

UNIVERSITÉ DE LIÈGE – FACULTÉ DE DROIT ET DE SCIENCE POLITIQUE  
UNITÉ DE DROIT PUBLIC ET DE DROIT CONSTITUTIONNEL

# **Droit constitutionnel comparé**

Master en droit

**Dossier de documentation**

Année académique 2010/2011

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Chargé de cours

<http://progours.ulg.ac.be/cocoon/cours/DROI2210-1.html>

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30 hrs.,  
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### Introduction générale

#### **Détermination des ordres juridiques à analyser et de l'objet de la comparaison**

- Détermination des ordres juridiques dans lesquels l'objet de la comparaison sera analysé.
- Détermination de l'objet de la comparaison.
- Rappel de la tâche des étudiants en ce qui concerne l'analyse de ce problème en droit belge.
- La difficulté d'interprétation de dispositions juridiques étrangères : le danger de se fier au simple libellé, illustré à l'aide de deux exemples
  - Le libellé de l'article 27 de la Constitution française et la décision 225 DC du Conseil constitutionnel du 23 janvier 1987.
  - Le libellé de l'article 12a, alinéa 2, de la Loi fondamentale allemande et l'arrêt de la Cour constitutionnelle allemande du 24 avril 1985 (*BVerfGE* 69, 1)

<sup>1</sup> Sur la méthode de détermination de l'un et de l'autre, en ce compris la liste des pays et des thèmes possibles, voy. l'engagement pédagogique du cours, disponible en ligne sur le site de la Faculté : [www.droit.ulg.ac.be](http://www.droit.ulg.ac.be).

**Questions de méthode : qu'est-ce faire du droit comparé ? Et plus particulièrement qu'est-ce faire du droit constitutionnel comparé ?**

Lecture : Élisabeth ZOLLER, « Qu'est-ce que faire du droit constitutionnel comparé ? »<sup>2</sup>.

A) Qu'est-ce qu'il nous faut pour procéder à une comparaison, sur un point de droit donné, entre deux ou plusieurs ordres juridiques distincts ?

1. une théorie du droit qui est

- a) susceptible d'être indistinctement appliquée à tous les ordres juridiques qui font l'objet de la comparaison (*homogénéité théorique*),
- b) indépendante de l'existence d'un ordre juridique donné, c'est-à-dire une théorie dont la survie n'est pas conditionnée par l'existence de tel ou tel ordre juridique déterminé (*indépendance théorique*),

2. un ensemble de concepts analytiques précis

- a) qui peuvent être utilisés avec le même degré de pertinence dans chacun des ordres juridiques, lors de l'analyse précise de l'objet à comparer (*homogénéité conceptuelle*),
- b) dont l'existence peut être intégralement fondée sur et expliquée par le recours à la théorie du droit précédemment choisie (*déductibilité autonome des concepts*).

B) Quelle sera la théorie du droit qui servira comme fondement à notre comparaison ?

La théorie du droit que nous retiendrons sera celle du *positivisme juridique*.

- Le contenu de toute norme juridique : obliger, interdire ou habiliter

- Lecture : Hans Kelsen (1881-1973), *Théorie pure du Droit*, 2<sup>e</sup> édition<sup>3</sup> (traduction française de la 2<sup>e</sup> édition de la *Reine Rechtslehre*), pages 6-8.

<sup>2</sup> *Droits*, 32 (2000), 121-134.

<sup>3</sup> Paris, Dalloz, 1962.

- L'ordre juridique, ordre de contrainte
  - Lecture : Hans Kelsen, *Théorie pure du Droit*, 2<sup>e</sup> édition, pages 46 et 47.
- Différence entre norme juridique et norme morale
  - Problème particulièrement important du recours à la morale dans une étude de droit comparé (non-existence d'une morale unique ; relativité des différentes morales).
  - Lecture : Hans Kelsen, *Théorie pure du Droit*, 2<sup>e</sup> édition, pages 90-94.

### C) Quelle est la finalité du droit comparé ?

- Différence entre comparaison *de lege lata* et *de lege ferenda*.
- Faire de telles propositions, est-ce le rôle du juriste ? Ou celui-ci doit-il se limiter à la simple description du droit positif ?
  - Rappel du texte de Hans Kelsen, *Théorie pure du Droit*, 2<sup>e</sup> édition, page 94, *in fine*.
  - Position de Konrad Zweigert et Hein Kötz (Hambourg) dans leur ouvrage *Introduction to Comparative Law*, 2<sup>e</sup> édition<sup>4</sup>.
  - Qu'en pensent les étudiants ?
  - Avis de l'enseignant.
- À supposer que ce rôle appartienne au juriste, la transposition d'une solution pratiquée dans un ordre juridique donnée à un autre ordre juridique est-elle intellectuellement possible ?
  - Une position radicale : Pierre Legrand, « The Impossibility of 'Legal Transplants' »<sup>5</sup>.
  - Qu'en pensent les étudiants ?
  - Avis de l'enseignant : c'est possible, mais importance des quatre notions précédemment introduites (homogénéité théorique, indépendance théorique, homogénéité conceptuelle, déductibilité autonome des concepts).  
À y voir clair, Legrand nie tant la notion d'homogénéité conceptuelle que celle – et avant tout celle – de la *déductibilité autonome*. On peut même se demander s'il accepte encore les prémisses de l'homogénéité et de l'indépendance théoriques. En définitive, on est en droit de demander à Legrand sur *quelle théorie du droit* il fonde son analyse dite comparative – mais est-elle encore comparative ?

<sup>4</sup> Oxford, Clarendon Press, 1987, 2 tomes.

<sup>5</sup> *Maastricht Journal of European and Comparative Law*, 4 (1997), 111-124. – Pour une position différente relativement aux "Legal Transplants", voy. William Ewald, « Comparative Jurisprudence (II) : the Logic of Legal Transplants », *American Journal of Comparative Law*, 43 (1995), 489-510 (il est précisé que cette dernière contribution ne fait pas partie de la matière du présent cours et ne doit pas être lue).

ARTICLE 27

«*Tout mandat impératif est nul. Le droit de vote des membres du parlement est personnel. La loi organique peut autoriser exceptionnellement la délégation de vote. Dans ce cas, nul ne peut recevoir délégation de plus d'un mandat.*»

RECUEIL DES DÉCISIONS

DU

CONSEIL CONSTITUTIONNEL

1987

*Publié sous le haut patronage du Conseil constitutionnel*

Décision n° 86-225 DC du 23 janvier 1987

Loi portant diverses mesures d'ordre social

ASSEMBLEES PARLEMENTAIRES.

DELIBERATIONS PARLEMENTAIRES : REGLES GENERALES. Exercice du droit de vote. Modes de votation.- vote personnel (cons. 2 à 5)

PROCEDURE LEGISLATIVE

discussion des amendements.- amendements hors du cadre du texte en discussion. Articles 39 et 44 de la Constitution (cons. 6 à 11).

CONSEIL CONSTITUTIONNEL ET CONTROLE DE CONSTITUTIONNALITE.

NORMES DE REFERENCE POUR LE CONTROLE DE CONFORMITE A LA CONSTITUTION droit à des moyens convenables d'existence : article 11 du préambule de 1946. (cons. 16 et 17) principe de territorialité en matière de prestations sociales (cons. 14) principe d'égalité (cons. 12 à 15 et cons. 19 à 24).

CONTROLE DE L'APPLICATION DES REGLES DE VALEUR CONSTITUTIONNELLE RELATIVES A LA PROCEDURE LEGISLATIVE conditions d'application de certaines règles de procédure législative. Vote personnel : article 27 de la Constitution (cons. 2 à 5). Exercice du droit d'amendement : articles 39 et 44 de la Constitution (cons. 6 à 11).

NATURE ET MODALITES D'EXERCICE DU CONTROLE DE CONFIRMITE A LA CONSTITUTION réserve d'interprétation (cons. 17 et 18 et cons. 23 et 24).

DROITS ET LIBERTES.

DROIT A LA VIE ET A L'INTEGRITE DE LA PERSONNE PHYSIQUE, PROTECTION DE LA SANTE (cons. 16 et 17).

EGALITE DEVANT LA LOI

EGALITE DEVANT LES CHARGES PUBLIQUES (cons. 23) applications diverses du principe d'égalité.- condition de résidence pour l'exercice de prestations sociales (cons. 15). Exercice d'une activité libérale dans les établissements publics d'hospitalisation (cons. 23).

Le Conseil constitutionnel a été saisi, le 24 décembre 1986, d'une part, par MM. Pierre JOXE, Lionel JOSPIN, Pierre MAUROY, Louis MERMAZ, Christian GOUX, Jean-Pierre MICHEL, Henri FISZBIN, Alain RICHARD, Olivier STIRN, Jean-Claude CHUPIN, André CLERT, Mme Ghislé STIEVENARD, MM. Pierre ORTET, Charles PISTRE, Robert LE FOLL, Edmond HERVE, André BILLARDON, Augustin BONREPAUX, Joseph MENGA, Mme Jacqueline OSSELIN, M. Georges LE BAILL, Mme Marie-France LECUIR, M. Jean-Hugues COLONNA, Mme Odile SICARD, MM. Jacques SANTROT, Jean-Paul DUREUX, Jean-Claude PORTHEAULT, Louis DARIOT, Pierre GARMENDIA, Jean-Michel BOUCHERON (Ille-et-Vilaine), Gérard WELZER, Claude BARTOLONE, Philippe PUAUD, Charles METZINGER, Bernard DEROSIER, André LEDRAN, Mme Catherine LALUMIERE, MM. Guy MALAN-DAIN, Alain BARRAU, Roger-Gérard SCHWARTZENBERG, Jean-Jack QUEYRANNE, Mme Yvette ROUDY, MM. Jean AUROUX, François LONCLE, Jean-Michel BOUCHERON (Charente), Nicolas ALFONSI, Jean ANCIANT, Pierre BERE-GOVOY, Alain CALMAT, Jean-Claude CASSAING, Guy CHANFRAULT, Daniel CHEVALLIER, Jean-Pierre CHEVENEMENT, Michel COFFINEAU, Michel CREPEAU, Gérard FUCHS, Michel SAPIN, Jean-Pierre FOURRE, Roland FLORIAN, Job

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DURUPT, Jean-Claude DESSEIN, Mme Marie JACO, députés, et, d'autre part, par MM. Jules FAIGT, Marcel COSTES, Jean PEYRAFFITE, Léon EECKHOÛTE, Marcel BONY, Robert PONTILLON, Germain AUTHIE, Michel DRÉYFUS-SCHMIDT, Lucien DELMAS, Louis FERREIN, René REGNAULT, Philippe MADRELLÉ, André BERIC, Robert LAUCOURNET, André ROUVIERE, Robert GUILLAUME, Jacques BIALSKI, François LOUISY, Philippe LABEYRIE, Claude ESTIER, Jean-Luc MÉLÉNCHON, Paul LORIDANT, Jacques BELLANGER, Guy PENNE, Charles BONIFAY, Roger QUILLIOT, Robert SCHWINT, William CHERVY, Raymond COURRIÈRE, Roland BERNARD, Georges BENEDETTI, Jean-Pierre BAYLÉ, Gérard ROUJAS, François AUTAIN, Franck SERUSCLAT, Guy ALLOUCHE, Gérard GAUD, Michel MOREIGNE, Albert RAMASSAMY, Albert PEN, Marcel DEBARCE, Roland COURTEAU, Bastien LECCHA, Marcel VIDAL, Marc BOEUF, Jean-Pierre MASSERET, Jacques CARAT, Michel MANET, Mme Irma RAPUZZI, MM. Roland GRIMALDI, Rodolphe DESIRE, Maurice PIC, André DELELLIS, Pierre MATRAJA, Félix CICCOLINI, Fernand TARDY, Raymond TARCY, Gérard DELFAU, Michel DARAS, Tony LARUE, Louis LONGEQUEUE, Michel CHARASSE, sénateurs, dans les conditions prévues à l'article 61, alinéa 2, de la Constitution, de la conformité à celle-ci de la loi portant diverses mesures d'ordre social;

#### LE CONSEIL CONSTITUTIONNEL,

Vu la Constitution;

Vu l'ordonnance n° 58-1067 du 7 novembre 1958 portant loi organique sur le Conseil constitutionnel, notamment les articles figurant au chapitre II du titre II de ladite ordonnance;

Vu l'ordonnance n° 58-1066 du 7 novembre 1958 portant loi organique autorisant exceptionnellement les parlementaires à déléguer leur droit de vote, complétée par la loi organique n° 62-1 du 3 janvier 1962;

Le rapporteur ayant été entendu;

1. Considérant que la conformité à la Constitution de la loi portant diverses mesures d'ordre social est contestée en raison des conditions de son adoption par l'Assemblée nationale, qui seraient contraires à l'article 27 de la Constitution, de l'insertion par vote d'amendement des dispositions relatives à l'aménagement du temps de travail et du contenu de certains de ses articles;

#### SUR LA PROCEDURE D'ADOPTION DE L'ENSEMBLE DE LA LOI :

2. Considérant que les députés auteurs de l'une des saisines soutiennent que la loi portant diverses mesures d'ordre social a été adoptée dans des conditions irrégulières; qu'en effet, lors du scrutin public intervenu le 20 décembre 1986 sur l'ensemble de la loi complétée par l'amendement n° 1, les députés présents ont, à l'exception de ceux du groupe socialiste, voté pour leurs collègues absents selon des modalités contraires aux règles constitutionnelles tenant, d'une part, à ce qu'ils ne disposaient pas d'une délégation de vote conforme aux prescriptions de l'ordonnance n° 58-1066 du 7 novembre 1958 portant loi organique autorisant exceptionnellement les parlementaires à déléguer leur droit de vote, et, d'autre part, à ce que chacun d'eux eût à voter pour plus d'un collègue absent, contrairement aux prescriptions du troisième alinéa, in fine, de l'article 27 de la Constitution;

3. Considérant que, selon le deuxième alinéa de l'article 27 de la Constitution « le droit de vote des membres du Parlement est personnel »; qu'aux termes du troisième alinéa du même article « la loi organique peut autoriser exceptionnellement la délégation de vote. Dans ce cas, nul ne peut recevoir délégation de plus d'un mandat »;

4. Considérant que pour l'application de ces dispositions, la circonstance que, dans le cadre d'un scrutin public, le nombre de suffrages favorables à l'adoption d'un texte soit supérieur au nombre de suffrages effectivement présentés au point de donner à penser que les délégations de vote utilisées sont par leur nombre que par les justifications apportées, excèdent les limites prévues par l'article 27 précité, ne saurait entraîner de nullité la procédure d'adoption de ce texte que s'il est établi, d'une part, qu'un ou des députés ont été portés comme ayant émis un vote contraire à leur opinion et, d'autre part, que, sans la prise en compte de ce ou ces votes, la majorité requise n'aurait pu être atteinte;

5. Considérant que, quelles que soient les conditions dans lesquelles il a été procédé par l'Assemblée nationale, au cours de sa séance du 20 décembre 1986, à un vote au scrutin public sur l'ensemble de la loi présentement déférée, il n'est pas établi, ni même allégué, qu'un des députés qui figurent au procès-verbal de séance au nombre de ceux ayant émis un vote favorable, ne se serait pas prononcé dans ce sens; que, dans ces conditions, le moyen tiré de la méconnaissance des deuxième et troisième alinéas de l'article 27 de la Constitution doit être écarté;

#### SUR LA PROCEDURE D'ADOPTION DE L'ARTICLE 39 :

6. Considérant que les auteurs des saisines soutiennent qu'à l'article 39 de la loi a été adopté dans des conditions non conformes à la Constitution; qu'ils font valoir que cet article a été introduit par voie d'amendement lors de l'examen par les assemblées du texte adopté par la commission mixte paritaire alors qu'il est sans lien direct avec ce texte; qu'au surplus, cet amendement s'est substitué en fait à l'ensemble d'un projet de loi dont le Gouvernement avait annoncé l'inscription à l'ordre du jour du Conseil des ministres pour le 22 décembre 1986;

7. Considérant que l'article 39 de la Constitution dispose, dans son premier alinéa, que « l'initiative des lois appartient concurremment au Premier ministre et aux membres du Parlement »; que le premier alinéa de l'article 44 énonce que « les membres du Parlement et le Gouvernement ont le droit d'amendement »; que, selon le premier alinéa de l'article 45, « tout projet ou proposition de loi est examiné successivement dans les deux assemblées du Parlement en vue de l'adoption d'un texte identique »; qu'en vertu des deuxième et troisième alinéas du même article : « Lorsque, par suite d'un désaccord entre les deux assemblées, un projet ou une proposition de loi n'a pu être adopté après deux lectures par chaque assemblée ou, si le Gouvernement a déclaré l'urgence, après une seule lecture par chacune d'entre elles, le Premier ministre a la faculté de provoquer la réunion d'une commission mixte paritaire chargée de proposer un texte sur les dispositions restant en discussion. Le texte élaboré par la commission mixte peut être soumis par le Gouvernement pour approbation aux deux assemblées. Aucun amendement n'est recevable sauf accord du Gouvernement »;

8. Considérant qu'il résulte de ces dispositions que l'adoption par la commission mixte paritaire d'un texte commun sur les dispositions restant en discussion ne fait pas obstacle à ce que le Gouvernement, en soumettant pour approbation aux deux assemblées le texte élaboré par la commission mixte, modifie ou complète celui-ci par les amendements de son choix, au besoin prenant la forme d'articles additionnels; que toutefois, les adjonctions ou modifications ainsi apportées au texte en cours de discussion ne sauraient, sans méconnaître les articles 39, alinéa 1, et 44, alinéa 1, de la Constitution, ni

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être sans lien avec ce dernier, ni dépasser, par leur objet et leur portée, les limites inhérentes à l'exercice du droit d'amendement;

9. Considérant que l'amendement qui est à l'origine de l'article 39 de la loi reprend l'intégralité des dispositions d'un texte établi par le Gouvernement sur le fondement de l'article 2 (4°) de la loi n° 86-793 du 2 juillet 1986, qui l'autorisait à prendre par ordonnances les mesures nécessaires au développement de l'emploi et, à cette fin, à « apporter aux dispositions du code du travail relatives à la durée du travail et à l'aménagement du temps de travail les modifications permettant, compte tenu des négociations entre les partenaires sociaux, d'adapter les conditions de fonctionnement des entreprises aux variations de leur niveau d'activité et aux conditions économiques générales »;

10. Considérant qu'à cet effet, les dispositions incluses dans l'article 39 de la loi, sous la forme de vingt paragraphes qui modifient ou complètent de nombreux articles du code du travail, prévoient que la modulation des horaires de travail pourra être mise en place, non seulement par accord de branche étendu mais également par accord d'entreprise ou d'établissement; qu'elles font disparaître le lien obligatoire existant antérieurement entre aménagement du temps de travail et réduction du temps de travail et laissent aux partenaires sociaux le soin de définir conventionnellement la nature et l'importance des contreparties au bénéfice des salariés; qu'elles précisent cependant que les accords d'entreprise relatifs à la modulation ne pourront entrer en vigueur qu'à la condition, d'une part, de ne pas avoir fait l'objet d'une opposition des syndicats ayant recueilli plus de la moitié des voix des électeurs inscrits aux dernières élections professionnelles et, d'autre part, d'être conformes au cadre défini par la loi sous peine de sanctions pénales; que le non respect de l'accord de modulation n'ouvre plus droit à un repos compensatoire de 50 %; qu'en revanche, des modifications sont apportées aux règles régissant la détermination des heures supplémentaires et leurs modalités de paiement; qu'en ce qui concerne le repos dominical, les dispositions incluses dans l'article 39 ouvrent aux branches dans lesquelles un accord collectif étendu le prévoit, la possibilité d'organiser le travail en continu pour des raisons d'ordre économique et non plus seulement pour des raisons d'ordre technique; qu'enfin, des aménagements particuliers sont apportés aux dispositions du code du travail relatives au travail de nuit des femmes;

11. Considérant qu'il résulte de ce qui précède qu'à raison tant de leur ampleur que de leur importance, les dispositions qui sont à l'origine de l'article 39 excèdent les limites inhérentes à l'exercice du droit d'amendement; que, dès lors, elles ne pouvaient être introduites dans le projet de loi portant diverses mesures d'ordre social, par voie d'amendement, sans que soit méconue la distinction établie entre les projets et propositions de loi visés à l'article 39 de la Constitution et les amendements dont ces derniers peuvent faire l'objet en vertu de l'article 44, alinéa 1; qu'il y a lieu, en conséquence, pour le Conseil constitutionnel de décider que l'article 39 de la loi déferée a été adopté selon une procédure irrégulière;

SUR L'ARTICLE 4 :

12. Considérant que l'article 4 de la loi a pour objet d'introduire une condition de durée minimale de résidence sur le territoire français, dans des conditions fixées par décret, pour l'attribution de l'allocation spéciale prévue par les articles L. 814-1 et suivants du code de la sécurité sociale, de l'allocation supplémentaire du fonds national de solidarité régie par les articles L. 815-1 et suivants de ce code et de l'allocation aux adultes handicapés visée par les articles L. 821-1 et suivants du code précité;

13. Considérant que les auteurs des saisines soutiennent que l'article 4 est contraire aux dispositions de l'article 2 de la Constitution aux termes desquelles « la France assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion »; qu'en effet, il introduit une discrimination entre Français en fonction de la durée de leur résidence en France, au détriment des Français ayant résidé à l'étranger, qui, lors de leur retour sur le territoire national, ne pourront immédiatement bénéficier des prestations sociales visées par cet article; qu'en outre, les sénateurs auteurs de l'une des saisines estiment qu'il est porté atteinte au principe de territorialité de la législation sociale;

14. Considérant que le principe de territorialité en matière de prestations sociales n'a pas valeur constitutionnelle;

15. Considérant que la fixation d'une condition de résidence pour l'octroi de prestations sociales n'emporte pas par elle-même une discrimination de la nature de celles qui sont prohibées par l'article 2 de la Constitution; qu'elle n'est pas davantage contraire au principe d'égalité des citoyens devant la loi proclamé par l'article 6 de la Déclaration des Droits de l'Homme et du Citoyen de 1789;

16. Considérant toutefois, qu'aux termes du onzième alinéa du Préambule de la Constitution du 27 octobre 1946, confirmé par celui de la Constitution du 4 octobre 1958, la Nation « garantit à tous, notamment à l'enfant, à la mère et aux vieux travailleurs, la protection de la santé, la sécurité matérielle, le repos et les loisirs. Tout être humain qui, en raison de son âge, de son état physique ou mental, de la situation économique, se trouve dans l'incapacité de travailler a le droit d'obtenir de la collectivité des moyens convenables d'existence »;

17. Considérant qu'il incombe, tant au législateur qu'au Gouvernement, conformément à leurs compétences respectives, de déterminer, dans le respect des principes proclamés par le onzième alinéa du Préambule, les modalités de leur mise en œuvre qu'il s'agit de la loi qu'il appartient au pouvoir réglementaire, dans chacun des cas prévus à l'article 4 de la loi, de fixer la durée de la condition de résidence de façon à ne pas aboutir à mettre en cause les dispositions précitées du Préambule et en tenant compte à cet effet des diverses prestations d'assurance dont sont susceptibles de bénéficier les intéressés; que toute autre interprétation serait contraire à la Constitution;

18. Considérant que sous les réserves ci-dessus énoncées l'article 4 de la loi n'est pas contraire à la Constitution;

SUR L'ARTICLE 23 :

19. Considérant que l'article 23 de la loi déferée insère dans la loi n° 70-1318 du 31 décembre 1970 portant réforme hospitalière les articles 25-1 à 25-6 qui ont pour objet d'autoriser les praticiens statutaires exerçant à temps plein dans les établissements d'hospitalisation publics à exercer également dans ces établissements une activité libérale, dans les conditions qu'il définit;

20. Considérant que les députés auteurs de l'une des saisines font grief aux dispositions de l'article 23 de méconnaître le principe d'égalité, d'une part, en ce que l'exercice d'une activité libérale bénéficierait par priorité aux chefs de services, et d'autre part, en ce que certains praticiens auront, en pratique, moins de possibilités que d'autres d'utiliser la faculté ouverte par la loi, en raison de l'interdépendance des disciplines qui conduit à ce que le refus de certains praticiens d'exercer à titre libéral rende impossible à ceux de leurs collègues

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## SUR L'ENSEMBLE DE LA LOI :

26. Considérant qu'en l'espèce il n'y a lieu pour le Conseil constitutionnel de soulever d'office aucune question de conformité à la Constitution en ce qui concerne les autres dispositions de la loi soumises à son examen;

## DECIDE :

**Article premier** — L'article 39 de la loi portant diverses mesures d'ordre social est déclaré non conforme à la Constitution.

**Article 2** — Sous les réserves d'interprétation ci-dessus énoncées, les autres dispositions de la loi ne sont pas contraires à la Constitution.

**Article 3** — La présente décision sera publiée au Journal officiel de la République française.

Délibéré par le Conseil constitutionnel dans sa séance du 23 janvier 1987.

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dont l'activité dépend d'eux, de bénéficier effectivement des dispositions de l'article 23;

21. Considérant que la portée de cette argumentation doit être appréciée au regard de l'objet de l'ensemble des dispositions de la loi qui régissent l'exercice d'une activité à titre libéral dans les établissements d'hospitalisation publiques;

22. Considérant que, dès lors que l'intérêt du service public n'y fait pas obstacle, la loi autorise les médecins à demander au représentant de l'Etat dans le département l'autorisation d'exercer une activité libérale dans un établissement public d'hospitalisation; que cette activité ne peut s'exercer que dans un cadre contractuel liant le médecin à l'établissement hospitalier et au sein de l'établissement dans lequel le praticien a été nommé et à condition qu'il exerce personnellement et à titre principal une activité de même nature dans le secteur hospitalier public et qu'aucun lit ni aucune installation médico-technique ne soit réservé à l'exercice de l'activité libérale; que cette activité ne peut, en aucun cas, dépasser le cinquième de la durée de service hebdomadaire à laquelle sont astreints les praticiens; que les modalités d'exercice de l'activité libérale sont placées sous le contrôle tant d'une commission de l'Etat dans le département que, selon l'article 25-3 inséré dans la loi n° 70-1318 du 31 décembre 1970, « l'activité libérale donne lieu au versement à l'établissement par le praticien d'une redevance dans des conditions déterminées par décret »; qu'enfin, aux termes de l'article 16-III de la loi déferée, qui complète à cet effet l'article L. 685 du code de la santé publique, des modalités différentes peuvent être prévues en ce qui concerne la protection sociale des praticiens hospitaliers, selon qu'ils concluent ou non un contrat d'activité libérale;

23. Considérant que ces dispositions ouvrent à l'ensemble des praticiens qui satisfont aux conditions posées par la loi un droit identique à demander la conclusion d'un contrat d'activité libérale, dès lors que l'intérêt du service public n'y fait pas obstacle; qu'il n'y a donc pas atteint à l'égalité des citoyens devant la loi; que le régime dérogatoire aux règles d'organisation et de fonctionnement des services publics institué par la loi, n'entraîne pas davantage de méconnaissance du principe d'égalité devant les charges publiques, dans la mesure où les praticiens exerçant à titre libéral sont tenus de verser à l'établissement d'hospitalisation une redevance pour service rendu qui devra correspondre, non seulement à l'utilisation des installations techniques ou des locaux mis à disposition, mais aussi aux dépenses de personnel exposées par l'établissement; qu'au demeurant, ceux des praticiens qui n'auront pas passé de contrat d'activité libérale bénéficieront d'une protection sociale accrue, conformément à l'article 16-III de la loi présentement examinée;

24. Considérant que les dispositions relatives à l'exercice d'une activité libérale dans les établissements d'hospitalisation publiques ne sont pas, compte tenu des conditions posées par la loi, contraires à la Constitution;

## SUR LE PARAGRAPHE XIV DE L'ARTICLE 39 :

25. Considérant que, ainsi qu'il a été dit ci-dessus, l'article 39 de la loi a été adopté selon une procédure irrégulière; que, dès lors, il n'y a pas lieu pour le Conseil constitutionnel d'examiner le moyen invoqué par les sénateurs auteurs de l'une des saisines et qui est tiré de ce que le paragraphe XIV de l'article 39 de la loi, qui apporte des aménagements aux dispositions du code du travail relatives au travail de nuit des femmes, serait contraire à une convention internationale;

(Rec 1987)

(Rec 1987)

# Loi fondamentale pour la République fédérale d'Allemagne

## du 23 mai 1949(1)

### Préambule(2)

Consentent de sa responsabilité devant Dieu et devant les hommes, animé de la volonté de servir la paix du monde en qualité de membre égal en droits dans une Europe unie, le peuple allemand s'est donné la présente Loi fondamentale en vertu de son pouvoir constituant.

Les Allemands dans les Länder de Bade-Wurtemberg, Bavière, Berlin, Brandebourg, Brême, Hambourg, Hesse, Mecklembourg-Poméranie occidentale, Basse-Saxe, Rhénanie du Nord-Westphalie, Rhénanie-Palatinat, Saxe, Saxe-Anhalt, Schleswig-Holstein et Thuringe ont parachevé l'unité et la liberté de l'Allemagne par une libre autodétermination.

La présente Loi fondamentale vaut ainsi pour le peuple allemand tout entier.

### Titre premier

#### Les droits fondamentaux

Article premier  
Dignité de l'ère humain, caractère obligatoire des droits fondamentaux pour la puissance publique

1. La dignité de l'ère humain est intangible. Tous les pouvoirs publics ont l'obligation de la respecter et de la protéger.
2. En conséquence, le peuple allemand reconnaît à l'ère humain des droits

inviolables et inaliénables comme fondement de toute communauté humaine, de la paix et de la justice dans le monde.

3. Les droits fondamentaux énoncés ci-après lient les pouvoirs législatif, exécutif et judiciaire à titre de droit directement applicable.

#### Article 2

Liberté d'agir, liberté de la personne  
1. Chacun a droit au libre épanouissement de sa personnalité pourvu qu'il ne viole pas les droits d'autrui ni n'enfreigne l'ordre constitutionnel ou la loi morale.

2. Chacun a droit à la vie et à l'intégrité physique. La liberté de la personne est inviolable. Des atteintes ne peuvent être apportées à ces droits qu'en vertu d'une loi.

#### Article 3

Egalité devant la loi

1. Tous les êtres humains sont égaux devant la loi.
2. Hommes et femmes sont égaux en droits. L'État promeut la réalisation effective de l'égalité en droits des femmes et des hommes et agit en vue de l'élimination des désavantages existants.

3. Nul ne doit être discriminé ni privilégié en raison de son sexe, de son ascendance, de sa race, de sa langue, de sa patrie et de son origine, de sa croyance, de ses opinions religieuses ou politiques. Nul

(1) Source : *Journal officiel fédéral*, p. 1 BGBI. III 1001 avec les 42 modifications intervenues depuis cette date. Le Conseil parlementaire a constaté le 23 mai à Bonn/Rhin en séance publique que la Loi fondamentale de la République fédérale d'Allemagne, adoptée le 8 mai 1949 par le Conseil parlementaire, a été ratifiée au cours de la semaine du 16 au 22 mai 1949 par les représentations du peuple de plus de deux tiers des Länder allemands participant. Sur la base de cette constatation, le Conseil parlementaire, représenté par ses présidents, a signé et promulgué la Loi fondamentale. Conformément à l'article 145, alinéa 3, la Loi fondamentale est publiée au *Journal officiel fédéral* (NDT) : cet avis de publication a paru dans le premier numéro du *Journal officiel fédéral* en date du 23 mai 1949. Elle a été traduite par C. Auzérix, J.-F. Flauss, M. Fromont, C. Orsato, O. Jouanjan et P. Koenig et publiée par l'Office de presse et d'information du gouvernement fédéral. La dernière révision prise en compte est celle du 16 juillet 1998.

(2) Version issue du traité d'Union conclue le 31 août 1950 entre la République fédérale d'Allemagne et la République démocratique allemande. Voir notamment l'article 3 de ce traité sous l'article 143 L.F.

ne doit être discriminé en raison de son handicap.

#### Article 4

Liberté de croyance, de conscience et de profession de loi

1. La liberté de croyance et de conscience et la liberté de professer des croyances religieuses et philosophiques sont inviolables.

2. Le libre exercice du culte est garanti.

3. Nul ne doit être astreint contre sa conscience au service armé en temps de guerre. Les modalités sont réglées par une loi fédérale.

#### Article 5

Liberté d'opinion

1. Chacun a le droit d'exprimer et de diffuser librement son opinion par la parole, par l'écrit et par l'image, et de s'informer sans entraves aux sources qui sont accessibles à tous. La liberté de la presse et la liberté d'informer par la radio, la télévision et le cinéma sont garanties. Il n'y a pas de censure.

2. Ces droits trouvent leurs limites dans les prescriptions des lois générales, dans les dispositions légales sur la protection de la jeunesse et dans le droit au respect de l'honneur personnel.

3. L'art et la science, la recherche et l'enseignement sont libres. La liberté de l'enseignement ne dispense pas de la fidélité à la Constitution.

#### Article 6

Mariage et famille, enfants naturels  
1. Le mariage et la famille sont placés sous la protection particulière de l'État.

2. Élever et éduquer les enfants sont un droit naturel des parents et une obligation qui leur échoit en priorité. La communauté étatique veille sur la manière dont ils s'acquittent de ces tâches.

3. Les enfants ne peuvent être séparés de leur famille contre le gré des personnes investies de l'autorité parentale qu'en vertu d'une loi, en cas de carence de celles-ci ou lorsque les enfants risquent d'être laissés à l'abandon pour d'autres motifs.

4. Toute mère a droit à la protection et à l'assistance de la communauté.

5. La législation doit assurer aux enfants naturels les mêmes conditions qu'aux enfants légitimes en ce qui concerne leur développement physique et moral et leur statut social.

#### Article 7

Enseignement scolaire

1. L'ensemble de l'enseignement scolaire est placé sous le contrôle de l'État.

2. Les personnes investies de l'autorité parentale ont le droit de décider de la participation des enfants à l'enseignement religieux.

3. L'enseignement religieux est une matière d'enseignement régulier dans les écoles publiques à l'exception des écoles confessionnelles. L'enseignement religieux est dispensé conformément aux principes des communautés religieuses, sans préjudice du droit de contrôle de l'État. Aucun enseignant ne peut être obligé de dispenser l'enseignement religieux contre son gré.

4. Le droit de fonder des écoles privées est garanti. Les écoles privées qui se substituent aux écoles publiques doivent être agréées par l'État et sont soumises aux lois des Länder. L'agrement doit être délivré lorsque les écoles privées ne sont pas d'un niveau inférieur aux écoles publiques et à leurs programmes, leurs installations et la formation scientifique de leur personnel enseignant, ni ne favorisent une ségrégation des élèves fondée sur la fortune des parents. L'agrement doit être refusé si la situation économique et juridique du personnel enseignant n'est pas suffisamment assurée.

5. Une école primaire privée ne doit être autorisée que si l'administration de l'enseignement public lui reconnaît un intérêt pédagogique particulier ou si les personnes investies de l'autorité parentale demandent la création d'une école interconfessionnelle, confessionnelle ou philosophique et qu'il n'existe pas d'école primaire publique de ce genre dans la commune. Les écoles préparatoires demeurent supprimées.

#### Article 8

Liberté de réunion

1. Tous les Allemands ont le droit de se réunir paisiblement et sans armes, sans déclaration ni autorisation préalables.

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2. En ce qui concerne les réunions en plein air, ce droit peut être restreint par une loi ou en vertu d'une loi.

Article 9  
Liberté d'association

1. Tous les Allemands ont le droit de fonder des associations ou des sociétés.

2. Les associations dont les buts ou l'activité sont contraires aux lois pénales, ou qui sont dirigées contre l'ordre constitutionnel ou l'idée d'entente entre les peuples, sont prohibées.

3. Le droit de fonder des associations pour la sauvegarde et l'amélioration des conditions de travail et des conditions économiques est garanti à tous et dans toutes les professions.<sup>1</sup> Les conventions qui limitent ou tendent à entraver ce droit sont nulles et les mesures prises en ce sens sont illégales.<sup>2</sup> Les mesures prises en vertu des articles 12a, 35, al. 2 et 3, 87a, al. 4 et 91, ne doivent pas être dirigées contre des conflits de travail déclenchés par des associations au sens de la première phrase (du présent alinéa) pour la sauvegarde et l'amélioration des conditions de travail et des conditions économiques.

## Article 10

Secret de la correspondance, de la poste et des télécommunications

1. Le secret de la correspondance ainsi que le secret de la poste et des télécommunications sont inviolables.

2. Des restrictions ne peuvent y être apportées qu'en vertu d'une loi.<sup>2</sup> Si la restriction est destinée à défendre l'ordre constitutionnel libéral et démocratique, ou l'existence ou la sécurité de la Fédération ou d'un Land, la loi peut disposer que l'intéressé n'en sera pas informé et que le recours juridictionnel est remplacé par le contrôle d'organes et d'organes auxiliaires désignés par la représentation du peuple.

## Article 11

Liberté de circulation et d'établissement

1. Tous les Allemands jouissent de la liberté de circulation et d'établissement sur l'ensemble du territoire fédéral.

2. Ce droit ne peut être limité que par la loi ou en vertu d'une loi et uniquement dans le cas où l'absence de moyens d'existence suffisants imposerait des charges

à des fins de protection de la population civile ; des affectations dans un régime de droit public ne peuvent être imposées que pour assurer des missions de police ou les missions administratives de puissance publique qui ne peuvent être remplies que dans un régime de droit public.<sup>2</sup> Des rapports de travail tels que ceux prévus à la première phrase peuvent être établis dans les forces armées, dans le secteur de l'intendance, ainsi que dans l'administration publique ; des rapports de travail ne peuvent être imposés dans le secteur de l'approvisionnement de la population civile que pour couvrir ses besoins vitaux ou assurer sa protection.

4. Si, pendant l'état de défense, les besoins en prestations de services de nature civile ne peuvent être couverts par des concours volontaires dans les établissements sanitaires et hospitaliers civils ainsi que dans les hôpitaux militaires fixes, les femmes âgées de dix-huit ans révolus à cinquante-cinq ans révolus peuvent être appelées, par la loi ou en vertu d'une loi, à accomplir des prestations de services de ce type.<sup>2</sup> Elle ne doivent en aucun cas accomplir un service armé.

5. Pendant la période précédant l'état de défense, les obligations définies à l'alinéa 3 ne peuvent être établies que dans les conditions de l'article 80a, al. 1.<sup>2</sup> Pour la préparation à celles des prestations de services visées à l'alinéa 3 pour lesquelles des connaissances ou des savoir-faire sont nécessaires, la participation à des stages de formation pourra être rendue obligatoire par la loi ou en vertu d'une loi.<sup>3</sup> Dans ce cas, la première phrase (du présent alinéa) ne s'applique pas.

6. Si, pendant l'état de défense, le besoin en main-d'œuvre pour les secteurs mentionnés à l'alinéa 3, 2<sup>e</sup> phrase ne peut être couvert par des concours volontaires, la liberté des Allemands de ne plus exercer une profession ou de ne plus occuper un emploi peut être limitée par la loi ou en vertu d'une loi, pour garantir la couverture de ces besoins.<sup>2</sup> L'alinéa 5, 1<sup>re</sup> phrase est applicable par analogie avant la survenance de l'état de défense.

## Article 13

Inviolabilité du domicile

1. Le domicile est inviolable.

2. Des perquisitions ne peuvent être ordonnées que par le juge ainsi que, s'il y a péril en la demeure, par les autres organes prévus par les lois ; elles ne peuvent être effectuées que dans la forme y prescrite.

3. Lorsque certains éléments de fait fondent le soupçon que quelqu'un a commis l'une des infractions pénales particulièrement graves spécialement prévues par la loi, des moyens techniques de surveillance acoustiques de domiciles dans lesquels la personne poursuivie est supposée séjourner peuvent pour la répression de cette infraction être utilisés sur le fondement d'une ordonnance juridictionnelle si l'investigation des faits par d'autres moyens serait incomparablement plus difficile ou vouée à l'échec. La mesure doit être limitée dans le temps. L'ordonnance est prise par une formation de trois juges. S'il y a péril en la demeure, elle peut être également prise par un juge unique.

4. Pour parer à des dangers imminents pour la sécurité publique et notamment à un danger collectif ou à un péril mortel, des moyens techniques de surveillance de domiciles ne peuvent être utilisés que sur le fondement d'une ordonnance juridictionnelle. S'il y a péril en la demeure, la mesure peut être également ordonnée par une autre autorité déterminée par la loi ; une décision juridictionnelle doit intervenir sans délai.

5. Lorsque des moyens techniques sont exclusivement prévus pour la protection de personnes intervenant dans des domiciles, la mesure peut être ordonnée par une autorité déterminée par la loi. L'exploitation à une autre fin des connaissances ainsi acquises n'est permise qu'à la seule fin de poursuites pénales ou de prévention d'un danger, et à la condition seulement que la régularité de la mesure ait été préalablement constatée par le juge ; s'il y a péril en la demeure la décision juridictionnelle doit intervenir sans délai.

6. Le gouvernement fédéral informe chaque année le Bundestag sur l'utilisation de moyens techniques dans le cadre de l'alinéa 3 et, pour les affaires ressortissant à la Fédération, de l'alinéa 4 ainsi que de l'alinéa 5 lorsque le juge doit exercer un

ENTSCHEIDUNGEN  
DES  
BUNDESVERFASSUNGSGERICHTS

Herausgegeben  
von den  
Mitgliedern des Bundesverfassungsgerichts

69. Band



1985

J. C. B. MOHR (PAUL SIEBECK) TUBINGEN

1. Die gesetzliche Regelung des Rechts der Kriegsdienstverweigerung hat das in Art. 4 Abs. 3 GG gewährleistete Grundrecht zu beachten und zugleich der verfassungsrechtlichen Grundentscheidung für eine wirksame militärische Landesverteidigung Rechnung zu tragen.

2. Der in Art. 12a Abs. 2 GG vorgesehene Ersatzdienst ist denjenigen Wehrpflichtigen vorbehalten, die den Kriegsdienst mit der Waffe aus Gewisensgründen verweigern. Daraus folgt die Pflicht des Gesetzgebers sicherzustellen, daß nur solche Wehrpflichtige als Kriegsdienstverweigerer anerkannt werden, bei denen mit hinreichender Sicherheit angenommen werden kann, daß in ihrer Person die Voraussetzungen des Art. 4 Abs. 3 Satz 1 GG erfüllt sind (Bestätigung von BVerfGE 48, 127). Das Kriegsdienstverweigerungs-Neuordnungsge-  
setz genügt diesen Anforderungen.

3. Nach Art. 12a Abs. 2 Satz 2 GG bildet die rechtliche zulässige Dauer des Wehrdienstes die zeitliche Obergrenze für die Dauer des Ersatzdienstes. Das normative Ziel des Art. 12a Abs. 2 Satz 2 GG ist es, ein Gleichgewicht der Belastung von Wehr- und Ersatzdienstleistenden sicherzustellen. Der Gesetzgeber kann daher bei der Bemessung der Dauer des Ersatzdienstes innerhalb des durch Art. 12a Abs. 2 Satz 2 GG gezogenen Rahmens die vorgegebenen Unterschiede zwischen Wehr- und Ersatzdienst berücksichtigen.

4. Kriegsdienstverweigerer, die zu einer Glaubensgemeinschaft gehören, deren Glaubensgrundsätze die Verweigerung des Kriegsdienstes mit der Waffe mitumfassen und deren Gewissensentscheidung gegen den Kriegsdienst mit der Waffe daher offenkundig erscheint, haben wie alle anderen, die sich auf das Grundrecht aus Art. 4 Abs. 3 GG berufen, die Last der Darlegung der von ihnen getroffenen Gewissensentscheidung. Das Grundrecht der Glaubensfreiheit (Art. 4 Abs. 1 GG) stellt sie von dieser Last nicht frei.

\* Das Urteil ist abweichend von der zeitlichen Reihenfolge abgedruckt.

2/83 - 3, der Regierung des Landes Hessen, vertreten durch den Hessischen Ministerpräsidenten, Bierstädter Straße 2, Wiesbaden, - 2 BvF 3/83 - 4, der Landesregierung Nordrhein-Westfalen, vertreten durch den Ministerpräsidenten, Mannesmannufer 1 A, Düsseldorf 1, - 2 BvF 4/83 - Antragsteller zu 1) bis 4) - Bevollmächtigte zu 1., 2., und 4.: Professor Dr. Erhard Denninger, Am Wiesenhof 1, Königstein 3 - a) Artikel 2 Nr. 5 b des Gesetzes zur Neuordnung des Rechts der Kriegs-Neuordnungsgesetz-KDVNG vom 28 Februar 1983 (BGBl. I S. 203), soweit dadurch § 24 Abs. 2 Satz 1 in das Zivildienstgesetz in der Fassung der Bekanntmachung vom 9. August 1973 (BGBl. I S. 1015) eingefügt wurde, wegen Unvereinbarkeit mit Art. 12 a Abs. 2 Satz 2 und Art. 4 Abs. 1 GG, b) Artikel 1 § 2, 4 bis 7, 9 bis 15 KDVNG in ihrer Verbindung mit Art. 2 Nrn. 1, 4, 5 b und 6 KDVNG wegen Unvereinbarkeit mit Art. 12 a Abs. 2 Satz 3 in Verbindung mit Art. 4 Abs. 3 GG und mit dem Rechtsstaatsprinzip (Grundsatz der Verhältnismäßigkeit), c) Artikel 1 § 2 Abs. 2 Satz 3 KDVNG in Verbindung mit Art. 1 § 5 Abs. 1 Nr. 2 KDVNG wegen Unvereinbarkeit mit dem Rechtsstaatsprinzip (Bestimmtheitsgrundsatz), d) Artikel 1 § 8 KDVNG wegen Unvereinbarkeit mit Art. 4 Abs. 3 und Art. 19 Abs. 2 GG für verfassungswidrig und nichtig zu erklären, und den Antrag des Dr. Hans-Jochen Vogel, MdB, und 195 weiterer Mitglieder des Deutschen Bundestages - 2 BvF 2/84 - Antragsteller zu 5) - Bevollmächtigte: a) Professor Dr. Alfred Riniken, Universität Bremen, b) Dr. Alfred Emmertlich, MdB, Bundeshaus, Bonn, c) Frau Anke Fuchs, MdB, Bundeshaus, Bonn - a) Artikel 1 § 6 Abs. 1, 7 Satz 3, 17, 18 Abs. 1 Satz 3 KDVNG in ihrer Verbindung mit Art. 1 § 2 Abs. 2 Satz 3 und 19 Abs. 2 KDVNG insoweit, als sie sich auf die Ablehnung eines Antrags auf Anerkennung als Kriegsdienstverweigerer beziehen, wegen Unvereinbarkeit mit Art. 4 Abs. 3 GG, dem Rechtsstaatsprinzip (Gesetzlichkeits-, Bestimmtheits- und Verhältnismäßigkeitsgrundsatz, Recht auf ein faires Verfahren), dem Gewaltenteilungsprinzip (Art. 20 Abs. 2 GG) und dem Gebot eines effektiven Rechtsschutzes (Art. 19 Abs. 4 Satz 1 GG), b) Artikel 1 § 8 KDVNG wegen Unvereinbarkeit mit Art. 4 Abs. 3 und Art. 19 Abs. 2 GG, c) Artikel 1 § 3 Abs. 2 Satz 2, 9 Abs. 1 Satz 1 KDVNG wegen Unvereinbarkeit mit dem Rechtsstaatsprinzip (Gesetzlichkeitsgrundsatz) und dem Gleichheitssatz (Art. 3 Abs. 1 GG), d) Artikel 1 § 14 Abs. 1 Satz 2 KDVNG wegen Unvereinbarkeit mit Art. 4 Abs. 3 GG und dem Rechtsstaatsprinzip (Übermaßverbot), e) Artikel 2 Nr. 5 b und KDVNG wegen Unvereinbarkeit mit Art. 12 a Abs. 2 Satz 2 GG und

5. Der im Rechtsstaatsprinzip wurzelnde Grundsatz der Verhältnismäßigkeit und der Gleichheitssatz (Art. 3 Abs. 1 GG) werden nicht dadurch verletzt, daß der Kriegsdienstverweigerer unbetrodet seiner Verpflichtung, Ersatzdienst zu leisten, der Anerkennung in einem Verwaltungsverfahren bedarf. Beide Elemente, die Verpflichtung zur Leistung des Ersatzdienstes und das Anerkennungsverfahren, gewährleisten nach der verfassungsrechtlich unbedenklichen Auffassung des Gesetzgebers nur in ihrem Zusammenwirken mit hinreichender Sicherheit, daß lediglich diejenigen Wehrpflichtigen vom Wehrdienst freigestellt werden, deren Kriegsdienstverweigerung auf einer Gewissensentscheidung beruht.

6. Der Antrag auf Anerkennung als Kriegsdienstverweigerer darf nach Art. 1 § 6 Abs. 1 Satz 1 des Kriegsdienstverweigerung-Neuordnungsgesetzes vom Bundesamt nur abgelehnt werden, wenn es auf der Grundlage eines vollständigen Antrags zu dem sicheren Schluß gelangt, daß die Beweggründe des Antragstellers nicht geeignet sind, das Recht auf Kriegsdienstverweigerung zu begründen.

7. Das Anerkennungsverfahren für Kriegsdienstverweigerer ist kein Widerspruchsverfahren in dem Sinne, daß die Anerkennungsbehörde die Behauptung des Antragstellers, er verweigere den Kriegsdienst aus Gewissensgründen, im Zweifel hinzunehmen hätte.

