* (1993), involves a New York school board. State law permitted after-hours use of school property. The board permitted use of school property for social, civic, and recreational purposes, (Rule 10), but prohibited use for religious purposes (Rule 7).

A Christian church made two requests to use school facilities for a film series by Dr. James Dobson on child rearing. The board denied both requests as "church-related." *Lamb's Chapel* considered whether the school board could discriminate against religious speech.

Justice Byron White, in a 9-0 decision, answered that government could not discriminate against religious speech. The facilities were not denied because of the subject, child rearing, but because of the religious viewpoint. Such "viewpoint discrimination" cannot withstand strict scrutiny under the First Amendment.


The Good News Club, a Christian children's club, was denied use of the building because school policy prohibited religious worship. Club activities included songs, Bible lessons, scripture memorization, and prayer. Justice Clarence Thomas, in a 6-3 decision, found the school's denial violated the First Amendment's Freedom of Speech Clause. Furthermore, the Establishment Clause did not require the school to exclude the club.

Thomas wrote that Milford Central School operated a limited public forum. The state may restrict speech in such a forum, but its power to restrict speech is subject to two limits. First, the restriction must be reasonable in light of the forum's purpose. Second, under *Lamb's Chapel*, the restriction must not involve "viewpoint discrimination." Speech cannot be excluded because of its religious nature.

The school's act demonstrated an impermissible state "hostility" to religion. This case was not akin to cases where students felt compelled to act within the classroom setting. The club's instructors were not teachers, the meetings were after-hours, and parental permission was required for attendance.

Justice Thomas lastly condemned "heckler's veto" jurisprudence in religious expression cases. "We decline to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive."

*Van Orden v. Perry* (2005) involved a monument containing the Ten Commandments on the Texas capitol grounds. Van Orden, a suspended attorney, sued to force the monument's removal under the Establishment Clause. Justice Rehnquist, in a 5-4 decision, ruled the monument did not violate the Establishment Clause.

Rehnquist began by holding that *Lemon v. Kurtzman* (1971), which prohibits "excessive government entanglement with religion," is inapplicable to a passive monument. Instead, the analysis should be driven by the monument's nature and the nation's history. The Ten Commandments are clearly religious, but they also have an undeniable historical meaning. Rehnquist noted numerous depictions of Moses and the Ten Commandments on federal buildings and monuments in Washington. The Texas monument did not violate the Establishment Clause simply because it contained religious content or promoted a message consistent with religious doctrine.

*Town of Greece, New York v. Galloway* (2014) involved public prayer. The town of Greece opened its monthly board meetings with a prayer by local clergy selected from congregations listed in the local directory. The prayer program was open to all creeds, but since the majority of local congregations were Christian, a majority of the prayer givers was Christian. Plaintiffs claimed the prayer program violated the Establishment Clause by preferring Christians to other prayer givers. Plaintiffs sought an order limiting the town to "inclusive and ecumenical" prayers referring only to a "generic God."

Justice Anthony Kennedy upheld the town's prayers in a 5-4 decision. The Establishment Clause must be interpreted "by reference to historical practices and understandings." The governing issue is whether the prayers fit within the tradition followed by Congress and state legislatures. This tradition was approved in *Marsh v. Chambers* (1983), which upheld Nebraska's employment of a legislative chaplain. The Court found that the Town of Greece's prayers fit within this tradition. The plaintiffs' requested prayers to a "generic God," on the other hand, did not.

Plaintiffs also complained that the prayers violated the Establishment Clause because they coerced citizens to engage in religious observance. This coercion offended plaintiffs, making them feel excluded and disrespected. The Court found no legal coercion. The board did not direct the public to participate in the prayers, single out dissenters for opprobrium, or indicate its decisions might be influenced by a person's acquiescence to the prayer. Justices Thomas and Scalia contrasted the prayers in this case to the coercive state religious establishments that existed at the founding. Those establishments exercised government power in order to exact financial support of the church, compel religious observance, or control religious doctrine.

The fifth strategy is that Americans are free to choose their ministers and religious teachers without government interference. Churches have the sole authority to select and control those who minister to the faithful. *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal..."
Employment Opportunity Commission (2012), discussed above, holds that Americans are free to choose their ministers and religious teachers without regard to federal discrimination laws.

Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission (2012) Supreme Court decision:  
https://supreme.justia.com/cases/federal/us/565/10-553/

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CONCLUSION

How The Supreme Court Constitutes America
Guest Essayist: William Mrorisey

In defending the establishment of the United States Supreme Court, Alexander Hamilton maintained that the absence of an independent judicial power had handicapped the government established by the Articles of Confederation. The way the Articles government had been structured made the rule of law—even the modest legislation enacted by Congress—more or less impossible.