8. Das Grundgesetz gebietet eine Auslegung des Art. 1 § 8 Satz 2 des Kriegsdienstverweigerung-Neuordnungsgesetzes (Einkaufungen im Spannungs- und Verteidigungsfall) dahin, daß der Wehrpflichtige bis zum rechtskräftigen Abschluß des Anerkennungsverfahrens nur zum waffenlosen Dienst herangezogen werden kann. In dieser Auslegung berührt die Vorschrift den Schutzbereich des Grundrechts aus Art. 4 Abs. 3 Satz 1 GG nicht. Es schützt nur vor solchen Tätigkeiten, die in einem nach dem Stand der jeweiligen Waffentechnik unmittelbaren Zusammenhang mit dem Einsatz von Kriegswaffen stehen.

Urteil des Zweiten Senats vom 24. April 1985 aufgrund der mündlichen Verhandlung vom 30. Januar 1985  
 - 2 BvF 2, 3, 4/83 und 2/84 -  
 in den Verfahren über die Anträge 1. des Senats der Freien Hansestadt Bremen, vertreten durch den Präsidenten des Senats, Rathaus, Bremen, - 2 BvF 2/83 - 2. des Senats der Freien und Hansestadt Hamburg, vertreten durch den Präses der Justizbehörde, Hamburg. - 2 BvF



dem verfassungsrechtlichen Instrumentalisierungsverbot (Art. 1 Abs. 1 GG), § Artikel 1 §§ 9 bis 15, 4 Abs. 2, 7 Sätze 1 und 2, 8 KDVG in ihrer Verbindung mit Art. 2 Nrn. 1, 4, 5 b und 6 KDVG wegen Unvereinbarkeit mit dem Rechtsstaatsprinzip (Grundsatz der Verhältnismäßigkeit) und dem verfassungsrechtlichen Instrumentalisierungsverbot (Art. 1 Abs. 1 GG) für verfassungswidrig und nichtig zu erklären.

ENTSCHEIDUNGSFORMEL:

1. Artikel 1 §§ 2 bis 7, 8 Satz 1, 9 bis 15 und 17 bis 19 sowie Artikel 2 Nummern 1, 4, 5 b und 6 des Gesetzes zur Neuordnung des Rechts der Kriegsdienstverweigerung und des Zivildienstes (Kriegsdienstverweigerungs-Neuordnungsgesetz - KDVG) vom 28. Februar 1983 (Bundesgesetzbl. I S. 203) sind mit dem Grundgesetz vereinbar.
2. Artikel 1 § 8 Satz 2 des Gesetzes ist mit Artikel 4 Absatz 3 des Grundgesetzes vereinbar, jedoch mit der Maßgabe, daß im Spannungs- und im Verteidigungsfall die in Artikel 1 § 4 Absatz 1 KDVG genannten Wehrpflichtigen zwar zum Wehrdienst einberufen, aber nur zu einem waffenlosen Dienst herangezogen werden dürfen.

GRÜNDE:

A. - I.

1. Mit Urteil vom 13. April 1978 (BVerfGE 48, 127) hat das Bundesverfassungsgericht das Gesetz zur Änderung des Wehrpflichtgesetzes und des Zivildienstgesetzes vom 13. Juli 1977 (BGBl. I S. 1229) für nichtig erklärt. Alle Fraktionen im Deutschen Bundestag erstrebten in der Folgezeit eine Neuregelung des Rechts der Kriegsdienstverweigerung. Nachdem die Reformbemühungen in der 8. Wahlperiode zu keinem Ergebnis geführt hatten, legte der Bundesminister für Arbeit und Sozialordnung am 1. Juli 1981 einen Referentenentwurf vor; dieser sprach sich für einen auf 20 Monate verlängerten und strukturell belastender ausgestalteten Zivildienst sowie den weitgehenden Wegfall

des Prüfungsverfahrens aus. Nach dem Regierungswechsel im Herbst 1982 brachten die SPD-Fraktion am 28. Oktober 1982 (BTDrucks. 9/2064) sowie die Fraktionen der CDU/CSU und der F.D.P. am 24. November 1982 (BTDrucks. 9/2124) jeweils einen „Entwurf eines Gesetzes zur Neuordnung des Rechts der Kriegsdienstverweigerung und des Zivildienstes“ beim Bundestag ein.

Beide Vorlagen sahen übereinstimmend vor: Der Zivildienst wird verlängert; ungediente Wehrpflichtige können ohne persönliche Anhörung im schriftlichen Verfahren vor dem Bundesamt für den Zivildienst (Bundesamt) als Kriegsdienstverweigerer anerkannt werden; über die Anträge von gedienten, einberufenen oder vorbenachrichtigten Wehrpflichtigen und von Soldaten entscheiden Ausschüsse und Kammern für Kriegsdienstverweigerung; im Ausschuß- und Kammerverfahren kommt eine Anerkennung ohne persönliche Anhörung des Antragstellers in Betracht, wenn nach dem Inhalt der Akten hinreichend sicher angenommen werden kann, daß die Verweigerung des Kriegsdienstes auf einer durch Art. 4 Abs. 3 Satz 1 GG geschützten Gewissensentscheidung beruht; ist diese Voraussetzung nicht erfüllt, wird der Antragsteller persönlich angehört; einberufene oder vorbenachrichtigte Wehrpflichtige, die ihre Anerkennung beantragen, können zum Wehrdienst herangezogen werden.

Der SPD-Entwurf wird insbesondere in folgenden Punkten vom Koalitionsentwurf ab: Der Zivildienst dauert vier Monate länger als der Grundwehrdienst; das Bundesamt erkennt den Antragsteller an, wenn seinem Antrag eine Erklärung beigefügt ist, mit der er seine Gewissensentscheidung nach seinem persönlichen Ausdrucksvermögen darlegt; es leitet seinen Antrag an den Ausschuß für Kriegsdienstverweigerung weiter, wenn er die Erklärung trotz Aufforderung durch das Bundesamt nicht nachreicht; liegen konkrete Anhaltspunkte weder für noch gegen die Ernsthaftigkeit der Gewissensentscheidung vor oder kann ein Übergewicht konkreter Anhaltspunkte in der einen oder anderen Richtung nicht festgestellt werden, so erkennen die Ausschüsse

(...)

Diese Ausgestaltung des Zivildienstes ermöglicht jedenfalls in Verbindung mit dem hinzutretenden Anerkennungsverfahren die hinreichend sichere Feststellung, daß eine Gewissensentscheidung vorliegt. Das ergibt sich für das Verfahren vor den Ausschüssen und Kammern für Kriegsdienstverweigerung bereits daraus, daß es dem früheren, mit dem Grundgesetz vereinbaren Prüfungsverfahren ähnlich ist (vgl. BVerfGE 28, 243 [259 f.]; 48, 127 [166]). Für das Verfahren vor dem Bundesamt gilt: Es hat zwar nur einen begrenzten Erkenntniswert; indessen kommt ihm lediglich eine ergänzende Funktion dahin zu, daß der Zivildienst als eigentliche Probe auf das Gewissen verbunden werden soll mit einem Mindestmaß an verfahrensrechtlich institutionalisierter individueller Prüfung. Diese eingeschränkte Aufgabe vermag es sachgerecht zu erfüllen. Eine weitergehende Prüfung durch das Bundesamt ist unter verfassungsrechtlichen Gesichtspunkten deshalb nicht notwendig, weil der Zivildienst in seiner nunmehrigen Ausgestaltung in der Regel geeignet erscheint, unechte Kriegsdienstverweigerer davon abzuhalten, sich unter mißbräuchlicher Berufung auf das Grundrecht aus Art. 4 Abs. 3 Satz 1 GG ihrer Wehrpflicht zu entziehen.

### III.

Die angegriffenen Regelungen des Kriegsdienstverweigerungs-Neuordnungsgesetzes sind auch im übrigen mit dem Grundgesetz vereinbar.

1. Art. 12 a Abs. 2 Satz 2 GG ist nicht dadurch verletzt, daß der Zivildienst nach § 24 Abs. 2 Satz 1 ZDG um ein Drittel länger dauert als der Grundwehrdienst.

a) Nach Art. 12 a Abs. 2 Satz 2 GG bildet die Dauer des Wehrdienstes eine selbständige zeitliche Obergrenze für die Dauer des Ersatzdienstes. Der aufgrund der Wehrpflicht in Friedenszeiten zu leistende Wehrdienst umfaßt den Grundwehrdienst von zur Zeit 15 Monaten Dauer (§ 5 Abs. 1 Satz 2 WPfAG), den Wehrdienst in der Verfügungsbereitschaft und Wehrübungen (§ 4 Abs. 1 WPfAG). Der Wehrdienst in der Ver-

fugungsbereitschaft wird auf die Gesamtdauer der Wehrübungen angerechnet (§ 5 a Abs. 3 WPfAG). Diese beträgt bei Mannschaftshöchstens neun, bei Unteroffizieren höchstens 15 und bei Offizieren höchstens 18 Monate (§ 6 Abs. 2 WPfAG). Der Wehrdienst kann demnach bei Mannschaften bis zu 24 Monaten dauern. Von der damaligen Gesetzeslage ausgehend hat deshalb der Senat auch festgestellt, daß etwa eine Verlängerung des Zivildienstes auf 24 Monate in Betracht kommen könnte (BVerfGE 48, 127 [170 f.]). Diese Auslegung des Art. 12 a Abs. 2 Satz 2 GG entspricht dem Wortlaut der Vorschrift.

Die Materialien (vgl. die Äußerungen der Abgeordneten Dr. Arndt und Dr. Schwarzhaupt, Verhandlungen des Deutschen Bundestages, 2. Wp., Protokoll der 110. Sitzung des Ausschusses für Rechtswesen und Verfassungsrecht vom 20. Februar 1956, S. 9 f., sowie dessen 111. Sitzung vom 21. Februar 1956, S. 12 und 14 f., sowie den Zweiten schriftlichen Bericht des Ausschusses für Rechtswesen und Verfassungsrecht, Verhandlungen des Deutschen Bundestages, 2. Wp., Sten.Ber. S. 6857) stehen ihr jedenfalls nicht entgegen. Aus ihnen erhellt, daß Grundwehrdienst und Wehrübungen zusammen die Bemessungsgrundlage für die Dauer des Ersatzdienstes bilden. Von einer völlig gleichzeitigen Belastung der Wehrdienst- und der Ersatzdienstleistenden kann der verfassungsändernde Gesetzgeber danach nicht ausgegangen sein; denn es stand schon damals fest, daß sich nicht übersehen läßt, ob und in welchem Umfang ihren Grundwehrdienst leistende Wehrpflichtige später zu Wehrübungen einberufen werden würden.

Mithin untersagt Art. 12 a Abs. 2 Satz 2 GG jedenfalls solche gesetzliche Regelungen, nach denen die Dauer des Zivildienstes die rechtlich zulässige Höchstdauer des Wehrdienstes übersteigt. Die Vorschrift verpflichtet den Gesetzgeber nicht, innerhalb der rechtlich zulässigen Höchstdauer des Wehrdienstes eine Zivildienstzeit vorzusehen, die genau der tatsächlichen Dauer des Wehrdienstes entspricht. Sie verbietet ihm auch nicht eine Regelung, die dazu führen kann, daß der zu leistende Zivildienst

länger dauert als der tatsächlich durchschnittlich zu leistende Wehrdienst. Vielmehr darf der Gesetzgeber die Dauer des Zivildienstes anhand eines Zeitrahmens festlegen, den er abstrakt, d. h. auf der Grundlage der rechtlich zulässigen Dauer des Wehrdienstes und damit losgelöst vom tatsächlich geleisteten Wehrdienst, bemißt. Dies ergibt sich aus den folgenden Erwägungen:

Das normative Ziel des Art. 12 a Abs. 2 Satz 2 GG besteht darin, ein Gleichgewicht der Belastung von Wehr- und Ersatzdienstleistenden sicherzustellen; der Ersatzdienstleistende darf im Vergleich zum Wehrdienstleistenden weder besser noch schlechter gestellt werden. Danach ist es ausgeschlossen, die tatsächliche Dauer von Wehr- und Ersatzdienst völlig und schematisch gleich zu bemessen. Angesichts der vorgegebenen Unterschiede zwischen Wehr- und Ersatzdienst kann der Gesetzgeber den Zivildienst nur dann als eine im Verhältnis zum Wehrdienst gleichbelastende Pflicht (vgl. BVerfGE 48, 127 [173]) ausgestalten, wenn ihm bei der Festlegung der Dauer des Ersatzdienstes ein gewisser Spielraum zur Verfügung steht. Anderenfalls könnte eine gleiche Belastung von Wehr- und Ersatzdienstleistenden nur durch „künstliche“, nicht von der Sache, d. h. von der Art und Weise der Dienstleistung, her gebotene Erschwerungen des Ersatzdienstes erreicht werden; diese müßten ihrerseits verfassungsrechtliche Bedenken hervorrufen.

Es liegt in den Besonderheiten des Wehrdienstes begründet, daß sich bei Eintritt der Wehrpflicht die Dauer des vom Wehrpflichtigen zu leistenden Wehrdienstes nicht genau bestimmen läßt. Ein konkreter Vergleich der Dauer von Wehr- und Ersatzdienst ist erst nach Beendigung der Wehrpflicht (vgl. § 3 Abs. 3 und 4 WPFfG) möglich. Erst dann läßt sich abschließend beurteilen, welches Verhältnis die tatsächliche Dauer des jeweiligen Wehr- und Zivildienstes zueinander aufweisen, erst dann steht fest, für welchen Zeitraum der Wehrdienstleistende zum Wehrdienst herangezogen wurde. Bis zu diesem Zeitpunkt muß er – anders als der Zivildienstpflichtige – jederzeit damit rechnen, zu weiteren Dienstleistungen verpflichtet zu werden. Auch muß

er in Betracht ziehen, in etwaigen Krisenzeiten, die derzeit für niemanden vorhersehbar sind, verstärkt und gegebenenfalls auf der Grundlage des § 6 Abs. 6 WPFfG zu Wehrübungen herangezogen zu werden. Diesen Ungewisheiten, denen die Dauer des Wehrdienstes unterliegt, steht – jedenfalls außerhalb von Krisenzeiten – die Gewisheit gegenüber, die der Zivildienstleistende über die Dauer des Zivildienstes besitzt. Er braucht nach dessen Ableistung mit einer weiteren Inanspruchnahme nicht zu rechnen. Ein anderes kommt hinzu; Im Verteidigungsfall hat der Wehrpflichtige unbefristeten Wehrdienst zu leisten (§ 4 Abs. 1 Nr. 4 WPFfG). Zwar ist auch die Dauer des Zivildienstes im Verteidigungsfall nicht befristet (§ 79 Nr. 1 ZDG i. V. m. § 4 Abs. 1 Nr. 4 WPFfG). Planungen für die Einberufung von Wehrpflichtigen, die als Kriegsdienstverweigerer anerkannt wurden und ihrer Zivildienstpflicht genügt haben, bestehen für diesen Fall jedoch nicht, wie die Bundesregierung in der mündlichen Verhandlung mitgeteilt hat. All dies darf der Gesetzgeber bei der Bemessung der Dauer des Zivildienstes im Rahmen der durch Art. 12 a Abs. 2 GG gezogenen Grenze in Rechnung stellen.

Gleiches gilt für die Funktion, die dem Zivildienst nach der mit dem Grundgesetz vereinbaren Konzeption des Kriegsdienstverweigerungs-Neuordnungsgesetzes als tragendes Indiz für das Vorliegen einer Gewissensentscheidung zukommen soll. Müßte der Gesetzgeber die Dauer des Ersatzdienstes genau an die tatsächliche gegenwärtige Dauer des Wehrdienstes angleichen, so wäre er ohne – verfassungsrechtlich bedenkliche – künstliche Erschwerungen des Ersatzdienstes nicht in der Lage, ihn so auszugestalten, daß er eine echte und die eigentliche Probe auf das Gewissen bildet.

b) Diesem Maßstab wird § 24 Abs. 2 Satz 1 ZDG gerecht. Nach dieser Vorschrift erreicht die Dauer des Zivildienstes die rechtlich zulässige Höchstdauer des Wehrdienstes nicht. Da der Grundwehrdienst zur Zeit 15 Monate dauert, beträgt die Dauer des Zivildienstes nach § 24 Abs. 2 Satz 1 ZDG gegenwärtig 20 Monate.

Dem steht nicht entgegen, daß danach der Zivildienst oft länger dauert als der Wehrdienst, der in der Vergangenheit im Durchschnitt tatsächlich abzuleisten war. Denn in der Praxis sind die rechtlich zulässigen Höchstzeiten für Wehrübungen bisher regelmäßig nicht in Anspruch genommen worden; im Durchschnitt wurden Reservisten 7 Tage, Mannschafsdienstgrade 3,5 Tage, Unteroffiziersdienstgrade 15,4 Tage und Offiziersdienstgrade 33 Tage zu Wehrübungen herangezogen. Die Personalplanung der Bundeswehr geht davon aus, daß in Zukunft mehr Wehrpflichtige häufiger zu Wehrübungen herangezogen werden sollen. Es ist beabsichtigt, die Zahl der Wehrübungsplätze bis zum Jahre 1995 auf 15 000 zu erhöhen; bei einer durchschnittlichen Wehrübungsdauer von 14 Tagen wäre dann mit jährlich rund 400 000 Einberufungen zu rechnen. Genaue Daten darüber, wie hoch die Wehrübungsdauer in Zukunft bei den Wehrpflichtigen bis zur Beendigung ihrer Wehrpflicht im Durchschnitt wahrscheinlich sein wird, liegen nicht vor. Indessen kommt es darauf im vorliegenden Zusammenhang nicht an. Aus einem Vergleich der tatsächlichen Dauer von Wehr- und Zivildienst – im Sinne einer konkreten Betrachtungsweise – läßt sich eine Verletzung des Art. 12 a Abs. 2 Satz 2 GG nicht herleiten.

e) Der Gesetzgeber hat die Grenzen der Gestaltungsfreiheit, die ihm bei der Bemessung der Dauer des Zivildienstes somit zusteht, bei der in § 24 Abs. 2 Satz 1 ZDG getroffenen Regelung nicht überschritten: Die Dauer des Zivildienstes ist so bemessen, daß sie einerseits die zulässige zeitliche Höchstgrenze von zur Zeit 24 Monaten nicht überschreitet und andererseits die ihr zugedachte Funktion als tragendes Indiz für das Vorliegen einer Gewissensentscheidung zu erfüllen geeignet ist. Hierin liegt insbesondere auch kein Verstoß gegen Art. 12 a Abs. 2 Satz 3 GG. Diese Verfassungsnorm untersagt gesetzliche Regelungen, die den Kriegsdienstverweigerer abschrecken, sein Grundrecht aus Art. 4 Abs. 3 Satz 1 GG wahrzunehmen, und damit auf seine Gewissensentscheidung einen unzulässigen Druck ausüben. Ein solcher Druck wird durch das Kriegsdienstverweigerungs-Neuordnungs-

gesetz nicht bewirkt. Wer den Kriegsdienst mit der Waffe aus Gewissensgründen verweigert, wird in der Freiheit seiner Gewissensentscheidung nicht dadurch beeinträchtigt, daß er neben der Darlegung seiner Gründe für diese Entscheidung in einem Anerkennungsverfahren einen Zivildienst von 20 Monaten Dauer leisten muß. Dabei sind wiederum die vorgegebenen Unterstände zwischen Wehr- und Zivildienst zu berücksichtigen: Der Zivildienstleistende erbringt seinen Dienst zusammenhängend und abschließend, ist in der Regel einem weniger strengen Dienstverhältnis unterworfen und befindet sich typischerweise in einer weniger belastenden Lebenssituation.

d) Der Gesetzgeber war auch nicht gehindert, die Länge des Zivildienstes von der jeweiligen Dauer des Grundwehrdienstes abhängig zu machen. Art. 12 a Abs. 2 Satz 2 GG legt nur fest, wie lange der Ersatzdienst dauern darf. Die Vorschrift besagt nichts darüber, auf welche Art und Weise die – zulässige – Dauer des Ersatzdienstes zu bestimmen ist. Zwar könnte der Gesetzgeber, ohne die derzeitige Fassung des § 24 Abs. 2 Satz 1 ZDG anzutasten, durch eine Änderung der Dauer des Grundwehrdienstes oder der Wehrübungen oder beider bewirken, daß die Dauer des Zivildienstes die des Wehrdienstes übersteigt. Darin läge ein offenkundiger Verstoß gegen Art. 12 a Abs. 2 Satz 2 GG. Die Möglichkeit, einen solchen Verstoß durch eine Änderung der Normen, an die die Regelung des § 24 Abs. 2 Satz 1 ZDG anknüpft, herbeizuführen, vermag indessen die Verfassungswidrigkeit dieser Vorschrift nicht zu begründen.

2. Es verstößt nicht gegen Art. 4 Abs. 1 GG, daß auch die jungen Kriegsdienstverweigerer, die zu einer Glaubensgemeinschaft gehören, deren Glaubensgrundsätze die Verweigerung Kriegsdienstes mitumfassen und deren Gewissensentscheidung gegen den Kriegsdienst mit der Waffe daher offenkundig erscheint, verpflichtet sind, den verlängerten Zivildienst zu leisten und ein Prüfungsverfahren zu durchlaufen. Dadurch wird in den Schutzbereich dieser Grundrechtsnorm nicht eingegriffen.

Das Grundrecht auf Glaubensfreiheit gewährleistet sowohl die

(...)

möglich zu gewährleisten. Er wollte zu diesem Zweck verhindern, daß eine Vielzahl ungedienter Wehrpflichtiger unter dem Eindruck der gesteigerten Gefahren des Wehrdienstes rechtsmissbräuchliche Anträge auf Anerkennung als Kriegsdienstverweigerer stellt, um einer Einberufung zum Wehrdienst zumindest vorläufig zu entgehen. Diesen Zielen wird auch durch eine Einberufung zum lediglich waffenlosen Dienst in erheblichem Maße Rechnung getragen.

Daß diese Auslegung dem Willen des Gesetzgebers zuwiderliefe, läßt sich insbesondere nicht aus Art. 3 Nrn. 4 und 7 KD-VNG folgern. Durch die Streichung des ehemaligen § 27 WPfG und der Worte „oder auf ihren Antrag zum waffenlosen Dienst“ in § 48 Abs. 2 Nr. 2 WPfG hat der Gesetzgeber lediglich zum Ausdruck gebracht, daß an eine besondere Organisation des waffenlosen Dienstes nicht (mehr) gedacht ist. Damit ist, ganz abgesehen davon, daß diese Entscheidung rückgängig gemacht werden kann, nicht gesagt, daß die Möglichkeit, Wehrpflichtige zum Wehrdienst einzuberufen und in einer Weise zu beschäftigen, die sie nicht zwingt, mit der Waffe Dienst zu tun, nunmehr ausgeschlossen sein soll.

c) Werden ungediente Wehrpflichtige, die ihre Anerkennung als Kriegsdienstverweigerer beantragt haben, im Spannungs- und Verteidigungsfall zum waffenlosen Dienst in der Bundeswehr – also z. B. in der Militärverwaltung oder im Sanitätsdienst – einberufen, so wird dadurch der Schutzbereich des Art. 4 Abs. 3 Satz 1 GG nicht berührt. Die Vorschrift schützt nur vor solchen Tätigkeiten, die in einem nach dem Stand der jeweiligen Waffentechnik unmittelbaren Zusammenhang zum Einsatz von Kriegswaffen stehen (Herzog in: Maunz/Düing/Herzog/Scholz, Grundgesetz, Stand: Oktober 1984, Art. 4 Rdnrn. 171 f.). Sie berechtigt nicht zur Verweigerung des Kriegsdienstes schlechthin, sondern nur zur Verweigerung des Kriegsdienstes mit der Waffe (vgl. BVerfGE 12, 45 [56]; 32, 40 [45]).

d) Die Heranziehung zum waffenlosen Dienst bleibt zulässig, bis der Wehrpflichtige rechtskräftig als Kriegsdienstverweigerer

anerkannt ist. Im Spannungs- und Verteidigungsfall, in dem der Staat alle verfügbaren Kräfte zur Sicherung seiner Existenz einzusetzen gezwungen ist, ist er dringend darauf angewiesen, Wehrpflichtige solange in der Bundeswehr verwenden zu können, bis endgültig feststeht, daß sie das Grundrecht aus Art. 4 Abs. 3 Satz 1 GG zu Recht in Anspruch nehmen. Denn steht in dieser Lage kein gleichgewichtiges Interesse des Wehrpflichtigen gegenüber, vom Wehrdienst gewissermaßen vorsorglich verschont zu bleiben; denn im waffenlosen Dienst kann er nicht in die Zwangssituation kommen, vor der ihn das Grundrecht des Art. 4 Abs. 3 Satz 1 GG zu bewahren bestimmt ist.

## C.

Soweit in den Sondervoten nichts anderes dargelegt wird, ist die Entscheidung im Ergebnis einstimmig ergangen.

(gez.) Zeidler Rinek Dr. Dr. h. o. Niebler  
Steinberger Träger Mahrenholz  
Böckenförde Klein

ÉLISABETH ZOLLER

QU'EST-CE QUE FAIRE DU DROIT  
CONSTITUTIONNEL COMPARÉ ?

Parmi les matières enseignées dans les facultés de droit françaises, le droit constitutionnel est l'une de celles où l'étude des droits étrangers occupe une place considérable jusqu'à absorber le tiers, voire la moitié d'un cours magistral annuel. Il n'y a pas de disciplines où l'on fasse plus grand cas des systèmes juridiques étrangers. Dans ces conditions, s'il est vrai, comme la tradition l'enseigne, que l'étude des droits et systèmes étrangers est le point de départ de toute réflexion comparative, les constitutionnalistes doivent certainement être comptés parmi les premiers comparatistes d'entre tous les juristes français, et leurs travaux constituent un excellent échantillon pour juger de la manière dont ces derniers font du droit comparé<sup>1</sup>. La tendance apparemment irrépressible des constitutionnalistes français à consacrer des développements très étendus aux systèmes étrangers est singulière. Ni en Angleterre ou en Allemagne, ni *a priori* aux États-Unis, les auteurs d'ouvrages de droit constitutionnel ne se croient obligés de consacrer des chapitres entiers à l'étude des systèmes constitutionnels étrangers, et encore moins à l'étude du nôtre. Certes, nos collègues étrangers (plutôt d'ailleurs les Anglais et les Allemands, et pratiquement jamais les Américains) font à l'occasion des allusions à des institutions ou à des mécanismes qui ne relèvent pas de leur propre système. Mais ils le font « en passant », sans ce caractère de systématisme qui nous est particulier. En France, il semblerait que l'on ne puisse pas parler de la Constitution du 4 octobre 1958 sans expliquer préalablement par le menu détail le parlementarisme de Westminster ou le régime présidentiel américain.

1. Pour une étude d'ensemble englobant bien plus que le seul droit constitutionnel, voir Étienne Picard, « L'état du droit comparé en France en 1999 », *Revue internationale de droit comparé*, 1999, n° 4, p. 885-915.

À quoi correspond cette idiosyncrasie nationale ? A-t-elle seulement une finalité ou, si elle n'en a pas ou n'en a qu'une imprécise et confuse, quelle finalité faut-il lui attribuer ? Telle est la problématique que l'on voudrait poser à travers trois questions. Que fait-on aujourd'hui quand on fait du droit comparé en droit constitutionnel ? Que pourrait-on en faire ? Que devrait-on en faire ?

Comme dans n'importe quel autre champ disciplinaire, la première manière de faire du droit comparé dans le champ du droit constitutionnel est d'étudier les systèmes étrangers comme un préalable au système français. De fait, la consultation des ouvrages de droit constitutionnel écrits par les auteurs français démontre que la toute première finalité de l'étude des droits étrangers est d'introduire au droit français. Invariablement les développements sur les droits étrangers précèdent ceux consacrés au droit français et ils leur servent d'introduction au même titre que les développements sur l'histoire constitutionnelle française. Cette finalité que l'on pourrait qualifier de « mise en situation » est l'un des plus grands bénéfices de la méthode comparative dans les études juridiques. Connaître les systèmes étrangers, c'est avoir des points de repère pour mieux comprendre le sien. Ceci implique, d'une part, de bien connaître la règle ou l'institution étrangère, et d'autre part, de la rapporter utilement à la règle ou à l'institution nationale soit pour dresser une opposition, soit pour souligner une similitude. Notons que les deux stades de la démarche ne sont pas nécessairement successifs. Il est parfaitement concevable d'étudier les droits étrangers en eux-mêmes sans qu'une réflexion comparative les relient aux institutions nationales. Dans ce cas, on n'est alors manifestement plus en présence d'un travail comparatif au sens propre du terme, mais en face d'une œuvre d'érudition et d'information qui vise à la transmission d'un savoir juridique. C'est un genre de travail académique qui a ses exigences, mais qui ne relève pas de la méthode comparative au sens strict. Comme exemple parfaitement réussi de ce genre de démarche, il faut citer *Les grandes démocraties contemporaines* de Philippe Lauvaux. Voilà un ouvrage dans l'avant-propos duquel l'auteur explique avec autant de clarté que d'honnêteté qu'il n'a pas voulu faire « un traité d'institutions politiques comparées » et que son propos a été « d'offrir au lecteur un système de référence aisé », ce qui l'a conduit à opter pour « une série de monographies très synthétiques, simplement juxtaposées ». Dans un genre voisin, mais sans aller, comme le dit Philippe Lauvaux jusqu'à faire « un traité d'institutions politiques comparées », il est aussi pos-

1. Philippe Lauvaux, *Les grandes démocraties contemporaines*, 2<sup>e</sup> éd., Paris, PUF, « Droit fondamental », 1998, p. 9.

sible d'utiliser les institutions étrangères de façon systématique pour mettre les institutions nationales en situation et en perspective. D'un point de vue pédagogique, la méthode donne d'excellents résultats et elle est appréciée des étudiants dans la mesure où la connaissance des droits étrangers fournit à l'étudiant des balises et des points de repère, et elle lui permet, ce faisant, de mieux comprendre et de mieux situer son propre droit national. La méthode comparative ouvre les yeux et les esprits.

Les références à l'étranger, si fréquentes dans nos études juridiques, sont bien plus que de joyaux de nos traditions universitaires. Elles sont bien plus que des figures de rhétorique qui donnent au discours sa force d'explication. Elles sont un témoignage de notre culture juridique. Sans ne peut pas s'empêcher de penser le droit à l'échelle universelle. Sans doute faut-il se garder de tout excès et ne pas rechercher (pis, postuler) des universaux à partir de nos institutions et des préjugés que nous en avons<sup>2</sup>. Néanmoins, il faut cultiver et perpétuer cette tradition qui est l'un des plus précieux héritages de la méthode universitaire européenne. Il faut savoir, en effet, que la méthode comparative comme méthode de pédagogie est surtout appliquée dans les pays de droit romaniste, là où le droit est enseigné par des membres de l'université, et bien moins dans les pays de *common law*, là où la tradition veut que le droit soit en principe enseigné par des membres des professions juridiques, des *lawyers*, non par des docteurs de l'Université. Ces traditions, à l'origine anglaises, remontent au Moyen Âge et elles ont laissé selon les pays de *common law* des marques profondes, curieusement toutefois bien plus aux États-Unis qu'en Angleterre. Aux États-Unis, les professeurs de droit sont d'abord des avocats (*lawyers*) en ce sens que l'immense majorité d'entre eux est recrutée parmi les membres du barreau. D'autre part, les *law schools* sont principalement des écoles professionnelles, supervisées, contrôlées et homologuées par une corporation professionnelle (*Association of American Law Schools* elle-même liée à l'*American Bar Association*) ; leur

1. Pour une tentative de cet ordre, voir Élisabeth Zoller, *Droit constitutionnel*, 2<sup>e</sup> éd., Paris, PUF, « Droit fondamental », 1999, 624 p.

2. Les Européens, séduits et tentés par la perspective de ressusciter sur un continent aujourd'hui divisé en États nationaux un *ius commune*, y compris dans (et même à commencer par) le domaine des droits civils et politiques, ont certainement moins sensiblement que les Américains au risque de l'ethnocentrisme, à ce versant qu'on appellera pour faire court « politiquement correct », des études comparatives. Voir notamment les précautions et les mises en garde de Günter Frankenberg, « Critical Comparisons : Re-thinking Comparative Law », *Harvard International Law Journal*, vol. 26, 1985, p. 411 et s.

première fonction est de former non des docteurs<sup>1</sup>, mais des praticiens, des savants, des avocats. Aussi bien va-t-on à ce dont le praticien a besoin et n'y enseigne-t-on, en principe (car, bien sûr, il y a des exceptions), que le droit positif. C'est ce qui explique que les étudiants américains qui, en première année, doivent obligatoirement suivre un cours de droit constitutionnel, entrent dès les premiers jours de plein pied dans le pouvoir de *judicial review* (contrôle judiciaire de constitutionnalité des lois) et l'analyse de l'arrêt *Marbury v. Madison* sans avoir reçu une once d'information sur les droits étrangers qui ne connaissent pas cette technique judiciaire. Éventuellement, c'est plus tard, en deuxième ou troisième année, dans des cours à option, qu'ils seront initiés aux droits constitutionnels étrangers. Mais le moule pédagogique dans lequel ils ont été formés fait que le droit américain est leur système de référence prioritaire au point qu'il leur est fort difficile de concevoir un droit constitutionnel qui ne soit pas un droit judiciaire, c'est-à-dire un droit dit par le juge. D'autre part, dans le cadre des cours à option sur les droits constitutionnels étrangers qui peuvent éventuellement exister en deuxième ou troisième année, il s'agit surtout de parfaire leur savoir-faire et leurs aptitudes de praticien du droit en les mettant en présence de problèmes étrangers identiques à ceux rencontrés dans le système américain. Il n'est pas inconcevable d'attirer leur attention sur les éléments de ces droits étrangers qui pourraient leur permettre de prendre du champ par rapport à leur propre système, le mettre en perspective et le revisiter dans une analyse au deuxième degré, mais ce n'est pas l'essentiel. La fonction de la pédagogie comparative n'est donc pas tout à fait la même qu'en Europe, et en tout cas qu'en France. Il ne faudrait pas en conclure que les juristes américains ignorent les vertus de la connaissance des droits étrangers. Si l'on trouve peu de références aux droits étrangers dans les *case-books* qui sont les manuels de travail utilisés par les étudiants (et leurs professeurs, en cours, pour la mise en œuvre de l'étude du droit par la méthode des cas) et qui se présentent sous la forme de gros ouvrages reproduisant les grandes affaires relatives à une branche de droit donnée, on en trouve en revanche, parfois de manière inattendue, dans les opinions des juges. La Cour suprême a plusieurs fois utilisé des références puisées dans les systèmes étrangers pour mieux mettre en évidence la spécificité du système constitutionnel américain et en préserver les avantages contre certaines propositions législatives manifestement irréflechies selon elle. Quelques exemples

1. Ceci n'empêche nullement les écoles de droit américaines de délivrer un diplôme connu par le sigle « JD » qui signifie en la circonstance *Juris Doctor*, alors même que les études ne se terminent pas par une thèse.

serviront à illustrer le propos. En 1949, dans une affaire *Terminiello v. Chicago*, la Cour suprême souligne : « Le droit de parler librement et d'encourager la diversité des idées et des programmes (politiques) est l'un des traits distinctifs qui nous séparent des régimes totalitaires. » En 1989, dans une affaire *Ward v. Rock Against Racism*, elle rappelle l'importance que les États-Unis ont toujours attaché à la liberté de toutes les expressions, y compris les expressions artistiques, et elle contraste ce libéralisme à la pratique « (d)es régimes totalitaires (qui) à notre époque ont souvent (...) censuré des compositions musicales aux seules fins de servir les besoins du pouvoir ». Récemment, la Cour a utilisé les vertus de la méthode comparative en dressant une opposition saisissante entre la France et les États-Unis dans une affaire *Alden v. Maine* (1999). Il s'agissait de savoir si, en application d'une loi adoptée par le Congrès en 1938, des agents de l'État du Maine, qui avaient été occupés par l'État à des fonctions semi-judiciaires (contrôle des régimes pénitentiaires de libération conditionnelle), pouvaient poursuivre en justice leur employeur devant les cours fédérales pour obtenir le versement d'arriérés de salaires pour des heures supplémentaires qui n'avaient pas été payées. L'État du Maine invoquait pour sa défense le principe d'immunité de juridiction de l'État qui faisait obstacle, selon lui, à ce que le Congrès décide qu'il puisse être poursuivi devant les juridictions fédérales. La Cour suprême lui a donné raison au terme d'une étonnante opinion, lue par le juge Kennedy, qui ressuscite de façon spectaculaire le fédéralisme des origines et le Onzième Amendement, et qui se termine par ces observations : « Le Congrès a de vastes pouvoirs, mais il n'a pas tous les pouvoirs. Lorsqu'il légifère dans des matières qui touchent au statut des États, il ne peut pas traiter ces entités souveraines comme de simples préfectures (...). »<sup>3</sup> Tout observateur, averti de la répulsion que les créations napoléoniennes suscitent aux États-Unis, appréciera les vertus pédagogiques de la mise en situation qui ici, à la faveur de ce qui passe en Amérique pour une institution française typiquement napoléonienne, tourne à la dramatisation.

La deuxième manière de faire du droit comparé dans l'étude du droit constitutionnel est de faire du travail comparatif à proprement parler, c'est-à-dire de comparer soit entre plusieurs systèmes sans privilégier l'un plus que l'autre, soit entre le système national et les systèmes étrangers en évaluant le premier par rapport aux seconds. La première

1. 337 US 1, 4.  
2. 491 US 781, 790.  
3. 119 S. Ct. 2240, 2268.



démarche permet de dégager des invariants et des matrices qui servent à la construction de modèles théoriques, la seconde conduit à étudier la variété des solutions généralement proposées dans chaque système à des problèmes d'intérêt commun et, si une solution apparaît meilleure que l'autre, à en suggérer l'adoption par la technique de l'emprunt.

La première démarche que l'on pourrait qualifier de recherche comparative pure est rare. La raison tient à ses difficultés intrinsèques. Il est toujours possible de juxtaposer des systèmes constitutionnels les uns à côté des autres. Mais il est beaucoup plus aléatoire à partir d'une telle juxtaposition de définir un échantillon qui fasse sens et de procéder à un travail comparatif systématique. Un ouvrage très achevé dans ce genre de recherche est celui de Constance Grewe et Hélène Ruiz Fabri, *Droits constitutionnels européens*. « Pionnières » et « exploratrices » pour reprendre les termes de leur avant-propos, ces deux auteurs se sont interrogées à partir d'un large échantillon, non limité aux États membres de la Communauté européenne, sur « l'existence d'un droit constitutionnel européen commun ou, du moins, d'un fond commun ». La réussite de leur entreprise originale tient, semble-t-il, au fait qu'elles ont su dépasser et retourner ce « mélange très particulier de convergences et de divergences » que l'examen des institutions était nécessairement voué à produire et qu'elles ont trouvé ce « fonds commun » dans la conception de la constitution dans les États européens<sup>1</sup>.

La deuxième démarche est plus utilitaire et pratique. On relèvera qu'elle est toutefois la plus parfaite expression de « la méthode » en droit comparé telle qu'on l'entend habituellement, laquelle consiste à examiner, d'abord, comment les différents systèmes juridiques répondent aux problèmes qui leur sont communs et à envisager, ensuite, dans quelle mesure il est ou il serait souhaitable d'améliorer tel ou tel système juridique par des emprunts aux droits ou systèmes juridiques étrangers. Appliquée au droit constitutionnel, cette méthode est rare, tout au moins en France, non pas parce qu'elle est difficile et aléatoire, mais parce que le droit constitutionnel ne fait pas partie en France de la pratique judiciaire, en ce sens qu'il n'est pas, comme aux États-Unis ou en Allemagne par exemple, un droit de praticien<sup>2</sup>. Bien mieux, une

1. Constance Grewe et Hélène Ruiz Fabri, *Droits constitutionnels européens*, Paris, FUF, « Droit fondamental », 1995, p. 10.

2. *Ibid.*, p. 11.

3. Voir justement les analyses des « praticiens » au colloque organisé en 1985 par le Centre Eason-Weinmann de la Faculté de droit de l'université Tulane (Nouvelle-Orléans) sur le sujet suivant « Comparative Perspectives on Constitutional Law » avec les communications de William Cohen, Mark V. Tushnet, Lawrence Sager, David G. T. Williams, Erhard Denninger et la présentation de Christopher Osakwe, *Tulane Law Review*, vol. 59, 1985, p. 875 et s.

grande partie du droit constitutionnel « pratique » est en France, pour des raisons historiques, du ressort du Conseil d'État (c'est le cas de la légalité des actes réglementaires), donc traitée par les administrativistes, non par les constitutionnalistes. Dans ces conditions, on comprend mieux pourquoi les institutions et sociétés savantes qui se consacrent au droit comparé faisaient jusqu'à une époque récente, si peu cas du droit constitutionnel, notamment en ne comptant pratiquement dans leurs instances que des privatistes<sup>1</sup> ! Il n'y avait là rien que de très logique. En effet, à l'époque où le droit comparé fut créé — en gros entre 1870 et 1900 — la principale fonction assignée à la nouvelle science était d'aider à la rédaction et à l'amélioration des codes et des lois. Le but était de comparer les législations entre elles pour découvrir les meilleures solutions et, le cas échéant, en suggérer l'usage, donc l'emprunt, aux praticiens du droit comme les législateurs, les juges ou les avocats. Ce genre de travail n'était manifestement pas autrefois au nombre des préoccupations des publicistes.

Sans doute pourrait-on dire, d'une certaine manière, que les constitutionnalistes français qui ont avant 1958 réfléchi sur les institutions de la République et sur les conditions d'un meilleur fonctionnement du régime parlementaire, ont été à leur façon des comparatistes. Chacun sait que le gouvernement parlementaire britannique était un modèle de référence pour Michel Debré. Cependant, hormis les périodes d'élaboration ou de révisions des constitutions, cette manière de faire du droit constitutionnel comparé ne peut avoir qu'une portée limitée. La raison tient au fait que, concrètement, on ne peut recourir à des emprunts aux droits étrangers et à des implants dans le droit national qu'au moment où l'on change ou modifie le droit. Or, en matière constitutionnelle, ces changements n'interviennent pas tous les jours. En principe, on ne révisé pas les constitutions comme on révisé les lois. La rigidité supposée des constitutions écrites connaît une extraordinaire métamorphose dans ces pays où les règles constitutionnelles n'ont plus besoin, à la limite, d'être modifiées parce qu'elles sont susceptibles de changer sous couvert d'interprétations jurisprudentielles. Là, en effet, où existe un juge constitutionnel investi du pouvoir de modifier et de faire évoluer les règles constitutionnelles par le biais de l'interprétation, c'est tous les jours qu'on peut lui suggérer d'apporter des améliorations

1. Ces mêmes institutions faisaient aussi jusqu'ici très peu cas du droit administratif, non pas bien sûr pour la même raison qu'en droit constitutionnel (le droit administratif est depuis fort longtemps un droit de praticien), mais parce que le droit administratif, en tant que droit exorbitant du droit commun, était propre à la France en sorte que les exercices comparatifs ne pouvaient se jouer que sur quelques notes de la gamme du droit public.

à son propre système en empruntant les solutions retenues par les juridictions étrangères. La suggestion est d'autant plus facile à faire et à suivre que l'emprunt se réalise très simplement par l'intermédiaire du pouvoir interprétatif du juge sans qu'il y ait besoin de passer par la procédure formelle de la révision constitutionnelle. L'adaptation des règles constitutionnelles par l'intermédiaire de l'interprétation judiciaire est le principal avantage technique de cette doctrine qui nous vient justement d'outre-Atlantique et qui exhorte les juges à faire de la Constitution « un document vivant » (*a living document*). Cette manière de faire du droit constitutionnel comparé est extrêmement difficile à réaliser en France à cause du nombre très réduit de personnes pouvant mettre en mouvement le contentieux constitutionnel. Qui plus est, elle est en fait actuellement inexistante si l'on en juge par l'absence totale de références étrangères dans les mémoires des « parties » devant le Conseil constitutionnel. En revanche, elle est en passe de connaître un grand développement aux États-Unis. Le mouvement a commencé dans les années 1980 lorsque, argumentant sur des sujets très conflictuels entre juristes américains comme la peine de mort ou l'avortement, des juges de la Cour suprême ou des membres de la doctrine ont insinué que le système constitutionnel américain gagnerait à regarder vers les expériences législatives étrangères, notamment européennes. On en veut pour preuve, par exemple, les juges Brennan, Marshall, Blackmun et Stevens, dissidents dans une affaire de 1989 concernant la peine de mort infligée aux mineurs et rappelant que plus de cinquante pays, pour la plupart d'Europe de l'Ouest, avaient aboli la peine de mort<sup>1</sup>, ou encore Mary-Ann Glendon, professeur à Harvard, suggérant la même année que l'approche française de l'avortement dans la loi IVG de 1975 était préférable à l'approche américaine<sup>2</sup>. À partir des années 1990, les Américains n'ont plus seulement regardé vers les législateurs, mais aussi vers les juges européens. En 1995, le juge Guido Calabresi, ancien doyen de la faculté de droit de Yale et aujourd'hui juge à la cour d'appel du 2<sup>e</sup> circuit, commit dans une affaire *United States v. Then* relative à la possession et au trafic de drogue une opinion individuelle dans laquelle il cita, au nombre des références qu'il aurait aimé voir prises en considération, la jurisprudence des cours constitutionnelles européennes. Rappelant combien le droit constitutionnel américain avait influencé les droits constitutionnels européens d'après-guerre, notamment ceux qui avaient adopté le contrôle judiciaire de constitu-

1. *Stanford v. Kentucky*, 492 US 361 (1989).

2. *Mary-Ann Glendon, Abortion and Divorce Law in Western Law: American Failures, European Challenges*, 1989, p. 19.

tionnalité des lois, le juge Calabresi affirma que nombre d'États européens devaient être aujourd'hui regardés comme faisant partie de la « progéniture constitutionnelle » (*constitutional offspring*)<sup>1</sup> des États-Unis. Appelant de ses vœux un regard du père sur sa descendance, le juge américain rappela que « des parents sages apprenaient (toujours) de leurs enfants ».

Récemment, deux affaires jugées par la Cour suprême en 1997 ont démontré sans hésitation possible que les membres de la prestigieuse institution américaine se tenaient au courant des décisions rendues par les cours constitutionnelles étrangères et qu'il pouvait même leur arriver d'envisager de possibles emprunts. L'arrêt *Printz v. United States* est à cet égard exemplaire. Dans cette affaire, la Cour suprême a déclaré l'acquisition des armes à feu – dite loi Brady – qui chargeait les agents inconstitutionnelle la partie de la loi fédérale sur la réglementation de l'acquisition des armes à feu – dite loi Brady – qui chargeait les agents et les officiers de police des États d'exécuter ses dispositions et de procéder aux contrôles nécessaires. La Cour a estimé que le fédéralisme interdisait au Congrès de « commander » les États de la sorte et qu'il ne pouvait pas les obliger à remplir des fonctions exécutives pour son compte. Mais, dans une opinion dissidente fort critique, le juge Breyer rejoint par le juge Stevens fit valoir : « Les États-Unis ne sont pas la seule nation qui cherche à concilier le besoin pratique d'une autorité centrale et les vertus démocratiques d'un surcroît de contrôle à l'échelon local. Mais au moins, dans les autres pays qui sont confrontés au même problème de base, on a compris que le contrôle à l'échelon local est mieux garanti par un principe qui est exactement l'inverse de celui découvert par la majorité dans les silences de la Constitution. Pour prendre les systèmes fédéraux de Suisse, d'Allemagne et de l'Union européenne, tous prévoient que ce sont les États membres, et non les bureaucraties fédérales, qui exécutent elles-mêmes nombre de lois, règles, règlements ou décrets pris par l'organe « fédéral » central. [...] Bien entendu, c'est notre propre Constitution que nous interprétons, et non celle des autres nations, et il existe certainement d'importantes différences politiques et structurelles entre leurs systèmes et le nôtre. [...] Mais leur expérience peut néanmoins jeter un éclairage empirique sur les conséquences résultant de solutions différentes à un problème juridique commun – en l'espèce, le problème de

1. 56 F. 3d 464, 469 (2d Cir. 1995). Il est intéressant, et même en un sens étonnant, de noter le peu d'intérêt que le juge Calabresi semble manifester pour une influence possible d'autres modèles que le modèle américain. Voir toutefois Louis Favoreu, *Les cours constitutionnelles*, 3<sup>e</sup> éd., Paris, PUF, « Que sais-je ? », 1996, qui considère justement à propos de l'Allemagne (p. 49) que « les constituants de 1949 adoptèrent le modèle allemand », et non le modèle américain.

savoir comment concilier l'existence d'une autorité centrale avec la nécessité de préserver l'autonomie et de développer la liberté d'entités gouvernementales constituées plus petites.<sup>1</sup> Une autre affaire jugée la même année, *Raines v. Byrd*, est tout aussi révélatrice, quoiqu'elle suggère, en matière d'emprunt, une solution radicalement inverse. Il s'agissait de savoir si des membres du Congrès pouvaient être considérés recevables à contester la constitutionnalité de la loi sur le veto sélectif avant tout contentieux, autrement dit en provoquant un contrôle préventif de constitutionnalité par une saisine immédiate des cours fédérales. Tenant la plume au nom de la Cour, le président Rehnquist répondit par la négative et remarqua *obiter* : « Il n'y aurait rien d'irrational [à admettre cet intérêt] dans un système qui admettrait un intérêt à agir dans de telles situations ; certaines cours constitutionnelles européennes fonctionnent sous ce régime ou un régime qui en est proche. Mais ce n'est manifestement pas le régime qui a été mis en place par notre Constitution jusqu'à ce jour. »<sup>2</sup>

Ces déclarations et ces allusions ont fait grande impression sur la doctrine. Déjà, Vicki C. Jackson et Mark Tushnet, tous deux professeurs de droit à l'université de Georgetown, ont fait paraître un *case-book* intitulé *Comparative constitutional law* qui étudie les systèmes constitutionnels étrangers moins en eux-mêmes ou pour eux-mêmes que pour celles de leurs parties ou de leurs solutions jurisprudentielles qui, si elles étaient empruntées, pourraient améliorer le droit constitutionnel américain, notamment le régime des droits et libertés. De manière significative, l'ouvrage débute avec le régime de l'avortement. Il est encore trop tôt pour dire si ce mouvement ira en se développant ou s'il se révélera n'être qu'un feu de paille. Sans doute le juge Scalia l'a-t-il déjà évacué péremptoirement ces emprunts aux systèmes étrangers en faisant valoir qu'en matière de constitutions, l'emprunt pouvait se concevoir au niveau de l'élaboration, mais non à celui de l'interprétation d'une constitution déjà faite<sup>3</sup>. Quoiqu'en dise le partisan farouche de l'originalisme, et même s'il devait avoir théoriquement raison, la comparaison est, comme l'a bien vu Vicki Jackson, « inévitable »<sup>4</sup> et les juristes américains la feront à coup sûr dans le domaine des droits et libertés. La raison tient aux nouvelles technologies de

1. 521 US 898. Trad. in Élisabeth Zoller, *Grands arrêts de la Cour suprême des États-Unis*, Paris, PUF, « Droit fondamental », 2000, p. 1269.

2. 117 S. Ct. 2322.

3. *Ibid.*, 2404.

4. Vicki C. Jackson, « Ambivalent Resistance and Comparative Constitutionalism : Opening Up the Conversation on "Proportionality", Rights and Federalism », *University of Pennsylvania Journal of Constitutional Law*, vol. 1, 1999, p. 600.

l'information et à la possibilité d'aller consulter la jurisprudence des cours constitutionnelles étrangères sur les sites Internet. L'intérêt des informations « en ligne » (de plus en plus nombreuses et, faut-il le préciser, en langue anglaise, donc accessibles sans difficultés linguistiques aux juristes américains) est considérable pour un citoyen américain dont le conseil peut mettre en cause la constitutionnalité des lois à n'importe quel niveau. Si l'on tient compte de l'agilité et de la mobilité avec laquelle les esprits se meuvent aux États-Unis, on peut penser que la manière dont les Américains ont commencé à faire du droit constitutionnel comparé ne restera pas sans effet, soit qu'elle induira des évolutions inspirées par l'étranger, soit qu'au contraire elle rigidifiera des solutions traditionnelles par peur de la nouveauté.

Les mêmes évolutions sont-elles concevables en droit français ? *A priori* certainement pas devant les juridictions judiciaires ou administratives puisque les plaideurs ne peuvent pas discuter la constitutionnalité des lois devant les juges et que, au surplus, les normes de référence des juges français, toujours énoncées dans les visas et limitées par principe à la loi écrite en vigueur sur le territoire national, sont beaucoup plus étroites que celles des juges américains. Notons toutefois qu'il n'en va pas de même pour les affaires portées devant la Cour européenne des droits de l'homme. La réponse est plus incertaine pour le Conseil constitutionnel, notamment si les auteurs de mémoires rédigés pour le compte des députés ou des sénateurs se métrient à citer de la jurisprudence constitutionnelle étrangère. Les juges de la Constitution y prêtent-ils attention ? On aurait tendance à trancher par la négative dans la mesure où jamais, parmi les normes de référence qu'il a utilisées (et qu'il prend toujours soin d'énumérer au début de toutes ses décisions dans les visas), le Conseil constitutionnel n'a donné à penser qu'il pourrait appliquer du droit étranger. Mais il est vrai que rien ne lui interdit de s'en inspirer en silence.

La technique de l'emprunt, qu'elle soit pratiquée aux États-Unis ou sur le continent, pose toutefois des problèmes d'adaptabilité et d'opportunité. Comme la greffe médicale, la greffe constitutionnelle est une opération délicate. Elle est même en un sens plus dangereuse car, si la greffe d'organe qui ne prend pas est rejetée par le corps humain, la greffe constitutionnelle, elle, s'incruste et peut provoquer à terme des dysfonctionnements ou éventuellement produire des résultats totalement imprévus. Les emprunts ne sont donc pas inconcevables, mais ils

1. Parmi les sources d'information les plus prises par les praticiens américains, il faut mentionner la jurisprudence des cours constitutionnelles australienne, canadienne et sud-africaine.

doivent être maniés avec beaucoup de précautions<sup>1</sup>. Il ne peut en être autrement dès lors que les droits constitutionnels baignent dans des cultures juridiques qui, à partir d'un certain point, sont incommensurables. Mais, pour en mesurer l'importance, il faut aller bien au-delà du simple exercice comparatif. Il faut pénétrer à l'intérieur du système étranger et essayer de le comprendre au sens étymologique, c'est-à-dire le « prendre avec soi ».

Cette troisième manière de faire du droit constitutionnel comparé, en l'état actuel des recherches, plus un idéal qu'une réalité. On peut toutefois penser qu'elle est promise à un grand avenir. Aujourd'hui, faire du droit constitutionnel comparé, c'est encore pour la grande majorité des comparatistes faire d'abord un travail documentaire ; c'est empiler, amasser, accumuler le maximum d'informations sur les constitutions et les systèmes constitutionnels étrangers. Topiques à cet égard sont les recueils de constitutions ou des groupes de pays (comme les pays de l'Afrique francophone, ou les pays de l'Europe de l'Est, ou ceux de l'Union européenne) ou encore les chroniques étrangères dans l'*Annuaire international de justice constitutionnelle* ou les différentes revues. Naturellement, ces travaux sont utiles et il n'est pas question ici de suggérer qu'ils ne le sont pas. Mais il faut bien comprendre qu'ils ne sont qu'un préalable, un pas de 1 m au départ d'un parcours de 100 km. Sans doute une fois la documentation rassemblée, le travail consistant à identifier, décrire et classer ces régimes étrangers, éventuellement à découvrir des « modèles » dans lesquels on s'efforce de faire rentrer tant bien que mal leurs caractéristiques n'est pas sans intérêt, mais chacun sait bien qu'il ne permet pas véritablement de connaître lesdits systèmes étrangers. Or, l'objectif doit être de comprendre le système constitutionnel étranger, de savoir comment et pourquoi il s'est construit avec les institutions qui sont les siennes aujourd'hui, et d'expliquer les raisons qui sous-tendent ces règles. Cet idéal s'inscrit dans une nouvelle approche du droit constitutionnel comparé dont nous avons esquissé une première approche à propos de l'affaire Clinton<sup>2</sup>. Sur un plan plus général, le comparatiste constitutionnaliste doit être mû par les mêmes exigences et les mêmes impératifs qui s'imposent à tout comparatiste et que résume Pierre Legrand dans une formule ramassée : « Comprendre comment et pour-

1. Voir par exemple Mark Tushnet, « The Possibilities of Comparative Constitutional Law », *Yale Law Journal*, vol. 108, 1999, p. 1225-1309.
2. Élisabeth Zoller, *De Nixon à Clinton. Matérialités juridiques transatlantiques*, Paris, PUF, « Bêhémot », 1999.

quoi le droit est ce qu'il est, là où il est.<sup>3</sup> Aux États-Unis aussi, le même souci se fait jour. Dans un long et important article, William Ewald a bien exprimé les nouvelles préoccupations des jeunes comparatistes américains<sup>4</sup>. Prenant pour exemple les procès d'animaux au Moyen Âge et, en particulier, le procès des rats mené en 1522 par la cour ecclésiastique de la ville d'Aurum, il a démontré combien il était illusoire d'imaginer qu'on puisse rendre scientifiquement compte de ces pratiques sans pénétrer à l'intérieur des représentations, des sensibilités, de ce qu'il appelle la « structure cognitive » des systèmes juridiques, laquelle constitue par excellence le fond de la culture juridique des sociétés en cause. Lui aussi résume très bien l'objectif de la nouvelle approche : « What we should be seeking to understand is not law in books nor law in action but law in minds.<sup>5</sup> »

Cette nouvelle approche du droit comparé est inséparable d'une nouvelle philosophie de la connaissance. Janet Ainsworth voit juste quand elle en rattache les origines à la philosophie postmoderne<sup>6</sup>. A la tyrannie des universaux qui structuraient nos approches antérieures et dont on s'efforçait de trouver les marques tant dans la classification des régimes politiques que dans la typologie des gouvernements, il faut substituer une approche plus pragmatique. Il faut admettre que chaque ordre juridique est unique et que chaque système constitutionnel est le produit finement ouvragé d'une culture globale dans laquelle il s'insère. Nous devons viser à comprendre le travail des idées, des pensées et des sensibilités dans un système juridique déterminé, pour ultimement pouvoir restituer les principes, les concepts, les croyances et les raisonnements qui y sont à l'œuvre. C'est d'ailleurs, semble-t-il, ce que les étudiants, qui sont de toute façon déjà politiquement surinformés dans la société de l'information et des médias, attendent aujourd'hui de leur professeurs. À l'heure de l'interpénétration des cultures, la question se pose de savoir si on peut toujours expliquer l'Angleterre par le régime parlementaire ou les États-Unis par le régime présidentiel. La restitution de la culture juridique et politique d'un peuple est un objectif ambitieux qui a ses exigences méthodologiques et qui, comme toute démarche scientifique, suppose que les moyens soient adaptés aux fins. Or, c'est ici que risquent de se lever des nuages de difficultés à l'horizon

1. Pierre Legrand, *Le droit comparé*, Paris, PUF, « Que sais-je ? », 1999, p. 32.
2. William Ewald, « Comparative Jurisprudence : What Was it Like to Try a Rat ? », *University of Pennsylvania Law Review*, vol. 143, 1995, p. 1889-2149.
3. William Ewald, « The Jurisprudential Approach to Comparative Law : A Field Guide to "Rats" », *American Journal of Comparative Law*, vol. 46, 1998, p. 704.
4. Janet E. Ainsworth, « Categories and Culture : On the "Rectification of Names" in Comparative Law », *Cornell Law Review*, vol. 82, 1996, p. 28.

des nouvelles recherches. Mis à part quelques esprits exceptionnels qui, par l'étendue de leurs connaissances des langues et des systèmes juridiques, ressortiraient de la catégorie de ces esprits universels qu'ont été des Erasme ou des Pic de La Mirandole, rares sont ceux qui pourraient se plier aux exigences de la nouvelle méthode sur plusieurs systèmes à la fois. La spécialisation des hommes et des savoirs est donc inévitable. Il faut s'en réjouir parce que cette évolution ne pourra qu'accroître notre compréhension des cultures juridiques et des systèmes étrangers, mais il faut aussi éviter qu'à pénétrer sous l'écorce des arbres, plus personne ne puisse voir la forêt. C'est pourquoi les généralistes comparatistes auront toujours leur place dans nos études juridiques, mais un peu de la même manière que les médecins du même nom ont la leur auprès des spécialistes. Ils n'interviendront pas au même moment.

En conclusion, le droit constitutionnel comparé se trouve aujourd'hui à l'heure des choix. Ou bien nous persistons à étudier les systèmes constitutionnels étrangers de manière séquentielle et juxtaposée en nous appliquant à faire des typologies et à construire des modèles par rapport auxquels nous situons avec plus ou moins de bonheur nos propres institutions, ou bien nous nous attelons à étudier les systèmes constitutionnels, politiques et juridiques étrangers comme nos grands comparatistes — songeons à Montesquieu ou à Tocqueville — savaient les regarder autrefois, de l'intérieur, en eux-mêmes et pour eux-mêmes. Il n'y a pas besoin d'être constitutionnaliste, ni même juriste, pour prétendre que, selon que nous choisirons l'une ou l'autre voie, l'avenir international et européen de la doctrine comparatiste française sera très contrasté.

# DROITS

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# THÉORIE PURE DU DROIT

Traduction française de la 2<sup>e</sup> édition  
de la « *Reine Rechtslehre* »

par

CHARLES EISENMANN  
Professeur à la Faculté de Droit  
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DALLOZ  
PARIS  
1962



d'après les dispositions de ce Code, valoir ~~comme~~ ~~testa-~~ment. Qu'une réunion d'hommes soit un Parlement, et que le résultat de son activité soit juridiquement une loi obligatoire, en d'autres termes : que les processus en question aient cette signification, cela signifie, uniquement que cet ensemble de faits, ce processus correspondent aux normes de la Constitution. Dans toutes ces hypothèses, la donnée essentielle est qu'il y a concordance du contenu d'un processus effectif avec le contenu d'une norme dont on admet qu'elle est valable.

#### b) Normes et création de normes.

La connaissance juridique a pour objet les normes qui ont le caractère de normes juridiques et qui confèrent à certains faits le caractère d'actes de droit (ou d'actes contre le droit). En effet, le droit, qui forme l'objet de cette connaissance, est un ordre ou règlement normatif de l'action humaine, c'est-à-dire un système de normes qui régissent la conduite d'êtres humains.

Le mot « norme » exprime l'idée que quelque chose *doit* être ou se produire, en particulier qu'un homme *doit* se conduire d'une certaine façon. Telle est la signification que possèdent certains actes humains qui, selon l'intention de leurs auteurs, visent à provoquer une conduite d'autrui.

Et l'on peut dire que des actes portent en intention sur la conduite d'autrui quand ils ont pour signification, soit d'ordonner (ou commander) cette conduite, soit également de la permettre, et en particulier de l'habiliter, c'est-à-dire de conférer à l'autre un certain pouvoir, en particulier le pouvoir de poser lui-même des normes.

Entendus en ce sens, ce sont des actes de volonté. Lorsqu'un homme exprime par un acte quelconque la volonté qu'un autre homme se conduise d'une certaine façon, lorsqu'il commande ou permet cette conduite ou l'habilite, on ne peut pas analyser la signification de son acte en énonçant que l'autre se conduira de telle façon; ce qu'il faut énoncer, c'est que l'autre *doit* se conduire de cette façon. Celui qui ordonne, permet ou habilite, veut; celui à qui le commandement s'adresse ou celui à qui est donnée la permission ou l'habilitation doivent (*sollen*).

Il faut souligner immédiatement qu'en écrivant ces dernières propositions, on donne au verbe « devoir (*sollen*) » une signification plus large que sa signification habituelle. Dans

le langage usuel, c'est seulement au commandement que l'on fait correspondre un « devoir (*Sollen*) »; à la permission, l'on fait correspondre un « avoir le droit de (*Dürfen*) »; à l'habilitation enfin, un « pouvoir (*Können*) ». Au contraire, tel qu'on vient de l'employer, ce terme « devoir (*sollen*) » désigne la signification normative de tout acte qui se rapporte en intention à la conduite d'autrui. « Devoir (*sollen*) » comprend donc aussi « avoir le droit (*dürfen*) » et « avoir le pouvoir (*können*) ». Car, aussi bien que commander, une norme peut permettre et, en particulier, donner pouvoir. Si celui auquel une certaine conduite est permise, ou celui à qui est habilité veut demander quel est le fondement de la situation qui en résulte pour lui — celle de sujet d'un devoir, d'une permission ou d'un pouvoir — (il ne s'agit pas de déterminer la cause de l'acte portant prescription, permission ou habilitation), la seule question qu'il puisse poser est celle-ci : pourquoi dois-je me conduire de telle façon; ou, en usant de la terminologie courante : pourquoi dois-je ou pourquoi ai-je le droit, ou pourquoi ai-je le pouvoir de me conduire de telle façon? Une « norme » est la signification d'un acte par lequel une conduite est ou pres-crit, ou permise et en particulier habilitée.

Il faut distinguer nettement cette « norme » de l'acte de volonté qui la pose : elle est bien la signification spécifique de cet acte qui vise, en intention, la conduite d'autrui; elle est cependant autre chose que cet acte. Et on effectue la norme est un « devoir être (*Sollen*) », alors que l'acte de volonté dont elle est la signification est un « être (*Sein*) ». D'où, il s'ensuit que la façon correcte d'exprimer l'ensemble des données qu'appor-tq un tel acte de volonté consistera à dire : A veut que B doive se conduire de telle façon. La première partie de la proposition se rapporte à un *Sein*, le fait réel (*Seins-Tatsache*) de l'acte de volonté; la seconde partie, à un *Sollen*, à une norme qui est la signification de cet acte. C'est pourquoi il n'est pas vrai, contrairement à ce que l'on avance fréquemment que la proposition qui affirme qu'un individu doit faire ou ne pas faire quelque chose signifierait simplement ou uniquement qu'un autre individu veut qu'il fasse ou qu'il ne fasse pas ce quelque chose; ce qui revient à admettre que l'affirmation d'un « devoir être » se laisserait réduire à l'affirmation d'un « être ».

La différence entre *Sein* et *Sollen*, « être » et « devoir » ou « de-

voir être », ne peut pas être expliquée davantage. Elle est donnée à notre conscience de façon immédiate (1). Personne ne peut nier que l'assertion de ceci ou cela « est », — c'est l'insertion qui décrit un fait positif — est essentiellement différente de la proposition que quelque chose « doit être », — c'est l'assertion qui décrit une norme; et personne ne peut nier que, du fait que quelque chose est, il ne peut pas suivre que quelque chose doit être, non plus qu'inversement de ce que quelque chose doit être, il ne peut pas suivre que quelque chose est (2).

b) *Le droit, ordre de contrainte.*

Un autre caractère distinctif commun aux ordres sociaux que l'on appelle droits, est que ce sont des ordres de contrainte, cette dernière expression voulant dire qu'ils réalisent par un acte de contrainte à certaines circonstances considérées comme indésirables parce que socialement nuisibles, en particulier à des faits de comportement humain de cette nature. Par acte de contrainte, on entend un mal — tel que retrait de la vie, de la santé, de la liberté, de biens économiques et autres — qui doit être infligé à celui qu'il atteindra, même contre son gré, et, si besoin est, en employant la force physique. Enfin, quand on dit que les actes de contrainte qui jouent le rôle de sanctions infligent un mal à ceux qui les subissent, c'est en se référant au sentiment très général qu'ils en éprouvent. Il peut se rencontrer des exceptions à ce sentiment : l'auteur d'un crime souffrira parfois, par repentir, de souffrir la peine établie par l'ordre juridique, qu'il ressentira donc comme un bien; ou encore un individu commettra un délit afin de se voir infliger la peine de prison qui y est attachée, parce que celle-ci lui assure un temps gîte et nourriture. Mais ce ne sont là que des cas très exceptionnels. On peut admettre que normalement les actes de contrainte qui jouent le rôle de sanction sont ressentis par leurs sujets passifs comme des maux.

Voilà donc en quel sens les ordres sociaux considérés comme des ordres juridiques sont des ordres de contrainte de la conduite humaine. Ils prescrivent de certaines conduites humaines en attachant aux conduites opposées des actes de contrainte qui sont dirigés contre ceux qui les adopteraient (ou contre leurs proches). En d'autres termes, ils donnent à de certains individus pouvoir de diriger contre d'autres individus, à titre de sanctions, des actes de contrainte.

Les sanctions statées par les ordres juridiques sont des sanctions socialement immanentes, et des sanctions socialement organisées; par le premier trait, elles diffèrent des sanctions transcendantes; par le second, des sanctions qui se réduisent à une approbation ou une désapprobation. Mais il faut noter — on aura à y revenir — que l'ordre

juridique peut ordonner des actes de contrainte pour régler, non plus, comme on l'a envisagé jusqu'à présent, à une certaine conduite humaine, mais à d'autres situations socialement nuisibles. En d'autres termes: alors que les actes de contrainte institués par l'ordre juridique représentent toujours, par définition, la conduite d'individus humains, la condition à laquelle ils sont attachés n'est pas toujours et nécessairement un comportement d'êtres humains; ils peuvent être également attachés à d'autres sortes de faits, qui sont considérés comme socialement nuisibles, pour quelque raison que ce soit. Les actes de contrainte institués par l'ordre juridique peuvent (nous le verrons plus tard) être rapportés à l'unité de l'ordre juridique, ils peuvent être attribués à la collectivité juridique fondée par l'ordre juridique, en qualité de réaction de cette collectivité à des faits considérés comme socialement nuisibles; et si ces faits consistent en un certain comportement humain, ils peuvent être interprétés comme des sanctions. En affirmant que le droit est un ordre de contrainte, on entend dire que les normes statuent des actes de contrainte attribuables à la collectivité juridique. Mais non pas que dans chaque cas où ces normes viennent à exécution il y a lieu de faire usage de la contrainte physique. Cette contrainte n'a à intervenir que lorsqu'une résistance est opposée à l'exécution de ces normes, ce qui normalement n'est pas le cas.

minimum moral, que, pour pouvoir être considéré comme droit, un ordre de contrainte devrait nécessairement remplir une exigence minimum de la morale. Car en formulant ce postulat, on présuppose une morale absolue d'un contenu déterminé, ou tout au moins l'existence d'un contenu commun à tous les systèmes de morale positifs; et, en fait, le plus souvent, c'est à l'idéal de paix que l'on songe comme tel. De l'analyse qui précède, il résulte que ce que l'on appelle ici la valeur juridique n'est pas un minimum moral, en ce sens, et qu'en particulier la valeur de paix n'est pas un élément essentiel à la notion du droit.

## 12. — SÉPARATION DU DROIT ET DE LA MORALE.

Si l'on admet que le droit est, par essence, moral, cela n'a pas de sens de postuler — en supposant l'existence de valeurs morales absolues — que le droit doit être moral. Un tel postulat n'a de sens, et la morale qu'il suppose ne constitue un étalon de valeur pour le droit, que si l'on reconnaît la possibilité d'un droit immoral, d'un droit moralement mauvais, et par conséquent si l'on n'inclut pas comme élément dans la définition du droit le caractère moral de son contenu. Quand une théorie du droit positif pose qu'il faut distinguer l'un de l'autre le droit et la morale en général, le droit et la justice en particulier, qu'il ne faut pas mêler l'un avec l'autre, elle prend position contre l'idée traditionnelle, considérée par la plupart des juristes comme évidente, qui suppose qu'il n'existe qu'une morale, seule valable, c'est-à-dire une morale absolue, et par conséquent une justice absolue. Le postulat de la séparation du droit et de la morale, du droit et de la justice, signifie que la validité des ordres juridiques positifs est indépendante de la validité de cette morale unique, seule valable, absolue, de « la » morale, de la morale « par excellence ». Si au contraire l'on ne reconnaît l'existence de valeurs morales que relatives, tout ce que peut signifier le postulat que le droit doit être moral, autrement dit : doit être juste, c'est que le contenu donné au droit positif doit être conforme à un système moral déterminé, parmi les multiples systèmes moraux possibles; ce postulat n'excluant nullement cet autre postulat que le contenu du droit positif doit être conforme à un autre système moral et y soit peut-être effectivement conforme, dépendant qu'il est contraire à un système moral différent de ce dernier. Si en partant de valeurs simplement

relatives, l'on formule également le postulat que le droit doit être distingué de la morale en général et de la justice en particulier, cela ne signifie point que l'on entende affirmer, par exemple, que le droit n'a rien à voir avec la morale ou avec la justice, que la notion de droit ne tombe pas sous la notion de « bien ». Car le « bien » ne peut pas être défini autrement que comme : « ce qui doit être » (das « Gesollte »), c'est-à-dire ce qui est conforme à une norme; et si l'on définit le droit comme une norme, cela implique que ce qui est conforme au droit est un bien. Le postulat de la séparation du droit et de la morale, et par conséquent un ordre et de la justice, formulé sur la base d'une théorie relativiste des valeurs, signifie simplement qu'en déclarant un ordre juridique moral ou immoral, juste ou injuste, on exprime simplement le rapport de l'ordre juridique à l'un des multiples systèmes moraux possibles, et non pas son rapport à « la morale », — qu'il s'agit par conséquent, non pas d'un jugement de valeur absolu, mais d'un jugement de valeur simplement relatif, et que la validité des ordres juridiques positifs est indépendante de leur conformité ou de leur non-conformité à un système moral quel qu'il soit.

Contrairement à une idée trop fréquente, une théorie relativiste des valeurs n'affirme pas qu'il n'existe pas de valeurs, et en particulier pas de justice; elle implique seulement qu'il n'existe pas de valeurs absolues, mais uniquement des valeurs relatives, pas de justice absolue, mais seulement une justice relative, que les valeurs que nous fondons par nos actes créateurs de normes et que nous mettons à la base de nos jugements de valeur ne peuvent pas avoir la prétention d'exclure la possibilité même de valeurs opposées.

Il se comprend de soi-même qu'une morale simplement relative ne peut pas remplir le rôle postulé — consciemment ou inconsciemment — pour la morale de fournir un étalon absolu pour apprécier les ordres juridiques positifs. Et en effet la connaissance scientifique ne permet pas de trouver un tel étalon. Mais cela ne signifie pas qu'il n'existe pas d'étalon du tout. Tout système de morale peut jouer ce rôle; lorsque l'on juge le contenu d'un ordre juridique positif d'un point de vue moral, à moralement, comme bon ou mauvais, comme juste et comme injuste (4) on doit seule-

(4) Etant donné que ce qui est l'objet d'un jugement de valeur, d'une appréciation, est la réalité, l'appréciation morale du droit positif

ment se souvenir que cet étalon est un étalon relatif, qu'une appréciation différente pourra être portée sur la base d'un autre système moral; que si, mesuré à l'étalon de tel système moral, un ordre juridique est jugé injuste, mesuré à l'étalon d'un autre système moral, il peut au contraire être jugé juste.

### 13. — JUSTIFICATION DU DROIT PAR LA MORALE.

Il n'est possible de justifier le droit positif par la morale que si l'on admet qu'il peut y avoir contrariété entre normes juridiques et normes morales, si, comme un droit moralement bon, il peut exister un droit moralement mauvais. Si un ordre moral prescrit, comme le fait par exemple Saint Paul dans sa Lettre aux Romains (1), de se conformer toujours et inconditionnellement aux normes posées par l'autorité gouvernementale, ou juridique, l'idée même d'une contradiction entre cet ordre moral et le droit positif est exclue par avance; dès lors, il ne peut réaliser son intention de légitimer le droit positif en lui conférant valeur morale. Car si tout droit positif est bon, c'est-à-dire juste, — parce qu'il est voulu de Dieu, comme tout ce qui est, est bon, parce que voulu par Dieu; si aucun droit positif ne peut être injuste, — comme rien de ce qui est ne peut être mauvais —, si le droit est identifié à la justice, le Sein au Sollen, la notion de justice a perdu tout sens, de même que celle de bien. S'il n'existe pas de mal, pas d'injuste, il n'existe pas de bien, pas de juste. Postuler qu'il faut distinguer le droit de la morale et la science du droit de l'éthique, signifie que, du point de vue d'une connaissance scientifique du droit positif, sa justification par un ordre moral distinct de lui est irrélevante. La science du droit n'ayant ni à approximer ni à désapprouver son objet, mais uniquement à le connaître et à le décrire. Bien que les normes juridiques en tant que prescriptions fondent des valeurs, la fonction de la science du droit n'est en aucun sens d'apprécier son objet ou de l'« évaluer »; elle est seulement de le décrire, indépendamment de tout jugement de valeur (*verifres*). Le juriste scientifique ne s'identifie avec aucune valeur juridique, notamment pas avec celles qu'il décrit.

se rapporte, immédiatement aux actes qui posent les normes, de façon médiate seulement aux normes qui sont posées par ces actes. Cf. *supra*, P. 23 et l'étude citée à la note suivante.

(1) Cf. H. Kelsen, *Justice et Droit naturel* (voir *supra* p. 24, n. 1).

Si l'ordre moral ne prescrit pas d'obéir inconditionnellement à l'ordre juridique positif, si donc existe la possibilité d'une contradiction entre la morale et l'ordre juridique, le postulat qui affirme qu'il faut distinguer le droit de la morale, la science du droit de l'éthique, signifie que la validité des normes juridiques positives ne dépend pas de leur conformité à l'ordre moral, que, du point de vue d'une connaissance du droit positif, une norme juridique peut être considérée comme valable alors même qu'elle contredit à l'ordre moral.

Mais le point capital et primordial — il faut l'affirmer sans se lasser et avec toute l'insistance possible —, c'est l'idée qu'il n'existe pas une seule morale, qui serait « la morale », mais de nombreux systèmes moraux, extrêmement différents les uns des autres, et se contredisant les uns les autres dans une large mesure, et qu'ainsi il se peut fort bien qu'un ordre juridique corresponde *grasso modo* aux conceptions morales d'une certaine couche ou d'un certain groupe, en particulier à celles de la population qu'il régit — et dominante à l'intérieur de la population qu'il régit —, en fait, il y correspond effectivement en règle générale, mais que cet ordre juridique soit contraire aux conceptions morales d'un autre groupe ou d'une autre couche; mais plus encore, il importe de se persuader que les idées relatives à ce qui est moralement bon ou moralement mauvais à ce qui est moralement justifiable ou moralement injustifiable, sont soumises à un changement constant — de même que le droit, et qu'il se peut qu'un ordre juridique ou certaines de ses normes qui étaient conformes aux conceptions morales en vigueur à l'époque où eux-mêmes l'étaient, soient au contraire condamnés aujourd'hui comme éminemment immoraux. Tout à l'opposé, la thèse que repousse la théorie pure du droit, mais qui est par contre très répandue dans la science du droit traditionnelle, que le droit doit être par essence moral, qu'un ordre social immoral n'est pas un droit, présuppose une morale absolue, c'est-à-dire valable en tous temps et partout. Sinon, elle ne pourrait pas atteindre le but qu'elle s'assigne d'appliquer aux ordres sociaux, pour juger ce qui est droit et ce qui n'est pas droit, un étalon fixe, indépendant des circonstances de temps et de lieu.

Si la théorie pure du droit rejette la thèse que le droit est par essence moral, c'est-à-dire que seul un ordre social moral peut être droit, ce n'est pas seulement pour la raison que cette thèse présuppose une morale absolue; c'est

également pour la raison que, dans son application effective par la doctrine dominante dans une certaine collectivité juridique, elle tend à une légitimation acritique de l'ordre de contrainte étatique qui fonde cette collectivité. Car que « son » ordre de contrainte étatique — c'est-à-dire de son Etat national — soit droit, le juriste le suppose comme une chose évidente. C'est uniquement à des ordres de contrainte d'Etats étrangers qu'il applique l'étalon problématique de la morale absolue; c'est parmi eux seulement qu'il disqualifiera certains comme immoraux et leur dénierá en conséquence la qualité de droits, lorsqu'ils ne correspondent pas à certaines exigences auxquelles satisfait au contraire son ordre national; par exemple, s'ils reconnaissent ou si, au contraire, ils ne reconnaissent pas la propriété privée, s'ils ont un caractère démocratique ou au contraire un caractère non-démocratique. Mais, selon cette thèse, étant donné que l'ordre de contrainte national du juriste, lui, est droit, il doit nécessairement, lui, être aussi moral.

Il est bien possible qu'une telle légitimation du droit positif rende de bons services politiques, en dépit de sa faiblesse logique. Du point de vue de la science du droit, elle est inadmissible. Car il n'est pas du rôle de la science du droit de légitimer le droit; il ne lui appartient absolument pas de justifier l'ordre normatif, que ce soit par une morale absolue ou par une morale relative; il lui appartient uniquement de le connaître et de le décrire.

INTRODUCTION  
TO  
COMPARATIVE LAW

VOLUME I — The Framework

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## A. GENERAL CONSIDERATIONS

### I

#### The Concept of Comparative Law

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## I

BEFORE we try to discover the essence, function, and aims of comparative law, let us first say what 'comparative law' means. The words suggest an intellectual activity with law as its object and comparison as its process. Now comparisons can be made between different rules in a single legal system, as, for example, between different paragraphs of the German Civil Code. If this were all that was meant by comparative law, it would be hard to see how it differed from what lawyers normally do: lawyers constantly have to juxtapose and harmonize the rules of their own system, that is, compare them, before they can reach any practical decision or theoretical conclusion. Since this is characteristic of every national system of law, 'comparative law' must mean more than appears on the surface. The extra dimension is that of internationalism. Thus 'comparative law' is the comparison of the different legal systems of the world.

Comparative law as we know it started in Paris in 1900, the year of the World Exhibition. At this brilliant panorama of human achievement there were naturally innumerable congresses, and the great French scholars ÉDOUARD LAMBERT and RAYMOND SALEILLES took the opportunity to found an International Congress for Comparative Law. The science of comparative law, or at any rate its method, was greatly advanced by the occurrence of this Congress, and the views expressed at it have led to a wealth of productive research in this branch of legal study, young though it is.

The temper of the Congress was in tune with the times, whose increasing wealth and splendour had given everyone, scholars included, an imperturb-

able faith in progress. Sure of his existence, certain of its point and convinced of its success, man was trying to break out of his local confines and peaceably to master the world and all that was in it. Naturally enough, lawyers were affected by this spirit; merely to interpret and elaborate their own system no longer satisfied them. This outgoing spirit permeates all the Congress papers; the whole Congress was dominated by a disarming belief in progress. What LAMBERT and SALEILLES had in mind was nothing less than a common law of mankind (*droit commun de l'humanité*). A world law must be created—not today, perhaps not even tomorrow—but created it must be, and comparative law must create it. As LAMBERT put it (above p. 1, pp. 26 ff.), comparative law must resolve the accidental and divisive differences in the laws of peoples at similar stages of cultural and economic development, and reduce the number of divergencies in law, attributable not to the political, moral, or social qualities of the different nations but to historical accident or to temporary or contingent circumstances.

Comparative law has developed continuously since then, despite great changes in man's attitude towards existence. The belief in progress, so characteristic of 1900, has died. At best we believe that history comes in waves, the crest of a later wave being perhaps a little higher than its predecessor. World wars have weakened, if not destroyed, faith in world law. Yet despite a more sceptical way of looking at the world, the development and enrichment of comparative law has been steady. Comparative lawyers have come to know their field better, they have refined their methods and set their sights a little lower, but they remain convinced that comparative law is both useful and necessary. Scholars are more resistant to fashionable pessimism than people in other walks of life; they have no immediate aim, only the ultimate goal of discovering the truth. This is true also of research in comparative law; it has no immediate aim. But if one did want to adduce arguments of utility, comparative law must be at least as useful as it was, especially as technological developments since 1900 have made the world ever smaller and, to all appearances, national isolationism is on the wane. Furthermore, by the international exchanges which it requires, comparative law procures the gradual approximation of viewpoints, the abandonment of deadly complacency, and the relaxation of fixed dogma. It affords us a glimpse into the form and formation of legal institutions which develop in parallel, possibly in accordance with laws yet to be determined, and permits us to catch sight, through the differences in detail, of the grand similarities and so to deepen our belief in the existence of a unitary sense of justice.

Despite all this, comparative law still occupies a rather modest position in academic curricula (see further Ch. 2 IV below). Though LAMBERT's great claims in this respect, as developed in his report of 1900 (above p. 1, pp. 53 ff.) were much more realistic than his dream of a 'droit commun de l'humanité', they have not yet been realized anywhere in the world. He thought that it



diverse styles of judicial opinion. Here too one could study the different ways of resolving conflicts adopted by different legal systems, and ask how effective they actually are. Attention may be focused on the official state courts: how is the business of proving the facts and establishing the law divided between attorneys and judges? What role do lay judges have in civil or criminal proceedings? What special arrangements, if any, are made for small claims? But one should not confine one's study to the state courts and judges: one should take account of all actual methods of settling disputes. Studying the various *people* engaged in the life of the law, asking what they do, how, and why, is a very promising field of work for comparative lawyers. First of all one would look at the judges and the lawyers, the people, whatever they are called, who apply or advise on the law in any system. But it can also be profitable to compare other persons involved in the law, such as the lawyers in Ministries and Parliaments who work on forthcoming legislation, notaries, the experts who appear in court, the claims adjusters of insurance companies and, last but not least, those who teach law in universities.

Microcomparison, by contrast, has to do with specific legal institutions or problems, that is, with the rules used to solve actual problems or particular conflicts of interests. When is a manufacturer liable for the harm caused to a consumer by defective goods? What rules determine the allocation of loss in the case of traffic accidents? What factors are relevant for determining the custody of children in divorce cases? If an illegitimate child is disinherited by his father or mother, what rights does he have? The list of possible examples is endless.

The dividing line between macrocomparison and microcomparison is admittedly flexible. Indeed, one must often do both at the same time, for it is only by discovering how the relevant rules have been created and developed by the legislature or the courts and ascertaining the practical context in which they are applied that one can understand why a foreign legal system resolves a given problem the way it does and not otherwise.

Thus one cannot give a true picture of the American law regarding the strict liability of the manufacturer just by listing the elements of a successful claim at law. One must also say that the claim will be decided in a trial by jury and show what roles the judge, lawyers, and jury play in such proceedings and how this influences the substantive law, by noting, for example, that in such a claim the plaintiff's attorney normally stipulates for a fee of 30-50 per cent of the damages awarded and that the jury takes account of this fact when fixing the damages. Or take a patient's claim for damages against a doctor for malpractice. No study could be complete or accurate without saying how malpractice is proved in court and, in particular, whether the experts are appointed by the court, or are chosen by the parties themselves to battle it out in the courtroom, as happens in Common Law countries. In many respects, therefore, microcomparison only makes sense if one takes due account of the general institutional context in which the rules of the foreign systems under comparison are developed and applied.

#### General Considerations

would be greatly to the good of society if pride of place in academic studies were accorded to comparative private law, the heartland of all comparative law. For if clear and consistent general principles of law were established, this would promote international trade and advance the general standard of living, and if lawyers were induced to look beyond their borders, international exchanges would increase. For a practising lawyer to be capable of this, he must have been exposed while still at university to comparative legislation and comparative law. A further reason for promoting comparative law in the academic curriculum is that its study renews and refreshes the study of national law, which suffers from confining itself to the interpretation of positive rules and neglecting broad principles in favour of tiny points of doctrine.

It may indeed be that the mere interpretation of positive rules of law in the way traditionally practised by lawyers does not deserve to be called a science at all, whether intellectual or social. Perhaps legal studies only become truly scientific when they rise above the actual rules of any national system, as happens in legal philosophy, legal history, the sociology of law, and comparative law.

Now it is precisely the broad principles which comparative law lets one see; it can help the economist by discovering the social preconditions of particular rules of law, and by the comparisons it makes across time it can assist the legal historian. Students today are often put off by textual disputes, and logomachies, and logical demonstrations, which prevent their seeing the living problems which lurk behind these technical facades. For this reason LAMBERT claimed for comparative law a place in the curriculum equal to that of the home system: four lectures a week should be given in comparative law for each of three semesters. Everything he said is as valid today as when he said it in 1900, but though much has improved in many countries in the ensuing eighty years, the radical restructuring of the curriculum which he showed to be necessary has yet to take place.

#### II

Comparative lawyers compare the legal systems of different nations. This can be done on a large scale or on a smaller scale. To compare the spirit and style of different legal systems, the methods of thought and procedures they use, is sometimes called macrocomparison. Here, instead of concentrating on individual concrete problems and their solutions, research is done into methods of handling legal materials, procedures for resolving and deciding disputes, or the roles of those engaged in the law. For example, one can compare different techniques of legislation, styles of codification, and methods of statutory interpretation, and discuss the authority of precedents, the contribution made by academics to the development of law, and the

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In order to understand what comparative law really is, it is as well to distinguish it from related areas of legal science, that is, to show what comparative law is *not*.

Since comparative law necessarily has to deal with foreign law, it must be distinguished from those other branches of legal science which have to do mainly or occasionally with other legal systems. As has often been observed, the mere study of foreign law falls short of being comparative law. For example, in 1937 the League of Nations produced a study of The Status of Women in the World, consisting merely of reports from different countries on their own solution of the problem. There was no real comparison of the solutions presented, and so at most one could call it descriptive comparative law. One can speak of comparative law only if there are specific comparative reflections on the problem to which the work is devoted. Experience shows that this is best done if the author first lays out the essentials of the relevant foreign law, country by country, and then uses this material as a basis for critical comparison, ending up with conclusions about the proper policy for the law to adopt which may involve a reinterpretation of his own system.

The neighbouring areas of legal science which also deal with foreign law, and from which comparative law must be distinguished, are private international law, public international law, legal history, legal ethnology, and finally sociology of law.

Handwritten notes: "l'ère", "l'au", "du", "com".

## The Functions and Aims of Comparative Law

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national codes, based on the existing law, principally Roman in origin. The Code of Maximilian of Bavaria and the General Code of Prussia in the eighteenth century were followed by the French Civil Code (1804) and the German Civil Code (1896) and then by the great codes of the twentieth century, the Swiss codes, the new Italian Civil Code, and the new Greek Civil Code. After these national codifications lawyers contented themselves with the study of their national rules, and stopped looking over the border. At a time of growing nationalism, this legal narcissism led to pride in the national system. Germans thought German law was the ark of the covenant, and the French thought the same of French law; national pride became the hallmark of juristic thought. Comparative law has started to put an end to such narrowmindedness.

The primary aim of comparative law, as of all sciences, is knowledge. If one accepts that legal science includes not only the techniques of interpreting the texts, principles, rules, and standards of a national system, but also the discovery of models for preventing or resolving social conflicts, then it is clear that the method of comparative law can provide a much richer range of model solutions than a legal science devoted to a single nation, simply because the different systems of the world can offer a greater variety of solutions than could be thought up in a lifetime by even the most imaginative jurist who was corralled in his own system. Comparative law is an 'école de vérité' which extends and enriches the 'supply of solutions' (ZITELMANN) and offers the scholar of critical capacity the opportunity of finding the 'better solution' for his time and place.

Like the lively international exchange on legal topics to which it gives rise, comparative law has other functions which can only be mentioned here in the briefest way. It dissolves unconsidered national prejudices, and helps us to fathom the different societies and cultures of the world and to further international understanding; it is extremely useful for law reform in developing countries; and for the development of one's own system the critical attitude it engenders does more than local doctrinal disputes.

But four particular practical benefits of comparative law call for closer attention: comparative law as an aid to the legislator (II); comparative law as a tool of construction (III); comparative law as a component of the curriculum of the universities and law schools (IV); and comparative law as a contribution to the systematic unification of law (V).

II

Legislators all over the world have found that on many matters good laws cannot be produced without the assistance of comparative law, whether in the form of general studies or of reports specially prepared on the topic in question.

Ever since the second half of the nineteenth century legislation in Germany has been preceded by extensive comparative legal research. This was true when commercial law

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'Fremdes Recht aus Büchern, fremde Rechtswirklichkeit und die funktionelle Dimension in den Methoden der Rechtsvergleichung', *RebelsZ* 34 (1970) 411.

'Rechtsvergleichung als Unterrichtsfach an deutschen Universitäten', *Festschrift Zweigert* (1981) 501.

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POUND, 'The Place of Comparative Law in the American Law School Curriculum', 8 *Tul. L. Rev.* 161 (1934).

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SCHMIDLIN/KNEUCKER, 'Der Beitrag der Rechtsvergleichung zum akademischen Unterricht', *Z/RV* 18 (1977) 241 and 251.

E. STEIN, 'Uses, Misuses—and Nonuses of Comparative Law', 72 *NWUL Rev.* 198 (1977).

TALLON, 'Les Perspectives de l'enseignement universitaire de droit comparé', *Festschrift Zajay* (1982) 479.

UYTERHOVEN, *Richterliche Rechtsfindung und Rechtsvergleichung* (1959).

WATSON, 'Legal Transplants and Law Reform', 92 *LQ Rev.* 79 (1976).

ZWIEGERT, 'Rechtsvergleichung als universelle Interpretationsmethode', *RebelsZ* 15 (1949/50) 5.

—PUTTFARKEN, 'Die Bedeutung der Rechtsvergleichung in der Juristenausbildung der Bundesrepublik Deutschland', *Zug/RW* 75 (1974) 125.

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I

It is beyond dispute today that the scholarly pursuit of comparative law has several significant functions. This emerges from a very simple consideration, that no study deserves the name of a science if it limits itself to phenomena arising within its national boundaries. For a long time lawyers were content to be insular in this sense, and to some extent they are so still. But such a position is untenable, and comparative law offers the only way by which law can become international and consequently a science.

In the natural and medical sciences there is an international exchange of discoveries and opinions. This is so familiar a fact that it is easy to forget its significance. There is no such thing as German physics or Belgian chemistry or American medicine. All one can say is that the contributions of the various nations to the different departments of world knowledge have been outstanding, average, or modest. But the position in legal science is astonishingly different. So long as Roman law was the essential source of all law on the Continent of Europe, an international unity of law and legal science did exist, and a similar unity could be found in English-speaking countries, the unity of the Common Law, differing in substance from that on the Continent of Europe because Roman law had very little effect in England and North America. The basic unity of legal science in the Anglo-American world still exists, but on the European Continent it started to disintegrate in the eighteenth century with the appearance of the great

of the existing legal remedies. This is true, for example, where although many people are affected by the illegal conduct, none of them is seriously enough hurt to warrant his bringing proceedings by himself. As a result, private litigation as a means of policing illegal conduct will be rare, and law-breakers may speculate that, by the simple device of committing numerous small wrongs, they may escape the arm of justice as long as they stay clear of criminal sanctions. Here there is a need to spur victims into suing, and thus acting as 'private Attorneys-General', by offering methods of 'aggregating' a lot of minor claims into a single lawsuit. The 'class action' is one of the ways in which this need has been met in the United States. Under certain conditions, where a large group of persons is affected, one of them may be allowed to sue not only for his own loss but also on behalf of everyone else similarly situated. A finding that the defendant is not liable becomes *res judicata*, binding also on those not involved in the trial, and if the claim succeeds, the damages awarded are divided among all the victims, including the plaintiff. It is true that the actual plaintiff has no very great interest in bringing such a class action, since at best he will only get compensation for his own harm, but his attorney has a major interest in winning, and thus in tracking down winnable cases, for his fee is then fixed by the court and constitutes a first charge on the damages awarded to the whole class of victims, including his client. This fee can reach astronomical levels if, as quite often happens, the class of victims numbers tens or hundreds of thousands. For the damages awarded may reach millions of dollars and the attorney may have spent much time and trouble on the preparation of the case. The attorney's time and trouble will certainly be wasted if the claim fails, but neither he nor his client has to pay the successful defendant's costs, since under the American rules even the winning party bears his own attorney's costs. The class action is undoubtedly a fascinating technique for making the private lawsuit an effective sanction, but whether it can be incorporated into German law, or any other law, is quite another question. In other countries there may be strong opposition, expressed in the rules on professional conduct, against the entrepreneurial role played by the plaintiff's lawyer in a class action, a lawyer's fees may be determined by statute on the basis of the amount at stake in the litigation, the losing party may have to pay his successful opponent's attorney's fees, and other devices may be available to stimulate private litigation as a means of redressing group wrongs through the courts. See KÖTZ, *Public Interest Litigation, A Comparative Survey*, in: *Access to Justice and the Welfare State* (ed. Cappelletti, 1981) 85.

III

Another practical use of comparative law lies in the interpretation of national rules of law. On this matter the standard textbooks say nothing, dealing only with the old question whether a law should be given the meaning attributed to it by the legislator at the time of enactment, or whether the statute, treated as leading a kind of independent life of its own, may not be interpreted in the light of changing social conditions. Our present question is whether the interpreter of national rules is able or entitled to invoke a superior foreign solution. It is clear that such foreign material cannot be used in order to bypass unequivocal national rules: the principle of respect for an unambi-

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was unified, first in Prussia and then in the German Empire, and also, after the Empire had acquired the necessary legislative powers, of the unification of private law, law of civil procedure, law of bankruptcy, law of judicature (courts system), and criminal law. Account was taken not only of the different laws then in force in Germany, including the French law in force in the Rhineland, but also of Dutch, Swiss, and Austrian law (see COING and DÖLLE (above p. 13 and below)). As to the present, it can be said that no major legislation since the Second World War has been undertaken without more or less extensive research in comparative law. This is true not only of reforms in German criminal law (see JESCHECK (above p. 13)) and family law (see DROBNIG/DOFFERL (above p. 13)), but also of numerous other laws, such as the law of commercial agents, company law, anti-trust law, the introduction of the dissenting opinion in the Federal Constitutional Court, the draft law of privacy (admittedly never enacted), the law for the compensation for victims of violent crime, the law regarding changes of sex, the law on legal advice for the indigent, and much more. Work in comparative law was also undertaken when the Federal Ministry of Justice was considering the reform of the law of obligations (see A. WOLFF, *AcP* 182 (1982) 80, and the submissions of the Max Planck Institute for Foreign and International Private Law, 'Zur Neueren Entwicklung des Vertragsrecht in Europa', printed in: *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts I* (ed. Federal Ministry of Justice, 1981) 1 ff.).

Comparative lawyers often propose that their own system should adopt, with regard to a particular problem, a solution which they have found to obtain abroad. Now one cannot resist such a proposal simply because it is foreign and *ipso facto* unacceptable. To those who object to the 'foreignness' of importations, RUDOLPH V. JHERING has given the conclusive answer:

'The reception of foreign legal institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from afar when he has one as good or better at home, but only a fool would refuse quinine just because it didn't grow in his back garden.' (*Geist des römischen Rechts*, Part I (9th edn., 1955) 8 f.)

Whenever it is proposed to adopt a foreign solution which is said to be superior, two questions must be asked: first, whether it has proved satisfactory in its country of origin, and secondly, whether it will work in the country where it is proposed to adopt it. It may well prove impossible to adopt, at any rate without modification, a solution tried and tested abroad because of differences in court procedures, the powers of the various authorities, the working of the economy, or the general social context into which it would have to fit.