In the twenty-second Federalist, Hamilton wrote, "Laws are a dead letter without courts to expound and define their true meaning and operation." He continued, "To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence and authorized to settle and declare in the last resort a uniform rule of civil justice."

This series of studies has shown how the Supreme Court has expounded and defined U. S. Constitutional law since 1789, "say[ing] what the law is," as Justice John Marshall put it—and not just any law, but the supreme law of the land. The scholars here have shown how the justices have also gone beyond the important but limited role set down by Hamilton and Marshall, contributing instead to the transformation of the original American regime into a new regime, more centralized and bureaucratic, designed for some purposes that diverge from those of the Framers.

The Framers' regime was a republic, distinguished from tyranny and from the absolute rule they called "despotism" first of all by its respect for and protection of the unalienable or natural rights which governments are duty-bound to secure. This is the link between Constitutional law and the laws of Nature and of Nature's God enunciated in the Declaration of Independence. The Framers' republicanism was first and foremost a natural-rights republicanism, as seen in the Constitution's preamble, in which they state their intention to secure the right to life ("domestic tranquility" and "the common defense"), liberty ("The blessings of Liberty to ourselves and our Posterity"), and
happiness ("the general Welfare")--all by forming "a more perfect Union" and "establish[ing] Justice," objects the Articles of Confederation had so conspicuously failed to obtain.

By contrast, the historical rights republicanism of the Progressive justices lends itself to an 'evolving' (mis)understanding of our rights whereby human laws effectively replace the permanent laws of Nature and of Nature's God. This amounts to moving what George Washington called "the main Pillar in the Edifice of [our] real independence," the American constitutional union, from the bedrock of the laws of Nature and of Nature's God to the shifting sands of social change.

The Framers' regime was also a democratic republic. Here, the people are the sovereigns. In Federalist 10, James Madison famously distinguished between the democratic regimes of antiquity where citizens assembled and voted directed on policies and laws, regimes prey to faction and conquest, from the modern republics where citizens elect "a small number" of their civic equals to run the people's government. The Constitutional prohibition of any grants of titles of nobility would prevent the establishment of a European-style aristocracy on American soil. Despite the absence of women's suffrage and the presence of slavery in most states, both the pool of eligible voters and potential representatives in America were far greater than in any other country in the world at that time. This was a republican regime founded on an impressively democratic foundation, a foundation to be widened further by the Civil War amendments.

Under Progressivism, the electorate democratized further, as women achieved the right to vote nationwide. However, the percentage of government officials elected directly or indirectly by this expanded electorate declined as Progressives successfully fought for a vastly augmented administrative state, staffed by unelected bureaucrats whose claim to rule rested not on popular consent but on professional expertise. America is now effectively what the Framers called a "mixed" republic--with one branch essentially aristocratic, a self-perpetuating hierarchy.

The possibility of a democratic republic that secures natural rights presents a serious problem. Why would majorities not oppress minorities, as they had done when an Athenian orator justified a war of imperial conquest by averring, "The strong do what they can, the weak suffer as they must"? The Framers responded to this dilemma by constituting America as a compound republic.

Madison introduces this term in Federalist 51, and he means two things by it. First, the United States will remain a federal republic, although the government of that federation will become stronger than it was under the Articles. The Framers strengthen but also limit federal authority by carefully enumerating the powers it may exert. The federal government will, for the first time, enjoy the authority to rule individual citizens in certain ways with no need for the cooperation of the states (laying taxes, organizing and regulating the militia, for example). But those powers not enumerated remain with the states and the people, individually and collectively, a point soon formalized by the Tenth Amendment. Perhaps the most important guarantee of federalism may be found in Article IV, section 4, which guarantees a "Republican Form of Government" to every state in the Union, in view of the fact that states with rival and contradictory regimes would far more likely break away from one another and eventually make war.
The Framers placed the second dimension of our compound republic into the federal government itself. Separated and balanced powers ensure that the legislative, executive, and judicial branches remain distinct but interdependent because they all wield, in Madison's words, "the means of keeping each other in their proper places." As late as 1892, the Supreme Court ruled in *Field v. Clark* that Congress may not give away its legislative power to the other branches. It was this "compound" design of the federal system and of the federal government which enabled Madison to argue that the body of the Constitution itself amounts to a Bill of Rights for the American people.