The 'reception' of foreign law and the question whether and under what circumstances it can succeed has provoked an interesting controversy between KAHN-FREUND and WATSON (above p. 13). (See also STEIN and HIRSCH (above p. 14), all with further references.)—An example may indicate the difficulties involved. Many countries have realized that the individual who wishes to combat illegal conduct and obtain compensation often has very great difficulty in doing so within the framework

quo us enactment must not be infringed in any legal system. But the question may be raised when the construction of a rule is doubtful, or where there is a lacuna in the system which the judge must fill. The purely logical techniques at our disposal are insufficient, and it is unconvincing to play with analogy or the *argumentum e contrario*. The rule applied all over the Continent which determines how a judge must find the law when all else fails is formulated in the Swiss Civil Code, art. 1 pars. 2 and 3, as follows:

'If no statutory provisions can be found, the judge must apply customary law, failing which he must decide according to the rule he would, were he a legislator, decide to adopt.—In so doing the judge must follow accepted doctrine and tradition.'

The principal thought underlying this provision is that gaps in the Swiss Civil Code are to be filled in the spirit of the national, that is, the Swiss, law. But will this do? If the judge is to decide in the way he would have decided had he been a legislator, must we not ask: how does a modern legislator reach his decisions? Now we have already seen that, to a great degree, the modern legislator takes his solutions from comparative law. Thus, thanks to the greater breadth of vision which we obtain from comparative law, we must include the comparative method among the criteria traditionally applied to the interpretation of national rules. There may still be questions about how far this can and should be done. For example, should one, in using the comparative law method of interpretation, consult only related systems like those of Switzerland and France, or also systems that are quite different in style, such as the Common Law or the law of socialist states? Can the judge choose whichever of the foreign solutions seems to him the best, or can he choose only a solution which is common to a number of other systems? May we, with the help of comparative law, reach an interpretation of our legal rules which is independent of, perhaps even at odds with, the conceptual structure of our own system? These questions, with the possible exception of the last one, should receive a bold rather than a timid answer (see further in ZWEIFERT (above p. 14)).

As may be seen from the law reports, comparative law has often helped the courts to clarify and amplify *German law*, though it is true that comparative law arguments are usually deployed in conjunction with normal methods of interpretation, and thus serve to confirm and support a result reached by a traditional route. One excellent example is the development by the Bundesgerichtshof of the principle that the victim of an invasion of the 'general right of personality' may claim damages at large (see vol. II, Ch. 20 II), a principle which the Bundesgerichtshof sought to defend against criticism by saying that

'In almost all the legal systems which, like ours, put a prime value on the individual, damages for pain and suffering are regarded as the proper private law sanction for invasions of the personality. The availability of such damages does not adversely affect the freedom of the press, which those systems also treat as of fundamental importance,

so the objection that the award of such damages in cases of invasions of personality improperly invades or unduly impairs the constitutionally guaranteed freedom of the press is clearly without substance' (BGHZ 39, 124, 132). In another decision the Bundesgerichtshof held that the claim for such damages was limited to cases where the invasion of the right of personality had been particularly serious; the Court observed that such a limitation is also to be found in Swiss law, which is more concerned with legal protection of the personality than the BGB (see art. 49 I OR) (BGHZ 35, 363, 369). Many further examples from German courts are analysed by AUBIN (above p. 13). The Swiss Bundesgericht accepts arguments from comparative law even more readily (leading examples are BGE 98 II 73 and 273. See also UYTERHOVEN (above p. 14), with further references). The *French Cour de Cassation*, on the other hand, seems utterly unresponsive to such arguments; this is to be explained by the very peculiar and characteristic style of its judgments, which pay no heed to the factual background of the law. (See below pp. 127 f.)

In general it must be said that comparative law has a much greater role to play in the application and development of law than the courts yet allow. The situation is rather better when *uniform laws* are being interpreted. Such laws normally result from international conventions, governmental co-operation, or supranational or international legislation, and since the underlying aim is to unify the law, their construction and development must be geared to this goal. This means that when a national judge is faced with a uniform law, he must not simply deploy his trusty old national rules of construction but modify them so as to arrive at an internationally acceptable result which promotes legal uniformity. This often calls for a *comparative law interpretation*: the judge must look to the foreign rules which formed the basis of the provision to be applied, he must take account of how courts and writers abroad interpret it, and he must make good any gaps in it with general principles of law which he has deduced from the relevant national legal systems.

For details see KROPHOLLER (above p. 13) 258 ff., 278 ff., 298 ff.—This is undoubtedly a hard and demanding task, and it may be beyond the powers of national judges who have to apply uniform law only very seldom. The only sure way to avoid national divergences in the construction and development of a uniform law is to grant jurisdiction to an international court. For the member states of the Common Market the Court of Justice of the European Communities is the leading example: it has already used the method of comparative legal interpretation in a large number of decisions with great success. On this see BLECKMANN, DAIG, PESCATORE, and MARTINY (above pp. 13-14).

#### IV

I. Comparative law also has an important function in legal education. In legal education as in legal science generally it is too limiting simply to study only one's national law, and for universities and law schools so to act at a time when world society is becoming increasingly mobile is an appallingly unprogressive

## V

1. *Unification of Law—Concept and Function*

The final function of comparative law to be dealt with here is its significant role in the preparation of projects for the international unification of law. The political aim behind such unification is to reduce or eliminate, so far as desirable and possible, the discrepancies between the national legal systems by inducing them to adopt common principles of law. The method used in the past and still often practised today is to draw up a uniform law on the basis of work by experts in comparative law and to incorporate it in a multipartite treaty which obliges the signatories, as a matter of international law, to adopt and apply the uniform law as their municipal law. For states which are members of the European Communities, the harmonization of law by supranational means (Community guidelines and directives) is of ever-increasing significance.

Unification cannot be achieved by simply conjuring up an ideal law on any topic and hoping to have it adopted. One must first find what is common to the jurisdictions concerned and incorporate that in the uniform law. Where there are areas of difference, one must reconcile them either by adopting the best existing variant or by finding, through comparative methods, a new solution which is better and more easily applied than any of the existing ones. Preparatory studies in comparative law are absolutely essential here; without them one cannot discover the points of agreement or disagreement in the different legal systems of the world, let alone decide which of the actual or proposed solutions is the best. A model of such a preparatory study is ERNST RABEL, *Das Recht des Warenkaufs* I (1936; reprinted 1957); II (1958), which was of vital importance for the unification of international sales law.

Sometimes diverse rules within single states are unified; this may be called *internal unification of law*. This may happen when a central legislator creates a great codification, as in France after the Revolution, or in Germany after the founding of the Empire, or in confederations such as Switzerland, but we must also include the partial unifications which have been brought about in the United States through the introduction of 'uniform laws' which any state is free to adopt (for example, the Uniform Commercial Code—now in force in all the states except, in part, Louisiana).

The advantage of unified law is that it makes international legal business easier. In the area they cover, unified laws avoid the hazards of applying private international law and foreign substantive law. Unified law thus reduces the legal risks of international business, and thereby gives relief both to the businessman who plans the venture and to the judge who has to resolve the disputes to which it gives rise. Thus unified law promotes greater legal predictability and security. International treaties for the unification of law often try to obtain the accession of all the states in the world, but none has yet

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which nearly every legal problem is open; in consequence they became incapable of personal commitment to law as such, or of a critical approach to it. By and large this type of training produced lawyers who, though technically competent, lacked intellectual independence and that sound sense of values which was needed to oppose national socialism.

Today it is comparative law we must look to in order to discover all the types of solution developed by contemporary legal systems for any particular problem, and to acquire the means by which all these solutions, including our own, can be disinterestedly evaluated. Now since the bulk of material makes it impossible simply to cram comparative law into the syllabus, it follows that we must integrate comparative law into the teaching of national law. That means that the problem being studied must be set in the context of the solutions obtaining in the most significant legal systems; then one must make a critical appraisal in order to determine which solution is best suited here and now to the national society as it is. Such a method allows one not only to highlight the characteristics of the solution which is accepted in the positive law, but also at the same time to encourage the reforming spirit and to develop a sense of responsibility for improving the law.

It follows from this that a textbook of comparative law should not try to stuff the student full of further foreign legal data; it should rather lay out the different approaches to a problem, state the critical arguments which illuminate and enliven it, and then indicate which is the best solution here and now. This involves that 'national' textbooks should be rewritten in the light of comparative law, and that in the long run all teachers of law should master the comparative method so as to obtain the necessary information for themselves.

As early as 1934 ROSCOE POUND expressed, more precisely and tersely, the view here put forward:

'What is aimed at by such a course [sc. in comparative law] may be done more effectively by a group of teachers who are conscious of the possibilities of comparative law in their daily teaching and know how to realise those possibilities. Hence I suggest that the law teacher of the future should ground himself in comparative law and should bring out continually other modes of treatment of the questions he takes up from the standpoint of our law, as shown by the civil law and the modern codes, just as he canvasses the modes of treatment in different English-speaking jurisdictions. I suggest that he continually seek to lead the student by concrete examples to appreciate that there is no one doctrine or rule or institution or conception for every case in every land in every time. In other words, I believe comparative law will best be taught, for the purposes of our professional instruction, in the course of teaching the law of the land, except as graduate students are able, after due training in the civil law, to go deeply into some of its particular problems' (above p. 14, p. 168). Such 'integrated' law teaching has been opposed by SCHLESINGER and NEUMAYER (*Festschrift Zweigert* 507 f.) and defended afresh by KÖTZ (*RechtsZ* 36 (1972) 570 ff.).

Plant and Machinery for Export, produced by the UN Economic Commission for Europe, and the so-called Incoterms (such as fob and cif clauses) and the Uniform Customs and Practices on Documentary Credits drawn up by the International Chamber of Commerce in Paris. Many observers think of these rules as forming a nascent, perhaps actual, *lex mercatoria* of a new and autonomous variety (on the whole question see KROPHOLLER (above p. 13) 119 ff.).

## 2. Areas and Agencies

Since the end of the nineteenth century the unification of law has produced its main results in private law, commercial law, trade and labour law, in copyright and industrial property law, and in the law of transport by rail, sea, and air, as well as in parts of procedural law, especially in connection with the recognition of foreign judgments and awards. Even where the substantive private law should not, or cannot, be unified, it may be possible to achieve a harmony of outcome by unifying the rules of conflicts of law, and thereby avoid differences attributable to the accident of the forum.

It is in private law in the widest sense that the world forces tending towards the integration of law are at their strongest.

The results already achieved by way of unification of law are too numerous to be listed here (compare ZWIGERT/KROPHOLLER, *Quellen des Internationalen Einheitsrechts*, 3 vols. (1971 ff.)). The League of Nations and the United Nations Organization have done much for the law of negotiable instruments and of arbitration, the Rome Institute for the Unification of Private Law (founded in 1926) has worked on the law of sale of goods, the Hague Conferences have helped in private international law, and various international organizations have advanced the unification of the law of transport, copyright, and labour. In 1966 the United Nations Organization resolved to set up a Commission for International and Commercial Law (UNCITRAL) charged with promoting the harmonization and unification of international trade law. Its greatest achievement so far is the Convention on Contracts for the International Sale of Goods (CISG) concluded in Vienna in April 1980 (see SCHLECHTRIEM, *Uniform Sales Law* (1986); HONNOLD, *Uniform Law for International Sales Under the 1980 U.N. Convention* (1982)).

## 3. Experience

In the past, enthusiasts have planned to unify the law of the whole world; people now realize that only the specific needs of international legal business can justify the vast amount of energy which is required to carry through any project for the unification of law. These needs are most pressing in the fields of law mentioned above (less, for example, in land law, family law, and the law of inheritance), and even there only for particular topics or specific institutions.

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succeeded. All unification of law so far has been limited in its geographical area of application, by force of circumstance rather than by design. Sometimes, however, schemes for the unification of law are designed to apply only within a limited area (regional unification of law, for example, in Scandinavia or the Benelux countries; here one can include also the *rapprochement* or harmonization of laws envisaged by the Treaty of the European Economic Community).

Multilateral treaties are very difficult to achieve and rather clumsy in operation; furthermore, their results in the field of unification of law are not very satisfactory (see 3 below). Accordingly, one must think of alternative means of achieving the goal. One way would be to produce model laws, a method which has been used for the internal unification of law within the British Commonwealth and especially in the United States. This method is less heavy-handed since the adoption of such laws by the different countries is a matter of recommendation rather than of obligation.

Other methods have been proposed by RENÉ DAVID in his encyclopedia article: for example, the creation of a new and universal *ius commune*, applicable to international relationships to which national systems of law may be insufficiently adapted. As an example of this he cites the socialist countries which have replaced a competitive economy by a planned economy, and therefore no longer possess any internal commercial law which could be applied to international trade. Thus in 1963 Czechoslovakia produced an extensive Code of International Trade to be applied when an international transaction calls for the application of Czechoslovakian law, and East Germany followed suit in 1976.—DAVID also urges a more widespread and international use of the device of *Restatements of the Law*, as practised in the United States. Every several state in the United States has its own private and commercial law, and the legislative competence of the Congress in Washington is rather limited. Nevertheless the laws of the several states have a great deal in common, thanks to the Common Law tradition. This common law in each principal area of law is set out in a series of books, called *Restatements*, with additional volumes which give the deviations in each state (see below pp. 259 f.). DAVID proposes the extension of this system to the countries of Africa in the first instance, and thinks that something analogous might be done in Europe, possibly even for the whole world.

Welcome though any idea is which tends to the greater harmonization of laws, overall the most suitable method for the immediate future seems to be that of model laws, provided that they are carefully drafted on the foundations of comparative law.

Running parallel with uniform enacted laws there may arise a kind of universal contract law, since in certain spheres of activity (such as wholesale trade in primary commodities, banking, insurance, and transport) there are general conditions or customs of business which are the same or similar in many countries. Here one might instance the Conditions of Business of the London Corn Trade Association, the General Conditions for the Supply of



Community is guaranteed by the Court of the European Communities (arts. 164 ff., Treaty of Rome), and it is to be welcomed that the member states have also entrusted to this court the power to interpret legal concepts used in certain treaties made pursuant to art. 220, Treaty of Rome. But apart from a few minor exceptions, this is the only court so far with power to give a uniform construction to uniform law. Until an international court is set up, the best that can be done is to procure that the highest courts of the member nations at least know what their opposite numbers have decided. If a uniform law is being differently construed in the different member states, it is impermissible to have recourse to the rules of conflicts law in order to determine whether in a particular case it is the law as applied, for example, in France or as applied in Germany which is to control (*aliter* the French Court of Cassation in *Hocke*, Rev. crit. 53 (1964) 264, and the Federal German Supreme Court, IPRspr. 1962-1963 no. 44). If the substantive law has been unified, it is the substantive law which must control, and not the rules of conflicts law. In brief: *unification of substantive law excludes the application of private international law*. Until we have an international court for the construction of uniform laws, the highest municipal courts should adopt as their own whichever construction, proposed or actually adopted elsewhere, seems to them the best and proper one.

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Though the total quantity of unified law is still not very great, it is bound to increase as traffic between states intensifies.

It is striking that hitherto the law has been unified only in very specific areas and on particular topics. For example, Europe has treaties for the unification of the law of liability of hotel-keepers, the package holiday contract, and the liability of the owner of a motor vehicle. UNIDROIT, the Rome Institute for the Unification of Private Law, is working on treaties which would unify the law of warehousing, commercial agency, and leasing. Such a fragmentary approach to the unification of law may have been quite justified in times past, and will doubtless be unavoidable for some years yet, but we are beginning to realize that as a method of unifying law it raises considerable problems. One problem is that in this increasingly complicated patchwork the unified rules often overlap with each other and increasingly clash with the non-unified rules of national law. Again, it has been shown that one cannot unify the law on any problem without using general concepts of contract and tort. These basic concepts may well take the same verbal forms in different legal systems, so it is tempting to adopt them in uniform rules without more ado, but if one does so, one discovers later, when the national courts actually have to apply them, that beneath the same words lie very dissimilar concepts. In the long run, therefore, it is unsatisfactory to try to unify law in a manner which produces a congeries of bitny rules and neglects their common basis. Those engaged in unifying the law must strive to embrace the fundamentals of private law and to work out a set of general rules in contract and tort which command international consensus. This would help courts which are applying the actual rules of unified law to avoid the differences of interpretation we have mentioned and would prepare the ground for further instances of uniform law. On this see KÖTZ (above p. 13).

The preparation and adoption of uniform laws is beset with difficulties. Some of these have psychological causes, such as dislike of novelty or pride in the national law, others are technical (differences in legal concepts or presuppositions, which only intensive preparatory studies in comparative law can overcome) or political: national parliaments are reluctant to adopt in their entirety the agreed drafts of international conferences. These difficulties are lessened somewhat if the uniform law is made applicable only to international transactions. Then each state has two concurrent sets of rules in the same area: for example, in the sale of goods, municipal law would cover internal transactions while the uniform law would apply to sales which were international in the sense of affecting at least one other state.

When uniform laws are applied by national courts, there is always the risk that the uniformity of law apparently achieved in that area will be eroded by its being differently construed and applied in the different member states. This risk cannot be wholly excluded by even the most careful drafting of the uniform law. Just as in any country a Supreme Court of Cassation or Appeal is needed to procure that the law is uniformly applied, so in the long run an international court is necessary to ensure the uniform application of uniform laws. The uniform construction of the law of the European Economic

ZACHER (ed.), *Methodische Probleme des Sozialrechtsvergleichs* (1977).

ZWIGERT, 'Rechtsvergleichung, System und Dogmatik', *Festschrift Bötticher* (1969) 443.

—, 'Die kritische Wertung in der Rechtsvergleichung', *Festschrift Schmitthoff* (1973) 493.

—/PUTTARKE, 'Zur Vergleichbarkeit analoger Rechtsinstitute in verschiedenen Gesellschaftsordnungen', in: ZWIGERT/PUTTARKE (eds.), *Rechtsvergleichung* (1978) 395.

## I

ACCORDING TO GUSTAV RADBRUCH, 'sciences which have to busy themselves with their own methodology are sick sciences' (*Einführung in die Rechtswissenschaft* (12th edn., 1969) 253). Though generally true, this is not a diagnosis which fits modern comparative law. For one thing, comparatists all over the world are perfectly unembarrassed about their methodology, and see themselves as being still at the experimental stage. For another, there has been very little systematic writing about the methods of comparative law. There are thus no signs of the disease in question. The same is true of comparative law as practised by legislators for a long time. Since the great codifications of Western Europe, national enactments and international regulations of all kinds have been preceded by critical and comparative surveys. This has been very successful and, because of its success, has given rise to no methodological worries. The same is true of modern comparative law as a critical method of legal science, as described and practised by RABEL, though the reasons for this are different: so recent a discipline could not be expected to have an established set of methodological principles. Even today the right method must largely be discovered by gradual trial and error. Experienced comparatists have learnt that a detailed method cannot be laid down in advance: all one can do is to take a method as a hypothesis and test its usefulness and practicability against the results of actually working with it. Earlier theories, some examples of which have been given in the previous chapter, committed the error of supposing that the basis, goals, and methods of comparative law could be determined a priori from a philosophy or scheme of law. Even today it is extremely doubtful whether one could draw up a logical and self-contained methodology of comparative law which had any claim to work perfectly. Most probably there will always remain in comparative law, as in legal science generally, let alone in the practical application of law, an area where only sound judgment, common sense, or even intuition can be of any help. For when it comes to evaluation, to determining which of the various solutions is the best, the only ultimate criterion is often the practical evidence and the immediate sense of appropriateness.

If there is a 'sick science' in RADBRUCH'S sense today it is not comparative

## 3

## The Method of Comparative Law

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The basic methodological principle of all comparative law is that of functionality. From this basic principle stem all the other rules which determine the choice of laws to compare, the scope of the undertaking, the creation of a system of comparative law, and so on. Incomparables cannot usefully be compared, and in law the only things which are comparable are those which fulfil the same function. This proposition may seem self-evident, but many of its applications, though familiar to the experienced comparatist, are not obvious to the beginner. The proposition rests on what every comparatist learns, namely that the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results. The question to which any comparative study is devoted must be posed in purely functional terms; the problem must be stated without any reference to the concepts of one's own legal system. Thus instead of asking, 'What formal requirements are there for sales contracts in foreign law?' it is better to ask, 'How does foreign law protect parties from surprise, or from being held to an agreement not seriously intended?' Instead of asking, 'How does foreign law regulate *Vorerschaff* and *Nacherschaff*?' one should try to find out how the foreign law sets about satisfying the wish of a testator to control his estate long after his death. To take another example: only in Germany does one meet with the concept of 'disappearance of enrichment' (*Wegfall der Bereicherung*, §818 par. 3 BGB), yet all systems must resolve the conflict which arises when a person who is bound to restore a thing received under an invalid contract no longer has the thing to restore. One must never allow one's vision to be clouded by the concepts of one's own national system; always in comparative law one must focus on the concrete problem.

The beginner often jumps to the conclusion that a foreign system has 'nothing to report' on a particular problem. The principle of functionality applies here. Even experienced comparatists sometimes look for the rule they want only in the particular place in the foreign system where their experience of their own system leads them to expect it; they are unconsciously looking at the problem with the eyes of their own system. If one's comparative researches seem to be leading to the conclusion that the foreign system has 'nothing to report' one must rethink the original question and purge it of all the dogmatic accretions of one's own system. The German legal system in particular is conceptually so highly developed that its practitioners think of it as being almost a product of natural law and have great difficulty in disentangling themselves from its concepts. It is only when one has roamed through the entire foreign legal system without avail, asking a local lawyer as a last resort, that one can safely conclude that it really does not have a solution to the problem. This hardly ever happens, but even if it does, that is no reason to terminate one's comparative study. To ask why a foreign system has not felt the need to produce a legal solution for a particular problem may lead to

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law but rather legal science as a whole. Though the hollowness of the traditional attitudes—unreflecting, self-assured, and doctrinaire—has increasingly been demonstrated, they are astonishingly vital. New and more realistic methods, especially those of empirical sociology, have been developed, but it is mere wishful thinking to suppose that they characterize our legal thought. One of these new methods is comparative law and it is pre-eminently adapted to putting legal science on a sure and realistic basis. Comparative law not only shows up the emptiness of legal dogmatism and systematics but, because it is forced to abandon national doctrines and come directly to grips with the demands of life for suitable rules, it develops a new and particular system, related to those demands in life and therefore functional and appropriate. Comparative law does not simply criticize what it finds, but can claim to show the way to a better mastery of the legal material, to deeper insights into it, and thus, in the end, to better law. It therefore makes good sense to pay quite close attention to the method of comparative law—not because comparative law is sick, but because legal science in general is sick, and comparative law can cure it.

We are concerned not only with a method of *thinking*—the principles whose application gives the right results—but also a method of *working*: How does one actually set about a task in comparative law? This at least the beginner can expect from an introductory work, to be told the lessons of experience so that he does not set to work without any guidance at all, and waste his time in unprofitable detours.

II

As in all intellectual activity, every investigation in comparative law begins with the posing of a question or the setting of a working hypothesis—in brief, an idea. Often it is the feeling of dissatisfaction with the solution in one's own system which drives one to inquire whether perhaps other legal systems may not have produced something better. Contrariwise, it may be the pure and disinterested investigation of foreign legal systems which sharpens one's criticism of one's own law and so produces the idea of working hypothesis. Thus JESCHECK (above p. 28, at pp. 36 f.), speaking of criminal law in particular, understandably observes that one's own view of what the law should be is material for a working hypothesis, and can act as a point of comparison (*tertium comparationis*). LANGROD (above p. 28, at pp. 363 f.) asks whether it is the material or the hypothesis which comes first. This is not quite the right question: the two may interact. Nor is he quite on point when he says (ibid.) that the hypothesis comes first, and that deductive reasoning plays the most important role. In fact the original idea is often not 'deductive'. As MAX WEBER said: 'The idea is normally bottomed on hard work.' For the comparatist the 'hard work' in question is the critical appreciation of his own law and the constant study of other people's.

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Writers often stress the number of traps, snares, and delusions which can hinder the student of comparative law or lead him quite astray. It is impossible to enumerate them all or wholly to avoid them, even by the device of enlisting multinational teams for comparative endeavours. The best advice one can give the novice is EICHENDORFF's: 'Hüte dich, sei wach und munter' (Watch out, be brave, and keep alert). Even so, the cleverest comparatists sometimes fall into error; when this happens the good custom among workers in the field is not to hound the forgivable miscreant with contumely from the profession, but kindly to put him right.

RABEL once said that in their explorations on foreign territory comparatists may come upon 'natives lying in wait with spears' (*RabelsZ* 16 (1951) 341); but let his wit not frighten us out of ours.

### III

The comparatist who wants to find in a foreign system the rules which are functionally equivalent to those which interest him in his native law requires both imagination and discipline. Many instances could be given, some of which are treated *in extenso* in Volume II. Suppose that the question is how to enable persons incapable of acting for themselves (minors, lunatics, persons under interdiction) to participate in legal affairs. For the European lawyer the notion of 'statutory representative' provides the ideal, if not the only imaginable answer. The idea is so self-evident that he thinks nothing of it: every child from the day he is born is provided with a person—the local youth authority if all else fails—who is comprehensively empowered by statute to represent him. Yet the Common Law has got by quite satisfactorily without any such legal institution. There the parents of a child are not automatically entitled or bound to represent him in legal affairs generally or in litigation in particular. When an infant is making a claim, he does so through a person appointed by the court for this purpose, called his 'next friend'. When an infant is being sued, the court similarly appoints a 'guardian *ad litem*'. Should a minor become entitled to an estate, the court in certain circumstances appoints an 'administrator *durante minore aetate*'. Furthermore a child may under certain circumstances be declared a 'ward of court', whereupon the court itself assumes powers of representation which in the normal case it later transfers to others. In the Common Law 'trustees' have the duties in relation to a child's property which on the Continent are performed by the statutory representative, for it has long been the rule in Anglo-American law to transfer property not to the child himself but to a trustee to manage on the child's behalf. This example shows that what the Continental lawyer sees as being a single problem and solves with a single institution is seen by the common lawyer as being a bundle of more specific problems which he solves with a plurality of legal institutions, most of them of ancient pedigree. (See further

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interesting conclusions about it, or about one's own law. Sometimes the solution in one's own system is quite superfluous, thought up in the interests of theoretical completeness by the academics who drafted the Code (compare the 'joke transaction' (*Scherzgeschäft*) of §118 BGB). Often a solution is provided by custom or social practice, and has never become specifically legal in form. The same is true if there is something about the structure of the foreign society which makes the adoption of a legal solution unnecessary. Again an inquiry into the source of so different a sense of justice may produce interesting conclusions. It may be, however, that no reason at all can be found for the absence of a legal rule: historical accident also plays some part in determining whether legal institutions arise or not.

This, then, is the negative aspect of the principle of functionality, that the comparatist must eradicate the preconceptions of his native legal system; the positive aspect tells us which areas of the foreign legal system to investigate in order to find the analogue to the solution which interests him.

The basic principle for the student of foreign legal systems is to avoid all limitations and restraints. This applies particularly to the question of 'sources of law': the comparatist must treat as a source of law whatever moulds or affects the living law in his chosen system, whatever the lawyers there would treat as a source of law, and he must accord those sources the same relative weight and value as they do. He must attend, just as they do, to statutory and customary law, to case-law and legal writing, to standard-form contracts and general conditions of business, to trade usage and custom. This is quite essential for the comparative method. But it is not enough. To prepare us for his view of the full requirements of the comparative method, RABEL says: 'Our task is as hard as scientific ideals demand . . . and then he proceeds:

'The student of the problems of law must encompass the law of the whole world, past and present, and everything that affects the law, such as geography, climate and race, developments and events shaping the course of a country's history—war, revolution, colonisation, subjugation—religion and ethics, the ambition and creativity of individuals, the needs of production and consumption, the interests of groups, parties and classes. Ideas of every kind have their effect, for it is not just feudalism, liberalism and socialism which produce different types of law; legal institutions once adopted may have logical consequences; and not least important is the striving for a political or legal ideal. Everything in the social, economic and legal fields interacts. The law of every developed people is in constant motion, and the whole kaleidoscopic picture is one which no one has ever clearly seen' (above p. 28, at pp. 3 ff.).

But one must be realistic. It is too much to say that one must systematically master all this knowledge and then keep it in mind before one is allowed to embark on any kind of comparative work. But RABEL's demands are justified if they are understood to mean that the comparatist must make every effort to learn and remember as much as he can about foreign civilizations, especially those whose law has engendered the great families of legal systems.

time, often quite unconsciously: comparison, indeed, stimulates the enterprise and determines the choice of materials. But as a creative activity going beyond the mere actual absorption of the data, the process of comparison proper starts only when the reports on the different legal systems have been completed. To present such reports before the comparison proper begins is an established method of research and a proven way of constructing works on comparative law. Separate reports should be offered for each legal system or family of legal systems, and they should be objective, that is, free from any critical evaluation, though containing all significant qualifications or modifications. Whoever reads or uses a work on comparative law must be made familiar with the basic material, or he will be in no position to make the necessary comparisons, but in any case it is useful to give jurists access to legal systems hitherto unfamiliar to them. Occasionally an unusual topic will demand a different method of treatment as did Esser's study 'Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts'. Esser was studying the various ways in which judges develop the law. This basic problem, of which German lawyers at least were barely conscious, cannot be posed or answered in terms of statutory or dogmatic rules. It would have been impossible or futile to try to produce an objective report on this problem in the different countries, free from critical commentary, and so the material had to emerge from the comparison itself. Topics of this kind are, however, the exception, for all individual legal problems the researcher should first produce an objective statement of the law in each jurisdiction.

But merely to juxtapose without comment the law of the various jurisdictions is not comparative law; it is just a preliminary step. As RAABEL put it: 'The inner relationship between the . . . legal systems is only discernible if in our comparative portrayal of their institutions we take the similarities and differences together' (*Fachgebiete* (above p. 28), at p. 186). This, the actual process of comparison, is the most difficult part of any work in comparative law, and the process is so much affected by the peculiarities of the particular problem and of its solutions in the different systems that it is impossible to lay down any firm rules about it. One can only tentatively state some basic generalities.

It goes without saying that a comparative analysis will bring out the differences between the actual solutions. It is, indeed, the feeling of surprise that such differences exist which first prompts us to undertake comparative researches. But one does not gain much by simply listing the similarities and differences one discovers: this is really just to repeat in a clearer form what is already contained in the reports on each jurisdiction. This may be sufficient where each of the jurisdictions gives a clear and easily comprehensible solution to the problem in question, but things are not often as easy as this, as our examples have shown. Furthermore, it is precisely the more taxing legal questions which justify comparative treatment. The process of comparison at

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systems. To give just a few examples: questions of anti-trust law will find more answers in the United States than in France; the limitation of liability of trading concerns is distinctively, though perhaps not best, treated in Liechtenstein; fairness of trial has received more attention in England than elsewhere. Finally there may be quite topical legal problems with which legislators and judges all over the world are currently grappling. Here the comparatist may often have to consider the solutions offered by quite small jurisdictions. Thus France and Sweden have enacted striking laws to deal with the problem of standard terms in contracts; the Canadian province of Saskatchewan, along with Poland, Finland, and Sweden, led the world in using social accident insurance as a model for dealing with the compensation of harm suffered in highway accidents, and New Zealand has extended this to the compensation of harm caused in all accidents (see vol. II, Ch. 19 VI); and in family law there is much to be learnt from the legislation of the Scandinavian countries. It is clear, therefore, that the rule proposed is simply a rule of thumb, and no substitute for the experience and flair which a comparatist urgently needs if he is to make a proper choice of legal systems to study.

DROBNIG (above p. 28) has doubted whether in principle the comparatist need study only the great 'parent' systems. He points out that these systems have no monopoly of legal inventiveness and that therefore the comparatist should invoke all the legal systems of the world which might make any contribution to the problem being studied. After such a world-wide investigation the comparatist should present, in the form it takes in a representative system, each of the different types of solution which are to be found. DROBNIG developed this view in the context of the *International Encyclopedia of Comparative Law*—an undertaking backed by enormous financial resources, in which hundreds of comparatists from all over the world participate. In the case of wholesale research like this (see ZWIEGERY, *RechtsZ* 31 (1967) 539), it is possible and justifiable to accede to DROBNIG's exacting demands, since provision was made for each of the participating scholars to visit libraries and question expert colleagues in almost every country, in order to obtain a complete picture of the world's legal systems. In such a situation there was no need to exclude a priori and without detailed investigation any legal system at all, even if it had no great legal experience and had not therefore been able to test by case-law and try by scholarly criticism the solutions adopted. But most comparative research is not done by international teams with world-wide coverage, and it might not be desirable if it were. Comparative law is still useful and necessary when undertaken by an individual, and the comparison of individual systems, as opposed to those of the whole world, is important, indeed indispensable. So although making a selection may be painful, it is unavoidable on practical grounds. If a selection must be made, a criterion of selection must be adopted, and for this purpose the rules of thumb outlined above—for they are no more than that—still seem to offer a useful point of departure.

#### VI

As one researches the chosen legal systems one makes comparisons the whole

purposes it must be separated out in accordance with the different legal needs it helps to satisfy. Contrariwise, one may have to go in for synthesis, as in the example of statutory representation: there several independent legal institutions must be treated as a single unit, because it is only their joint operation which provides the solution of the problem.

## VII

The next step in the process of comparison is to build a system. For this one needs to develop a special syntax and vocabulary, which are also in fact necessary for comparative researches on particular topics. The system must be very flexible, and have concepts large enough to embrace the quite heterogeneous legal institutions which are functionally comparable. To give an example: all legal systems have somehow to distinguish those expressions of a person's will which have a binding effect from those which do not, but the legal techniques they use for this purpose are very different. One way is to insist on purely objective requirements (formality, typicality of object, *quid pro quo*), while at a more developed stage it may be left to the judge as a matter of pure interpretation. Thus a system of comparative law must have a category which includes 'form', 'causa' (in one of its protean meanings) and 'consideration', and which also suggests that it is concerned with distinguishing the legally binding expression of will from the merely social utterance: perhaps 'indicia of earnestness' would do.

To take another example, ESSER observes that the principle of enrichment is 'ubiquitous' (above p. 28, at p. 307). So it is, but it appears in various guises and serves very various functions. What in one system is seen as a claim for restitution appears in another as a claim in tort and in a third as a claim for rescission of contract. A system of comparative law must here find a higher concept related to the function common to all these claims, or several different higher concepts, one for each of the different functions of restitutionary claims and capable of including claims of a different cast but similar practical object: perhaps one might have 'restitution of payments gone wrong', 'restitution for appropriating the property of others', 'restitution for unjustifiably using another's thing', and so on (see v. CAEMMENER, 'Berelbterung und unerlaubte Handlung', *Festschrift Kabel I* (1954) 333). There are simpler examples: we should talk of 'breach of contract' rather than '*Unmöglichkeit*' [impossibility], 'liability for others' is a better expression than 'liability for assistants', 'liability for servants' or 'respondent superior'; 'strict liability' is more comprehensive than '*Gefährdungshaftung*' or '*théorie du risque*', and so on.

A system of comparative law will thus seem to be rather a loose structure. The component concepts cast a wider net than those of national systems: this is because the functional approach of comparative law concentrates on the

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this stage involves adopting a new point of view from which to consider all the different solutions. The objective report which sets out the law of a particular jurisdiction will give a comprehensive portrayal of its legal solution to a practical problem, but it does so 'on its own terms', with its particular statutory rules or decisions, its characteristic conceptual form, and in its systematic context: the significance of this has been brought out above. But when the process of comparison begins, each of the solutions must be freed from the context of its own system and, before evaluation can take place, set in the context of all the solutions from the other jurisdictions under investigation. This is one new point of view, the one required by the process of comparison itself. The other standpoint to be adopted by the comparatist is intimately connected with the first, indeed, a precondition of it, namely that of function. Earlier in this chapter it was shown how significant the principle of functionality is as a guide to one's investigations in the different legal systems. Now, in the process of comparison, we come to the aim of these investigations. Different legal systems can be compared only if they solve the same factual problem, that is, answer the same legal need. In other words, the institutions of different legal systems can be meaningfully compared only if they perform the same task, if they serve the same function. Function is the start-point and basis of all comparative law. It is the *tertium comparationis*, so long the subject of futile discussion among earlier comparatists. For the comparative process, this means that the solutions we find in the different jurisdictions must be cut loose from their conceptual context and stripped of their national doctrinal overtones so that they may be seen purely in the light of their function, as an attempt to satisfy a particular legal need. It means also that we must look to function in order to determine the proper ambit of the solution under comparison: for a solution may be unitary although in its own system parts or stages of it are regarded as separate and distinct, as, for example, 'rules of law' as opposed to matters of interpretation, or as case-law as opposed to merely factual phenomena of legal significance. Experience shows that it is unprofitable and misleading to compare parts of a solution only; only the principle of functionality can let us see a solution as a whole. In particular one must resist the temptation of comparing only the statutory rules or doctrinal principles to which the various systems themselves admit, for principles are often so heavily qualified by exceptions that it is sometimes hard for the observer to think of a case which would not be decided in the same way even in countries which have adopted fundamentally opposed principles. Sometimes what actually happens in practice can severely weaken the operation of an admitted principle. But it is impossible to make general statements about how to free a solution from its national conceptualism and to reduce it to its functional form, since so much depends on the particular problem being investigated. Sometimes an institution has to be dissected into separate parts, as, for example, the trust: in its native systems it is regarded as a unitary institution, but for comparative

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real live problem which often lurks unseen behind the concepts of the national systems. The system produced by comparative law is, however, functionally coherent: its concepts identify the demands that a particular slice of life poses for the law in all systems where the social and economic conditions are similar and provide a realistic context within which to compare and contrast the various solutions, however much they may differ technically or substantially. DROBING has shown that the wider the international coverage of a comparative work is, the more necessary, though the more problematical, the development of such structural concepts is (above p. 28, at pp. 228 ff.). The task is not, however, different in nature from that of the librarian who needs a supranational system of concepts if he is to arrange his foreign materials in factual categories rather than simply in national groupings.

It now becomes unmistakably clear that an international legal science is possible. After a period of national legal developments, producing academically and doctrinally sophisticated structures, each apparently peculiar and incomparable, private law can once again become, as it was in the era of natural law, a proper object for international research, without losing its claim to scientific exactitude and objectivity. To this recognition of the fact that law, and especially private law, may properly be studied outside national boundaries, comparative law has greatly contributed, though other legal disciplines also have long been pointing the way. The jurisprudence of interests, the *Freirechtsschule*, the sociology of law, legal realism—all these have played a part by criticizing purely national conceptualism, deprecating scholarship which is territorially limited, and emphasizing that legal science should study the actual problems of life rather than the conceptual constructs which seek to solve them. Law is 'social engineering' and legal science is a social science. Comparative lawyers recognize this: it is, indeed, the intellectual and methodological starting-point of their discipline. Comparative law is thus closely in tune with current trends in legal science when it asks what the function of legal institutions in different countries may be, rather than what their doctrinal structure is, and when it orders the solutions of the various systems upon a realistic basis by testing them for their responsiveness to the social needs they seek to fill. It adds the international dimension and generates a supply of material beyond the imagination of even the cleverest stay-at-home lawyer. The vision of a universal comparative legal science is already sketched in the preface to JHERING'S *Geist der römischen Rechts*:

... legal science has degenerated into the jurisprudence of states, limited like them by political boundaries—a discouraging and unseemly posture for a science! But it is up to legal science itself to cast away these chains and to rediscover for all time that quality of universality which it long enjoyed: this it will do in the different form of comparative law. It will have a distinct method, a wider vision, a ripper judgment, a less constrained manner of treating its material: the apparent loss [of the formal community of Roman law] will in reality prove a great gain, by raising law to a higher level of scientific

activity.' (JHERING, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, Part I (7th/8th edn., 1924) p. 15.)

JHERING'S vision is on the point of becoming reality, and comparative law has greatly helped to bring this about. If law is seen functionally as a regulator of social facts, the legal problems of all countries are similar. Every legal system in the world is open to the same questions and subject to the same standards, even countries of different social structures or different stages of development. Our universal legal science must have a structure and all the conceptual apparatus for ordering, organizing, and transmitting its material; we have shown above what form these must take. These cannot be laid down a priori, but only achieved inductively through continuing experiments in comparative law. In doing this comparative law will itself begin to be truly international. Though great progress has been made, most German work in comparative law even today still starts from a particular question or legal institution in German law, proceeds to treat it comparatively, and ends, after evaluating the discoveries made, by drawing conclusions—proposals for reform, new interpretations—for German law alone. The same is doubtless true of comparative studies in other countries. This activity could be called national comparative law. What we must aim for is a truly international comparative law which could form the basis for a universal legal science. This new legal science could provide the scholar with new methods of thought, new systematic concepts, new methods of posing questions, new material discoveries, and new standards of criticism: his scientific scope would be increased to include the experience of all the legal science in the world, and he would be provided with the means to deal with them. Comparative law is primarily a heuristic method of legal science rather than a way of discovering positive law. Only if one forgets this can one deny the value of an international legal science founded on comparative law, as SANDROCK (above p. 28, at pp. 59, 58, 65, 68) has just done, at least implicitly, in Germany: it sees very little value, if any, in the comparatist's discovery of supranational legal types, legal concepts, or principles of solving legal problems, or indeed in the creation of a supranational system of law. But even for the modest purpose of facilitating understanding between jurists of different nationalities, and of avoiding the misunderstandings which come from the prejudices, constraints, and diverse vocabularies of the different systems, such legal types, concepts, principles, and systems are indispensable. The legal scholar has more to do than simply decide cases; law is a mechanism of social regulation which can and must be studied across national boundaries, such international study and co-operation, as in all other sciences, will extend and improve our knowledge. Only if one refuses to see this can one doubt the value of comparative law.

## VIII

A necessary part of the comparatist's task is to make critical evaluation of what he has discovered by his comparisons. Often he will find that the different solutions are equally valid, or that, as RABEL said, 'a reasoned choice is hard to make' (*Rabelsz* 16 (1951) 357). Often he will find that one solution is clearly superior. Finally, he may be able to fashion a new solution, superior to all others, out of parts of the different national solutions. The comparatist must consider all this, and be explicit about it. It is true that RABEL wanted to distinguish such evaluation on policy grounds from comparative law properly so-called, as being a 'distinct activity . . . because, though neither task is free from subjectivity, the pure comparison of laws can in general claim for its conclusions and theoretical pronouncements a greater degree of general validity than can value-judgements and conclusions directed to practical matters like legislative policy . . .' ('Fachgebiete', above p. 28, at p. 186). Much could be said on the question whether the critical evaluation of law is a legitimate scientific activity; it raises the famous dispute over Kelsen's pure theory of law, and this is not the place to give a final answer. However, there is one important difference between the comparatist's criticism of law and the criticism made by the observer of a rule of municipal law: the comparatist's conclusions are not rendered superfluous by the word of the legislator, since his comparative and critical analysis takes him above the national systems, which merely provide him with his data. RABEL himself in the same breath speaks out against a division of labour as between comparison and criticism of law: 'Lawyers who are used to criticism and are animated by the desire to improve the law can hardly prevent themselves from seeing and commenting upon the better practical rule.'

In fact the comparatist is in the best position to follow his comparative researches with a critical evaluation. If he does not, no one else will do it, and if no one does it, comparative law will deserve BINDER's sour description of 'piling up blocks of stone that no one will build with'. The comparatist's standards of criticism are those used every day by all legal scholars, who consider which of various solutions is best adapted to its purpose and operates most justly, and give a reasoned conclusion. The comparatist must leave it to the philosopher of law to state what this implies, though he can help by producing a greater mass of relevant data than legal philosophy has hitherto been ready or able to use. To rebut the charge that evaluation is a subjective matter we must turn again to RABEL: 'If the picture presented by a scholar is coloured by his background or education, international collaboration will correct it' (*Rabelsz* 16 (1951) 359).



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## The Impossibility of 'Legal Transplants'

[A] comparative study [sh]ould not aim at finding 'analogies' and 'parallels', as is done by those engrossed in the currently fashionable enterprise of constructing general schemes of development. The aim should, rather, be precisely the opposite: to identify and define the individuality of each development, the characteristics which made the one conclude in a manner so different from that of the other. This done, one can then determine the causes which led to these differences.

Max Weber<sup>1</sup>

### § 1. 'Legal Transplant' Explored

To 'transplant', according to the *Oxford English Dictionary*, is to 'remove and reposition', to 'convey or remove elsewhere', to 'transport to another country or place of residence'. 'Transplant', then, implies displacement. For the lawyer's purposes, the transfer is one that occurs across jurisdictions: there is something in a given jurisdiction that is not native to it and that has been brought there from another. What, then, is being displaced? It is the 'legal' or the 'law'. But what do we mean by the 'legal' or the 'law'? An answer to this question seems imperative if comparatists wish to draw the line, as I believe their hermeneutical quest for understanding compels them to do, between instances of displacement having law as their object and others not having law as their object. Although they tend not to argue the point expressly, students of 'legal transplants' have emphatically embraced the formalist understanding of 'law'. Thus, the

\* Professor of Comparative Legal Culture, Tilburg University (NL). An early version of this essay was given at the University of California, Hastings College of the Law, in January 1997. I am grateful to Ugo Mattei for his kind invitation. I owe Linda Rae Legault for helping me to organize the argument. The usual disclaimer applies.

1. Max Weber, *The Agrarian Sociology of Ancient Civilizations*, transl. by R.I. Frank (NLB, 1976) at 385 [originally published, in German, in 1909].

'legal' is, in substance, reduced to rules - which are usually not defined, but which are conventionally understood to mean statutory instruments and, although less peremptorily, judicial decisions. A good example of this approach is offered by Alan Watson who writes that 'legal transplants' refer to 'the moving of a rule [...] from one country to another, or from one people to another'.<sup>2</sup> This author, by way of illustration, mentions a set of rules dealing with matrimonial property which would travel 'from the Visigoths to become the law of the Iberian Peninsula in general, migrating then from Spain to California, from California to other states in the western United States'.<sup>3</sup> Clearly, Watson has in mind statutory rules.

A consideration of a range of legal systems over the long term should lead anyone interested in the matter of 'legal transplants' to conclude, in Watson's words, that 'the picture that emerges [...] of continual massive borrowing [...] of rules'.<sup>4</sup> The nomadic character of rules proves, according to this author, that 'the idea of a close relationship between law and society' is a fallacy.<sup>5</sup> Change in the law is independent from the workings of any social, historical, or cultural substratum; it is rather - and rather more simply - a function of rules being imported from another legal system. Indeed, Watson has written that 'the transplanting of legal rules is socially easy'.<sup>6</sup> Taking his observation to its logical conclusion, he asserts that 'it would be a relatively easy task to frame a single basic code of private law to operate throughout [the whole of the western world]'.<sup>7</sup> Against this background, Watson argues, unsurprisingly I should think, that the comparative enterprise, understood as 'an intellectual discipline', can be defined as 'the study of the relationships of one legal system and its rules with another'.<sup>8</sup> Moreover, the comparatist should only be concerned with 'the existence of similar rules' and 'not with how [they] operate within [...] society'.<sup>9</sup> In other words, comparative legal studies is - or, at least, ought to be - about 'legal transplants' which themselves are about legal rules, in the main statutory rules, considered in isolation from society.

## § 2. Rule Examined

Because I do not want to caricature Watson's position, I wish to reproduce the following (somewhat lengthy) passage from his book devoted to legal transplants which elucidates his understanding of 'rule':

2. Alan Watson, *Legal Transplants*, 2d ed. (University of Georgia Press, 1993) at 21.
3. *Ibid* at 108.
4. *Ibid* at 107. See also *ibid* at 95: 'the transplanting of individual rules [...] is extremely common'.
5. *Ibid* at 108.
6. *Ibid* at 95.
7. *Ibid* at 100-01.
8. *Ibid* at 6.
9. *Ibid* at 96, footnote 3, and 20 respectively.

Let me quote from a statement by a former Scottish Law Commissioner: '... account has necessarily to be taken of English solutions even if these are eventually rejected as unsuitable for reception into Scots law. Indeed in many contexts English solutions have to be studied to identify fundamental differences from Scots law cloaked by superficial similarity. Endeavours to achieve unified solutions in the field of Contract law have in particular revealed that what has been assumed to be common ground was approached by members of the Scottish and English Contracts Teams through conceptually opposed habits of thought. Whereas English comparative research relied particularly on American and Commonwealth sources, the background of some of the Scottish proposals derived from French, Greek, Italian and Netherlands sources - and from the Ethiopian Civil Code, which was, of course, drafted by a distinguished French comparative lawyer.' Now this, to me, is rather too academic. If the rules of contract law of the two countries are already similar (as they are) it should be no obstacle to their unification or harmonisation that the legal principles involved come ultimately from different sources, or that the habits of thought of the commission teams are rather different. It is scholarly law reformers who are deeply troubled by historical factors and habits of thought. Commercial lawyers and business men in Scotland and England do not in general perceive differences in habits of thought, but only - and often with irritation - differences in rules.<sup>10</sup>

Thus, law is rules and only that, and rules are bare propositional statements and only that. It is these rules which travel across jurisdictions, which are displaced, which are transplanted. Because rules are not socially connected in any meaningful way, differences in 'historical factors and habits of thought' do not limit or qualify their transplantability. A given rule is potentially equally at home anywhere (in the western world).

## § 3. Objections

I disagree with Watson's views which I regard as providing a most impoverished explanation of interactions across legal systems - the result of a particularly crude apprehension of what law is and of what a rule is.<sup>11</sup> Yet, in my opinion, anyone who

10. *Ibid* at 96-97 [emphasis original].
11. Cf. J.W.F. Allison, *A Continental Disinction in the Common Law* (Oxford University Press, 1996) at 14: 'Watson's theoretical argument [...] is flawed and his empirical evidence is unconvincing'; Richard L. Abel, 'Law as Lag: Inertia as a Social Theory of Law', 80 *Michigan Law Review* (1982), 785 at 793: 'Perhaps the most serious problem with Watson's theory is that it is not a theory at all'; Conara: William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants', 43 *American Journal of Comparative Law* (1995), 489. For a recent reiteration of his position by Watson, see Alan Watson, 'Aspects of Reception of Law', 44 *American Journal of Comparative Law* (1996), 335.

believes in the reality of 'legal transplants' must broadly agree with Watson's position and must accept, in particular, a 'law-as-rules' and a 'rules-as-bare-propositional-statements' model. In this sense, Watson's stance, however simplistic, is representative of the approach that must be followed, explicitly or not, by proponents of the 'legal-change-as-legal-transplants' thesis. Anyone who takes the view that 'the law' or 'the rules of the law' travel across jurisdictions must have in mind that law is a somewhat autonomous entity unencumbered by historical, epistemological, or cultural baggage. Indeed, how could law travel if it was not segregated from society? I wish to question this vision of law and, specifically, this understanding of rules which I regard as profoundly lacking in explicatory power. Rules are just not what they are represented as being by Watson. And, because of what they effectively are, rules cannot travel. Accordingly, legal transplants are impossible.

#### § 4. Rule and Meaning

No form of words purporting to be a 'rule' can be completely devoid of semantic content, for no rule can be without meaning. The meaning of the rule is an essential component of the rule; it partakes in the rule's nature. The meaning of a rule, however, is not entirely supplied by the rule itself; a rule is never completely self-explanatory. To be sure, meaning emerges from the rule so that it must be assumed to exist, if virtually, within the rule itself even before the interpreter's interpretive apparatus is engaged. To this extent, the meaning of a rule is acontextual. But, meaning is also – and perhaps mostly – a function of the application of the rule by its interpreter, of the concretization or instantiation in the events the rule is meant to govern. This ascription of meaning is predisposed by the way the interpreter understands the context within which the rule arises and by the manner in which she frames her questions, this process being largely determined by who and where the interpreter is and, therefore, to an extent at least, by what she, in advance, wants and expects (unwittingly?) the answers to be. The meaning of the rule is, accordingly, a function of the interpreter's epistemological assumptions which are themselves historically and culturally conditioned.

These pre-judices (I use the term in its etymological, not in its negative, or acquired, sense) are actively forged, for example, through the schooling process in which law students are immersed and through which they learn the values, beliefs, dispositions, justifications and the practical consciousness that allows them to consolidate a cultural code, to crystallize their identities, and to become professionally socialized. Indeed, even before they reach law school students will have assimilated a cultural profile (let us say the Gadamarian '*Vorverständnis*')<sup>12</sup> – whether English or Italian or German – which will colour in a most relevant way their legal education experience and their internalization of the narrative and mythology in which they will share. Each English

12. Hans-Georg Gadamer, *Wahrheit und Methode*, 4th ed. (J.C.B. Mohr, 1975) at 252.

child, for example, is a common-law-lawyer-in-being long before she even contemplates going to law school. Inevitably, therefore, a significant part of the very real emotional and intellectual investment that presides over the formulation of the meaning of a rule lies beneath consciousness because the act of interpretation is embedded, in a way that the interpreter is often unable to appreciate empirically, in a language and in a tradition, in sum, in a whole cultural ambience.

An interpretation, then, is always a subjective product and that subjective product is necessarily, in part at least, a cultural product: the interpretation is, in other words, the result of a particular understanding of the rule that is conditioned by a series of factors (many of them intangible) which would be different if the interpretation had occurred in another place or in another era (for, then, different cultural claims would be made on interpreters). Specifically, an interpretation is the outcome of an unequal distribution of social and cultural power within society as a whole and within an interpretive community in particular (judges vis-à-vis professors, and so forth) and operates, through repeated articulation, to eliminate or marginalize alternatives. Ultimately, what interpretation will prevail amongst the array of competing interpretations – and what interpretation will endow the rule with a relative fixity of meaning – is a function of epistemic conventions produced as the result of power struggles that are themselves non-epistemic (which means that the other interpretations on offer would also have promoted understanding of the rule if they had been adopted, albeit not in the same ways).

It must be stressed that the interpretation that finally transcends the collision of interpretations does not wholly turn, of course, on the interpreter's idiosyncratic construction. Rather, it depends in part upon a framework of intangibles internalized by the interpreter (without any awareness of this process having taken place) which colours and, indeed, constrains the interpreter's subjectivities. It is more accurate, therefore, to think of interpretation as an 'intersubjective' phenomenon in the sense that it is the product of the interpreter's subjectivity as it interacts with the network of all subjectivities within an interpretive community which, over time, is fundamentally constitutive of that community's articulated values and sustains that community's cultural identity.

#### § 5. Rule as Culture

In enacting a rule for the reasons they do and in the way they do, as a product of the way they think, with the hopes they have, in enacting a particular rule (and not others), the French, for example, are not just doing *thar*: they are also doing something typically French and are thus alluding to a modality of legal experience that is intrinsically theirs. In this sense, because it communicates the French sensibility to law, the rule can serve as a focus of inquiry into legal Frenchness and into Frenchness *tout court*. It cannot be regarded only as a rule in terms of a bare propositional statement. There is more to rulelessness than a series of inscribed words which is to say that a rule is not identical to the inscribed words.

A rule is necessarily an incorporative cultural form. As an accretion of cultural elements, it is supported by impressive historical and ideological formations. A rule does not have any empirical existence that can be significantly detached from the world of meanings that characterizes a legal culture; the part is an expression and a synthesis of the whole: it resonates. Such is Gadamer's point: 'the meaning of the part can be discovered only from the context - i.e., ultimately from the whole'.<sup>13</sup> Incidentally, it is this ability to see the whole in the part that defines the interpretive competence of the comparatist. Because a rule exists in a larger cognitive framework, the comparatist must relate it to other phenomena in a way that will make the particular proposition look less like an arbitrary event and more like the manifestation of a relatively coherent and intelligible whole. Thus, the rule becomes the unknowing articulator of a cultural sensibility which the observer invests into the language of the text through a process of abstraction from the particular. The habitual tendency of most comparatists to focus on comparisons of substantive law can only be made expressive if set in a context embracing the view-points from which these materials emanate. Beyond the specification, there must be an explicitation of why what has been specified is in the mode it is, why it could not in important ways be otherwise, and how this specification and explicitation differ from other experiences of legal order.

### § 6. Comparative Legal Studies and Understanding

As an alternative to an appreciation of law understood as a system of bare propositional statements (or 'law-as-geometry'!), I argue that the comparatist can hope to achieve a more meaningful constitution, explication, and critique of experiences of legal order through formulations which show an appreciation of law, to quote from Robert Cover, 'not merely [as] a system of rules to be observed, but [as] a world in which we live'.<sup>14</sup> The comparatist must adopt a view of law as a polysemic signifier which connotes *inter alia* cultural, political, sociological, historical, anthropological, linguistic, psychological and economic referents. To borrow from Mauss, each manifestation of the law - each rule, for instance - must be apprehended as a '*fait social total*', a complete social fact.<sup>15</sup>

### § 7. 'Legal Transplants' Reconsidered

If one agrees that, in significant ways, a rule receives its meaning from without and if one accepts that such investment of meaning by an interpretive community effectively partakes in the rulelessness of the rule, indeed, of the *nucleus* of rulelessness, it must follow that there could only occur a meaningful 'legal transplant' when both the propositional

13. Hans-Georg Gadamer, *Truth and Method*, 2d rev. ed., transl. by Joel Weinsheimer and Donald G. Marshall (Sheed and Ward, 1989) at 190 [originally published, in German, in 1960].
14. Robert M. Cover, 'Nomos and Narrative', 97 *Harvard Law Review* (1983), 4 at 5.
15. Marcel Mauss, 'Essai sur le don', *Sociologie et anthropologie*, 6th ed. (Presses Universitaires de France, 1995) at 274-75 and *passim* [originally published in 1925].

statement as such and its invested meaning - which jointly constitute the rule - are transported from one culture to another. Given that the meaning invested into the rule is itself culture-specific, it is difficult to conceive, however, how this could ever happen. In linguistic terms, one could say that the signified (meaning the idea content of the word) is never displaced because it always refers to an idiosyncratic semi-cultural situation. Rather, the propositional statement, as it finds itself technically integrated into another legal order, is understood differently by the host culture and is, therefore, invested with a culture-specific meaning at variance with the earlier one (not least because the very understanding of the notion of 'rule' may differ). Accordingly, a crucial element of the rulelessness of the rule - its meaning - does not survive the journey from one legal system to another. In the words of Eva Hoffman, '[y]ou can't transport human meanings whole from one culture to another any more than you can transliterate a text'.<sup>16</sup> This is because, to quote from this writer again, '[i]n order to transport a single word without distortion, one would have to transport the entire language around it'.<sup>17</sup> Indeed, '[i]n order to translate a language, or a text, without changing its meaning, one would have to transport its audience as well'.<sup>18</sup> If you will, the relationship between the inscribed words that constitute the rule in its bare propositional form and the idea to which they are connected is arbitrary in the sense that it is culturally determined. Thus, there is nothing to show that the same inscribed words will generate the same idea in a different culture, *a fortiori* if the inscribed words are themselves different because they have been rendered in another language. (As Benjamin wrote, 'the word *Brot* means something different to a German than the word *pain* to a Frenchman'.<sup>19</sup>) In other terms, as the words cross boundaries there intervenes a different rationality and morality to underwrite and effectuate the borrowed words: the host culture continues to articulate its moral inquiry according to traditional standards of justification. Thus, the imported form of words is inevitably ascribed a different, local meaning which makes it *ipso facto* a different rule. As the understanding of a rule changes, the meaning of the rule changes. And, as the meaning of the rule changes, the rule itself changes. To paraphrase J.A. Jolowicz, the addition of a litre of green paint to four litres of yellow does not give us the same colour as the addition of a litre of red paint to four litres of yellow.<sup>20</sup>

16. Eva Hoffman, *Lost in Translation* (Minerva, 1991) at 175.

17. *Ibid* at 272.

18. *Ibid* at 275.

19. Walter Benjamin, 'The Task of the Translator', *Illuminations*, transl. by Harry Zohn, (Fontana, 1973) at 75 [originally published, in German, in 1923]. For an application of this reasoning to law, see Max Rheinstein, 'Comparative Law - Its Functions, Methods and Usages', 22 *Arkansas Law Review* (1968), 415 at 418-19. Observe how Rheinstein emphasizes the point that '[e]ven words of the same language may have different meanings in different legal systems' (at 419).

20. J.A. Jolowicz, 'New Perspectives of a Common Law of Europe: Some Practical Aspects and the Case for Applied Comparative Law', in Mauro Cappelletti (ed.), *New Perspectives for a Common Law of Europe* (Sijthoff, 1978) at 244.

So, the transplant does not, in effect, happen: a key feature of the rule – its meaning – stays behind so that the rule that was 'there', in effect, is not itself displaced over 'here'. Assuming a common language, the position is as follows: there was one rule (inscribed words  $a$  + meaning  $x$ ), and there is now a second rule elsewhere (inscribed words  $a$  + meaning  $y$ ). It is not the same rule. (The differentiation between *conceptions* of law is not overcome.)<sup>21</sup> Meaning simply does not lend itself to transplantation. There always remains an irreducible element of autochthony constraining the epistemological receptivity to the incorporation of a rule from another jurisdiction,<sup>22</sup> therefore limiting the *possibility* of effective legal transplantation itself. The borrowed form of words thus rapidly finds itself indigenized on account of the host culture's inherent integrative capacity.

A good illustration of the phenomenon is offered by the English decision in *O'Reilly v. Mackean* introducing a procedural distinction to the effect that in public law cases the plaintiff cannot litigate by way of an ordinary action and that an application for judicial review is her exclusive remedy.<sup>23</sup> The differentiation between public law and private law litigation had acquired significance in nineteenth century France 'in a context characterized by inquisitorial judicial procedures, a categorical approach to law, a conception of a distinct state administration, and a separation of powers that met the need for judges with both judicial independence and administrative expertise'.<sup>24</sup> Its recent emergence in English law 'in a context lacking any of the features characterizing the French context of the late nineteenth century' has generated 'extensive debate and uncertainty about the proper procedure and judicial role in public-law cases and about the very idea of distinguishing public- from private-law cases'.<sup>25</sup> Consequently, the House of Lords decision cannot be said to have 'entrenched' the distinction between public and private law whereby the importation of the division from France '[would have] brought about a convergence of English and French law'.<sup>26</sup> The fact is that the alleged rule that is now to be found in England does not coincide with the French rule even though it is that French rule itself which had attracted the attention of English lawyers: the French formulation has been domesticated by the English interpretive

21. It is the case, of course, that English and French law both make use of the concept of 'offer'. It might be said, therefore, that there arises, in such a case, a ready opportunity for uniform legislation to intervene in the name of predictability and general efficiency, if not to achieve formal equality in the market-place. However, what must not be overlooked is that within the English and French legal cultures, there are to be found two discrete *conceptions* of 'offer'. E.g.: John Rawls, *A Theory of Justice* (Harvard University Press, 1971) at 5; Ronald Dworkin, *Law's Empire* (Fonana, 1986) at 90-94.

22. E.g.: F.S.C. Northrop, 'The Comparative Philosophy of Comparative Law', 45 *Cornell Law Quarterly* (1960), 617 at 657; 'in introducing foreign legal and political norms into any society, those norms will become effective and take root only if they incorporate also a part at least of the norms and philosophy of the native society'.

23. [1982] 3 All E.R. 1124 (H.L.).

24. Allison, *A Continental Distinction in the Common Law*, at 235.

25. *Ibid.*

26. *Ibid.* at 234.

community with the result that the meaning of what is public law, private-law, a public law remedy, a private law remedy, and so on, inevitably differs as between the two legal systems. Making allowance for exaggerated pithiness, it remains helpful to reiterate that 'stateways cannot change folkways'.<sup>27</sup>

To return to Watson briefly, the inadequacy of his argument should now be plain. I borrow at random a single illustration from his book (which offers many more):

Before the *Code civil* the Roman rules [on transfer of ownership and risk in sale] were generally accepted in France [...]. This was also the law accepted by the first modern European code, the Prussian *Allgemeines Landrecht für die Preussischen Staaten* of 1794.<sup>28</sup>

Now, the fact is that the Roman 'rules' were written in Latin and purported to regulate the dealings of citizens in sixth century Constantinople. The French rules mentioned by Watson were written in French and intended to govern citizens in pre-revolutionary France. And, the Prussian rules to which Watson refers were written in German and were concerned with 'legal relationships in what remained feudal Prussia. I argue (admittedly in advance of empirical demonstration) that cultural constructions of reality and of law and of rules in the three settings would harbour certain distinctive characteristics which would, therefore, affect the interpretation of a rule, that is, which would determine the *nulness* of the rule according to the distinctive cultural logics of the native systems. These rules, therefore, are not the same rules; any similarity stops at the bare form of words itself. Even then, this conclusion would not account for the fact that the inscribed words appear in three different languages with each language suggesting a specific relationship between the words and their content (for example, '[n]o language divides time or space exactly as does any other [...]; no language has identical taboos with any other [...]; no language dreams precisely like any other').<sup>29</sup>

Watson's underinterpreted compilation is facile as John Merryman's reflection demonstrates: 'there is a very important sense in which a focus on rules is superficial and misleading: superficial because rules literally lie on the surface of legal systems and whose true dimensions are found elsewhere; misleading because we are led to assume that if rules are made to resemble each other something significant by way of *rapprochement* has been accomplished'.<sup>30</sup> Watson's argument is also insidious because it effaces the local ideological explanations of why things are done the way they are

27. Jack Greenberg, *Race Relations and American Law* (Columbia University Press, 1959) at 2. The author is referring to William Graham Sumner's work in sociology of law. See, e.g., William Graham Sumner, *Folkways* (Dover, 1959) at 77: 'legislation cannot make mores' [originally published in 1906].

28. Watson, *Legal Transplants*, at 83.

29. George Steiner, *What is Comparative Literature?* (Oxford University Press, 1995) at 10.

30. John H. Merryman, David S. Clark, and John O. Haley, *The Civil Law Tradition: Europe, Latin America, and East Asia* (Michie, 1994) at 50.

with respect to any given rule. It is wrong to present the law as a stable monolithic element within societies and to overlook the fact that it can only reflect the localized and particularized outlooks of culturally-situated individuals as members of historically and epistemologically conditioned interpretive communities. *Extra culturam nihil datur.*

### § 8. To Summarize

At best, what can be displaced from one jurisdiction to another is, literally, a *meaningless* form of words. To claim more is to claim too much. In any *meaningful* sense of the term, 'legal transplants', therefore, cannot happen. No rule in the borrowing jurisdiction can have any significance as regards the rule in the jurisdiction from which it is borrowed. This is because, as it crosses boundaries, the original rule necessarily undergoes a change that affects it *qua* rule. The disjunction between the bare propositional statement and its meaning thus prevents the displacement of the *rule* itself. Consider this statement drawn from ongoing anthropological research on cognition: 'The fact that exactly the same word gets printed or uttered again and again does not mean that exactly the same meaning (which is half the word) spreads from minds to minds'.<sup>31</sup>

Any advocacy of the reality of 'legal transplants', for instance, to account for change in the law, must, however, unavoidably reduce law to rules and rules to bare-propositional-statements. It must suggest that a rule exists in solitary state as the most basic feature of legal activity (and consequently of legal theory) and that it carries definite meaning irrespective of interpretation or application.<sup>32</sup> Inevitably, it fails, therefore, to treat rules as actively constituted through the life of interpretive communities. Moreover, it fails to make apparent the negotiated character of rules, that is, the fact that rules are the product of divergent and conflicting interests in society. In other words, it eliminates the dimension of power from the equation. Also, it fails to attest to the existence of local moral worlds or, if you like, local lifeworlds – the worlds of our everyday goals, social existence, and practical activity. In sum, any argument reducing change in law to the displacement of rules across boundaries is little more than an exercise in 'reification as false determinateness': in fact, the shifting complexity of development in the law cannot be explained through a rigid and jejune framework such as that propounded by the 'legal transplants' thesis.<sup>33</sup>

This leaves one issue. What of the fact that the inscribed words – assuming a common language between the host jurisdiction and the one from which the words are borrowed

– are themselves displaced? Even accepting the points that I have argued above, is it not the case that a 'legal transplant' is happening at the level of the inscribed words themselves which is consequential for the host jurisdiction in terms of the growth of its law and, therefore, of importance to the comparatist? The answer must be negative: there is nothing in the borrowing of a bare string of words to anchor a theory of 'legal-change-as-legal-transplants'. All that one can see is that law reformers on occasion find it convenient, presumably in the interest of economy and efficiency, to adopt a pre-existing form of words which may happen to have been formulated outside of the jurisdiction within which they operate – not unlike the way writers on occasion find it convenient to quote from other authors some of whom will be foreigners. What is at issue here is a rhetorical strategy involving the ordinary act of repetition as an enabling discursive method. To say that change in law is in large part driven by mimesis is not to say any more – or any less – than that individuals will turn to the past to help them construct the present. This is as evident in law as it is in literature or mathematics. This observation is hardly the stuff of legal theories about interactions across legal cultures.

Quite irrespective of the spatial or temporal origins of the forms of words that are repeated and of the contents of those forms of words themselves, what would, of course, prove much more promising is to move away from *l'énoncé* to *l'énonciation*, that is, to investigate how the fact of repetition – which always implies repression – is conditioned by a particular epistemological framework, by a specific *mentalité*.<sup>34</sup> Civil law discourse, for instance, is centripetal in that it submits to the order of the posited text of law from which it gets its warrant and to which, therefore, it always seeks to return. The common law tradition reveals a different approach, for it studies antecedent discourses (the 'precedents') strictly as a propaedeutic toward the elaboration of other, present discourses. What came before is relevant inasmuch as it fulfils an exemplificatory function. Common law discourse is not second-degree discourse nor a gloss. Rather, it is its own discourse constantly broadening its field by moving away from an earlier (equally self-contained) discourse. The common law is centrifugal. How, then, do these epistemological configurations affect the cognitive disposition of the civilian or of the common law lawyer as she engages in the act of repetition *today*? Here is one of the privileged questions that comparatists must be invited to answer.

### § 9. The Politics of 'Legal Transplants'

To return to the 'legal-change-as-legal-transplants' argument, I maintain that the proponents of this thesis pay undue attention to the texts of written language to the detriment of the frameworks of intangibles within which interpretive communities operate and which have normative force for these communities – something which automatically leads them to harbour a limited perspective on law. Their stance is, if you

31. Dan Sperber, 'Learning to Pray Attention', *The Times Literary Supplement*, 27 December 1996, 14, col. 3.

32. For Gadamer, 'application' is an essential aspect of 'interpretation'. See Gadamer, *Truth and Method*, 311. See also Frederick Schauer, *Playing by the Rules* (Oxford University Press, 1991) at 207.

33. Matthew H. Kramer, *Legal Theory, Political Theory, and Deconstruction* (Indiana University Press, 1991) at 255.

34. For the connection between 'repetition' and 'repression', see Gilles Deleuze, *Différence et répétition* (Presses Universitaires de France, 1968) at 139.

away: bananas do exist even if I do not like them and the continental drift is happening even if I cannot perceive it.

### § 10. Comparative Legal Studies Otherwise

The ethics of comparative analysis of law lie elsewhere. Comparative legal studies is best regarded as the hermeneutic explication and mediation of different forms of legal experience within a descriptive and critical metalanguage.<sup>39</sup> Because insensitivity to questions of cultural heterogeneity fails to do justice to the situated, local properties of knowledge, the comparatist must never abolish the distance between self and other. Rather, she must allow the self to make the journey and see the other in the way he must be seen, that is, as other. The comparatist must permit the other to realize 'his vision of his world'.<sup>40</sup> Defining a legal culture or tradition for the comparatist means, therefore, 'finding what is significant in [its] difference from others'.<sup>41</sup> Comparison must not have a unifying but a multiplying effect: it must aim to organize the diversity of discourses around different (cultural) forms and counter the tendency of the mind toward uniformization.<sup>42</sup> Comparison must grasp legal cultures *diacritically*. Accordingly, the comparatist must emphatically rebut any attempt at the axiomatization of similarity, especially when the institutionalization of sameness becomes so extravagant as to suggest that a finding of difference should lead her to start her research afresh!<sup>43</sup> To quote Günter Frankenberg, '[a]nalogies and the presumption of similarity have to be abandoned for a rigorous experience of distance and difference'.<sup>44</sup> I argue that comparison must involve 'the primary and fundamental

like, 'bookish'. But, it must be seen that this attitude betrays a *political* decision to marginalize difference and correlatively to extol sameness. The notion of 'legal transplant' is used as a convenient variance reducer. The proponents of 'legal-change-as-legal-transplants' offer what can be described as a 'synthetic vision' focusing exclusively on the technical level of the law. This decision reflects a faith in abstract universalism which is at odds with the observable decline of formal rationality and the correlative materialization of formal law characterized by the increasing prevalence of informative arguments of a sociological, economic, political, historical, cultural, epistemological or ethical, rather than conceptual nature.<sup>35</sup>

More importantly, the 'legal transplants' thesis discards the existence of qualitatively differentiated phenomena and the concrete contents of experiences and values. It is an idea concerned with finding patterns of the axiomatization of which requires the imposition on effectively disparate experiences of law of an *a priori* rational unity. The advocates of 'legal-change-as-legal-transplants' have nothing to say about thought (recall Watson's own words in the lengthy quotation reproduced above). And, clearly, the 'legal transplants' thesis lacks any critical vocation. It is conservative and favours the *status quo* in that it privileges 'the knowledge of observed regularities' so as to achieve 'certainty, predictability and control'.<sup>36</sup> Indeed, Watson rightly stands accused of defending a 'basically conservative world view' and of attempting to 'trivialize the political', his aim being 'to confute radicals'.<sup>37</sup>

The proponents of 'legal-change-as-legal-transplants' create a false consensus which can only be established through exclusive reference to the formalized elements of the object under discussion and through the delegitimation of a notion such as 'tradition' or 'culture' which, in its intricacy, would intervene as an irrational interloper interfering with the production and the perception of empirical regularity – the kind of regularity that is regarded as necessary to meet 'the regulatory needs of liberal capitalism' (recall Watson's concern with the preoccupations of 'commercial lawyers and business men' in the lengthy quotation reproduced above).<sup>38</sup> The 'legal transplants' argument is precariously based on analogies, on *mechanical* analogies. The problem, therefore, is that in the way the reasoning promotes a most exacerbated positivism it fails to grasp and express the multi-layered nature of the interaction between the constituents of a social totality. The refusal or inability to see that law acts as a site of ideological refraction of deeply embedded cultural dispositions does not, however, make reality go

35. I draw on Lawrence M. Friedman and Gunter Teubner, 'Legal Education and Legal Integration: European Hopes and American Experience', in Mauro Cappelletti, Monica Secombe, and Joseph Weiler (eds.), *Integration Through Law, I: Methods, Tools and Institutions*, book 3, *Forces and Potential for a European Identity* (de Gruyter, 1986) at 372-74.

36. Boaventura de Sousa Santos, *Toward a New Common Sense* (Routledge, 1995) at 73.

37. Abel, 80 *Michigan Law Review* (1982), 785 at 803.

38. Santos, *Toward a New Common Sense* at 72.

39. Cf. Anthony Giddens, *New Rules of Sociological Method*, 2d ed. (Polity, 1993) at 170.  
40. Bronislaw Malinowski, *Argonauts of the Western Pacific* (Routledge and Kegan Paul, 1922) at 25 [emphasis original].

41. Charles Taylor, *The Malaise of Modernity* (Anansi, 1991) at 35-36.

42. For a sense of the magnitude of the challenge, see, e.g., Giambattista Vico, 'Principi di scienza nuova', in Fausto Nicolini (ed.), *Opere* (Riccardo Ricciardi, 1953), bk I, XLVII at 452; 'The human mind naturally tends to delight in the uniform' [*La mente umana è naturalmente portata a dilettersi dell'uniforme*] (originally published as the definitive edition by Vico himself in 1744); Michel Foucault, *L'archéologie du savoir* (Gallimard, 1969) at 21, who notes that 'one experiences a singular repugnance to think in terms of difference, to describe discrepancies and dispersions' [*on éprouve une répugnance singulière à penser la différence, à décrire des écarts et des dispersions*].

43. Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, 2d rev. ed., transl. by Tony Weir (Oxford University Press, 1992) at 36.

44. Günter Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law', 26 *Harvard International Law Journal* (1985), 411 at 453. I am unable to agree with Rudolf Schlesinger who observes, without supporting evidence, that '[t]raditionally, comparative legal writings have tended to dwell more heavily on differences than on similarities'; Rudolf B. Schlesinger, 'Introduction', in Schlesinger (ed.), *Formation of Contracts (?) A Study of the Common Core of Legal Systems* (Oceana, 1968) at 3, footnote 1. See Richard Hyland, 'Comparative Law', in Dennis Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory* (Blackwell, 1996) at 185: 'Throughout much of the modern history of comparative law, the dominant comparative paradigm has focused on the similarities among the various legal systems', attempting in various ways to identify a set of ideas or practices common



investigation of difference'.<sup>45</sup> The priority of alterity must act as a governing postulate for the comparatist. To privilege alterity at all times is the only way in which the comparatist can guard against the deception otherwise suggested by the similarity of solutions to given socio-legal problems across legal cultures: the fact that the same solution (say, '6') can be reached by multiplying two numbers (say, '3' and '2') or by adding two numbers (say, '5' and '1') does not entail the same operands or cognitive operations. It is the case, of course, that the success of this comparative project must depend upon an initial receptivity to the otherness of the other.

Law is part of the symbolic apparatus through which entire communities try to understand themselves better. Comparative legal studies can further our understanding of other peoples by shedding light on how they understand their law. But, unless the comparatist can learn to think of law as a culturally-situated phenomenon and accept that the law lives in a profound way within a culture-specific – and therefore contingent – discourse, comparison rapidly becomes a pointless venture. Kahn-Freund went one step further and observed that comparative analysis of law 'becomes an *abuse* [...] if it is informed by a legalistic spirit which ignores [the] context of the law'.<sup>46</sup>

44.→

to all developed legal orders'. See also, e.g., Tullio Ascarelli, 'Etude comparative et interprétation du droit', *Problemi giuridici* (Giuffrè, 1959) at 321, who observes that comparative legal studies are either concerned with unification of laws within substantive or geographical limits or are more philosophically inclined and aspire to a uniform law that would be universal.

45. Michel Foucault, *Les mots et les choses* (Gallimard, 1966) at 68 [*la recherche première et fondamentale de la différence*].

46. Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law', 37 *Modern Law Review* (1974), 1 at 27 [my emphasis]. Contrast Alan Watson, 'Legal Transplants and Law Reform', 92 *Law Quarterly Review* (1976), 79 at 81: 'the recipient system does not require any real knowledge of the social, economic, geographical and political context of the origin and growth of the original rule'.

## Droit constitutionnel comparé

30 hrs.,  
Master en droit

Aperçu général du droit des États-Unis d'Amérique  
- partim 1<sup>er</sup> -

### L'échec de la Confédération et la rédaction de la Constitution de 1787

- Les Articles de Confédération (*Articles of Confederation*) du 15 novembre 1777 (une lecture rapide suffit),
- La notion de *checks and balances* (« freins et contrepoids ») d'Alexander HAMILTON, James MADISON et John JAY : *Le Fédéraliste* [*The Federalist Papers*] de 1787-1788 [lecture, en traduction française<sup>1</sup>, des nos 47 à 51],
- La Constitution des États-Unis d'Amérique du 17 septembre 1787,
- Élisabeth ZOLLER, « La Cour suprême dans le système constitutionnel des États-Unis »<sup>2</sup>.

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<sup>1</sup> Cette traduction a été établie par G. JEZE, *Le Fédéraliste*, Paris, LGDJ, 1957 (réédition, Paris, Economica, 1988, préface A. TUNC).

<sup>2</sup> In : É. Zoller, *Grands arrêts de la Cour suprême des États-Unis*, Paris, Presses universitaires de France, 2000, 13-51.

## The ARTICLES of CONFEDERATION and PERPETUAL UNION

Between The States Of

New Hampshire, Massachusetts-bay Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia.

ARTICLE I. The Stile of this Confederacy shall be "The United States of America".

II 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.

III The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.

IV The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State, of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.

If any person guilty of, or charged with, treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall, upon demand of the Governor or executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offense.

Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State.

V For the most convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislatures of each

State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State to recall its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year.

No State shall be represented in Congress by less than two, nor more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit, receives any salary, fees or emolument of any kind.

Each State shall maintain its own delegates in a meeting of the States, and while they act as members of the committee of the States.

In determining questions in the United States in Congress assembled, each State shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress, and the members of Congress shall be protected in their persons from arrests or imprisonments, during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace.

VI No State, without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any King, Prince or State; nor shall any person holding any office of profit or trust under the United States, or any of them, accept any present, emolument, office or title of any kind whatever from any King, Prince or foreign State; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No State shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in Congress assembled, with any King, Prince or State, in pursuance of any treaties already proposed by Congress, to the courts of France and Spain.

No vessel of war shall be kept up in time of peace by any State, except such number only, as shall be deemed necessary by the United States in Congress assembled, for the defense of such State, or its trade; nor shall any body of forces be kept up by any State in time of peace, except such number only, as in the judgement of the United States in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defense of such State; but every State shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of filed pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

or more States concerning boundary, jurisdiction or any other causes whatever; which authority shall always be exercised in the manner following. Whenever the legislative or executive authority or lawful agent of any State in controversy with another shall present a petition to Congress stating the matter in question and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question: but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names as Congress shall direct, shall in the presence of Congress be drawn out by lot, and the persons whose names shall be so drawn or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination: and if either party shall neglect to attend at the day appointed, without showing reasons, which Congress shall judge sufficient, or being present shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the secretary of Congress shall strike in behalf of such party absent or refusing; and the judgement and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgement, which shall in like manner be final and decisive, the judgement or sentence and other proceedings being, in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned: provided that every commissioner, before he sits in judgement, shall take an oath to be administered by one of the judges of the supreme or superior court of the State, where the cause shall be tried, well and truly to hear and determine the matter in question, according to the best of his judgement, without favor, affection or hope of reward: provided also, that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdictions as they may respect such lands, and the States which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall on the petition of either party to the Congress of the United States, be finally determined as near as may be in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.

The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States -- fixing the standards of weights and measures throughout the United States -- regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated -- establishing or regulating post offices from one State to another, throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office -- appointing all officers of the land forces, in the service

No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay till the United States in Congress assembled can be consulted; nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the Kingdom or State and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.

**ARTICLE VII.** When land forces are raised by any State for the common defense, all officers of or under the rank of colonel, shall be appointed by the legislature of each State respectively, by whom such forces shall be raised, or in such manner as such State shall direct, and all vacancies shall be filled up by the State which first made the appointment.

**ARTICLE VIII.** All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States in proportion to the value of all land within each State, granted or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States within the time agreed upon by the United States in Congress assembled.

**ARTICLE IX.** The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article -- of sending and receiving ambassadors -- entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever -- of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated -- of granting letters of marque and reprisal in times of peace -- appointing courts for the trial of pirates and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of Congress shall be appointed a judge of any of the said courts.

The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two

of the United States, excepting regimental officers -- appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States -- making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States in Congress assembled shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated 'A Committee of the States', and to consist of one delegate from each State; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction -- to appoint one of their members to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses -- to borrow money, or emit bills on the credit of the United States, transmitting every half-year to the respective States an account of the sums of money so borrowed or emitted -- to build and equip a navy -- to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State; which requisition shall be binding, and thereupon the legislature of each State shall appoint the regimental officers, raise the men and cloath, arm and equip them in a solid-like manner, at the expense of the United States; and the officers and men so cloathed, armed and equipped shall march to the place appointed, and within the time agreed on by the United States in Congress assembled. But if the United States in Congress assembled shall, on consideration of circumstances judge proper that any State should not raise men, or should raise a smaller number of men than the quota thereof, such extra number shall be raised, officered, cloathed, armed and equipped in the same manner as the quota of each State, unless the legislature of such State shall judge that such-extra number cannot be safely spread out in the same, in which case they shall raise, officer, cloath, arm and equip as many of such extra number as they judge can be safely spared. And the officers and men so cloathed, armed, and equipped, shall march to the place appointed, and within the time agreed on by the United States in Congress assembled.

The United States in Congress assembled shall never engage in a war, nor grant letters of marque or reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defense and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war, to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander in chief of the army or navy, unless nine States assent to the same: nor shall a question on any other point, except for adjourning from day to day be determined, unless by the votes of the majority of the United States in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances or military operations, as in their judgement require secrecy; and the yeas and nays of the delegates of each State on any question shall be entered on the journal, when it

is desired by any delegates of a State, or any of them, at his or their request shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the legislatures of the several States.

**ARTICLE X.** The Committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the consent of the nine States, shall from time to time think expedient to vest them with; provided that no power be delegated to the said Committee, for the exercise of which, by the Articles of Confederation, the voice of nine States in the Congress of the United States assembled be requisite.

**ARTICLE XI.** Canada acceding to this confederation, and adjoining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.

**ARTICLE XII.** All bills of credit emitted, monies borrowed, and debts contracted by, or under the authority of Congress, before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States, and the public faith are hereby solemnly pledged.

**ARTICLE XIII.** Every State shall abide by the determination of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.

And Whereas it hath pleased the Great Governor of the World to incline the hearts of the legislatures we respectively represent in Congress, to approve of, and to authorize us to ratify the said Articles of Confederation and perpetual Union. Know Ye that we the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said Articles of Confederation and perpetual Union, and all and singular the matters and things therein contained: And we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States in Congress assembled, on all questions, which by the said Confederation are submitted to them. And that the Articles thereof shall be inviolably observed by the States we respectively represent, and that the Union shall be perpetual. In Witness whereof, we have hereunto set our hands in Congress.

DONE at Philadelphia, in the State of Pennsylvania, the 9th day of July, in the Year of our Lord 1778, and in the third year of the independence of America.

The aforesaid articles of confederation were finally ratified on the first day of March 1781; the state of Maryland having, by their Members in Congress, on that day acceded thereto, and completed the fame.

New Hampshire:  
JOSIAH BARTLETT  
JOHN WENTWORTH, jun.

Massachusetts Bay:  
JOHN HANCOCK  
SAMUEL ADAMS  
ELBRIDGE GERRY  
FRANCIS DANA  
JAMES LOVELL  
SAMUEL HOLTEN

Rhode Island and Providence Plantations:  
WILLIAM ELLERY  
HENRY MERCHANT  
JOHN COLLINS

Connecticut:  
ROGER SHERMAN  
SAMUEL HUNTINGTON  
OLIVER WOLCOTT  
TITUS HOSMER  
ANDREW ADAMS

New York:  
JAMES DUANE  
FRANCIS LEWIS  
WILLIAM DUER  
GOVERNEUR MORRIS

New Jersey:  
JOHN WITHERSPOON  
NATHANIEL SCUDDER

Pennsylvania:  
ROBERT MORRIS  
DANIEL ROBERDEAU  
JOHN BAYARD SMITH  
WILLIAM CLINGAN  
JOSEPH REED

Delaware:  
THOMAS M'KEAN  
JOHN DICKINSON  
NICHOLAS VAN DYKE,

Maryland:  
JOHN HANSON  
DANIEL CARROLL

Virginia:  
RICHARD HENRY LEE  
JOHN BANISTER  
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# LE FÉDÉRALISTE

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## LE FÉDÉRALISTE, N<sup>o</sup> XLVII

(MADISON)

*Au peuple de l'Etat de New York :*

Après avoir passé en revue la forme générale du gouvernement proposé, et la masse générale des pouvoirs qui lui sont conférés, je vais examiner la structure particulière de ce gouvernement et la distribution de cette masse de pouvoir entre ses parties composantes.

L'une des principales objections dirigées par les plus respectables adversaires de la Constitution est la prétendue violation de l'axiome politique d'après lequel les pouvoirs législatif, exécutif et judiciaire doivent être séparés et distincts. Dans l'organisation du gouvernement fédéral, a-t-on dit, il semble que l'on n'ait point fait attention à cette précaution essentielle en faveur de la liberté. Les différents départements du pouvoir sont distribués et confondus de manière à exclure toute symétrie et toute beauté de forme, et ainsi à exposer quelques-unes des parties essentielles de l'édifice au danger d'être écrasées

d'après lequel on devait juger tous les ouvrages du même genre; de même, ce grand écrivain politique semble avoir considéré la Constitution de l'Angleterre comme le type, ou, pour nous servir de sa propre expression, comme le tiroir de la liberté politique, et nous avoir donné, sous la forme de vérités élémentaires, les divers principes caractéristiques de ce système particulier. Dès lors, pour être sûrs de ne pas nous méprendre sur son sentiment à cet égard, remontons à la source d'où il a tiré la maxime.

Un examen très superficiel de la Constitution britannique doit nous convaincre qu'en aucune façon elle ne sépare entièrement les départements législatif, exécutif et judiciaire. Le magistrat exécutif est partie intégrante de l'autorité législative. Il a seul la prérogative de faire les traités avec les souverains étrangers, et ces traités, une fois conclus, ont, sans quelques limitations, la force des actes législatifs. Tous les membres du département judiciaire sont nommés par lui, peuvent être révoqués par lui sur l'adresse des deux Chambres du Parlement, et forment, quand il lui plaît de les consulter, l'un de ses conseils constitutionnels. L'une des branches du département législatif forme aussi, pour le chef de l'exécutif, un grand conseil constitutionnel; d'un autre côté, elle est seule dépositaire du pouvoir judiciaire dans les cas d'*impeachment*; et dans tous les autres procès, elle est investie de la suprême juridiction d'appel. De même encore, les juges sont associés au département législatif, au point d'assister et de participer souvent à ses délibérations quoiqu'ils ne soient point admis à émettre un vote législatif. De ces faits, qui guidèrent Montesquieu, on peut conclure clairement que, en disant « qu'il n'y a point de liberté lorsque dans la même per-

sons le poids disproportionné de quelques autres.

Il n'est certainement pas de vérité politique de plus grande valeur appuyée de l'autorité de défenseurs plus éclairés de la liberté que celle sur laquelle repose l'objection. L'accumulation de tous les pouvoirs, législatif, exécutif et judiciaire, dans les mêmes mains, soit d'un seul homme, soit de quelques-uns, soit de plusieurs, soit par l'hérédité, par la conquête, ou par l'élection, peut justement être considérée comme la véritable définition de la tyrannie. Si donc la Constitution fédérale était réellement coupable de l'accumulation des pouvoirs ou de leur combinaison avec une tendance dangereuse à cette accumulation, il ne serait besoin d'aucun autre argument pour inspirer une réprobation universelle du système. Mais je me hâte de prouver que l'accusation est sans fondement, et que le principe sur lequel elle est appuyée a été tout à fait mal entendu et appliqué. Afin de nous faire une idée correcte sur ce point, il sera bon de rechercher le sens dans lequel le maintien de la liberté exige la séparation des trois grands départements du pouvoir.

L'oracle toujours consulté et cité sur ce sujet est l'illustre Montesquieu. S'il n'est pas l'auteur de cet inestimable précepte de la science politique, il a, tout au moins, le mérite de l'avoir développé et de l'avoir recommandé avec le plus de succès à l'attention du monde. Essayons, tout d'abord, de chercher son sentiment sur ce point.

La Constitution britannique était pour Montesquieu ce que fut Homère pour tous ceux qui ont écrit sur la poésie épique. De même que ceux-ci ont regardé l'ouvrage du barde immortel, comme le parfait modèle d'où devaient être tirés tous les principes et toutes les règles de l'art épique et

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sonne, ou dans le même corps de magistrature, la puissance législative est réunie à la puissance exécutive », ou « lorsque la puissance de juger n'est pas séparée de la puissance législative et de l'exécutrice », il n'a point entendu proscrire toute action partielle, tout contrôle rétrograde des différents pouvoirs l'un sur l'autre; ce qu'il a voulu dire, comme le montrent ses propres expressions, et plus évidemment encore les exemples qu'il avait sous les yeux, c'est que, lorsque la totalité du pouvoir d'un département est exercée par les mêmes mains qui possèdent la totalité du pouvoir d'un autre département, les principes fondamentaux d'une Constitution libre sont renversés. Tel aurait été le cas pour la Constitution qu'il examinait, si le roi, qui est le seul magistrat exécutif, avait possédé en outre le pouvoir législatif complet, ou l'administration suprême de la justice; ou si le corps législatif tout entier avait possédé l'autorité judiciaire suprême ou l'autorité exécutive suprême. Mais on ne peut reprocher ces vices à celle du pouvoir exécutif en qui réside la totalité de la Constitution. Le magistrat en qui réside la totalité du pouvoir exécutif ne peut faire lui-même de loi, quoiqu'il puisse apposer un veto sur toute loi; il ne peut administrer la justice en personne, quoiqu'il ait la nomination de ceux par qui elle est rendue. Les juges ne peuvent exercer aucune fonction exécutive, quoique leurs offices soient des ramifications du tronc exécutif; ni aucune fonction législative, quoiqu'ils puissent être consultés par les conseils législatifs. La législature entière ne peut faire d'acte judiciaire, quoique, par la volonté conjointe de deux de ses branches, les juges puissent être privés de leurs offices et qu'une de ses branches soit revêtue du pouvoir judiciaire en dernier ressort. De même, la législature entière ne peut exercer aucun acte fonction exécutive, quoique l'une de ses

branches constitue la magistrature exécutive suprême, et qu'une autre branche, sur l'impeachment d'une troisième, puisse juger et condamner tous les agents subordonnés du département exécutif.

Les raisons sur lesquelles Montesquieu fonde son principe, sont une nouvelle preuve du sens qu'il y attache. « Lorsque, dans la même personne ou dans le même Corps de magistrature, la puissance législative est réunie à la puissance exécutive, dit-il, il n'y a point de liberté, parce qu'on peut braier le que le même monarque ou le même Sénat ne fasse des lois tyranniques pour les exécuter tyranniquement. » Il dit encore: « si la puissance de juger était jointe à la puissance législative, le pouvoir sur la vie et la liberté des citoyens serait arbitraire, car le juge serait législateur. Si elle était jointe à la puissance exécutive, le juge pourrait avoir la force d'un oppresseur ». Quelques-uns de ces raisons sont encore plus particulièrement développées dans d'autres passages; mais quelque brièvement qu'elles soient exposées ici, elles suffisent pour déterminer le sens que nous avons donné à ce principe célèbre de cet auteur illustre.

Si nous examinons les Constitutions des différents Etats, nous trouvons que, malgré les termes solennels et parfois absolus dans lesquels cet axiome y a été posé, il n'est pas un seul cas où les différents départements du pouvoir aient été entièrement séparés et distincts. New-Hampshire, dont la Constitution a été faite la dernière, semble avoir parfaitement senti l'impossibilité et l'inutilité d'éviter tout mélange de ces départements; il a expliqué la doctrine en déclarant « que les pouvoirs législatif, exécutif et judiciaire devaient être séparés et indépendants l'un de l'autre, autant que la nature d'un gouvernement le permet, ou autant que cette séparation peut s'accorder

avec cette chaîne d'union qui lie l'ensemble de la Constitution dans un tout indissoluble d'unité et d'amitié ». En conséquence, sa Constitution mélange les départements à quelques égards. Le Sénat, qui est une branche du département législatif, est aussi un tribunal judiciaire pour le jugement des *impeachments*. Le Président, qui est le chef du département exécutif, est aussi membre président du Sénat, et non seulement à voix compte comme celles des autres membres dans tous les cas mais encore elle est prépondérante en cas de partage. Le Chef exécutif est lui-même éventuellement élu tous les ans par le département législatif, et son Conseil est tous les ans choisi par et parmi les membres du même département. Quelques fonctionnaires de l'Etat sont aussi nommés par la législature. Et les membres du département judiciaire sont nommés par le département exécutif.

La Constitution de Massachusetts a observé cette réserve suffisante, quoique moins marquée, dans l'expression de cet article fondamental de la liberté. Elle déclare « que le département législatif n'exercera jamais les pouvoirs exécutif et judiciaire, ou l'un des deux ; que le département exécutif n'exercera jamais les pouvoirs législatif et judiciaire, ou l'un des deux ; que le judiciaire n'exercera jamais les pouvoirs législatif et exécutif, ou l'un des deux ».

Cette déclaration s'accorde parfaitement avec la doctrine de Montesquieu, telle qu'elle vient d'être expliquée, et n'est pas violée en un seul point par le plan de la Convention. Elle ne fait que défendre à l'un des départements d'exercer les pouvoirs d'un autre département. Dans toute Constitution en tête de laquelle elle se trouve, on admet un mélange partiel des pouvoirs. Le magistrat exécutif a un droit de veto conditionné sur le corps législatif, et le Sénat,

qui est une partie de la législature, est cour d'*impeachment* pour les membres des départements exécutif et judiciaire. De même, les membres du judiciaire sont nommés par le département exécutif et ce dernier peut aussi les destituer, sur l'adresse des deux branches législatives. Enfin, le département législatif nomme chaque année un certain nombre des agents du gouvernement. Comme la nomination aux fonctions, particulièrement aux fonctions exécutives, est par sa nature une fonction exécutive, les réelecteurs de la Constitution ont, à cet égard au moins, violé la règle établie par eux-mêmes.

Je passe sous silence les Constitutions de Rhode Island et de Connecticut, parce qu'elles ont été faites avant la Révolution et même avant que le principe que nous examinons fût devenu un objet de discussion politique.

La Constitution de New York ne contient pas de déclaration sur ce point; mais il apparaît très clairement que, dans son élaboration, on ait vu les dangers d'une imprudente confusion des différents départements. Et cependant, elle donne au magistrat exécutif un contrôle partiel sur le département législatif; et, qui plus est, elle donne un contrôle semblable au département judiciaire; bien mieux, elle réunit les départements exécutif et judiciaire dans l'exercice de ce contrôle. Dans son Conseil de nomination, les membres du législatif sont associés au pouvoir exécutif, pour la nomination de fonctionnaires exécutifs et judiciaires. Et sa cour pour le jugement des *impeachments* et la correction des erreurs, est composée de l'une des branches de la législature et des principaux membres du département judiciaire.

La Constitution de New Jersey a mélangé les différents pouvoirs du gouvernement plus qu'aucune des

l'une des Chambres sont de droit, juges de paix, de même que les membres du Conseil exécutif. Les principaux officiers du département exécutif sont nommés par le législatif, et l'une des branches qui composent celui-ci forme une cour d'*impeachments*. Tous les fonctionnaires publics peuvent être destitués sur l'adresse de la législature.

Le Maryland a adopté le principe dans les termes les plus absolus en déclarant que les pouvoirs législatif, exécutif et judiciaire doivent toujours être séparés et distincts l'un de l'autre. Sa Constitution cependant fait nommer le magistrat exécutif par le département législatif; et les membres du judiciaire par le département exécutif.

Les termes de la Constitution de Virginie sont encore plus formels à cet égard; elle déclare « que les départements législatif, exécutif et judiciaire seront séparés et distincts, de manière qu'aucun d'entre eux n'exerce les pouvoirs qui appartiennent légitimement à l'autre; et qu'aucune personne n'exercera en même temps les pouvoirs de plus de l'un d'entre eux, sauf que les juges des cours de comté seront éligibles à l'une et l'autre Chambre de l'Assemblée ». Et cependant, indépendamment de cette exception formelle à l'égard des membres des cours inférieures, nous voyons la législature nommer le principal magistrat ainsi que son Conseil exécutif; nous voyons encore que, tous les trois ans, deux membres de ce dernier Conseil sont remplacés au gré de la législature; et que les principaux emplois exécutifs et judiciaires sont remplis par le même département. De même, en un cas particulier, la prérogative exécutive de faire grâce est confiée au département législatif.

La Constitution de la Caroline du Nord, qui déclare « que les pouvoirs législatif, exécutif et judi-

ciécutives. Le gouverneur, qui est le magistrat exécutif, est nommé par la législature; il est chancelier et *ordinaire* ou subrogé de l'Etat; il est membre de la Suprême Cour d'Appel, et président, avec voix prépondérante en cas de partage, de l'une des Chambres législatives. La même Chambre législative remplit encore les fonctions de Conseil exécutif du gouvernement et consilium avec lui la Cour d'Appel. Les membres du département judiciaire sont nommés par le département législatif et peuvent être révoqués par l'une des Chambres, sur l'*impeachment* de l'autre.