Progressives undermined both elements of the compound republic. They moved much of the initiative for legislation to the executive branch, and much of the actual law-writing to the bureaucracies. For its part, under pressure from the other branches, the Supreme Court staked out its own territory by claiming the right to exercise 'broad construction' of the Constitution. At its core, this means shifting the meaning of 'construction' itself from its original sense of *construing* the Constitution to that of *constructing* or inventing an ever-'evolving' or 'living' Constitution. This task was aided by the Court's appropriation of the Bill of Rights—the most general or abstract part of the Constitution—for its own constitutional 'turf,' leaving economic regulation to the other two (really, by the 1930s, three) branches of government.

Madison had observed that representation enabled the United States to become the world's first *extended* republic. The small city-states of antiquity were too weak to defend themselves against large, monarchic empires. Democracies needed to assemble all citizens in one place at one time, which limited their size. Representative or republican regimes only needed so to gather the people elective representatives, affording themselves the opportunity to extend and expand both the territory and the population of a popularly-governed nation. A people ruling itself in such a regime, especially when linked together in a confederation, could now defend itself against the worst tyrannies of the modern world. For the first time, an empire of liberty could face off against the empires of tyranny and despotism.

Progressives have not been so foolish as to destroy the extensive character of American republicanism. On the contrary, they used it to fight regimes ruled by kaisers, fuehrers, and commissars. However, they have also tended to dilute the democratic and natural-rights character of the American regime by envisioning leagues of nations and other international bodies in which popular sovereignty exerts minute influence, again bowing to administrative agencies—in these cases staffed mostly by foreigners unlikely much to care for the unalienable rights of Americans.

Finally, the United States Constitution secures the American way of life by giving legal support for a *commercial* republic. A constitutional union ruled by market-friendly laws amounts to a sort of power grid for American enterprise, providing both a system of pathways for entrepreneurial energies to travel and also limiting those energies so that they do not 'electrocute' citizens' rights. By requiring uniformity of duties, imposts, and excises, bankruptcy laws, currency, weights and measures, by establishing post offices and enacting patent laws, and by prohibiting state import taxes, the Framers made the United States into a vast free trade zone.
Commerce guards our unalienable rights by promoting what the Scottish philosopher David Hume called "parties from interest" and discouraging "parties from principle." By parties from principle Hume referred primarily to the violent and uncompromising factions that fought civil wars in seventeenth-century England. Following this line, Hamilton very nearly begins The Federalist with a criticism of fanatic wars. A regime that guards the unalienable right to property by leaving citizens at liberty to engage in commerce, thereby encourages them to direct their attention and energy to a form of peaceful competition that can be regulated by law. Parties of principle, whether religious or political, tend to despise law and break it. While based upon unalienable right— that is, upon principle— commercial life inclines toward compromise and amelioration; it does not foster violence. It is telling that the American Civil War was sparked by the existence of slavery in the southern states and the question of its extension into the western territories—and that the notorious Dred Scott decision generated one of those sparks. Slavery denies the moral foundation of all commerce: the right to the product of your own, or someone else's, labor, which in turn provides practical support for our rights to life, liberty, and the pursuit of happiness.

Unlike socialism, Progressivism doesn't deny property rights altogether so much as it severely constrains them by distorting markets and skewing incentives to work by establishing a complex panoply of payments and services not to citizens generally but to the several socioeconomic groups designated to receive them. Because Progressivism eschews natural rights for historical rights, it appeals in its politics not so much to policies animated not so much by reason— by actions constrained by rational and legal boundaries— but by a particular kind of passion: compassion. As a passion or sentiment, compassion fits well with the assertion of ever-changing historical rights because passion wants no boundaries and seeks none. This has changed the American 'power grid.' A regime which provides both disincentives to commercial life (on the grounds that such a way of life is only an instance of another passion, greed) and inducements not to engage in that life (through payments not-to-work) has become increasingly bedeviled by new "parties of principle," based if not on religious than on secularist fanaticisms.

By studying major cases that have come before the Supreme Court, as well as the lives and thoughts of some of the distinguished justices who wrote opinions on those cases, we give ourselves the chance to understand our own lives better. A constitutional court fundamentally serves as a 'regime court,' the place where cases bearing on the Constitution which constitutes our governmental system are heard, considered, and decided. A regime is no dull and irrelevant thing, merely a collection of ruling institutions that tells us what to do. A regime consists of those who rule, the institutions with which they rule, the purposes of those rulers and institutions, and finally the way of life of every person in the nation so ruled. Our hopes, thoughts, and actions turn out the way they do in large part because the regime in which we live shapes our expectations and habits. The 'nine old men' and now women who interpret the supreme law of our land know that very well, and in understanding them and their arguments we understand ourselves better.

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