D'après la Constitution de Pennsylvanie, le Président, qui est le chef du département exécutif, est élu chaque année par un vote dans lequel domine le département législatif. Joint à un Conseil exécutif, il nomme les membres du judiciaire, et forme une cour d'*impeachment* pour le jugement de tous les agents aussi bien judiciaires qu'exécutifs. Les juges de la Cour Suprême et les juges de paix semblent aussi pouvoir être destitués par la législature; et le pouvoir exécutif de faire grâce dans certains cas semble appartenir au même département. Les membres du Conseil exécutif sont *ex-officio* juges de paix dans tout l'Etat.

Dans le Delaware, le magistrat exécutif suprême est annuellement élu par le département législatif. Les présidents des deux Chambres législatives sont vice-présidents dans le département exécutif. Le Chef de l'exécutif, avec six autres personnes, nommées à raison de trois par chacune des Chambres législatives, forme la Suprême Cour d'Appel; conjointement avec le Corps législatif, il nomme les autres juges. Dans tous les Etats, il semble que les membres de la législature puissent être en même temps juges de paix; dans cet Etat (New-York), les membres de

j'ai voulu prouver, c'est que lorsqu'on reproche à la Constitution proposée de violer le principe sacré de tout gouvernement libre, cette accusation n'est fondée ni sur le sens véritable attaché à ce principe par son auteur, ni sur le sens qu'on lui a donné jusqu'ici en Amérique. Ce sujet intéressant sera continué dans l'article prochain.

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ciaire suprême du gouvernement doivent toujours être séparés et distincts l'un de l'autre », attribue en même temps au Corps législatif la nomination non seulement du Chef de l'exécutif, mais encore des principaux fonctionnaires des départements exécutif et judiciaire.

Dans la Caroline du Sud, la Constitution fait élire par le corps législatif le magistrat exécutif. Elle donne aussi au législatif la nomination des membres du département judiciaire en y comprenant même les juges de paix et les sheriffs; et la nomination des agents du département exécutif jusqu'aux capitaines de l'armée et de la flotte de l'Etat.

Dans la Constitution de Georgie, qui déclare « que les département législatif, exécutif et judiciaire seront séparés et distincts, de manière qu'aucun d'eux n'exerce les pouvoirs qui appartiennent légalement à un autre », nous voyons la législature nommer aux emplois du département exécutif, et exercer en définitive la prérogative exécutive de pardon. Et même, les juges de paix sont nommés par la législature.

En citant ces cas dans lesquels la séparation complète des trois pouvoirs n'a pas été complètement observée, je ne désire pas être regardé comme l'avocat des organisations particulières des divers gouvernements d'Etats. Je suis tout à fait certain qu'au milieu de plusieurs excellents principes qu'ils ont mis en pratique, ces gouvernements portent des traces visibles de la hâte et encore plus de l'ignorance qui a présidé à leur formation. Il n'est que trop certain que parfois le principe fondamental que nous examinons a été enfreint par un trop grand mélange, même par une véritable réunion des différents pouvoirs; et que jamais il n'a été fait de disposition efficace pour maintenir dans la pratique la séparation tracée sur le papier. Ce que

pouvoirs respectifs. On ne contestera pas que tout pouvoir est naturellement envahissant et qu'il doit être mis efficacement dans l'impossibilité de franchir les limites qui lui sont assignées. Ainsi donc, après avoir classé, en théorie, les différentes sortes de pouvoirs suivant qu'ils peuvent être de nature législative, exécutive ou judiciaire, la chose la plus importante et la plus difficile est de les garantir pratiquement contre leurs usurpations mutuelles. Quelle doit être cette garantie? Voilà le gros problème à résoudre.

Sera-t-il suffisant de marquer avec précision les frontières de ces départements dans la constitution du gouvernement, et de compter sur ces barrières de papier pour prévenir l'esprit d'usurpation? C'est la garantie que semblent avoir prise ceux qui ont rédigé la plupart des Constitutions américaines. Mais l'expérience nous apprend que l'efficacité de cette mesure s'est trouvée grandement en défaut; et qu'il faut, de toute nécessité, des armes plus sûres pour défendre les plus faibles membres du gouvernement contre les plus puissants. Le département législatif étend partout la sphère de son activité et engloutit tous les pouvoirs dans son impétueux tourbillon.

Les fondateurs de nos Républiques méritent tant d'éloges pour la sagesse qu'ils ont montrée, qu'aucune tâche ne peut être moins agréable que celle de relever les erreurs dans lesquelles ils sont tombés. Le respect pour la vérité nous oblige pourtant à faire observer qu'ils semblent avoir cru voir toujours la liberté menacée par la prérogative toujours orbissant et toujours usurpatrice d'un magistrat héréditaire, soutenu et fortifié par une branche héréditaire de l'autorité législative. Ils ne semblent jamais s'être rappelés le danger des usurpations législatives qui, en rassemblant tous les pouvoirs dans les mêmes

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## LE FÉDÉRALISTE, N° XLVIII

(MADISON)

*Au Peuple de l'Etat de New York :*

On a prouvé, dans le dernier article, que l'axiome politique, examiné ici, n'exige pas une séparation absolue des départements législatif, exécutif et judiciaire. Je vais essayer maintenant de montrer que si, entre ces départements, il n'existe pas une liaison et une union qui donne, à chacun d'eux, un contrôle constitutionnel sur les autres, le degré de séparation que requiert le principe, comme essentiel à un gouvernement libre, ne sera jamais, en pratique, efficacement maintenu.

Il est généralement reconnu que les pouvoirs, qui appartiennent en propre à l'un des départements, ne doivent pas être exercés directement et complètement par l'un ou l'autre des autres départements. Il est également évident qu'aucun d'eux ne doit posséder directement ou indirectement une influence prépondérante sur les autres dans l'exercice de leurs

dans des corps législatifs, si l'effet d'une mesure particulière s'étendra ou non au delà de la sphère législative. D'un autre côté, le pouvoir exécutif étant circonscrit dans un espace plus resserré et étant plus simple par sa nature, le pouvoir judiciaire étant limité par des lignes de démarcation encore moins incertaines, des projets d'usurpation ne pourraient être formés par ces départements sans qu'ils fussent à l'instant découverts et renversés. Ce n'est pas tout : comme le département législatif peut, seul, puiser dans les poches du peuple et qu'il n., dans quelques Constitutions, une autorité illimitée et, dans toutes, une influence prépondérante sur les rétributions pécuniaires des agents des autres départements, il en résulte, vis-à-vis du législatif, une dépendance qui facilite encore ses usurpations.

J'ai invoqué notre expérience personnelle à l'appui de mon opinion sur ce point. S'il était nécessaire d'appuyer cette expérience par des preuves particulières, je pourrais les multiplier indéfiniment. J'y trouverais un témoin dans tout citoyen qui a pris part au cours des administrations publiques ou qui y a prêté quelque attention. Je trouverais des preuves en abondance dans les registres publics et dans les archives de tous les Etats de l'Union. Comme preuve plus brève et en même temps aussi satisfaisante, je rappellerai l'exemple de deux Etats, attéstié par des autorités irréprochables.

Le premier exemple est celui de la Virginie, Etat qui, comme nous l'avons vu, a expressément déclaré dans sa Constitution que les trois grands départements ne doivent pas être confondus. L'autorité que j'invoque est celle de M. JEFFERSON qui, indépendamment de sa perspicacité pour observer la marche du gouvernement, était lui-même le premier magistrat de cet Etat. Pour ne rien perdre des idées que son

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maîns, doivent mener à la même tyrannie que les usurpations de l'exécutif.

Dans un gouvernement où des prérogatives nombreuses et étendues sont placées dans les mains d'un Monarque héréditaire, le département exécutif est très-justement considéré comme la source du danger, et surveillé avec toute la jalousie que doit inspirer le zèle pour la liberté. Dans une démocratie, où la multitude exerce en personne les fonctions législatives et est continuellement exposée, par son incapacité de prendre des délibérations régulières et des mesures réfléchies, aux ambitieuses intrigues de ses magistrats exécutifs, on peut bien craindre que, dans une occasion favorable, la tyrannie ne s'ensuive. Mais, dans une République représentative, où la magistrature exécutive est soigneusement limitée dans l'étendue et dans la durée de son pouvoir, où le pouvoir législatif est exercé par une assemblée animée, à cause de l'influence que l'on suppose qu'elle a sur le peuple, d'une confiance inébranlable dans sa propre force, assez nombreuse pour éprouver toutes les passions qui agissent sur une multitude, trop peu nombreuse cependant pour être incapable d'employer, pour la satisfaction de ses passions, des moyens dictés par la raison, c'est contre l'entrepreneante ambition de ce département que le peuple doit diriger toute sa jalousie et épuiser toutes ses précautions.

Le département législatif lire une supériorité dans nos gouvernements d'autres causes. Ses pouvoirs constitutionnels étant à la fois plus étendus et moins susceptibles d'être renfermés dans des limites précises, il peut, avec plus de facilité, voiler, sous des mesures compliquées et indirectes, les usurpations qu'il commet aux dépens des départements coordonnés. Quelquefois, il est réellement difficile de dire,



latif pour leur entretien en fonction et quelques-uns pour leur maintien. Si, donc, la législature assumé les fonctions exécutive et judiciaire, on ne peut y faire d'opposition; ou, si l'on en fait, elle ne sera pas effective, parce que, dans ce cas, la législature peut donner à ses décisions la forme de lois de l'Assemblée qui les rend obligatoires pour les autres branches. En conséquence, elle a, en *maine* circonstance, *décidé sur des droits* qui auraient dû être laissés à la *discussion judiciaire* et la direction de l'exécutif fut pour elle chose habituelle et familière pendant toute la durée de sa session. »

L'autre Etat, que je prendrai pour exemple, est la Pennsylvanie, et mon autorité sera le Conseil des Conseurs qui se réunit pendant les années 1783 et 1784. Une partie des fonctions de ce Corps, ainsi que cela résulte de la Constitution, était « de rechercher si la Constitution était restée inviolée dans toutes ses parties; si les branches législative et exécutive du gouvernement avaient rempli leurs devoirs de défenseurs du peuple, et s'ils s'étaient appropriés ou s'ils avaient exercé d'autres ou de plus grands pouvoirs que ceux qui leur sont conférés par la Constitution ». Dans l'exécution de cette mission, le Conseil a été naturellement amené à comparer la conduite du législatif et de l'exécutif avec les pouvoirs constitutionnels de ces départements; des fautes citées — dont l'exactitude a été reconnue par tous les membres de ce Conseil — il résulte que la Constitution a été violée d'une manière flagrante par la législature en une foule de circonstances importantes. Dans la confection d'un grand nombre de lois, on a violé, sans nécessité apparente, la règle qui exige que tous les bills d'intérêt public soient d'abord imprimés, pour être soumis à l'examen du peuple; et cependant, c'est une des plus importantes précautions opposées

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expérience lui a suggérées à cet égard, il sera nécessaire de citer un passage assez étendu, tiré de ses très intéressantes « Notes sur l'Etat de Virginie », p. 195 (1).

« Tous les pouvoirs du gouvernement, législatif, exécutif et judiciaire, résultent du corps législatif. La concentration de ceux-ci entre les mêmes mains, voilà justement la définition du gouvernement despotique. Ce ne sera pas un adoucissement que ces pouvoirs soient exercés par les mains de plusieurs et non d'un seul. Cent soixante-troize despotismes seraient sûrement aussi oppressifs qu'un seul. Que ceux qui en doutent tournent leurs regards vers la République de Venise.

« Peu nous importe qu'ils soient choisis par nous. Un *despotisme électif* n'était pas le gouvernement que nous cherchions; ce que nous voulions, c'est un gouvernement qui reposât non seulement sur des principes libéraux, mais où les pouvoirs du gouvernement seraient divisés et balancés entre divers corps de magistrature, de façon à ce qu'aucun ne dépassât les limites légales sans être efficacement arrêté et contenu par les autres. C'est pour cela que la Convention, qui a organisé le gouvernement, l'a fait reposer sur cette base que les départements législatif, exécutif et judiciaire seraient séparés et distincts, de telle sorte que nulle personne n'exerçât les pouvoirs de plus d'un seul d'entre eux en même temps. *Mais on n'a prévu aucune barrière entre ces différents pouvoirs.* Les membres du judiciaire et de l'exécutif ont été laissés sous la dépendance du légis-

(1) Il a été publié, en 1786, une traduction française de cet ouvrage sous le titre : *Observations sur la Virginie*. Cfr. pages 241 à 254. La traduction du texte n'a point été empruntée à cet ouvrage. — G. J.]

constitutionnelles avec plus d'assurance que si le département exécutif était administré par une seule main ou par un petit nombre de mains.

La conclusion que je suis en droit de tirer de ces observations, n'est qu'une simple ligne de démarcation tracée sur le papier pour fixer les limites constitutionnelles des différents départements. n'est pas une garantie suffisante contre ces usurpations qui aboutissent à une concentration tyrannique de tous les pouvoirs du Gouvernement dans les mêmes mains.

PCOLIUS.

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par la Constitution contre les lois inopportunes de la législature.

La forme constitutionnelle du jugement par jury a été violée, et des pouvoirs, qui n'avaient pas été délégués par la Constitution, ont été assumés.

Des fonctions exécutives ont été aussi usurpées. Les salaires des juges, que la Constitution déclare expressément fixes, ont été parfois modifiés; et des affaires, appartenant au département judiciaire, ont été souvent soumises à la connaissance et à la décision de la législature.

Ceux qui désirent connaître le détail des faits rentrant sous chacun de ces chefs, peuvent consulter les procès-verbaux du Conseil qui sont à l'impression. Ils trouveront que quelques-uns peuvent être imputés à des circonstances particulières relatives à la guerre, mais la plupart sont les effets naturels d'un gouvernement mal organisé.

Il paraît aussi que le département exécutif s'est rendu coupable de fréquentes violations de la Constitution. Il faut toutefois faire, à cet égard, trois observations: 1° une grande partie de ces violations ont été, soit immédiatement produites par les effets de la guerre, soit recommandées par le Congrès ou par le Commandant en chef; — 2° dans la plupart des autres cas, l'exécutif n'a fait que se conformer aux sentiments déclarés ou connus du département législatif; — 3° le département exécutif de Pennsylvanie se distingue de celui des autres États par le nombre des membres qui le composent. À cet égard, il ressemble plus à une Assemblée législative qu'à un Conseil exécutif. Et ses membres, étant dégagés de toute crainte de responsabilité individuelle pour les actes du corps et s'encourageant mutuellement par leur exemple et par la réunion de leur influence, peuvent naturellement hasarder des mesures in-

de nos présentes recherches, il importe de ne point la passer sous silence.

L'auteur propose « que, lorsque deux des trois branches du gouvernement s'accorderont à penser, — à la majorité, dans chacune, des deux tiers de leur nombre total, — qu'une Convention est nécessaire pour changer la Constitution ou en réparer les violations, il sera convoqué à cet effet une Convention. »

Comme le peuple est la seule source légitime de l'autorité législative, et que c'est de lui seul que dérive la charte constitutionnelle en vertu de laquelle les différentes branches du gouvernement tiennent leur pouvoir, il semble strictement conforme aux principes républicains de recourir à la même autorité originale, non seulement lorsqu'il peut être nécessaire d'étendre, de diminuer, ou de remodeler les pouvoirs du gouvernement, mais encore pour corriger l'effet des usurpations commises par l'un des départements sur les droits constitutionnels des autres. Les différents départements étant par conséquent égaux d'avant les termes de l'acte communément appelé la Constitution, cela est évident, qui, si les établit, il n'en est aucun, ou supérieur, qui puisse prétendre à un droit exclusif ou supérieur de fixer les bornes qui séparent leurs pouvoirs respectifs; et comment empêcher les usurpations du plus fort ou remédier aux atteintes portées aux droits du plus faible, sans un appel au peuple même qui, les ayant créés tous, peut seul déclarer sa véritable intention et en assurer l'observation ?

Ce raisonnement a certainement beaucoup de force, et il faut reconnaître qu'il prouve qu'il faut donner au peuple un moyen constitutionnel et toujours existant de faire connaître sa décision dans certaines occasions importantes et extraordinaires. Mais il semble qu'il y ait des objections innombrables contre le recours proposé au peuple, en tant qu'il s'agit de

LA RÉPUBLIQUE

*Du New York Packet, mardi 5 février 1788.*

## LE FÉDÉRALISTE, No XLIX

(HAMILTON OU MADISON)

*Au Peuple de l'Etat de New York :*

L'auteur des « Notes sur l'Etat de Virginie », citées dans le dernier article, a joint à cet estimable ouvrage le plan d'une Constitution qui devait être soumise à l'examen d'une Convention qu'on croyait devoir être convoquée par la législature en 1783, pour l'établissement d'une Constitution pour cette république. On trouve dans ce projet, comme dans tout ce qui sort de la même plume, une tournure d'esprit originale, large et avérée, et, ce qui est le plus digne d'attention, on y distingue un fort attachement au gouvernement républicain et une connaissance approfondie des inclinations dangereuses contre lesquelles il faut se mettre en garde. Une des précautions qu'il propose, et qu'il semble en définitive regarder comme un palladium pour défendre les départements les plus faibles contre les usurpations des plus forts, lui appartient peut-être exclusivement; comme elle a un rapport direct avec l'objet

l'admettre dans tous les cas pour maintenir les différents départements du pouvoir dans leurs limites constitutionnelles.

Tout d'abord, la disposition n'atteint pas son but dans le cas où deux départements se coaliseraient contre le troisième. Si l'autorité législative, qui possède tant de moyens d'agir sur les dispositions des autres départements, parvenait à mettre l'un d'entre eux dans ses intérêts, ou même un tiers de ses membres, le troisième département ne pourrait tirer aucun avantage du remède proposé. Je ne m'arrête pas toutefois à cette objection parce qu'elle peut sembler dirigée contre la mise en application du principe, plutôt que contre le principe lui-même.

En second lieu, on peut faire observer, — etc'est une objection contre le principe, — que, comme tout appel au peuple suppose un quelquel défaut dans le gouvernement, de fréquents appels tendraient dans une grande mesure à priver le gouvernement de ce respect que le temps imprime à tout, et sans lequel peut-être le plus sage et le plus libéral des gouvernements ne posséderait pas la stabilité nécessaire. S'il est vrai que tout gouvernement repose sur l'opinion, il n'est pas moins vrai que la force de l'opinion, chez chaque individu, et son influence sur sa conduite, dépendent, en grande partie, de l'idée qu'il a du nombre de ceux qui partagent la même opinion. La raison de l'homme, comme l'homme lui-même, est timide et réservée quand elle est abandonnée à elle-même; elle acquiesce de la fermeté et de l'assurance en proportion du nombre de ceux avec lesquels elle est associée. Quand les exemples qui forment une opinion sont aussi anciens que nombreux, on sait qu'ils ont un double effet.

Dans une nation de philosophes, cette considération ne mériterait pas de nous occuper. Mais une

nation de philosophes n'est pas moins impossible que la race philosophique de rois désirée par Platon. Et, dans toute autre nation, le plus sage gouvernement ne regardera pas comme un avantage superflu d'avoir les préjugés populaires de son côté.

Le danger de troubler la tranquillité publique, en excitant trop fortement les passions publiques, est une objection encore plus sérieuse contre un renvoi fréquent des questions constitutionnelles à la décision de la nation entière. Malgré le succès qui a couronné les révisions de nos anciennes formes de gouvernement et qui fait tant d'honneur à la vertu et à l'intelligence du peuple d'Amérique, il faut avouer que les expériences sont d'une nature trop délicate pour être multipliées sans nécessité. Nous devons nous rappeler que toutes les Constitutions existantes ont été faites au milieu de dangers qui contenaient les passions les plus ennemies de l'ordre et de la concorde; à un moment où la confiance du peuple dans ses chefs patriotes étouffait la diversité ordinaire d'opinions sur les grandes questions nationales; alors que l'ardeur universelle pour des formes nouvelles et contraires était enflammée par un ressentiment et une indignation générale contre l'ancien gouvernement; alors enfin que l'esprit de parti, en ce qui touchait les changements à apporter ou les abus à réformer, ne pouvait mêler son levain à l'action du peuple. Les situations où il faut nous attendre à nous trouver habituellement dans la suite n'offrent pas d'aussi puissantes garanties contre le danger que je redoute.

Mais la plus forte de toutes les objections, c'est que les décisions qui seraient prises, sans doute, à la suite de semblables appels n'atteindraient pas leur but, qui est de maintenir l'équilibre constitutionnel du gouvernement. Nous avons vu, dans les gouver-

nements républicains, la tendance du département législatif à s'aggrandir aux dépens des autres. Les appels au peuple seraient donc ordinairement faits par les départements exécutif et judiciaire. Mais faits par l'un ou par l'autre, jouiraient-ils chacun, pour le jugement, d'avantages égaux? Examinons leurs différentes situations. Les membres de l'Exécutif et du judiciaire sont en petit nombre et ne peuvent être personnellement connus que d'une petite partie du peuple. Les derniers, par le mode de leur nomination aussi bien que par la nature et la durée de leurs fonctions, sont trop éloignés du peuple pour avoir grande part dans ses affections. Les premiers sont généralement les objets de la défiance, et leur administration est toujours exposée à être dénaturée et rendue impopulaire. Les membres du législatif, au contraire, sont nombreux. Ils sont distribués et vivent au milieu du peuple en général. Leurs relations de parenté, d'amitié et de connaissance embrassent un grand nombre de ceux qui ont dans la société une influence considérable. La nature de leurs fonctions publiques suppose une influence personnelle sur le peuple; on les considère comme étant plus particulièrement les gardiens dévoués des droits et des libertés du peuple. Avec de tels avantages, il est difficile de supposer que leurs adversaires auraient, pour un résultat favorable, une chance égale.

Mais les membres du législatif ne seraient pas seulement en meilleure posture pour plaider leur cause avec succès auprès du peuple. Ils en seraient probablement aussi les juges. La même influence qui les aurait conduits à la législation, les ferait nommer à la Convention. Si tel n'était pas le cas pour tous, ce serait probablement le cas pour beaucoup, et ce serait presque toujours le cas pour ces chefs de qui tout dé-

pend dans ces assemblées. En résumé, la Convention serait en grande partie composée d'hommes qui auraient été, qui seraient, ou qui espéreraient être membres du département dont la conduite est critiquée. Ils seraient donc parties dans la question même qu'ils auraient à juger.

Il pourrait, cependant, arriver parfois que les appels au peuple fussent faits dans des circonstances moins défavorables pour les départements exécutif et judiciaire. Les usurpations de la législation pourraient être trop flagrantes et trop soudaines pour être colorées d'un prétexte spécieux. Un grand nombre de ses membres pourrait se ranger du côté des autres branches du gouvernement. Le pouvoir exécutif pourrait être dans les mains d'un homme particulièrement aimé du peuple. Dans un tel état de choses, la décision du peuple pourrait être moins entraînée par les préjugés favorables au parti législatif. Mais encore ici, il ne faudrait pas s'attendre à la voir dictée par les véritables motifs de la question. Elle s'inspirerait nécessairement de l'esprit des partis existants antérieurement ou de ceux que la question même aurait fait naître. Elle serait liée aux personnes d'un caractère éminent et jouissant d'une grande influence sur la nation. Elle serait prononcée par ceux-là même qui auraient été ou les auteurs ou les adversaires des mesures sur lesquelles porterait la décision. Ainsi ce seraient les *passions* et non la *raison* du peuple qui jugeraient. Or, c'est la raison seule du peuple qui doit contrôler et régler le gouvernement. Les passions doivent être contrôlées et réglées par le gouvernement.

Nous avons vu, dans le dernier article, que de pires déclarations dans la Constitution écrite sont insuffisantes pour contenir les différents départements dans leurs droits légaux. Il apparaît en celui-ci que

des appels occasionnels au peuple ne seraient un moyen ni prudent ni efficace. Je n'examine pas l'effet que pourraient avoir des dispositions d'une autre nature, contenues dans le plan ci-dessus mentionné. Quelques-unes sont incontestablement fondées sur d'excellents principes politiques, et toutes sont rédigées avec une habileté et une précision admirables.

PUBLIÉS.

*Du New York Packet, mardi 5 février 1788.*

## LE FÉDÉRALISTE, No L

(HAMILTON ON MADISON)

*Au Peuple de l'Etat de New York :*

On prétendrait peut-être qu'au lieu de fuir au peuple des appels occasionnels, auxquels s'appliquent les objections que nous venons de faire, des appels périodiques sont les plus sûrs et les meilleurs moyens de prévenir et de corriger les infractions à la Constitution.

Il faut s'attendre à ce que, dans l'examen de ces procédés, je ne considère ces appels qu'en tant qu'ils sont de nature à renforcer la Constitution en maintenant les différents départements du pouvoir dans leurs limites légitimes, sans les considérer particulièrement comme des moyens de changer la Constitution. A ce premier point de vue, des appels au peuple à des époques fixes me paraissent avoir presque autant d'inconvénients que des appels faits dans des occasions particulières. Si les époques sont séparées par de courts intervalles, les mesures qu'il s'agira d'examiner et de pacifier auront une date

récente, et seront environnées de toutes les circonstances qui tendent à altérer et à pervertir le résultat des révisions occasionnelles. Si les époques sont éloignées, la même observation s'appliquera à toutes les mesures récentes; et si l'éloignement des autres peut en favoriser la discussion impartiale, cet avantage est inséparable d'inconvénients qui semblent le contrebalancer. En premier lieu, l'expectative d'une censure publique lointaine serait un bien faible obstacle au pouvoir dont il faut empêcher immédiatement les excès. S' imagine-t-on qu'une assemblée législative, composée de cent ou de deux cents membres qui poursuivent avec ardeur quelque objet favori et qui renversent, pour y parvenir, les obstacles opposés par la Constitution, serait arrêtée dans sa carrière, par la crainte de voir examiner et censurer sa conduite dans dix, quinze ou vingt ans? En second lieu, les abus auraient consommé leurs effets pernicieux avant l'application du remède. Et enfin, s'il n'en était pas ainsi, ces abus seraient de longue date; ils auraient pris racine; ils ne pourraient pas être facilement extirpés.

Le projet de reviser la Constitution pour réparer l'effet des atteintes récentes qu'elle aurait subies et pour d'autres objets, a été mis à exécution dans l'un des Etats. L'une des fonctions du Conseil des censeurs qui s'est réuni en Pennsylvanie en 1783 et 1784, était, comme nous l'avons vu, d'examiner « si la Constitution avait été violée, et si les départs législatif et exécutif avaient empiété l'un sur l'autre. » Cette expérience importante et nouvelle en politique mérite, à quelques égards, une attention toute particulière. A certains points de vue, elle peut, en tant qu'expérience isolée, faire dans des circonstances particulières, sembler n'être pas absolument concluante. Mais appliquée à la question qui

nous occupe, elle contient quelques faits que je citerai comme donnant une illustration complète et satisfaisante au raisonnement que j'ai fait.

Premièrement, il paraît, par les noms de ceux qui composent le conseil, que plusieurs, au moins, de ses membres les plus actifs et les plus influents, avaient été aussi des membres actifs et influents dans les partis qui, antérieurement, existaient dans l'Etat.

En second lieu, il semble bien que ces mêmes membres actifs et influents du Conseil avaient été des membres actifs et influents des branches législative et exécutive dans le cours des années sur lesquelles devait porter l'examen du Conseil; ils avaient même été les instigateurs ou les adversaires des mesures mêmes qu'il s'agissait de juger d'après les termes de la Constitution. Deux des membres avaient été vice-présidents de l'Etat, et quelques autres avaient été membres du Conseil exécutif dans le cours des sept années précédentes. L'un d'entre eux avait été speaker, et nombre d'autres avaient joué dans l'assemblée législative un rôle important durant la même période.

En troisième lieu, chaque page des procès verbaux des discussions du Conseil atteste l'effet que toutes ces circonstances ont produit sur leur délibération. Pendant toute sa session, le Conseil fut divisé en deux partis déterminés et violents. Ceux qui le composaient reconnaissent eux-mêmes et déplorent le fait. A défaut de cet aveu, l'aspect extérieur de leurs délibérations offre une preuve non moins satisfaisante. Sur les questions les moins importantes et les plus indépendantes les unes des autres, les mêmes noms s'opposent invariablement dans deux colonnes opposées. Tout observateur impartial en conclura, sans crainte d'erreur et en même temps sans vouloir attaquer l'un ou l'autre parti ni

aucun des individus qui les composaient, que malheureusement c'est la *passion* et non la *raison* qui doivent avoir présidé à leurs décisions. Quand des hommes exercent froidement et librement leur raison sur une foule de questions distinctes, ils diffèrent nécessairement d'opinion sur quelques-unes d'entre elles. Quand ils sont gouvernés par une passion commune, leurs opinions, si on peut leur donner ce nom, seront toujours les mêmes.

*Quatrièmement*, il est au moins douteux que dans ses décisions, ce corps ne se soit, en diverses circonstances, mépris sur les bornes respectives des départements législatif et exécutif, au lieu de les réduire et de les cantonner dans leur situation constitutionnelle.

*Cinquièmement*, je n'ai jamais entendu dire que les décisions du Conseil sur des questions constitutionnelles, qu'elles fussent sages ou erronées, aient réussi à rien changer aux usages fondés sur les interprétations législatives. Il paraît même, si je ne me trompe, que, sur un point, la législation qui existait alors a refusé de reconnaître les interprétations du Conseil et a fini par l'emporter dans le conflit.

Cette assemblée de censeurs prouve donc en même temps, par ses recherches, l'existence du mal, et, par son exemple, l'inefficacité du remède.

On ne peut affaiblir la portée de cette conclusion, en prétendant que l'Etat dans lequel l'épreuve a été faite était à cette époque et avait été depuis longtemps déjà violemment excité et déchiré par la rage des partis. Peut-on présumer que, à une future période septennale, le même Etat sera débarrassé de partis? Doit-on présumer qu'un autre Etat quelconque, à la même époque ou à une autre, sera à l'abri des partis? C'est ce que nous ne devons ni

croire, ni désirer; car une disparition des partis suppose nécessairement ou bien une akarme universelle pour la sûreté publique, ou la destruction absolue de la liberté.

On ne prévoirait pas les difficultés en prenant la précaution d'exclure des assemblées, élues par le peuple pour examiner la précédente administration du gouvernement, tous ceux qui auraient été mêlés au gouvernement dans la période donnée. Cette importante fonction serait sans doute alors abandonnée à des hommes qui, avec moins de talents, ne seraient guère mieux qualifiés. Sans avoir pris part à l'administration et par conséquent aux mesures qu'ils auraient à examiner, ils se trouveraient probablement englobés dans les partis que ces mesures intéressent et sous les auspices desquels ils auraient été élus.

PULLIUS.



paré et distinct des différents pouvoirs du gouvernement que, dans une certaine mesure, tout le monde reconnaît être essentiel au maintien de la liberté, il faut évidemment que chaque département ait une volonté qui lui soit propre, et par conséquent soit organisé de manière que les membres de chacun d'eux aient le moins d'influence possible sur la nomination des membres des autres pouvoirs. Si l'on observait rigoureusement ce principe, il faudrait que toutes les nominations à la magistrature exécutive suprême, aux fonctions législatives et judiciaires eussent la même sorte d'autorité, à savoir une communication. Peut-être cette manière d'organiser les différents départements serait-elle, dans l'exécution, moins difficile qu'on ne l'imagine. Il y aurait toutefois, dans l'exécution, quelques difficultés et quelques dépenses nouvelles. On voit donc admettre quelques dérogations au principe. En particulier dans l'organisation du département judiciaire il pourrait être mauvais de s'attacher rigoureusement au principe : premièrement à raison des qualités particulières qui sont nécessaires à ses membres, la première chose à considérer doit être d'adopter tel mode de sélection qui assurera le mieux ces qualités ; en second lieu, étant donné que, dans ce département, les nominations sont faites pour une durée permanente, cela doit immédiatement supprimer toute dépendance vis-à-vis de l'autorité à qui est due la nomination.

Il est également évident que les membres de chaque département doivent être aussi peu dépendants que possible de ceux des autres quant aux émoluments attachés à leurs fonctions. Si le magistrat exécutif ou les juges n'étaient point indépendants de la législature à cet égard, leur indépendance à

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## LE FÉDÉRALISTE, N° LI

(HAMILTON OU MADISON)

*Au Peuple de l'Etat de New York :*

A quel moyen, dès lors, aurons-nous enfin recours pour maintenir dans la pratique cette division nécessaire du pouvoir entre les différents départements que la Constitution établit ? La seule réponse qui puisse être donnée, c'est que, puisque tous les modes extérieurs se trouvent être impuissants, le vice doit être écarté en aménageant la structure extérieure du gouvernement de telle sorte que ses diverses parties constituantes puissent, par leur rapport réciproque, servir à maintenir chacune des autres dans sa place légitime. Sans entreprendre de développer pleinement cette idée importante, je présenterai un petit nombre d'observations générales, qui pourront peut-être la placer mieux en lumière, et nous mettre à même de former un jugement plus correct des principes et de la structure du gouvernement proposé par la Convention.

pour donner une base sérieuse à cet exercice sé-

tous les autres points de vue serait absolument normal. Mais la garantie sérieuse contre une concentration progressive des différents pouvoirs dans le même département, c'est de donner à ceux qui administrent chaque département les moyens constitutionnels nécessaires et un intérêt personnel pour résister aux empiétements des autres. Les moyens de défense doivent être, dans ce cas, comme dans tous les autres, proportionnés aux dangers d'attaque. Il faut opposer l'ambition à l'ambition, et l'intérêt de l'homme doit être lié aux droits constitutionnels de la place. C'est peut-être une critique de la nature humaine, que ces moyens soient nécessaires pour contrôler les élus du gouvernement. Mais qu'est le gouvernement lui-même sinon le plus grand critique de la nature humaine ? Si les hommes étaient des anges, il ne serait pas besoin de gouvernement; si les hommes étaient gouvernés par des anges, il ne faudrait aucun contrôle extérieur ou intérieur sur le gouvernement. Lorsqu'on fait un gouvernement qui doit être exercé par des hommes sur des hommes, la grande difficulté est la suivante : il faut d'abord mettre le gouvernement en état de contrôler les gouvernés, il faut ensuite l'obliger à se contrôler lui-même. La dépendance vis-à-vis du peuple est, sans doute, le premier contrôle sur le gouvernement; mais l'expérience a montré la nécessité de précautions complémentaires.

Le système, qui consiste à suppléer par l'opposition et la rivalité des intérêts à l'absence de sentiments meilleurs, se retrouve dans tout le cours des affaires humaines, publiques et privées. Nous le voyons particulièrement mis en pratique dans toutes les distributions inférieures des pouvoirs où l'on s'attache constamment à diviser et à combiner

les différentes fonctions, de manière que chacune soit un frein pour l'autre, et que les intérêts privés de chaque individu soient une sentinelle pour les droits publics. Ces inventions de la prudence ne sont pas moins nécessaires dans la distribution des suprêmes pouvoirs de l'Etat.

Mais il n'est pas possible de donner à chaque pouvoir une autorité égale pour sa propre défense. Dans un gouvernement républicain, l'autorité législative prédomine nécessairement. Le remède à cet inconvénient est de diviser la législature en plusieurs branches; et de les rendre, par la différence du mode d'élection et de leurs principes d'action, aussi étrangers l'une à l'autre, que le permettent des fonctions communes et leur dépendance commune vis-à-vis de la nation. Il peut même être nécessaire de se mettre en garde, par de nouvelles précautions, contre le danger des usurpations. De moins que l'influence de l'autorité législative exige qu'elle soit ainsi divisée, de même la faiblesse de l'exécutif peut demander, à l'inverse, qu'il soit fortifié. Un veto absolu sur la législature semble, à première vue, être l'arme la plus naturelle pour la défense du magistrat exécutif. Mais l'usage en pourrait être à la fois dangereux et insuffisant. Dans les circonstances ordinaires, il pourrait n'être pas exercé avec la fermeté nécessaire, et, dans les occasions extraordinaires, on pourrait en faire un abus perfide. Ce défaut du veto absolu ne peut-il être suppléé par l'établissement, entre le département le plus faible et la plus faible branche du département plus fort, d'une certaine union qui pousserait cette dernière à soutenir les droits constitutionnels du premier sans trop abandonner les droits de son propre département ? Si les principes sur lesquels sont fondées ces observations sont justes, comme je le crois, et si on les ap-

très improbable, sinon impossible, une combinaison injuste de la majorité. La première méthode existe dans tous les gouvernements qui possèdent une autorité héréditaire ou qui s'est nommée elle-même. Mais il n'y a là, à tout prendre, qu'une garantie précaire ; c'est qu'en effet un pouvoir indépendant de la nation peut favoriser les projets injustes de la majorité, aussi bien que défendre les intérêts légitimes de la minorité ; parfois même il peut opprimer les deux partis. La république fédérale des États-Unis offre un exemple de la seconde méthode. En même temps que toute autorité dans ce gouvernement découlera et dépendra de la nation, la nation elle-même sera divisée en un si grand nombre de parties, d'intérêts et de classes de citoyens, que les droits des individus ou de la minorité seront peu menacés par les combinaisons intéressées de la majorité. Dans un gouvernement, les droits civils doivent être défendus de la même manière que les droits religieux. Le moyen, c'est la multiplicité des intérêts dans un cas, et dans l'autre la multiplicité des sectes. Le degré de protection dans les deux cas dépendra du nombre des intérêts et des sectes ; et l'on peut présumer que cela dépend de l'étendue du pays et du nombre d'habitants compris sous le même gouvernement. Cette considération doit recommander loyalement le système fédéral à tous les amis sincères et intelligents du gouvernement républicain, puisqu'elle prouve que si le territoire de l'Union venait à être divisé en confédérations moins étendues, ou en États, cette division faciliterait d'autant les combinaisons oppressives de la majorité ; la plus puissante sauvegarde qui puisse exister pour les droits individuels sous une forme républicaine serait diminuée, et, par suite, la stabilité et l'indépendance de quelque membre du gouvernement, — la

plique comme critérium aux Constitutions des différents États et à la Constitution fédérale, ou verra que si cette dernière n'est pas absolument d'accord avec eux, les premières sont encore plus éloignées d'offrir ce témoignage.

Il est, en outre, deux considérations particulièrement applicables au système fédéral de l'Amérique, et qui placent ce système sous un jour très intéressant.

*Premièrement.* — Dans une république unitaire, toute l'autorité déléguée par le peuple est soumise à l'administration d'un seul gouvernement ; et l'on se met en garde contre les usurpations par une division du gouvernement en départements distincts et séparés. Dans la république composée d'Amérique, le pouvoir délégué par le peuple est tout d'abord partagé entre les deux gouvernements distincts ; et ensuite la portion assignée à chacun d'eux est subdivisée entre des départements distincts et séparés. De là résulte une double sécurité pour les droits du peuple. Les différents gouvernements se contrôleront les uns les autres, en même temps que chacun se contrôlera lui-même.

*En second lieu,* il est de grande importance dans une république, non seulement de garantir la nation contre la tyrannie de ses chefs, mais encore de défendre une partie de la nation contre l'injustice de l'autre partie. Il existe nécessairement des intérêts divers dans les différentes classes de citoyens. Si la majorité est unie par un intérêt commun, les droits de la minorité seront en péril. Il n'y a que deux manières pour parer à ce danger : la première est de créer dans la nation une volonté indépendante de la majorité, c'est-à-dire de la nation elle-même ; la seconde, c'est de faire entrer dans la nation assez de classes différentes de citoyens pour rendre

seule autre garantie. — devraient être augmentées en proportion. La justice est la fin du gouvernement, c'est la fin de toute société civile. Elle a toujours été et sera toujours le but poursuivi jusqu'à ce que ce but soit atteint, ou que la liberté soit perdue à sa poursuite. Dans une société où la faction la plus puissante peut aisément se réunir et opprimer la plus faible, on peut dire que l'anarchie règne aussi bien que dans l'état de nature, où l'individu plus faible n'est point à l'abri de la violence du plus fort; et de même que, dans l'état de nature, les individus les plus forts eux-mêmes sont contraints, par l'incertitude de leur condition, à se soumettre à un gouvernement qui protège les faibles, ainsi qu'eux-mêmes; de même, dans un gouvernement anarchique, les mêmes motifs conduiront peu à peu les factions ou les partis les plus puissants à souhaiter un gouvernement qui protège tous les partis, les faibles et les forts. On ne peut guère douter que si l'Etat de Rhode-Island était séparé de la Confédération et livré à lui-même, l'incertitude des droits, sous un gouvernement populaire restreint dans un si petit espace, ne fût tellement manifestée par les injustices répétées de majorités factieuses, qu'à la fin un pouvoir entièrement indépendant du peuple ne fût bientôt appelé par la voix des factieux mêmes dont la mauvaise administration en aurait fait sentir la nécessité. Dans la vaste république des Etats-Unis, et au milieu de la grande variété des intérêts, des partis et des sectes qu'elle contient, une coalition de la majorité de la nation tout entière aura rarement lieu pour d'autres motifs que la justice et l'intérêt général; et comme la minorité aura moins à craindre de la volonté de la majorité, on aura moins de prétexte aussi d'établir des garanties pour cette minorité par l'introduction dans le gouverne-

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ment d'une volonté indépendante de la majorité, ou, en d'autres termes, d'une volonté indépendante de la nation elle-même. Il est certain et non moins important, bien qu'on l'ait contesté, que plus une société est étendue, pourvu que ce soit dans une sphère pratique, plus elle est en état de se gouverner elle-même. Et heureusement pour la cause républicaine, la sphère pratique peut être portée jusqu'à une immense étendue, par une modification et une combinaison judicieuses du principe fédéral.

PUBLIUS.

## *Constitution des États-Unis*

[Les passages soulignés ont été modifiés ou affectés par des amendements]

Nous, le peuple des États-Unis, afin de former une union plus parfaite, d'établir la justice, d'assurer la tranquillité intérieure, de pourvoir à la défense commune, de développer le bien-être général, et d'assurer à nous-mêmes et à notre postérité les bienfaits de la liberté, ordonnons et établissons la présente Constitution pour les États-Unis d'Amérique.

### Article I

#### Section 1.

Tous les pouvoirs législatifs accordés par la présente Constitution seront attribués à un Congrès des États-Unis, qui se composera d'un Sénat et d'une Chambre des représentants.

#### Section 2.

[1] La Chambre des représentants sera composée de membres choisis tous les deux ans par le peuple des divers États, et les électeurs dans chaque État devront posséder les qualifications requises des électeurs de la branche la plus nombreuse de la législature de l'État.

[2] Nul ne pourra être représentant s'il n'a atteint l'âge de vingt-cinq ans, s'il n'est depuis sept ans citoyen des États-Unis, et s'il ne réside, au moment de son élection, dans l'État où il est élu.

## *The Constitution of the United States*

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

### Article I

#### Section 1.

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

#### Section 2.

[1] The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

[2] No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[3] Les représentants et les impôts directs seront répartis entre les différents États qui pourront faire partie de l'Union, proportionnellement à leur population, laquelle sera déterminée en ajoutant au nombre total des personnes libres, y compris celles liées à un service pour un nombre donné d'années, et à l'exclusion des Indiens non soumis à l'impôt, les trois cinquièmes de toutes les autres personnes. (Note : modifié par la Section 2 de l'XIV<sup>e</sup> Amendement.) Le recensement se fera dans les trois ans qui suivront la première réunion du Congrès des États-Unis et, par la suite, tous les dix ans de la manière que la loi prescrira. Le nombre des représentants ne pourra pas excéder un pour trente mille habitants, mais chaque État aura au moins un représentant; et jusqu'à ce que le premier recensement soit effectué, l'État du New Hampshire aura le droit d'être trois [représentants], le Massachusetts huit, le Rhode Island et les plantations de Providence un, le Delaware cinq, l'État de New York six, le New Jersey quatre, la Pennsylvanie huit, le Delaware un, le Maryland six, la Virginie dix, la Caroline du Nord cinq, la Caroline du Sud cinq, et la Géorgie trois.

[4] Lorsque des vacances surviendront dans la représentation de l'un quelconque des États, l'autorité exécutive de celui-ci procédera à des élections pour y pourvoir.

[5] La Chambre des représentants désignera son président et ses autres agents; et elle aura, seule, le pouvoir de mise en accusation (*impeachment*).

## Section 3.

[1] Le Sénat des États-Unis sera composé de deux sénateurs par État, choisis par la législature de chacun (Note : modifié par le XVII<sup>e</sup> Amendement), pour six ans; et chaque sénateur aura une voix.

[2] Immédiatement après qu'ils se seront assemblés à la suite de leur première élec-

[3] Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

[4] When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writts of Election to fill such Vacancies.

[5] The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

## Section 3.

[1] The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof for six Years; and each Senator shall have one Vote.

[2] Immediately after they shall be assembled in Consequence of the first Election, they

tion, les sénateurs seront répartis, aussi également que possible, en trois classes. Les sièges des sénateurs de la première classe seront vacants à l'expiration de la seconde année, ceux de la seconde classe à l'expiration de la quatrième, et ceux de la troisième classe à l'expiration de la sixième, de telle sorte qu'un tiers [des sièges] soit pourvu tous les deux ans; et si, au cours de l'intervalle entre les sessions de la législature d'un État, des vacances viennent à se produire par démission ou autrement, l'exécutif de cet État pourra procéder à des nominations provisoires jusqu'à la réunion suivante de la législature, qui pourvoira alors à ces vacances. (Note : modifié par le XVII<sup>e</sup> Amendement.)

[3] Nul ne pourra être sénateur s'il n'a atteint l'âge de trente ans, s'il n'est depuis neuf ans citoyen des États-Unis, et s'il ne réside, au moment de son élection, dans l'État pour lequel il est désigné.

[4] Le Vice-Président des États-Unis présidera le Sénat, mais sans droit de vote, à moins de partage égal des voix.

[5] Le Sénat désignera ses autres agents, ainsi qu'un Président *pro tempore* pour remplacer le Vice-Président soit en son absence, soit si celui-ci vient à exercer les fonctions de Président des États-Unis.

[6] Le Sénat aura, seul, le pouvoir de juger toutes les mises en accusation (*impeachment*). Quand il siègera à cet effet, ses membres prêteront serment ou feront une déclaration solennelle. Lorsqu'il jugera le Président des États-Unis, [le Sénat] sera présidé par le Président de la Cour suprême; et nul ne pourra être déclaré coupable sans l'accord des deux tiers des membres présents.

[7] Dans toutes les affaires de mise en accusation, la sentence ne pourra pas excéder la destitution, assortie de l'incapacité de détenir et d'exercer toute charge honorifique, ou

shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

[3] No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

[4] The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

[5] The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

[6] The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

[7] Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the

et, à la demande d'un cinquième des présents, les oui et les non des membres des deux chambres sur n'importe quelle question devront être consignés au procès-verbal.

[4] Pendant la session du Congrès, aucune chambre ne pourra, sans le consentement de l'autre, s'ajourner plus de trois jours, ou se transporter dans tout autre lieu que celui où siègent les deux chambres.

Section 6.

[1] Les sénateurs et les représentants recevront pour leurs services une indemnité qui sera fixée par la loi et payée par le Trésor des États-Unis. Dans toute affaire judiciaire, sauf celles où ils seraient mis en cause pour trahison, crime, ou trouble [grave] à l'ordre public, [les sénateurs et les représentants] ne pourront être arrêtés durant leur présence à la session de leurs chambres respectives, ni pendant qu'ils s'y rendent ou qu'ils en reviennent; et pour n'importe quel discours ou débat qu'ils auraient tenu dans l'une ou l'autre des deux chambres, ils ne pourront être [judiciairement] interrogés dans un autre lieu.

[2] Pendant la durée de son mandat, aucun sénateur ou représentant ne pourra être nommé à une fonction civile placée sous l'autorité des États-Unis, qui aurait été créée ou dont le traitement aurait été augmenté au cours de cette période; et aucune personne exerçant une quelconque fonction sous l'autorité des États-Unis ne pourra devenir membre de l'une ou l'autre des deux chambres pendant la durée de ses fonctions.

Section 7.

[1] Toutes les propositions de lois tendant à lever des recettes publiques devront émaner de la Chambre des représentants, mais le Sénat pourra consentir ou proposer des amendements, comme pour les autres propositions de lois.

Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

[4] Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6.

[1] The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

[2] No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7.

[1] All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

charge de confiance, ou charge rémunérée, pour le compte des États-Unis. Toutefois, la partie déclarée coupable sera tenue responsable et sujette à mise en accusation, procès, jugement et punition, conformément au droit.

Section 4.

[1] Les sénateurs et les représentants seront élus aux époques, dans les lieux et selon les formalités prescrits par la législation de chaque État; mais le Congrès pourra, à tout moment par une loi, établir ces formalités, ou modifier [celles qui existent], à l'exception des lieux où sont désignés les sénateurs.

[2] Le Congrès se réunira au moins une fois par an, et cette réunion aura lieu le premier lundi de décembre (Note: modifiée par la Section 2 du XII<sup>e</sup> Amendement), à moins que [le Congrès] ne fixe, par une loi, un jour différent.

Section 5.

[1] Chaque chambre sera juge des élections, du nombre des voix obtenues par ses membres et de leurs qualifications, et dans chacune d'entre elles, le quorum pour débiter sera fixé à la majorité [de ses membres]; mais, un nombre inférieur pourra s'ajourner d'un jour à l'autre, et être autorisé à requérir [par la force] la présence des membres absents, selon les modalités et les pénalités que chaque chambre pourra arrêter.

[2] Chaque chambre pourra établir son règlement intérieur, punir ses membres pour manquement à la discipline intérieure, et, à la majorité des deux tiers, prononcer l'expulsion de l'un d'entre eux.

[3] Chaque chambre tiendra procès-verbal de ses séances, et en assurera la publication régulière à l'exception des parties qui, selon son jugement, devront rester secrètes;

United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4.

[1] The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.

[2] The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5.

[1] Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

[2] Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

[3] Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and

[2] Chaque proposition de loi, qui aura été adoptée par la Chambre des représentants et par le Sénat, devra, avant d'acquiescer force de loi, être présentée au Président des États-Unis; si celui-ci l'approuve, il y apposera sa signature; sinon, il la renverra, avec ses objections, à la chambre dont elle émane, laquelle devra consigner l'intégralité desdites objections dans son procès-verbal et entreprendre de l'examiner à nouveau. Si, après nouvel examen, les deux tiers des membres de ladite chambre s'accorde pour reconformer la proposition de loi, celle-ci sera envoyée, accompagnée des objections [présidentielles], à l'autre chambre qui devra la réexaminer de la même manière, et si la proposition est approuvée par les deux tiers des membres de cette chambre, la proposition deviendra loi. Mais, dans tous les cas, les votes dans chacune des deux chambres seront comptés par oui ou par non, et le nombre des personnes votant pour ou contre la proposition sera respectivement consigné au procès-verbal de chaque chambre. Lorsque, dans les dix jours (dimanches non compris) qui suivent la présentation d'une proposition de loi au Président, celui-ci ne l'aura pas retourné à l'une des deux chambres, la proposition deviendra loi, de la même manière que si le Président l'avait signée, à moins qu'en s'ajournant le Congrès n'en empêche le renvoi, auquel cas la proposition ne deviendra pas loi.

[3] A l'exception des questions d'ajournement, chaque ordre, résolution, ou vote pour lesquels l'accord du Sénat et de la Chambre des représentants est nécessaire, devra être présenté au Président des États-Unis; et aucun de ces actes ne pourra prendre effet avant d'avoir été approuvé par ce dernier ou, à défaut, avant d'avoir été à nouveau approuvé par les deux tiers des membres du Sénat et de la Chambre des représentants, selon les mêmes règles et les mêmes conditions que celles qui sont prévues pour les propositions de lois.

[2] Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

[3] Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be re-passed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

## Section 8.

[1] Le Congrès aura le pouvoir d'asseoir et de percevoir des taxes fiscales, droits [de douane], impôts [indirects] et excises, de payer les dettes et de pourvoir à la défense commune et au bien-être général des États-Unis; mais tous les droits [de douane], impôts [indirects] et excises devront être uniformes sur tout le territoire des États-Unis;

[2] De faire des emprunts sur le crédit des États-Unis;

[3] De réglementer le commerce avec les nations étrangères, entre les divers États, et avec les tribus indiennes;

[4] D'établir une loi uniforme en matière de naturalisation, et des lois uniformes concernant les faillites sur tout le territoire des États-Unis;

[5] De battre monnaie, d'en réglementer la valeur et celle des monnaies étrangères, et de déterminer l'éalon des poids et mesures;

[6] D'assurer la répression de la contrefaçon des titres et de la monnaie en circulation des États-Unis;

[7] D'établir des bureaux de postes et des routes de poste;

[8] De promouvoir le progrès de la science et des arts utiles, en garantissant aux auteurs et aux inventeurs, pour une durée limitée, un droit exclusif sur leurs écrits et découvertes respectifs;

[9] De constituer des tribunaux subordonnés à la Cour suprême;

[10] De définir et punir les actes de piraterie et les crimes commis en haute mer, et les violations du droit des gens;

[11] De déclarer la guerre, d'accorder des lettres de marque et de représailles, et d'établir des règles concernant les prises sur terre et sur mer;

## Section 8.

[1] The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

[2] To borrow Money on the credit of the United States;

[3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

[4] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

[5] To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

[6] To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

[7] To establish Post Offices and post Roads;

[8] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

[9] To constitute Tribunals inferior to the supreme Court;

[10] To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

[11] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.



[12] De lever et d'entretenir des armées, mais aucune affectation de crédits à cet usage ne se fera pour une durée supérieure à deux ans ;

[13] De créer et d'entretenir une marine de guerre ;

[14] D'établir des règles pour le commandement et la discipline des forces terrestres et navales ;

[15] De pourvoir à la convocation de la milice pour faire exécuter les lois de l'Union, réprimer les insurrections et repousser les invasions ;

[16] De pourvoir à l'organisation, à l'armement et à la discipline de la milice, et au commandement de la partie de celle-ci qui viendrait à être placée au service des États-Unis, sous réserve du droit des États de protéger, pour leur part, à la nomination des officiers et à l'entraînement de la milice selon les règles de discipline prescrites par le Congrès ;

[17] D'exercer le pouvoir législatif exclusif en toutes matières sur tel district (n'excédant pas dix milles carrés) qui, après cession de certains États et acceptation du Congrès, pourra devenir le siège du gouvernement des États-Unis, et d'exercer le même pouvoir sur tous les lieux qui seront achetés à l'État sur le territoire duquel ils sont situés et après consentement de sa législature, pour l'érection de forts, magasins, arsenaux, chantiers navals et autres bâtiments utiles à l'Union ; — et

[18] De faire toutes lois qui seront nécessaires et appropriées pour mettre à exécution les pouvoirs ci-dessus énumérés, et tous autres pouvoirs conférés par la présente Constitution au gouvernement des États-Unis ; à l'un quelconque de ses départements ou de ses agents.

#### Section 9.

[1] L'immigration ou l'importation de telles personnes que l'un quelconque des États existants aujourd'hui jugera opportun d'admettre ne sera pas interdite par le Congrès

[12] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years.

[13] To provide and maintain a Navy;

[14] To make Rules for the Government and Regulation of the land and naval Forces;

[15] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

[16] To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

[17] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings: — And

[18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

#### Section 9.

[1] The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one

avant l'année mil huit cent huit, mais une taxe ou un droit [indirect] n'excédant pas dix dollars par tête pourra être prélevé sur cette importation.

[2] Le privilège de l'ordonnance d'*habeas corpus* ne sera pas suspendu, sauf lorsqu'en cas de rébellion ou d'invasion l'ordre public l'exigerait.

[3] Aucune loi emportant condamnation sans jugement ou effet rétroactif ne sera adoptée.

[4] Aucune capitation, ni aucun autre impôt direct ne sera prélevé, si ce n'est en proportion du recensement ou dénombrement ci-avant prévu. (Note : voir le *XVI<sup>e</sup> Amendement*.)

[5] Aucune taxe ou droit ne sera prélevé sur les articles exportés d'un quelconque État

[6] Aucune préférence ne sera accordée par un quelconque règlementation commerciale ou fiscale aux ports d'un État sur ceux d'un autre ; et aucun navire à destination ou en provenance d'un État ne sera obligé de se faire enregistrer, de passer en douane ou de payer des droits dans un autre.

[7] Aucun argent ne sera tiré sur le Trésor public, si ce n'est en vertu de crédits ouverts par la loi ; et un état régulier et un compte de toutes les recettes et de toutes les dépenses de deniers publics seront périodiquement publiés.

[8] Aucun titre de noblesse ne sera conféré par les États-Unis ; et aucune personne qui tiendra d'eux une charge rémunérée ou de confiance ne pourra, sans le consentement du Congrès, accepter quelque présent, émoulement, fonction ou titre que ce soit, de quelque roi, prince, ou État étranger.

#### Section 10.

[1] Aucun État ne pourra se joindre à un traité, à une alliance, à une confédération ; délivrer des lettres de marque et de représailles ; battre monnaie ; émettre du papier-

thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

[2] 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.

[3] No Bill of Attainder or ex post facto Law shall be passed.

[4] No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

[5] No Tax or Duty shall be laid on Articles exported from any State.

[6] No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another, nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

[7] No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

[8] No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

#### Section 10.

[1] No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver

monnaie ; donner cours légal, pour le paiement des dettes, à autre chose que la monnaie d'or et d'argent ; adopter des lois portant condamnation sans jugement, ou emportant effet rétroactif, ou portant atteinte aux obligations contractuelles, ou conférant des titres de noblesse.

[2] Aucun État ne pourra, sans le consentement du Congrès, lever des impôts [indirects] ou des droits sur les importations ou les exportations, à l'exception de ce qui peut être absolument nécessaire à l'exécution de ses lois d'inspection ; et le produit net de tous les droits et impôts [indirects] qui viendrait à être prélevés par l'un quelconque des États sur les importations et exportations sera reversé au Trésor public des États-Unis, et le Congrès aura le pouvoir de contrôler et d'annuler toutes les lois de cette sorte.

[3] Aucun État ne pourra, sans le consentement du Congrès, lever des droits de tonnage, entretenir des troupes ou des navires de guerre en temps de paix, conclure un quelconque accord ou pacte avec un autre État, ou avec une puissance étrangère, ou entrer en guerre, à moins qu'il ne soit effectivement envahi ou mis en présence d'un danger imminent au point de ne souffrir aucun délai.

#### Article II

##### Section 1.

[1] Le pouvoir exécutif sera confié à un Président des États-Unis d'Amérique. Il exercera ses fonctions pour un mandat de quatre ans et, conjointement avec le Vice-Président, désigné pour un mandat de même durée, il sera élu de la manière suivante :

Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

[2] No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

[3] No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

#### Article II

##### Section 1.

[1] The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

[2] Chaque État devra désigner, selon les modalités arrêtées par sa législature, un nombre d'électeurs égal au nombre total de sénateurs et de représentants auquel il a droit au Congrès ; mais, aucun sénateur ou représentant, ni aucune personne exerçant une charge de confiance ou une charge rémunérée pour le compte des États-Unis ne pourra être nommé comme électeur.

[3] Les électeurs se réuniront dans leurs États respectifs, et éliront deux personnes, dont l'une au moins ne devra pas habiter le même État qu'eux. Ils dresseront une liste de toutes les personnes ayant recueilli des voix, et du nombre de voix qu'elles auront chacune obtenues ; [puis] ils signeront, authentifieront, et transmettront ladite liste, sous scellés, au siège du gouvernement des États-Unis, à l'adresse du président du Sénat. En présence des membres du Sénat et de la Chambre des représentants, celui-ci ouvrira toutes les listes certifiées et il sera procédé au décompte des voix. La personne ayant obtenu le plus grand nombre de voix sera désignée Président [des États-Unis] si le nombre de voix [obtenues par elle] représente une majorité du nombre total des électeurs désignés ; et si plusieurs personnes ont obtenu cette majorité et ont un nombre égal de voix, la Chambre des représentants procédera immédiatement à un scrutin pour élire l'une d'entre elles comme Président ; et si aucun d'entre elles n'obtient une majorité, ladite Chambre élira alors le Président selon les mêmes modalités parmi les cinq personnes les mieux placées sur la liste. Mais, pour l'élection du Président, les votes seront comptés par État, la représentation de chaque État ayant une voix ; le quorum requis à cette fin sera constitué par un ou plusieurs représentants des deux tiers des États, et la majorité de tous les États sera nécessaire pour un choix. Dans tous les cas une fois le Président élu, la personne ayant obtenu le plus grand nombre de suffrages

[2] Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[3] The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each, which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall in the Presence of the Senate and House of Representatives open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed, and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President, and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote. A quorum for this purpose shall consist of a Member or Members from two-thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person

Section 2.  
 [1] Le Président sera commandant en chef de l'armée et de la marine des États-Unis, et de la milice des divers États quand celle-ci sera appelée au service actif des États-Unis ; il pourra requérir l'opinion, par écrit, des principaux agents [supérieurs] de chacun des départements du pouvoir exécutif, sur n'importe quel sujet concernant les obligations de leurs charges respectives, et il aura le pouvoir d'accorder des remises de peines et il exercera le droit de grâce, sauf dans les affaires de destination (*imprachment*).  
 [2] Il aura le pouvoir, sur l'avis et avec le consentement du Sénat, de conclure des traités, sous réserve de leur approbation par les deux tiers des sénateurs présents ; et il nommera les ambassadeurs, les autres ministres publics et les consuls, les juges de la Cour suprême et tous les autres agents des États-Unis, dont la nomination n'est pas autrement prévue par la présente Constitution, et dont [les emplois] seront établis par la loi ; mais le Congrès pourra, s'il le juge opportun, investir le Président seul, les cours de justice ou les chefs de départements, de la nomination de tels agents inférieurs.  
 [3] Le Président aura le pouvoir de pourvoir à toutes les vacances qui viendraient à se produire dans l'intervalle des sessions du Sénat, en accordant des commissions qui expirent à la fin de la session suivante.

Section 3.  
 [1] Il fournira périodiquement au Congrès des informations sur l'état de l'Union, et il recommandera à son examen les mesures qu'il estime nécessaires et opportunes ; il pourra, en cas de circonstances exceptionnelles, convoquer les deux chambres, ou l'une d'entre elles [seulement], et en cas de désaccord entre elles sur leurs dates d'ajournement, il pourra les ajourner à tel moment qu'il estimera opportun ; il recevra les ambassadeurs

Section 2.  
 [1] The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Imprachment.  
 [2] He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.  
 [3] The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3.  
 He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other

des électeurs sera désignée Vice-Président. Mais, s'il reste deux ou plusieurs personnes ayant le même nombre de voix, le Sénat élira parmi elles le Vice-Président. (Note : modifié par le XII<sup>e</sup> Amendement.)

[4] Le Congrès pourra fixer la période où les électeurs seront choisis et le jour où ils devront voter ; lequel jour sera le même sur tout le territoire des États-Unis.

[5] Nul ne sera éligible aux fonctions de Président s'il n'est citoyen de naissance ou citoyen des États-Unis au moment de l'adoption de la présente Constitution, [et] s'il n'a trente-cinq ans révolus et n'a été résident des États-Unis pendant quatorze ans.

[6] En cas de destitution, décès, démission, ou incapacité du Président à s'acquitter des pouvoirs et des devoirs de sa charge, ceux-ci seront dévolus au Vice-Président ; et pour le cas où le Président et le Vice-Président seraient, tous les deux, frappés de destitution, décès, démission ou incapacité, le Congrès aura compétence pour désigner, par une loi, l'agent [des États-Unis] qui devra alors occuper les fonctions de Président et qui les exercera jusqu'à ce que l'incapacité ait été levée ou qu'un Président ait été élu. (Note : modifié par le XXV<sup>e</sup> Amendement.)

[7] Le Président recevra, à échéances fixes, une indemnité pour ses services qui ne pourra être ni augmentée, ni diminuée en cours de mandat ; et durant cette même période, il ne percevra aucun autre émoulement des États-Unis, ou de l'un des États.

[8] Avant d'entrer en fonctions, il prêtera le serment ou fera la déclaration solennelle qui suit : « Je jure (ou déclare) solennellement que je remplirai fidèlement les fonctions de Président des États-Unis et que, dans toute la mesure de mes moyens, je sauvegarderai, protégerai et défendrai la Constitution des États-Unis. »

having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

[4] The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

[5] No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

[6] In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

[7] The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

[8] Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: — "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

et autres ministres publics ; il veillera à ce que les lois soient fidèlement exécutées, et il commissionnera tous les agents des États-Unis.

## Section 4.

Le Président, le Vice-Président et tous les agents civils [supérieurs] des États-Unis seront destitués de leurs fonctions sur mise en accusation (*impeachment*), et condamnation pour trahison, corruption, ou autres hauts crimes et délits.

## Article III

## Section 1.

Le pouvoir judiciaire des États-Unis sera dévolu à une Cour suprême et à telles cours inférieures que le Congrès pourra, le cas échéant, ordonner et établir. Les juges de la Cour suprême et des cours inférieures conserveront leurs charges tant qu'ils auront une bonne conduite, et recevront, à échéances fixes, une indemnité pour leurs services qui ne sera pas diminuée tant qu'ils resteront en fonction.

## Section 2.

[1] Le pouvoir judiciaire s'étendra à toutes les affaires, en droit et en équité, survenues sous l'empire de la présente Constitution, des lois des États-Unis, des traités conclus, ou qui seraient conclus, sous leur autorité ; — à toutes les affaires concernant les ambassadeurs, les autres ministres publics et les consuls ; — à toutes les affaires d'amirauté et de juridiction maritime ; — aux différends dans lesquels les États-Unis seront partie ; — aux différends entre deux ou plusieurs États ; — entre un État et les citoyens d'un autre État (*Note: modifié par le XI<sup>e</sup> Amendement*) ; — entre citoyens de diffé-

rents États ; — entre citoyens d'un même État réclamant des terres en vertu de concessions d'autres États, et entre un État, ou ses citoyens et des États, citoyens ou sujets étrangers.

[2] Dans toutes les affaires concernant les ambassadeurs, les autres ministres publics et les consuls, et celles dans lesquelles un État sera partie, la Cour suprême aura la juridiction du premier degré. Dans toutes les autres affaires sus-mentionnées, elle aura juridiction d'appel, à la fois pour le droit et pour le fait, avec telles exceptions et sous telles règles que le Congrès aura établies.

[3] Le jugement de tous les crimes, sauf dans les procès en destitution, sera effectué par un jury ; et ce jugement aura lieu dans l'État où lesdits crimes auront été commis ; mais, lorsqu'ils n'auront été commis dans aucun État particulier, le jugement aura lieu à tel endroit ou tels endroits que le Congrès pourra avoir déterminés par une loi.

## Section 3.

[1] La trahison envers les États-Unis ne consistera que dans l'acte de s'armer contre eux, ou celui de s'allier à leurs ennemis en leur donnant aide et facilités. Nul ne sera convaincu de trahison, à moins de la déposition de deux témoins sur le même acte patent, ou de son propre aveu en audience publique.

[2] Le Congrès aura le pouvoir de fixer la peine de la trahison, mais aucune condamnation de ce chef ne pourra frapper la postérité du coupable, ni emporter confiscation de biens, sauf pendant la vie du condamné.

Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[2] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

[3] The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

## Section 3.

[1] Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

[2] The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.

## Section 4.

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

## Article III

## Section 1.

The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

## Section 2.

[1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between

## Article IV

## Section 1.

Pleine foi et crédit seront donnés, dans chaque État, aux actes publics, procès-verbaux et procédures judiciaires de tout autre État. Et le Congrès pourra, par des lois générales, prescrire la manière suivant laquelle de tels actes, procès-verbaux et procédures seront prouvés, ainsi que leurs effets.

## Section 2.

(1) Les citoyens de chaque État auront droit à tous les privilèges et immunités des citoyens dans les divers États.

(2) Toute personne accusée dans un État de trahison, félonie ou autre crime, qui fuira la justice et sera trouvée dans un autre État, devra, sur la demande de l'autorité exécutive de l'État d'où elle a fui, être livrée pour être ramenée dans l'État ayant juridiction sur le crime.

(3) Aucune personne tenue au service ou au travail dans un État, en vertu des lois de ce dernier, s'échappant dans un autre, ne sera, en conséquence d'aucune loi ou règlement de ce dernier, libérée de ce service ou travail, mais elle sera livrée sur la demande de la partie à laquelle ce service ou travail peut être dû. (Note : modifié par le XIII<sup>e</sup> Amendement.)

## Section 3.

(1) De nouveaux États peuvent être admis par le Congrès dans l'Union ; mais aucun nouvel État ne sera formé ou érigé à l'intérieur de la juridiction de l'un quelconque des autres États ; ni aucun État ne sera formé par la réunion de deux ou de plusieurs États, ou de parties d'États, sans le consentement des législatures des États intéressés, aussi bien que du Congrès.

## Article IV

## Section 1.

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

## Section 2.

(1) The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

(2) A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

(3) No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

## Section 3.

(1) New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

(2) Le Congrès aura le pouvoir de disposer du territoire ou de toute autre propriété appartenant aux États-Unis, et de faire à ce sujet toutes lois et tous règlements nécessaires, et rien dans la présente Constitution ne sera interprété de manière à porter préjudice aux réclamations des États-Unis, ou [à celles] d'un quelconque État particulier.

## Section 4.

Les États-Unis garantiront à chaque État de l'Union une forme républicaine de gouvernement, et ils protégeront chacun d'entre eux contre l'invasion ; et, sur la demande de la législature, ou de l'exécutif (lorsque la législature ne pourra être réunie), contre la violence intérieure.

## Article V

Le Congrès, toutes les fois que les deux tiers des deux chambres l'estimeront nécessaires, proposera des amendements à la présente constitution ou, sur la demande des législatures des deux tiers des divers États, convoquera une convention pour proposer des amendements qui, dans l'un et l'autre cas, seront validés, à tous égards et à toute fin, comme partie intégrante de la présente constitution, lorsqu'ils auront été ratifiés par les législatures des trois quarts des États, ou par des conventions dans les trois quarts d'entre eux, selon que l'un ou l'autre mode de ratification aura été proposé par le Congrès ; à condition que nul amendement qui serait adopté avant l'année nul huit cent huit n'affecte en aucune manière les première et quatrième clauses de la neuvième section de l'article premier ; et qu'aucun État ne soit, sans son consentement, privé de son suffrage égal au Sénat.

(2) The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

## Section 4.

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence.

## Article V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

## Article VI

[1] Toutes dettes contractées et tous engagements pris avant l'adoption de la présente constitution seront aussi valides à l'égard des États-Unis sous l'empire de cette constitution, que sous la Confédération.

[2] La présente Constitution, et les lois des États-Unis qui seront prises pour son application, et tous les traités conclus, ou qui seront conclus, sous l'autorité des États-Unis, seront la loi suprême du pays ; et les juges dans chaque État seront liés de ce fait, nonobstant toute disposition contraire dans la constitution ou les lois de l'un quelconque des États.

[3] Les sénateurs et représentants sus-mentionnés, les membres des diverses législatures d'États, et tous les agents [de rang supérieur] exécutifs et judiciaires, tant des États-Unis que des divers États, seront tenus par serment ou déclaration solennelle de soutenir la présente constitution ; mais aucune profession de foi religieuse ne sera exigée comme condition d'aptitude à quelque fonction ou charge publique de confiance dépendant des États-Unis que ce soit.

## Article VII

La ratification des conventions de neuf États sera suffisante pour la mise en vigueur de la présente constitution entre les États qui l'auront ainsi ratifiée.

Fait en convention du consentement unanime des États présents, le dix-septième

jour de septembre de l'an de grâce mil sept cent quatre-vingt-sept, et de l'indépendance des États-Unis d'Amérique le douzième.

Articles additionnels et amendements à la Constitution des États-Unis d'Amérique, proposés par le Congrès, et ratifiés par les législatures de plusieurs États, conformément au cinquième article de la Constitution originnaire

[L'année indiquée entre crochets est celle de la ratification]

I<sup>er</sup> Amendement [1791]

Le Congrès ne fera aucune loi relativement à l'établissement d'une religion ou en interdisant le libre exercice ; ou en restreignant la liberté de parole ou de la presse ; ou le droit du peuple de s'assembler paisiblement, et d'adresser des pétitions au gouvernement pour une réparation de ses torts.

II<sup>e</sup> Amendement [1791]

Une milice bien réglée étant nécessaire à la sécurité d'un État libre, le droit du peuple de détenir et de porter des armes ne sera pas transgressé.

III<sup>e</sup> Amendement [1791]

Aucun soldat ne sera, en temps de paix, logé dans une maison sans le consentement du propriétaire, ni en temps de guerre, si ce n'est de la manière prescrite par la loi.

Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth.

Articles in Addition to, and Amendment of, the Constitution of the United States of America, Proposed by Congress, and Ratified by the Legislatures of the Several States, Pursuant to the Fifth Article of the Original Constitution

## Amendment I [1791]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## Amendment II [1791]

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.

## Amendment III [1791]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

## Article VI

[1] All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

[2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

[3] The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

## Article VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Done in Convention by the Unanimous Consent of the States present the Seventeenth

IV<sup>e</sup> Amendement [1791]

Le droit des individus d'être garantis dans leurs personnes, domiciles, papiers et effets, contre des perquisitions et saisies déraisonnables ne sera pas violé, et aucun mandat ne sera délivré, si ce n'est pour un motif plausible, soutenu par serment ou déclaration solennelle, ni sans qu'y soient décrits avec précision le lieu à fouiller et les personnes ou choses à saisir.

V<sup>e</sup> Amendement [1791]

Nul ne sera tenu de répondre d'un crime capital ou infamant si ce n'est sur déclaration [spontanée] de mise en accusation (*presentment*) ou acte d'accusation [sur poursuite du procureur] (*indictment*) pris par un grand jury, sauf dans les causes nées dans l'armée de terre et de mer, ou dans la milice lorsqu'elle est en service actif en temps de guerre ou de danger public; nul ne sera exposé pour le même crime à encourir deux fois une menace pour sa vie ou son corps; nul ne sera forcé de témoigner contre lui-même dans aucune affaire criminelle; nul ne sera privé de vie, de liberté ou de propriété sans le bénéfice des protections dues par le droit (*without due process of law*); nulle propriété privée ne sera prise pour usage public sans juste indemnité.

VI<sup>e</sup> Amendement [1791]

Dans toutes les poursuites criminelles, l'accusé aura droit à un jugement rapide et public par un jury impartial de l'État et du district où le crime aura été commis, ce district ayant été préalablement déterminé par la loi, et d'être instruit de la nature et du motif de l'accusation; d'être confronté avec les témoins à charge; de bénéficier d'une procédure obligatoire de citation de témoins à décharge, et d'être assisté d'un conseil pour sa défense.

## Amendment IV [1791]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## Amendment V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## Amendment VI [1791]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

VII<sup>e</sup> Amendement [1791]

Dans les procès de *common law* où la valeur en litige excédera vingt dollars, le droit au jugement par jury sera respecté et aucun fait jugé par un jury ne sera examiné de nouveau dans une cour des États-Unis autrement que selon les règles de la *common law*.

VIII<sup>e</sup> Amendement [1791]

Des cautions excessives ne seront pas exigées, ni des amendes excessives imposées, ni des châtimens cruels et inhabituels infligés.

IX<sup>e</sup> Amendement [1791]

L'énumération, dans la Constitution, de certains droits ne sera pas interprétée de façon à dénier ou diminuer d'autres droits retenus par le peuple.

X<sup>e</sup> Amendement [1791]

Les pouvoirs non délégués aux États-Unis par la Constitution, ni refusés par elle aux États, sont réservés aux États respectivement, ou au peuple.

XI<sup>e</sup> Amendement [1798]

Le pouvoir judiciaire des États-Unis ne sera pas interprété de façon à s'étendre à tout procès en droit ou en équité entamé ou poursuivi contre l'un des États, membre des États-Unis, par des citoyens d'un autre État, ou par des citoyens ou sujets d'un État étranger.

XII<sup>e</sup> Amendement [1804]

Les électeurs se réuniront dans leurs États respectifs et voteront par scrutin pour le Président et le Vice-Président dont l'un au moins ne sera pas habitant du même État qu'eux; ils nommeront sur leurs bulletins la personne pour laquelle ils votent comme Président, et sur des bulletins distincts la personne pour laquelle ils votent comme Vice-

## Amendment VII [1791]

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

## Amendment VIII [1791]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

## Amendment IX [1791]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

## Amendment X [1791]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

## Amendment XI [1798]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

## Amendment XII [1804]

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all

Président, et ils dresseront des listes distinctes de toutes les personnes pour lesquelles on aura voté pour la présidence, et de toutes les personnes pour lesquelles on aura voté pour la vice-présidence, et du nombre de voix obtenues par chacune d'elles, et ils signeront ces listes, les authentifieront, et les transmettront sous scellés au siège du gouvernement des États-Unis, à l'adresse du président du Sénat. — En présence des membres du Sénat et de la Chambre des représentants, celui-ci ouvrira toutes les listes certifiées et il sera procédé au décompte des voix ; — La personne ayant obtenu le plus grand nombre de voix pour la présidence sera désignée Président [des États-Unis] si le nombre de voix [obtenue par elle] représente la majorité du nombre total des électeurs désignés ; et si personne n'obtient une telle majorité, alors, parmi les trois personnes ayant obtenu le plus grand nombre de voix pour la présidence, la Chambre des représentants procédera immédiatement à un scrutin pour élire l'une d'entre elles comme Président. Mais, pour l'élection du Président, les votes seront comptés par État, la représentation de chaque État ayant une voix ; le quorum requis à cette fin sera constitué par un ou plusieurs représentants des deux tiers des États, et une majorité de tous les États sera nécessaire pour un choix. Et si la Chambre des représentants, quand le droit de choisir lui échouera, ne choisit pas un Vice-Président avant le quatrième jour de mars suivant, alors le Vice-Président agira en qualité de Président comme dans le cas du décès ou d'autre incapacité constitutionnelle du Président. (Note: remplacé par la Section 3 du XX<sup>e</sup> Amendement.) La personne ayant obtenu le plus grand nombre de voix pour la vice-présidence sera désignée vice-président si le nombre de voix [obtenue par elle] représente la majorité du nombre total des électeurs désignés ; si personne n'obtient une telle majorité, alors, parmi les deux personnes les mieux placées sur la liste, le Sénat choisira le Vice-Président ; le quorum requis

persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; — the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate

à cette fin sera constitué des deux tiers du nombre total des sénateurs, et une majorité de ce nombre total sera nécessaire pour un choix. Mais aucune personne, déclarée par la Constitution inadmissible aux fonctions de Président des États-Unis, ne sera éligible à celles de Vice-Président.

#### XIII<sup>e</sup> Amendement [1865]

Section 1. Ni esclavage ni servitude involontaire, si ce n'est en punition d'un crime dont le coupable aura été dûment convaincu, n'existeront aux États-Unis ou dans aucun endroit soumis à leur juridiction.

Section 2. Le Congrès aura pouvoir de donner effet au présent article par une législation appropriée.

#### XIV<sup>e</sup> Amendement [1868]

Section 1. Toutes personnes nées ou naturalisées aux États-Unis, et soumises à leur juridiction, sont citoyens des États-Unis et de l'État où elles résident. Aucun État ne fera ou n'appliquera de loi qui restreindrait les privilèges ou immunités des citoyens des États-Unis ; ni ne privera aucune personne de vie, de liberté ou de propriété sans le bénéfice des protections dues par le droit (*without due process of law*) ; ni ne refusera à quiconque relève de sa juridiction l'égalité protection des lois.

Section 2. Les représentants seront répartis entre les divers États proportionnellement à leurs populations respectives, en comptant la totalité des habitants de chaque État, à l'exclusion des Indiens non imposés. Mais, lorsque le droit de voter pour élire les électeurs du Président et Vice-Président des États-Unis, les représentants au Congrès, les agents exécutifs ou judiciaires d'un État, ou les membres de la législature de celui-ci, est dénié à des habitants mâles de cet État, âgés de vingt et un ans (*Note: modifié par la*

shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

#### Amendment XIII [1865]

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

#### Amendment XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; 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.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and



XV<sup>e</sup> Amendement [1870]  
 Section 1. Le droit des citoyens des États-Unis de voter ne sera pas dénié ou restreint ni par les États-Unis, ni par aucun État, pour raison de race, couleur, ou condition antérieure de servitude.

Section 2. Le Congrès aura le pouvoir de donner effet au présent article par une législation appropriée.

XVI<sup>e</sup> Amendement [1913]  
 Le Congrès aura le pouvoir d'établir et de percevoir des impôts sur les revenus, de quelque source qu'ils proviennent, sans répartition parmi les divers États, et sans égard à aucun recensement ou dénombrement.

XVII<sup>e</sup> Amendement [1913]

[1] Le Sénat des États-Unis sera composé de deux sénateurs de chaque État, élus par le peuple de cet État pour six ans ; et chaque sénateur aura une voix. Les électeurs dans chaque État auront les qualités requises pour être électeurs de la branche la plus nombreuse de la législature de l'État.

[2] Quand des vacances se produiront dans la représentation d'un État au Sénat, l'autorité exécutive de cet État procédera à des élections pour y pourvoir, sous réserve de la possibilité de la législature de chaque État de donner à l'exécutif de l'État le pouvoir de procéder à des nominations temporaires jusqu'à ce que le peuple pourvoie aux vacances par élection de la façon que la législature déterminera.

[3] Le présent amendement ne sera pas interprété comme affectant l'élection ou la durée du mandat de tout sénateur choisi avant qu'il ne soit validé en tant que partie [intégrante] de la Constitution.

Section 1 du XXVII<sup>e</sup> Amendement) et citoyens des États-Unis, ou restreint d'une quelconque manière, sauf en cas de participation à une rébellion, ou d'un autre crime, la base de la représentation dudit État sera réduite dans la proportion existant entre le nombre des citoyens mâles visés et le nombre total des citoyens mâles âgés de vingt et un ans.

Section 3. Nul ne sera sénateur ou représentant au Congrès, ou électeur des Président et Vice-Président, ni ne tiendra aucune fonction, civile ou militaire, relevant des États-Unis ou de l'un quelconque des États, qui, ayant préalablement prêté serment, comme membre du Congrès, ou agent [supérieur] des États-Unis, ou membre d'une législature d'État, ou agent exécutif ou judiciaire d'un État, de défendre la Constitution des États-Unis, aura pris part à une insurrection ou à une rébellion contre eux, ou aura donné aide et assistance à ses ennemis. Toutefois, le Congrès pourra lever cette incapacité par un vote des deux tiers des membres de chaque chambre.

Section 4. La validité de la dette publique des États-Unis, autorisée par la loi, y compris les dettes contractées pour le paiement de pensions et de primes pour service dans la répression d'une insurrection ou d'une rébellion, ne sera pas mise en question. Mais ni les États-Unis, ni aucun État n'assumeront ni ne paieront aucune dette ou obligation contractées dans l'aide à l'insurrection ou à la rébellion contre les États-Unis, ni aucune réclamation pour la perte ou l'emancipation d'esclaves ; au contraire toutes dettes, obligations et réclamations de cette nature seront tenues pour illégales et nulles.

Section 5. Le Congrès aura le pouvoir de donner effet aux dispositions du présent article par une législation appropriée.

Amendment XV [1870]  
 Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have the power to enforce this article by appropriate legislation.

Amendment XVI [1913]  
 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.

Amendment XVII [1913]  
 [1] The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

[2] When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

[3] This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States; or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

cera à midi, le troisième jour de janvier, à moins que, par une loi, il ne fixe un jour différent.

XVIII<sup>e</sup> Amendement [1919]  
 Section 1. Un an après la ratification du présent article, la fabrication, la vente et le transport des boissons enivrantes, l'importation desdites boissons ou leur exportation seront interdits par les présentes aux États-Unis et dans tout territoire soumis à leur juridiction en la matière.

Section 2. Le Congrès et les divers États auront concurrentement pouvoir pour donner effet au présent article par une législation appropriée.

Section 3. Le présent article sera inopérant à moins d'être ratifié comme amendement à la Constitution par les législatures des divers États, de la manière prévue dans la Constitution, dans les sept années qui suivront la date de sa présentation aux États par le Congrès. (Note : abrogé par la Section 1 du XXI<sup>e</sup> Amendement.)

XIX<sup>e</sup> Amendement [1920]

[1] Le droit de vote des citoyens des États-Unis ne pourra pas être dénié ou restreint pour raison de sexe par les États-Unis ou par l'un quelconque des États.

[2] Le Congrès aura le pouvoir de donner effet au présent article par une législation appropriée.

XX<sup>e</sup> Amendement [1933]

Section 1. Les mandats du Président et du Vice-Président prendront fin à midi, le vingtième jour de janvier, et les mandats des sénateurs et des représentants à midi, le troisième jour de janvier, des années au cours desquelles ces mandats auraient pris fin si le présent article n'avait pas été ratifié ; et les mandats de leurs successeurs commenceront alors.

Section 2. Le Congrès s'assemblera au moins une fois l'an, et cette réunion commen-

Amendement XVIII [1919]

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

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

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendement XIX [1920]

[1] The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

[2] Congress shall have power to enforce this article by appropriate legislation.

Amendement XX [1933]

Section 1. The terms of the President and the Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting

Section 3. Si, à la date fixée pour le commencement du mandat du Président, le Président élu est décédé, le Vice-Président élu deviendra Président. Si un Président n'a pas été choisi avant la date fixée pour le commencement de son mandat, ou si le Président élu ne remplit pas les conditions, alors le Vice-Président élu fera fonction de Président jusqu'à ce qu'un Président remplisse les conditions ; et le Congrès peut, par une loi, pourvoir au cas où ni un Président élu, ni un Vice-Président élu ne rempliraient les conditions en désignant qui fera alors fonction de Président, ou la manière selon laquelle une personne qui fera fonction de Président sera choisie, et ladite personne agira en cette qualité jusqu'à ce qu'un Président ou un Vice-Président remplisse les conditions.

Section 4. Le Congrès peut par une loi pouvoir au cas de décès de l'une des personnes parmi lesquelles la Chambre des représentants peut choisir un Président lorsque le droit de choisir lui est dévolu, et au cas de décès de l'une des personnes parmi lesquelles le Sénat peut choisir un Vice-Président lorsque le droit de choisir lui est dévolu.

Section 5. Les sections 1 et 2 prendront effet le quinzième jour d'octobre suivant la ratification du présent article.

Section 6. Le présent article sera inopérant à moins d'être ratifié comme amendement à la Constitution par les législatures des trois quarts des divers États, dans les sept années qui suivront la date de sa soumission.

XXI<sup>e</sup> Amendement [1933]

Section 1. Le dix-huitième amendement à la Constitution des États-Unis est abrogé par les présentes.

shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

Amendement XXI [1933]

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. Le transport ou l'importation dans tout État, territoire ou possession des États-Unis, de boissons enivrantes pour livraison ou consommation en violation des lois de ceux-ci sont interdits par les présentes.

Section 3. Le présent article sera inopérant à moins d'être ratifié comme amendement à la Constitution par convention dans les divers États ainsi que prévu dans la Constitution, dans les sept années qui suivront la date de la soumission de celui-ci aux États par le Congrès.

XXXII<sup>e</sup> Amendement [1951]

Section 1. Nul ne sera élu aux fonctions de Président plus de deux fois, et nul, s'il a occupé les fonctions de Président, ou agi en qualité de Président, pendant plus de deux ans d'un mandat pour lequel quelque autre personne était élue Président, ne sera élu aux fonctions de Président plus d'une fois. Mais cet article ne s'appliquera pas à toute personne ayant occupé les fonctions de Président quand cet article fut proposé par le Congrès, et il n'empêchera pas quiconque pourrait occuper les fonctions de Président, ou agir en qualité de Président, durant le mandat au cours duquel cet article deviendrait exécutoire, d'occuper les fonctions de Président ou d'agir en qualité de Président durant le reste de ce mandat.

Section 2. Le présent article sera inopérant à moins d'être ratifié comme amendement à la Constitution par les législatures des trois quarts des divers États dans les sept années de sa soumission aux États par le Congrès.

XXXIII<sup>e</sup> Amendement [1961]

Section 1. Le District constituant le siège du gouvernement des États-Unis désignera selon telle manière que pourra déterminer le Congrès :

Section 2. The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XXII [1951]

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

Amendment XXIII [1961]

Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as Congress may direct:

Un nombre d'électeurs du Président et du Vice-Président équivalent au nombre total des sénateurs et représentants au Congrès auquel ce District aurait droit s'il était un État, mais en aucun cas supérieur à celui de l'État le moins peuplé; ces électeurs se joindront à ceux désignés par les États et ils seront considérés, pour les besoins de l'élection du Président et du Vice-Président, comme désignés par un État; et ils se réuniront dans le District et rempliront les devoirs prévus par le douzième article d'amendement.

Section 2. Le Congrès aura le pouvoir de donner effet au présent article par une législation appropriée.

XXIV<sup>e</sup> Amendement [1964]

Section 1. Le droit des citoyens des États-Unis de voter à toute élection primaire ou autre élection du Président ou du Vice-Président, des électeurs du Président et du Vice-Président, ou des sénateurs ou représentants au Congrès, ne sera pas dénié ou restreint par les États-Unis, ou par aucun État, pour cause de manquement au paiement d'une taxe électorale ou de tout autre impôt.

Section 2. Le Congrès aura le pouvoir de donner effet au présent article par une législation appropriée.

XXV<sup>e</sup> Amendement [1967]

Section 1. En cas de destitution, décès ou démission du Président, le Vice-Président deviendra Président.

Section 2. Quand il y aura une vacance dans les fonctions de Vice-Président, le Président présentera un Vice-Président qui entrera en fonction après confirmation par un vote majoritaire des deux chambres du Congrès.

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXIV [1964]

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay poll tax or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXV [1967]

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3. Whenever the President transmits to the President *pro tempore* of the Senate and the President of the House of Representatives a written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President *pro tempore* of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President *pro tempore* of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President *pro tempore* of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Section 3. Whenever the President transmits to the President *pro tempore* of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President *pro tempore* of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President *pro tempore* of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President *pro tempore* of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the

que le Président est incapable d'assumer les pouvoirs et devoirs de sa charge, le Vice-Président continuera à assumer ces fonctions en qualité de Président *pro tempore*; dans le cas contraire, le Président reprendra les pouvoirs et devoirs de sa charge.

XXXVI<sup>e</sup> Amendement [1971]

Section 1. Le droit des citoyens des États-Unis, qui sont âgés de dix-huit ans ou plus, de voter ne sera pas dénié ou restreint par les États-Unis ou l'un quelconque des États pour raison d'âge.

Section 2. Le Congrès aura le pouvoir de donner effet au présent article par une législation appropriée.

XXXVII<sup>e</sup> Amendement [1992]

Aucune loi modifiant l'indemnité versée aux sénateurs et aux représentants pour leurs services ne prendra effet avant qu'une élection (à la Chambre) des représentants ne soit intervenue.

powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Amendment XXVI [1971]

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXVII [1992]

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of representatives shall have intervened.

DROIT POLITIQUE ET THÉORIQUE

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*Grands arrêts  
de la Cour suprême  
des États-Unis*

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*Avec la collaboration des chercheurs  
du Centre du droit américain*

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# LA COUR SUPRÊME DANS LE SYSTÈME CONSTITUTIONNEL DES ÉTATS-UNIS

## Section I La Cour suprême des États-Unis et le pouvoir judiciaire fédéral

1 LE POUVOIR JUDICIAIRE AUX ÉTATS-UNIS. — Avec sa légendaire clairvoyance, Alexis de Tocqueville avait remarqué : « Je ne pense pas que, jusqu'à présent, aucune nation du monde ait constitué le pouvoir judiciaire de la même manière que les Américains. » Il existe, en effet, aux États-Unis non pas un, mais deux pouvoirs judiciaires : le pouvoir judiciaire des États et le pouvoir judiciaire fédéral. Cette originalité tient à la structure fédérale de l'Union américaine.

Les États-Unis sont un État fédéral qui regroupe 50 États. Chacun de ces États est un État souverain, au sens plein du terme, en ce sens qu'il se fixe à lui-même ses propres lois par l'intermédiaire d'un vrai gouvernement doté de trois pouvoirs, législatif, exécutif et judiciaire. Le pouvoir judiciaire des États est partout organisé selon un schéma tripartite très classique : à la base, des juridictions de premier degré (*County Court*), puis des cours intermédiaires d'appel qui ont, selon les États, diverses dénominations (*Appellate Division, State Appellate Division, Superior Court* où *Intermediate Court of Appeals*), et enfin, au sommet, une cour finale d'appels souvent dénommée « Cour suprême » (*Supreme Court*) bien que, dans l'État de New York, elle soit dénommée *Court of Appeals* et que, dans le Maine et le Massachusetts, on parle de *Supreme Judicial Court*. À côté de ces juridictions d'États, il existe dans chaque État d'autres cours, moins nombreuses, sur lesquelles les États n'ont aucune autorité, et qui appartiennent au pouvoir judiciaire des États-Unis. Ces cours fédérales sont, elles aussi,

1. *De la démocratie en Amérique*, I, chap. VI, Paris, GF, 1981, p. 167.

organisées selon un schéma tripartite : à la base, des cours de districts (*U.S. District Courts*) qui sont aujourd'hui au nombre de 94 (il existe de 1 à 4 districts par État) ; puis des cours d'appel (*U.S. (Circuit) Court of Appeals*) au nombre de 13, ayant toutes, sauf 2<sup>1</sup>, un ressort géographique couvrant plusieurs États que l'on appelle « circuit » ; et, enfin, au sommet, la Cour suprême des États-Unis (*U.S. Supreme Court*). La Cour suprême est ainsi l'instance suprême du pouvoir judiciaire fédéral et c'est de là qu'il faut partir pour comprendre sa position exacte dans le système judiciaire américain.

2 LA CRÉATION DU POUVOIR JUDICIAIRE FÉDÉRAL. — Le pouvoir judiciaire fédéral a été créé par l'article III de la Constitution de 1787, en ces termes : « Le pouvoir judiciaire des États-Unis sera dévolu à une Cour suprême et à telles cours inférieures que le Congrès pourra, le cas échéant, ordonner et établir. » Ce texte, comme bien d'autres dispositions adoptées par la Convention de Philadelphie, est le résultat d'un compromis.

Sans refaire l'histoire de la création des États-Unis, il faut rappeler qu'à l'issue de la guerre d'Amérique, en 1783, les États-Unis regroupaient sous une forme fédérale assez lâche treize jeunes États, indépendants certes, mais faibles, dont les frontières correspondaient à celles des anciennes colonies anglaises. Les problèmes intérieurs de cette confédération étaient considérables et les chances de les résoudre paraissaient minces. Les États ne se sentaient guère d'intérêts communs. Chacun d'eux, en bordure de l'Océan, avait commercé avec l'Europe ; mais ils n'avaient jamais beaucoup commercé entre eux. Les solidarités étaient fragiles. Pendant la guerre, des luttes commerciales les avaient déjà opposés sous forme d'imposition de taxes sur les produits importés. On pouvait craindre que ces luttes ne se développent ou que les États ne nouent des alliances commerciales ou politiques avec d'autres nations. Au surplus, la Confédération était écrasée de dettes qu'elle ne pouvait payer. Discreditée à l'étranger, elle était virtuellement en voie de dissolution. A l'extérieur, les problèmes n'étaient pas moins graves. Affaiblis, entourés d'ennemis, défenseurs d'idées politiques dangereuses pour les monarchies d'Europe, les Américains avaient tout à redouter des puissances européennes. Au pire pouvaient-ils craindre même une éventuelle revanche de l'Angleterre. Grâce à la ténacité des plus clairvoyants d'entre eux — au premier rang desquels il faut citer Washington, Franklin, Jefferson, Hamilton, Madison — le Congrès qui depuis 1774 avait regroupé les colonies en une confédération peu contraignante décida, le 21 février 1787, la réunion d'une convention constitutionnelle à Philadelphie aux fins de « réviser les articles de la Confé-

ration (...) de manière à rendre la Constitution fédérale propre à satisfaire les exigences d'un gouvernement et la préservation de l'Union ».

La Convention constitutionnelle de Philadelphie commença ses travaux le 25 mai 1787 et les acheva quatre mois plus tard, le 17 septembre 1787, avec l'adoption de la Constitution fédérale. Elle prit sa décision la plus importante dès le 29 mai. Ce jour-là, à l'initiative de la Virginie dont la délégation était arrivée à la Convention avec un projet centralisateur tout prêt, la Convention constituée en commission plénière adopta une résolution qui prévoyait qu'« un gouvernement national suprême, composé d'organes législatif, exécutif et judiciaire, devrait être établi » (*that a national Government ought to be established consisting of a supreme Legislative, Executive and Judiciary*). Ce faisant, la Convention abandonna l'idée d'une simple révision des articles de la Confédération pour s'engager dans la voie de la rédaction d'une nouvelle constitution et pour créer un gouvernement qui serait suprême, comme le souhaitaient les grands États dont la Virginie était le porte-parole. Ce que les grands États reprochaient à la Confédération, c'était de ne disposer d'aucun moyen pour forcer ses membres à remplir leurs obligations et à obéir aux actes légalement pris par le Congrès. Pour remédier à ce défaut constitutif, la Convention créa un gouvernement qui pourrait agir directement sur les individus. En d'autres termes, elle résolut le problème des sanctions en établissant un gouvernement indépendant des États qui serait placé au-dessus d'eux. Au sein de ce gouvernement, la création d'un pouvoir judiciaire — que personne à Philadelphie ne pouvait imaginer autrement qu'armé de ces pouvoirs d'exécution forcée, propres aux juges de *common law*, que sont l'injonction et le *contempt of court* — était tout naturellement considérée comme une garantie décisive de l'exécution des obligations.

Même les petits États, qui réagrent le 15 juin avec le plan du New Jersey, partagèrent cette approche de l'importance du pouvoir judiciaire pour garantir une exécution effective des lois décidées par le Congrès. Bien que moins centralisateur et plus respectueux de l'égalité des États, leur projet remédiait lui aussi au problème des sanctions en s'appuyant sur le pouvoir judiciaire. Mais il s'agissait du pouvoir judiciaire des États, ce qui ne les empêchait pas, par ailleurs, d'admettre l'idée d'un « tribunal suprême ». A cette fin, ils proposèrent une clause qui allait connaître un grand avenir et qui prévoyait que les lois du Congrès et les traités des États-Unis « ser[ai]ent le droit suprême des différents États... et le pouvoir judiciaire dans chaque État sera lié par ce fait, nonobstant toute disposition contraire des lois de l'un quelconque des États ».

La nécessité d'un pouvoir judiciaire s'imposa ainsi à tous et la proposition faite par Edmund Randolph (Virginie) de créer un pouvoir judiciaire national ne rencontra aucune objection ; elle fut adoptée à l'unanimité des

1. Il s'agit de la cour d'appel pour le District de Columbia et de la cour d'appel pour le circuit fédéral.

le début des travaux. En revanche, des dissensions surgirent à propos de l'organisation qui serait donnée à ce nouveau pouvoir. Tout le monde voulait bien un tribunal suprême, d'où la disposition de l'article III, section 1 de la Constitution qui établit une « Cour suprême unique » (*One Supreme Court*). Mais nombre de délégués craignaient que des cours fédérales inférieures ne s'ingèrent abusivement dans les prérogatives législatives des États. Le conflit se résolut par ce que l'on appelle le compromis madisonien (*Madisonian Compromise*). Le Congrès aurait le pouvoir de créer des cours inférieures, mais ne serait nullement obligé de le faire, d'où la formule de l'article III qui évoque « telles cours inférieures que le Congrès pourra, le cas échéant (*from time to time*), ordonner et établir ».

3 L'ÉTENDUE DU POUVOIR JUDICIAIRE FÉDÉRAL. — Le principe d'un pouvoir judiciaire national étant acquis, les délégués à la Convention de Philadelphie en définirent l'étendue. Sur ce chapitre, les procès-verbaux de la Convention ne donnent que des renseignements éparses et parcellaires et il n'est pas toujours possible d'en restituer la logique intrinsèque. Le texte de la Constitution [art. III, sect. 2 (1)] énumère neuf cas d'« affaires » (*cases*) ou de « différends » (*controversies*) qui relèvent de la compétence du pouvoir judiciaire fédéral. On les classe habituellement en deux catégories, selon la qualité des plaideurs ou l'objet du procès.

Certains plaideurs ne peuvent être jugés que par les cours fédérales. C'est le cas, d'abord, des ambassadeurs, et autres ministres consul. C'est bien entendu, des États-Unis eux-mêmes s'ils sont partie à un procès et, un ou les autres, par leurs cours respectives. C'est le cas, enfin, des individus de citoyenneté différente (*diversity of citizenship jurisdiction*) étant ici précisé que la justification de ce chef de compétence, vraisemblablement tiré à l'origine du désir d'éviter une éventuelle partialité des cours d'États contre un individu citoyen d'un autre État, est aujourd'hui remise en cause. Faute d'avoir trouvé une autre raison, les auteurs américains vont même jusqu'à considérer que la compétence fédérale pour les affaires mentionnées en cause une diversité de citoyenneté comme « mystérieuse », quand elle n'est pas « inexplicable » ce qui prouve à quel point l'Union est aujourd'hui réalisée et solide entre les 50 États.

A raison de leur nature, il y a des procès qui ne peuvent être jugés que par les cours fédérales. C'est le cas, en premier lieu, de toutes les questions qui se rattachent au commerce maritime. A l'origine, ce chef de compétence était l'une des principales raisons pour lesquelles un pouvoir judiciaire fédéral était indispensable. La constitution d'un espace économique unifié entre les États passait par l'élaboration d'un corps de règles uniformes en matière de communications maritimes, surtout à une époque où le

commerce entre États et avec l'étranger se faisait essentiellement par mer. Ressortissant ensuite de la compétence des cours fédérales toutes les affaires qui prennent naissance dans le droit des États-Unis, à savoir toutes celles qui surviennent « sous l'empire de la présente Constitution, des lois des États-Unis, des traités conclus, ou qui seraient conclus, sous leur autorité ». En renvoyant au pouvoir judiciaire fédéral le soin de décider de tous les procès qui mettent en cause le droit du gouvernement fédéral (qu'il s'agisse de la Constitution, des lois fédérales et des traités), la Constitution a donné aux États-Unis le droit le plus suprême qui soit, celui d'être juge des situations qui les mettent en cause, c'est-à-dire le pouvoir souverain. Ce faisant, l'article III, section 2 (1) de la Constitution doit être tenu pour une pièce essentielle dans l'architecture du principe de suprématie de la Constitution. Il n'en est certes pas le fondement qui, lui, se trouve énoncé à l'article VI; mais il en est le mécanisme central de garantie et d'effectivité. *Supremacy clause*

4 L'ORGANISATION DU POUVOIR JUDICIAIRE FÉDÉRAL. — A Philadelphie, les délégués n'avaient fait qu'esquisser les composantes du pouvoir judiciaire des États-Unis. Celui-ci devait être réellement mis en place par la loi sur l'organisation judiciaire de 1789 (*Judiciary Act of 1789*). Ce texte capital a été adopté par le premier Congrès à l'initiative des Fédéralistes de sensibilité centralisatrice parmi lesquels il faut mentionner, en particulier, Oliver Ellsworth (Connecticut). Le *Judiciary Act* de 1789 a complété l'article III d'un point de vue institutionnel en créant les structures du pouvoir judiciaire fédéral.

La loi de 1789, l'un des plus importants textes adoptés par le Congrès, a organisé le pouvoir judiciaire fédéral selon une structure tripartite toujours valable aujourd'hui. Au sommet, la Cour suprême, qui était juste mentionnée dans la Constitution, et que le Congrès établit avec un Président (*Chief Justice*) et cinq juges (*Associate Justice*). A la base, les cours de districts à raison d'une par État, sauf le Massachusetts et la Virginie qui en avaient deux, et composées d'un juge. Entre les deux, s'intercalent des cours de circuit (à l'époque, le Congrès créa trois circuits). Les cours de circuit sont des cours de premier degré en matière de juridiction pour diversité de citoyenneté, dans nombre de matières criminelles et dans un très grand nombre d'affaires où les États-Unis sont partie. Elles recurent aussi une juridiction d'appel limitée sur les arrêts des cours de district. Les cours de circuit avaient, à l'époque, la particularité d'être des cours temporaires appelées à siéger deux fois par an, en étant composée, de deux juges de la Cour suprême et d'un juge de district. Ce système qui obligea les juges de la Cour suprême à siéger dans les cours de circuit dura plus d'un siècle.



tions qui ressortent de la compétence exclusive de l'État. Cela revient à dire que, comme tous les organes du gouvernement fédéral, la Cour suprême n'a pas la plénitude du pouvoir qu'elle est censée exercer, en l'espèce le pouvoir judiciaire. La Cour suprême n'exerce que le pouvoir judiciaire fédéral.

Les pouvoirs de la Cour suprême sont donc limités. A l'instar de ceux des cours fédérales, ils sont à la mesure de l'étendue du pouvoir judiciaire des États-Unis, lequel a vocation à s'exercer par priorité sur « toutes les affaires (cases), en droit et en équité, survenues sous l'empire de la [...] Constitution, des lois des États-Unis, des traités conclus, ou qui seraient conclus, sous leur autorité » [art. III, section 2 (1)]. Il s'agit d'affaires qui mettent en jeu, selon l'expression consacrée, une « question de droit fédéral » (*federal question*). On peut donc bien dire que la Cour suprême est une cour constitutionnelle si l'on veut dire par là qu'elle est prévue dans la Constitution (c'est d'ailleurs la seule cour des États-Unis qui le soit). Mais elle n'est pas une cour constitutionnelle au sens où ce terme est compris en Europe, c'est-à-dire une juridiction qui ne traite que de problèmes constitutionnels. Les questions constitutionnelles ne constituent qu'une partie des questions soumises à la Cour. Le rôle de la Cour est de s'occuper en dernier ressort de « questions fédérales ». Il faut bien comprendre que ces « questions » comprennent certes des questions constitutionnelles, mais aussi des questions législatives, en sorte que la Cour suprême n'est pas toujours systématiquement « juge constitutionnel », au sens où ce terme est généralement compris dans la doctrine française. Elle peut être aussi, et elle est même très souvent, « juge législatif ». C'est le cas chaque fois qu'elle statue sur des litiges qui ne posent que des questions liées à l'interprétation des lois du Congrès [v., par ex., *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.* (1984), arrêt n° 60]. On ajoutera que la Cour suprême n'accepte d'ailleurs d'être « juge constitutionnel » qu'à titre exceptionnel, dans la mesure où, depuis la crise du New Deal, elle accorde généralement une présomption de constitutionnalité à toutes les lois invoquées devant elle, qu'il s'agisse des lois du Congrès ou des lois d'États [v. *United States v. Carolene Products Co.* (1938), arrêt n° 30].

De la position très particulière qu'occupe la Cour suprême dans le système judiciaire américain, il résulte qu'une certaine prudence s'impose dans les analogies qu'on est parfois tenté d'opérer entre elle et certaines institutions européennes. La Cour suprême est certes une « cour » qui est « suprême », en ce sens qu'elle décide en dernier ressort de toute question judiciaire entrant dans le champ de ses compétences. Elle est toutefois très différente d'institutions judiciaires suprêmes nationales comme la Cour de cassation, en France, ou la Chambre des lords en sa formation judiciaire, en Angleterre. La principale différence tient à ce que la Cour suprême pos-

Dans la construction du pouvoir judiciaire fédéral qui leur tenait à cœur, l'autre grande réussite des fédéralistes fut la célèbre section 25 de la loi de 1789, qui devait avoir pour résultat de placer toutes les cours d'États sous le contrôle des cours fédérales en organisant les possibilités d'appel des jugements rendus par les cours d'État devant le pouvoir judiciaire fédéral. Selon ce texte, appel pouvait être formé devant la Cour suprême de toute décision rendue par une cour d'État statuant en dernier ressort (il s'agit la plupart du temps de la Cour suprême de l'État), chaque fois que : 1 / la décision a prononcé l'inconstitutionnalité d'une loi fédérale ou d'un traité des États-Unis ; ou 2 / la décision a confirmé la validité d'un acte de l'État qui était contesté comme contraire à la Constitution, aux traités, ou aux lois des États-Unis ; ou 3 / la décision a rejeté une demande et justice fondée sur la Constitution ou le droit fédéral. Concrètement, ce texte avait pour conséquence d'ouvrir une voie de recours dans tous les cas où une cour d'État refusait de donner son plein effet au principe de la suprématie de la Constitution, des traités et des lois des États-Unis, tel qu'il est énoncé à l'article VI de la Constitution.

La section 25 du *Judiciary Act of 1789* a été une clé de voûte dans la construction du principe de la suprématie constitutionnelle. Si la Constitution, les lois fédérales et les traités des États-Unis devaient être la « loi suprême du pays », il était capital que toutes ces règles fassent l'objet d'une interprétation uniforme. A cette fin, la Cour suprême reçut de la section 25 compétence à l'effet de se prononcer sur les conflits de compétence entre les États et l'Union. Sans ce texte, les cours d'État auraient pu vider de toute substance l'autorité fédérale, un peu comme elles avaient su déjà énerver la compétence du Congrès à l'époque de la Confédération. Pour obvier à ces dérives, les fédéralistes insistèrent pour que la Cour suprême soit l'interprète en dernier ressort de la Constitution et qu'à ce titre, elle reçoive juridiction d'appel sur les cours d'État, sans autre condition qu'une simple initiative de la partie qui succombe devant elles.

5 LA POSITION DE LA COUR SUPRÊME DANS LE POUVOIR JUDICIAIRE FEDERAL. — La Cour suprême des États-Unis est ainsi la plus haute instance judiciaire du pouvoir judiciaire fédéral. Il serait toutefois erroné de concevoir cette institution comme le sommet d'une pyramide dont la base serait constituée par les cours des États. La Cour suprême des États-Unis n'est pas en tant que telle l'instance judiciaire suprême de toutes les juridictions américaines, juridictions d'États et juridictions fédérales : elle ne l'est que pour des litiges qui mettent en jeu un problème de droit fédéral. Il en résulte que les cours suprêmes d'États statuent toujours en dernier ressort dans tous les litiges qui ne ressortent pas de la compétence judiciaire fédérale. Elles sont donc bien « souveraines » sur toutes les ques-

plémentaire pour chaque juge restant en fonction au-delà de 70 ans, avec une limite maximum de 15 juges sur le siège. L'intense combat politique qui permit la défaite de cette proposition de fournée de juges (« *court-packing plan* ») eut pour résultat paradoxal de sanctifier dans l'opinion publique le chiffre neuf, et de donner un caractère quasi sacré à l'institution d'une Cour composée de 9 juges.

7 STATUT DES JUGES. — Le statut des juges de la Cour suprême est aligné sur celui des juges fédéraux. A la Convention de Philadelphie, si les délégués s'opposèrent sur l'organisation du pouvoir judiciaire en un seul organe ou en plusieurs selon un modèle hiérarchisé, ils furent en revanche unanimes sur le statut des juges fédéraux qu'ils voulaient indépendants et à l'abri des pressions politiques. D'où les deux dernières dispositions de l'article III, section 1 : 1 / les juges fédéraux ont l'assurance de conserver leur charge tant qu'ils auront une bonne conduite (*during good behaviour*), ce qui est une manière de dire qu'ils sont inamovibles ; 2 / le Congrès ne peut pas faire pression sur eux en réduisant leur traitement tant qu'ils restent en fonction. A ces deux garanties s'en ajoute une autre qui concerne leur nomination. Les juges fédéraux sont protégés des vicissitudes politiques, dans la mesure où ils échappent à l'élection (alors commune pour les juges d'États) en étant désignés par le Président et confirmés par le Sénat [art. II, sect. 2 (2)]. L'inamovibilité de fait dont ils bénéficient ne les distrait toutefois pas d'une éventuelle procédure de destitution (*impeachment*), comme tous les « fonctionnaires civils » des États-Unis (*officers*), mais uniquement pour « *trahison, corruption ou autres hauts crimes et délits (Treason, Bribery, or other high Crimes and Misdemeanors)*, conformément aux dispositions de l'article II, section 4. Ces dispositions s'appliquent en tous points aux juges de la Cour suprême (v. *infra*, § 10).

8 DESIGNATION DES JUGES PAR LE PRÉSIDENT. — Le Président des États-Unis a une très grande liberté de choix dans la désignation des candidats qu'il souhaite proposer au Sénat pour exercer les fonctions de juges (*associate Justice*) ou, si le siège est vacant, celle de président (*Chief Justice*) de la Cour suprême. La Constitution n'impose aucune qualification particulière ni d'âge, ni même de formation. Il est de tradition que le Président choisisse un candidat de la sensibilité du parti qui l'a fait élire. Mais cette pratique ne garantit nullement une fidélité partisane et on a souvent vu des juges réputés conservateurs pat leur nominations devenir libéraux par leurs opinions. Parmi les exemples célèbres, il faut mentionner le président Warren et le juge Brennan, l'un et l'autre nommés par le président Eisenhower, ainsi que le juge Blackmun nommé par le président Nixon, et le juge Souter nommé par le président Bush, qui tous évoluèrent

sède un pouvoir que celles-ci n'ont pas, le pouvoir de contrôler la constitutionnalité des lois. On est alors tenté de se tourner vers les cours constitutionnelles européennes, créées au XX<sup>e</sup> siècle en Allemagne, en Italie, ou en Espagne, pour y trouver le repère comparatif qui permettra de la mieux comprendre. Mais, derechef, la comparaison n'est pas pleinement satisfaisante car, à la différence de ces cours constitutionnelles qui pourtant lui doivent tant, la Cour suprême possède un pouvoir qui leur échappe, celui d'être l'instance ultime devant laquelle peuvent être déferées toutes les décisions judiciaires en matière civile et pénale. Il reste alors la Cour de justice des Communautés européennes, et c'est certainement l'institution qui, en vérité, s'approcherait le plus de la prestigieuse institution américaine. Mais il manque à la Cour de Luxembourg au moins deux attributs pour égaler la puissance de la juridiction américaine, d'une part, celui d'être au sommet d'un ordre judiciaire qui lui soit propre, avec des juridictions installées dans les États eux-mêmes, et dont la compétence concurrencerait celle des juges nationaux dans toutes les questions de droit communautaire, et d'autre part, celui de pouvoir être saisi par principe (et pas seulement occasionnellement et à titre exceptionnel) directement par les citoyens eux-mêmes.

## Section II Organisation et fonctionnement

### I | COMPOSITION

6 NOMBRE DES JUGES. — La Cour suprême comprend aujourd'hui 9 membres, un président (*Chief Justice*) et 8 juges (*Associate Justice*). Il n'en fut pas toujours ainsi et, la composition de la Cour étant du ressort du Congrès, la première loi sur l'organisation judiciaire (*Judiciary Act of 1789*) créa la Cour avec 6 juges. Ce nombre passa à 7 en 1807, à 9 en 1837, à 10 en 1864. En 1866, pour empêcher le président Jackson de faire une nomination à la Cour, le Congrès décida qu'aucune vacance ne serait pourvue avant que le nombre des juges (*associate justices*) ne se soit réduit de lui-même à 6. Ayant que les départs volontaires ou les décès en cours de mandat n'aient permis la réalisation de ce programme, le Congrès vota en 1869 une loi qui fixait définitivement le nombre des juges à 9. Ce nombre n'a pas bougé depuis. En 1937, le président Roosevelt proposa au Congrès de voter une loi qui aurait autorisé la nomination d'un juge sup-

vers des positions libérales. Les mouvements en sens inverse sont plus insolites. En pratique, la liberté de choix du Président est encadré par des usages. Lorsque les juges de la Cour suprême étaient astreints, en sus de leurs obligations à la Cour suprême, de présider chacun durant l'année les sessions de l'une des cours d'appel (cette obligation dura jusqu'à une loi judiciaire de 1891), les considérations géographiques jouaient un rôle important. Les présidents considéraient comme souhaitable que leurs candidats soient originaires des États situés dans le ressort des cours de circuits qu'ils seraient amenés à présider. C'est ainsi qu'au XIX<sup>e</sup> siècle, les candidats devaient être géographiquement qualifiés pour occuper le siège de la « Nouvelle Angleterre » ou celui de « New York » ou encore celui de la « Virginie-Maryland ». Cet usage a aujourd'hui pris fin, mais il a été remplacé par d'autres. En particulier, l'origine ethnique ou religieuse des candidats n'est pas indifférente. L'usage veut qu'il y ait aujourd'hui au moins un siège « afro-américain » ainsi qu'un siège « catholique » et un siège « juif », et, depuis plus récemment, un (ou des) siège(s) féminins. Enfin, il ne faut pas négliger dans ce processus de désignation le rôle (parfois très important) que peuvent jouer certains lobbies institutionnels, comme la puissante association américaine des avocats (*American Bar Association*), ou la très active union américaine des droits et libertés (*American Civil Liberties Union*).

9 CONFIRMATION DES JUGES PAR LE SÉNAT. — Le Sénat est totalement libre de confirmer ou de ne pas confirmer les candidats présentés par le chef de l'exécutif. Les candidats font l'objet d'une audition devant la commission des affaires judiciaires du Sénat. Celle-ci peut durer plusieurs jours. Les candidats sont interrogés de façon très approfondie, à partir de leurs écrits, qu'il s'agisse d'écrits de doctrine ou des opinions qu'ils ont pu rédiger en tant que juges fédéraux lorsqu'ils ont eu cette qualité. Les sénateurs cherchent à anticiper la position que le candidat prendra sur telle ou telle question une fois sur le siège. Les débats et les échanges de vues sont toujours de haute tenue juridique. Selon les réponses des candidats, les votes peuvent se répartir selon des clivages politiques. Mais certains candidats font l'objet d'une confirmation unanime ou quasi unanime (ce fut le cas des deux femmes jusqu'ici nommées à la Cour, Sandra Day O'Connor et Ruth Bader Ginsburg).

De 1789 à 1996, le Sénat rejeta 28 fois des candidats présentés par le Président. Une douzaine d'entre eux furent éliminés immédiatement. Le reste des candidats soit se retira spontanément, soit alla jusqu'au bout de la procédure et au vote négatif du Sénat. La dernière fois qu'un candidat essaya un refus du Sénat, ce fut le 23 octobre 1987, lorsque le Sénat refusa,

par 58 voix contre 42, la confirmation du juge Robert H. Bork proposé par le président Reagan.

10 IMPEACHMENT. — Comme les juges fédéraux [ainsi que le président, le vice-président et tous les « hauts fonctionnaires » (*civil officers*) des États-Unis], les juges de la Cour suprême peuvent être démis de leurs fonctions au terme d'une procédure d'*impeachment*. La mise en accusation appartient exclusivement à la Chambre des représentants et l'éventuelle destitution, prononcée après jugement contradictoire (*trial*), relève du seul Sénat. Seul le juge fédéraliste Samuel Chase fut effectivement mis en accusation, en 1804, par les membres républicains de la Chambre des représentants, mais il fut acquitté l'année suivante par le Sénat. Sur les 8 chefs d'accusation votés contre lui, 6 concernaient son attitude énergique et ses décisions jugées arbitraires pendant les procès pour sédition et trahison d'un militant républicain, James T. Callender, et du chef d'une révolte essennienne, John Fries. En réalité, les griefs articulés contre Chase étaient essentiellement politiques. Chase était poursuivi pour ses opinions fédéralistes ; il tenait les idées du Parti républicain — ces « théories modernes », disait-il, sur « l'égalité des droits » — pour de dangereuses doctrines qui menaient tout droit au « gouvernement populiste » (« *mobocracy* »). Le jeune et brillant représentant républicain de Virginie, John Randolph, tenta en vain de convaincre le Sénat qu'il s'agissait là de « hauts crimes et délits » qui méritaient la destitution. La procédure fut si peu concluante que le président républicain Jefferson devait dire que l'*impeachment* d'un membre de la Cour suprême était « une farce qu'il faudrait mieux ne pas répéter ».

En 1969, la procédure de destitution fut engagée contre le juge Abe Fortas, pour avoir accepté, moyennant un chèque de 20 000 \$, les fonctions de conseil juridique auprès d'une fondation dédiée à la promotion d'une meilleure entente entre les races, mais dont le président, industriel multimillionnaire, fut poursuivi quelques mois plus tard pour malversations financières. Fortas restitua immédiatement l'argent qui lui avait été versé ; cela n'empêcha pas le déclenchement d'une procédure de destitution contre lui. Elle n'alla pas à son terme par suite de démission anticipée de l'intéressé. Abe Fortas fut le premier juge de la Cour suprême à démissionner sous la menace d'un *impeachment*.

Le juge William O. Douglas, nommé en 1939 par Roosevelt et notoirement connu pour son grand libéralisme, fit l'objet de deux tentatives d'*impeachment* ; la première en 1953 pour avoir décidé, le 17 juin, de temporairement surseoir à l'exécution des époux Julius et Ethel Rosenberg accusés d'espionnage (le lendemain, un projet de destitution était déposé à la Chambre des représentants et un sous-comité d'enquête était immédiate-

ment constitué, mais, le 19, la Cour suprême renversait l'ordonnance de sursis et les Rosenberg étaient exécutés; la seconde en 1970, pour avoir manqué de se désister dans une affaire impliquant un éditeur qui lui avait versé 350 \$ pour un article écrit deux ans auparavant, pour avoir écrit un livre (*Poins of Rebellion*) qui pourrait être interprété comme prônant le renversement du gouvernement par la violence et, enfin, pour avoir exercé les fonctions de conseil juridique d'une fondation dédiée à la promotion de l'éducation à travers le monde, mais alimentée par des sommes provenant des jeux de hasard, le président, multimillionnaire, étant propriétaire de plusieurs casinos à Las Vegas. Ces deux tentatives n'aboutirent pas et le juge Douglas se retira en 1975, au terme d'un mandat de trente-six ans et sept mois, le plus long mandat jamais exercé par un juge de la Cour.

11 FIN DES FONCTIONS. — En principe, les juges quittent la Cour toujours volontairement (sauf aboutissement d'une procédure d'impeachment et, bien entendu, décès). L'aphorisme toujours cité de Jefferson, selon lequel « un juge à la Cour suprême ne prend jamais sa retraite et meurt rarement », n'a plus la portée qu'elle a eue tout au long du XIX<sup>e</sup> siècle et pendant une bonne partie du XX<sup>e</sup> siècle. Depuis 1937, date à laquelle le Congrès vota une loi qui étendit aux juges de la Cour suprême les avantages de pension des juges fédéraux, les juges de la Cour peuvent prendre leur retraite soit à 70 ans, après dix ans de service, soit à 65 ans, après quinze ans de service, à plein traitement. Mais personne ne peut les contraindre à se retirer et ils peuvent rester sur le siège aussi longtemps que leur santé le leur permet. C'est à eux seuls qu'il appartient de prendre une telle décision. Le choix de leur date de départ n'est pas sans conséquence politique, eu égard au parti qui occupe la présidence.

II | COMPÉTENCE ET MODES DE SAISINE

12 COMPÉTENCE DE PREMIER DEGRÉ (*ORIGINAL JURISDICTION*). — La Cour suprême exerce, on l'a vu, la compétence dévolue au pouvoir judiciaire fédéral. Dans les différents chefs de compétence énumérés à ce titre, la Constitution en a isolé certains pour les confier à la Cour suprême en première instance. L'article III, section 2 (2) a inclus dans ces chefs de compétence d'une part, les affaires qui mettent en cause les ambassadeurs, les autres ministres publics et les consuls, et d'autre part, les affaires dans lesquelles un État est partie. Toutefois, le Congrès n'a jamais interprété « juridiction de premier degré » (*original jurisdiction*) comme signifiant toujours juridiction exclusive (*exclusive jurisdiction*), sauf dans un cas...

dans toutes les affaires entre deux ou plusieurs États [28 USC, § 1251 (a)]. A l'exception de ces affaires qui doivent donc être en principe entendues par la Cour suprême, toutes les autres (et notamment celles mettant en cause les ambassadeurs, les autres ministres publics et les consuls) peuvent être entendues par d'autres juridictions fédérales ou d'États. Le résultat est que ces affaires, qui n'ont jamais de toute façon occupé une place très importante, ont aujourd'hui pratiquement disparu du rôle de la Cour. Les affaires que la Cour entend au titre de sa compétence de premier degré concernent donc principalement les États, lesquels interviennent soit comme demandeur, soit comme défendeur. L'immunité de juridiction de l'État, rappelé par le XI<sup>e</sup> Amendement (v. *infra*, l'arrêt n° 1, *Chisholm v. Georgia*), est certes opposable aux personnes privées et, en particulier, aux citoyens d'autres États. En revanche, elle est inopposable au souverain fédéral en sorte que les États-Unis peuvent former une action contre un État directement devant la Cour suprême.

Lorsque la Cour statue en première instance, elle est évidemment juge du fait. Les affaires qu'elle entend à ce titre mettent d'ailleurs souvent en cause des questions de fait complexes (par exemple, en matière de litiges frontaliers entre États). Ces affaires commencent toujours par une requête aux fins de poursuivre (*motion for leave to file a complaint*). Si la requête est rejetée, l'affaire est close. Si elle est acceptée, elle est inscrite au rôle et un procès (*trial*) au sens d'un examen judiciaire des faits s'ensuit inévitablement. Les juges de la Cour suprême n'assurent pas eux-mêmes cet examen. Celui-ci est conduit par un expert judiciaire nommé par la Cour (*special master*), généralement parmi les anciens avocats ou juges à la retraite. Sa fonction consiste à recueillir les preuves, entendre les témoins, enregistrer les dépositions, et, à la fin, proposer ses conclusions juridiques sur les faits qui lui ont été soumis. Toutes ces opérations sont conduites sous le contrôle de la Cour, les parties pouvant faire appel de toutes les décisions de l'expert judiciaire. Parce qu'elle ne s'estime pas écartée pour juger le fait, la Cour interprète sa compétence de première instance de manière très restrictive. Elle considère qu'elle ne doit l'exercer que « parimonieusement » (*sparingly*)<sup>1</sup> et, chaque fois que les parties peuvent résoudre leurs différends devant une autre juridiction, elle préfère les renvoyer devant celle-ci.

13 COMPÉTENCE D'APPEL (*APPELLATE JURISDICTION*). — Dans tous les cas autres que ceux dans lesquels elle a reçu compétence de premier degré, la Cour suprême a compétence d'appel, tant pour le droit que pour le fait, sur toutes les affaires qui ressortent de la compétence judiciaire

1. Wyoming v. Oklahoma, 502 U.S. 437, 450 (1992).

fédérale telle que définie précédemment (v. *supra*, § 3), mais « avec telles exceptions et sous telles règles que le Congrès aura établies » [art. III, sect. 2 (2)]. Il ressort de ce texte que le Congrès est maître de l'étendue de la compétence d'appel de la Cour. Le fil directeur de toutes les grandes lois votées par le Congrès depuis la fin du XIX<sup>e</sup> siècle sur la juridiction d'appel de la Cour se résume à une chose : limiter les possibilités d'appel à la Cour suprême. Cet objectif a été si bien réalisé qu'aujourd'hui la Cour n'est en principe jamais obligée d'examiner une affaire portée devant elle en appel. Sa compétence d'appel est pratiquement discrétionnaire.

Aujourd'hui, une affaire peut venir en appel devant la Cour essentiellement de deux manières différentes, par la voie d'une ordonnance d'appel (*writ of appeal*) ou par la voie d'une ordonnance de « certiorari » (*writ of certiorari*), et très rarement par la voie d'une demande de certification. Techniquement, les ordonnances, les *writs*, d'appel ou de « certiorari » sont des décisions de la Cour suprême que le requérant sollicite celle-ci de prendre, et qui consistent dans un ordre adressé à la juridiction inférieure de lui envoyer l'affaire aux fins d'un nouvel examen. Le *writ of appeal* est de droit, le *writ of certiorari* est purement discrétionnaire. L'ancien *writ of error*, vieille procédure de *common law* très voisine de l'actuel *writ of appeal*, qui était au XIX<sup>e</sup> siècle la voie procédurale la plus usuelle pour porter une affaire devant la Cour (v., par ex., *infra*, l'arrêt n° 9 *Barron v. Baltimore*), n'existe plus. Cette ordonnance, qui permettait de faire venir devant la Cour suprême l'intégralité d'une affaire en vue d'un examen pour erreur de droit, a été supprimée en 1928. Enfin, il faut relever pour être complet que, très exceptionnellement, une affaire peut venir devant la Cour par la voie de la procédure de certification. Il s'agit d'une ordonnance prise par une juridiction inférieure à propos de « toute question de droit en matière civile ou pénale » sur laquelle la juridiction en question estime avoir besoin d'instructions de la part de la Cour suprême. Cette procédure de renvoi pour, en quelque sorte, question de droit préalable est très rare ; la demande de certification peut être formée soit par une cour d'appel, soit par la *Court of Claims* (cour créée par le Congrès au titre de l'article III et principalement chargée des recours en responsabilité contre le gouvernement fédéral).

a) L'appel par la procédure du *writ of appeal*. Cette procédure qui était autrefois d'usage courant pour porter une affaire devant la Cour suprême est aujourd'hui confinée à certaines questions très précises de droit électoral. En 1988, le Congrès a en effet pratiquement supprimé la possibilité de saisir la Cour par ce *writ* pour lui substituer le *writ of certiorari*. Le *writ of appeal* est maintenant limité aux situations dans lesquelles une cour de district composée de trois juges (dont au moins un juge de cour d'appel) s'est prononcée par voie d'injonctions dans des affaires concernant la constitu-

tionnalité de la mise en œuvre de lois fédérales (ou d'États) relatives à des opérations électorales, en particulier les questions de découpage électoral, ou encore dans les situations où ce même type de cour est requis d'intervenir en application des grandes lois sur les droits civils (*Civil Rights Act of 1964*), ou sur le droit de vote (*Voiting Rights Act of 1965*), ou sur les fonds de campagne pour l'élection présidentielle (*Presidential Election Campaign Fund Act of 1974*).

b) L'appel par la procédure du *writ of certiorari*. C'est aujourd'hui le recours de droit commun pour saisir la Cour suprême d'une affaire en appel. La procédure du *certiorari* est née à la fin du XIX<sup>e</sup> siècle lorsqu'il apparut que la Cour ne pouvait plus faire face au flot de tous les appels dont elle était saisie. Le Congrès commença alors à limiter la juridiction d'appel obligatoire de la Cour en instituant, avec la loi Evarts de 1891, deux nouvelles procédures d'appel. Soit l'appel serait formé par requête aux fins d'obtenir un *writ of certiorari*, et dans ce cas la Cour aurait pouvoir discrétionnaire pour refuser de statuer, soit l'appel serait formé par requête en appel pur et simple (*appeal*), auquel cas la Cour devrait juger l'affaire dont elle est saisie. La distinction *appeal/certiorari* prit une grande importance avec la loi judiciaire de 1925 (*Judiciary Act of 1925*) qui étendit si largement la compétence d'appel discrétionnaire de la Cour que les requêtes en *certiorari* atteignirent près de 80 % des appels formés devant elle. Cette distinction entre l'*appeal* et le *certiorari* a aujourd'hui perdu une grande partie de son intérêt depuis que, par une loi du 27 juin 1988, le Congrès a fait de la requête en *certiorari* la procédure de droit commun pour saisir la Cour suprême d'une affaire en appel.

14 LA PROCÉDURE DU *WRIT OF CERTIORARI*. — Une demande de *writ of certiorari* est une requête introductive d'instance qui énumère et développe en une dizaine de pages les raisons pour lesquelles, de l'avis de l'appelant, la décision rendue par la juridiction inférieure soulève des problèmes juridiquement si importants et pertinents sur le plan fédéral que la Cour suprême doit se prononcer sur eux et rejeter l'affaire au fond. La plupart du temps, le dossier de procédure accompagne la requête. Selon une pratique bien établie, le *writ sollicite n'est octroyé que si au moins quatre juges votent en sa faveur (rule of four)*. Si la requête est accueillie, l'affaire est inscrite au rôle de la Cour suprême et des copies certifiées conformes de l'inscription sont alors communiquées aux parties et à la

1. Techniquement, dans la *common law*, l'expression *writ of certiorari* désigne l'ordonnance d'une cour supérieure qui enjoint à une juridiction inférieure de certifier et de lui envoyer l'intégralité des pièces de procédure d'une affaire, en cours d'examen ou déjà examinée par elle, afin qu'elle puisse être jugée au niveau supérieur. Dans le vocabulaire de la Cour suprême, l'expression désigne l'ensemble de la procédure par laquelle la Cour exerce sa compétence d'appel de manière discrétionnaire.

juridiction inférieure pour qu'elle adresse à la Cour suprême l'intégralité du dossier en certifiant l'authenticité. Le pouvoir de la Cour d'accueillir une requête en *certiorari* est purement discrétionnaire, mais ce n'est pas un pouvoir arbitraire. Depuis qu'elle a reçu compétence discrétionnaire pour exercer sa juridiction d'appel, la Cour a toujours pris soin de définir dans son règlement les conditions auxquelles elle exercerait sa compétence. Le règlement a été modifié plusieurs fois, la dernière révision datant de 1995. Selon de fins connaisseurs de la procédure complexe de la Cour, l'énigme éternelle et centrale de toute la procédure est de déterminer les facteurs qui dans une affaire donnée peuvent conduire la Cour à satisfaire la requête en *certiorari* qui lui est soumise. La doctrine la plus autorisée considère que les mystères sont loin d'être tous levés<sup>1</sup>. Dans le dernier état de la rédaction de la règle n° 10 du règlement de la Cour qui définit les conditions auxquelles la Cour accorde ou refuse le *writ of certiorari*, la Cour explique :

« Un contrôle de constitutionnalité fondé sur un *writ of certiorari* n'est pas un droit, mais une grâce discrétionnaire de la Cour. Une requête en *certiorari* n'est accordée que pour des raisons impérieuses. Les critères suivants, tout en ayant un caractère purement illustratif et simplement énonciatif, peuvent être tenus pour une indication des motifs que la Cour prend en considération pour se prononcer :

« a) une cour d'appel fédérale a rendu une décision qui est en conflit avec une décision d'une autre cour d'appel fédérale sur le même sujet ; à décidé d'une importante question de droit fédéral d'une manière qui contredit une décision adoptée par une cour d'État en dernier ressort ; ou a elle-même violé (ou approuvé la violation par une cour d'État) des règles acceptées et usuelles de la conduite du procès judiciaire dans des proportions de nature à requérir de la Cour l'exercice de son pouvoir de contrôle ;

« b) une cour d'État de dernier ressort s'est prononcée sur une importante question de droit fédéral d'une manière qui contredit la décision d'une autre cour d'État de dernier ressort ou d'une cour d'appel fédérale ;

« c) une cour d'État ou une cour d'appel fédérale s'est prononcée sur une importante question de droit fédéral qui n'a jamais été, mais qui devrait être, tranchée par cette cour, ou s'est prononcée sur une importante question de droit fédéral d'une manière qui contredit les décisions applicables de cette cour.

1. B. Bostley and E. Gressman, *The Supreme Court's New Rules - Model 1995*, 164 FRD 80. Pour une étude sur la signification politique des choix opérés par la Cour dans la masse des affaires qui lui sont soumises, v. D. M. Province, *Care Selection in the United States Supreme Court*, Chicago and London, The University of Chicago Press, 1980.

2. R. L. Stern, E. Gressman, S. M. Shapiro and K. S. Oeller, *Supreme Court Practice* (8NA, 7th ed., 1993), chap. 4, p. 162 et s.

« Une requête aux fins d'obtenir un *writ of certiorari* est rarement acceptée lorsque l'erreur alléguée consiste en une erreur de fait ou en la fausse application d'une règle de droit clairement établie. »<sup>1</sup>

De cette rédaction très restrictive de 1995, qui a remplacé celle de 1990, il est clair que la raison centrale qui justifie l'octroi ou le refus d'un *certiorari* est la contrariété de jugements entre juridictions inférieures. Le conflit entre décisions juridictionnelles est la raison décisive. Il peut s'agir de contrariété de jugements entre différentes cours fédérales d'appel (les conflits entre cours de circuit sont les cas les plus fréquents), ou de conflits entre une cour d'appel et la Cour suprême, ou encore de divergences entre différentes décisions d'une même cour d'appel, ou enfin de conflits entre cours d'États. En tout état de cause, aussi décisive soit-elle, cette condition n'est pas suffisante. Capitale à cet égard est la phrase d'ouverture dont on peut dire qu'elle relève d'un truisme, dans la mesure où le pouvoir purement discrétionnaire de la Cour est depuis longtemps établi. Il n'en reste pas moins que cette phrase est nouvelle, signe que c'est bien la discrétionnarité de ce pouvoir de juger qui est l'élément décisif et le critère distinctif du *writ of certiorari*. En second lieu, à la place des « raisons spéciales et importantes » qui justifiaient la délivrance du *writ* dans la version de 1990, celle de 1995 exige des « raisons impérieuses ». Très significatif est aussi le changement des adjectifs qui qualifient la question de droit fédéral dont la Cour estime devoir se saisir. Dans les trois alinéas du texte, cette question a été précédée de l'adjectif « importante ». A défaut d'autres précisions, c'est en prenant des exemples de questions dont la Cour se saisit qu'on arrive à comprendre ce qu'est une importante question de droit fédéral, et la vérité est qu'il n'y a pas de règle absolue dans ce domaine. Il n'y a que des indices qui peuvent tenir, par exemple, à la nature du litige, à la manière dont la cour inférieure s'est prononcée, à l'état du droit sur la question, à la nature et au nombre des personnes susceptibles d'être concernées par le jugement. Un de ces multiples indices est aussi la publicité donnée dans les médias à l'affaire. L'affaire de la protection des mineurs contre le discours obscène sur Internet en est un exemple. C'est moins la difficulté constitutionnelle, en tant que telle, que la publicité donnée par les médias à la loi du Congrès qui soumettait à des sanctions pénales le discours indécent sur Internet qui a fait qu'il était pratiquement certain que la Cour se prononcerait sur le problème [*Reno v. American Civil Liberties Union* (1997)]<sup>2</sup>.

A l'origine, la requête en *certiorari* est née du besoin d'alléger le rôle d'une Cour encombrée et surchargée d'affaires. Aujourd'hui, alors qu'elle

1. *V. Supreme Court Rules. The 1995 Revision*, 8NA, Washington DC, 1995, p. 27.  
2. 521 U.S. 844.

est saisie d'environ 7 500 recours par an, la Cour fait grand usage du pouvoir discrétionnaire dont elle dispose, si l'on en juge par la parcimonie avec laquelle elle accueille les requêtes en *certiorari* qui lui sont présentées. Alors que, de 1971 à 1988, la Cour suprême jugeait une moyenne de 147 affaires par an, dès 1989 le nombre des décisions tomba à 132. En 1990, il n'était plus que de 116, et pour l'année judiciaire 1995, il a atteint le chiffre de 77. Ce déclin spectaculaire s'explique pour diverses raisons. On peut y voir, avec beaucoup de juristes américains, une réévaluation complète par la Cour de son rôle dans le système juridique américain, qui aurait pu être induite notamment par le départ de juges libéraux et l'arrivée de juges conservateurs<sup>1</sup>. Mais il est aussi possible d'y voir la recherche d'une nouvelle distribution des pouvoirs dans l'Union. Dans la mesure où les refus d'accorder les requêtes en *certiorari* signifient le maintien des jugements rendus par les juridictions inférieures, fédérales et d'États, ils contribuent d'une certaine manière à décongestionner le gouvernement fédéral.

### III | MÉTHODES DE TRAVAIL

15 LES LIEUX ET LES HOMMES. — Après avoir longtemps siégé dans les locaux du Congrès, la Cour suprême est installée depuis 1935 dans l'un des bâtiments les plus imposants et les plus majestueux de Washington. Le bâtiment a été conçu pour être une réplique du temple de Diane à Éphèse. La forte symbolique qui s'attache à cette architecture est un extraordinaire témoignage du respect, voire de la vénération que les Américains ont conçu pour le droit, la justice et le pouvoir judiciaire. Au fronton de ce temple du droit sont gravés les mots *Equal Justice Under Law*. Ces termes apparemment simples emportent pourtant une double signification tant pour *Equal Justice* qui peut compris dans un sens procédural (accès à la justice) et/ou matériel (justice distributive) que pour *Under Law* qui peut signifier la loi positive et/ou le droit naturel. On peut les traduire, sans souci d'élégance, par « égale justice (pour et à tous) conformément au droit (et à la loi) ».

Les 9 juges de la Cour suprême tiennent une session annuelle qui commence officiellement le premier lundi d'octobre et qui dure en pratique environ neuf mois, jusqu'à la fin juin ou, le cas échéant, jusqu'à ce que les affaires en l'état d'être jugées aient été décidées, date à laquelle la Cour interromp ses travaux, étant ici précisé qu'elle ne s'ajourne formellement

1. V., notamment, A. D. Hellman, *The Shrinking Docket of the Rehnquist Court*, 9 *The Supreme Court Review* 1996, p. 403-438.

qu'au mois d'octobre suivant. Par opposition à la tradition continentale de l'anonymat de la fonction judiciaire, les juges de la Cour suprême sont connus du grand public. Les plus grands journaux (*New York Times*, *Washington Post*) rendent compte des décisions de la Cour ; ils possèdent d'ailleurs des correspondants spécialement attachés à suivre son travail et à rendre compte de ses arrêts<sup>1</sup>. Chaque juge a une individualité bien identifiée et il (ou elle) est classé(e) sur une échelle de préférences partisans qui va de « libéral » à « conservateur ». Les arrêts (*opinions*) sont apparatés la répartition des votes. A la lecture de la décision, on sait la position prise par chaque juge sur l'affaire. Cette règle est toutefois écartée lorsque la décision de la Cour est rendue *per curiam*, c'est-à-dire lorsque l'arrêt de la Cour est réputé avoir été écrit par la Cour tout entière, comme dans la tradition continentale. En principe, un arrêt est rendu *per curiam* lorsque la Cour renverse ou confirme le jugement de la juridiction inférieure après procédure sommaire, sans passer par un échange complet de mémoires écrits et de plaidoiries [v., par ex., *Bibles v. Oregon Natural Desert Ass'n*, 519 U.S. 355 (1997)]. Mais dans certains cas, qui n'obéissent pas toujours à une logique très rigoureuse, un arrêt peut être rendu *per curiam* pour des raisons très différentes. Parfois, il s'agit d'exprimer la solidarité des juges [v. *infra*, à propos de l'autorité des décisions de la Cour l'arrêt n° 36, *Cook v. Aaron* (1958)]. Parfois, la Cour n'entend pas que la position individuelle de ses membres sur certains problèmes soit identifiée, sans qu'il soit possible de donner un énoncé précis des questions sur lesquelles les juges peuvent souhaiter réserver pour l'avenir leur liberté d'opiner [v. *infra*, à propos du financement de la vie politique l'arrêt n° 51, *Buckley v. Valeo* (1976)]. Parfois, l'arrêt de la Cour peut consister en un paragraphe très bref rendu *per curiam*, mais être suivi par plusieurs opinions individuelles ou dissidentes, aucune d'elles ne rassemblant de majorité, ce qui témoigne de la désunion des juges sur la question [v. *infra*, à propos de la peine de mort, l'arrêt n° 45, *Furman v. Georgia* (1972), ou encore, *Lee v. International Society for Krishna Consciousness*, 505 U.S. 830 (1992)]. Ainsi, même dans la technique de l'arrêt *per curiam* censé effacer l'individualité des juges, celle-ci peut réapparaître et même réapparaître souvent dans la plus pure tradition de la *common law*.

La Cour ne se divise jamais en chambres pour l'examen des affaires. Tous les juges prennent connaissance de toutes les affaires. Toutefois, un juge peut (et doit) se désister en cas de conflits d'intérêts, étant ici précisé que, conformément à la tradition des avocats et gens de justice aux États-Unis, cette notion est largement entendue. Ainsi, un juge se désistera d'une affaire concernant une société dont il peut posséder des actions ou, encore,

1. V. Linda Greenhouse, *Telling the Court's Story*, *Yale Law Journal*, vol. 105, 1996, p. 1537-1561.

un juge refusera de délibérer dans toute affaire où son impartialité pourrait être mise en doute, ne serait-ce que de manière indirecte. Par exemple, le juge Rehnquist s'est désisté dans l'affaire *United States v. Nixon* (arrêt n° 50) à raison des fonctions qu'il avait occupées au secrétariat à la Justice avant d'être désigné par le président Nixon pour siéger à la Cour

16 LES TRADITIONS DE LA COMMON LAW. — Elles ont exercé une profonde influence sur les méthodes de travail de la Cour. L'une d'entre elles veut que la justice soit rendue par des individus, non par un collège anonyme. Aussi bien, en Angleterre, les arrêts, notamment ceux de la Cour d'appel ou de la formation judiciaire de la Chambre des lords, sont-ils rendus *seriatim*, en ce sens que chaque juge est autorisé à opiner individuellement sur l'affaire. Il y a bien une décision de la Cour, au sens de ce que l'on considérerait en droit français comme un dispositif, et les plaideurs savent évidemment s'ils ont perdu ou gagné leur affaire. Mais il n'y a pas une opinion de la Cour au sens d'un jugement qui contiendrait dans un texte unique, censé avoir été adopté par tous les juges, les motifs de l'arrêt. Le jugement est toujours l'opinion d'un juge auquel peuvent éventuellement se rallier certains de ses collègues pour des raisons souvent brièvement exprimées tandis que d'autres peuvent estimer nécessaire de s'en séparer. Ce système, fort différent de la tradition continentale, où la justice ne parle que d'une seule voix, n'est pas sans poser parfois certains problèmes quand il s'agit de dégager la *ratio decidendi* du jugement, c'est-à-dire la règle de droit qui justifie le jugement rendu. Dès lors que les États-Unis ont puisé les sources de leur culture juridique dans la *common law*, il était dans l'ordre des choses que la pratique des jugements *seriatim* fût très naturellement retenue dès les premières années de fonctionnement de la Cour suprême et que les premiers arrêts fussent rendus sous cette forme [v., par ex., l'arrêt n° 1, *Chisholm v. Georgia* (1793) ou l'arrêt n° 2, *Ware v. Hylton* (1796)].

En 1801, la primauté à la tête de la Cour suprême de celui qui allait devenir son plus grand président apporta à la tradition des jugements *seriatim* un grand bouleversement. John Marshall estimait que « la pratique interne à chaque tribunal doit nécessairement faire en sorte que l'opinion qui est délivrée comme l'opinion de la cour soit préalablement soumise à tous les juges ; et si une quelconque partie du raisonnement est contestée, il faut la modifier jusqu'à ce qu'elle rencontre l'approbation de chacun, avant de pouvoir être délivrée comme l'opinion de tous » (« *A Friend of the Union* »). Cette conception toute « continentale » de la manière de dire le droit a introduit dans la pratique de la Cour suprême la

1. Cité par Jenn Edward Smith, *John Marshall, Defender of a Nation*, New York, Henry Holt Co., 1996, p. 283.

notion d'« *opinion de la Cour* », et elle fut mise en œuvre en 1801 dès le premier jugement rendu par la Cour Marshall dans une affaire *Talbot v. Seaman*. La pratique de l'« *opinion de la Cour* », censée exprimer l'opinion unanime des juges, qui est lue par le Président (tout au moins du temps de John Marshall) et à laquelle tous les juges peuvent apporter une touche personnelle, mais sans que l'on puisse identifier une individualité particulière, dura quelques années. Il n'est pas insignifiant de relever que le mémorable arrêt *Marbury v. Madison* (v. *infra*, arrêt n° 3) fut rendu selon cette forme.

Mais rapidement, sans pour autant que la pratique d'une « *opinion de la Cour* » soit écartée, la culture de *common law* et l'individualisme du juge qui la caractérise ont repris leurs droits. C'est ainsi que sont nées ces pratiques de l'« *opinion dissidente* » (*dissenting opinion*) et de l'« *opinion individuelle* » (*concurring opinion*). L'opinion dissidente exprime le désaccord d'un juge avec l'opinion de la Cour. Certains juges sont passés à la postérité pour la clairovoyance de leur dissentiment dans certaines affaires. C'est le cas, en particulier, du juge John M. Harlan qui sut mettre en garde contre les maux à venir de la doctrine « *Séparés, mais égaux* » retenue par la Cour dans la malheureuse décision *Plessy v. Ferguson* (1896) [v. *infra*, arrêt n° 15]. C'est aussi le cas du juge Oliver Wendell Holmes, qui siégea à la Cour de 1902 à 1932 [v. *infra* soit opinion dissidente dans l'affaire *Lochner v. New York* (1905), arrêt n° 16]. Sans être en désaccord avec l'opinion de la Cour, un juge peut estimer que certains points de droit, insuffisamment traités ou plus simplement ignorés dans l'opinion, méritent d'être développés ou précisés. Dans ce cas, il peut faire valoir son point de vue dans une opinion individuelle (*concurring opinion*) et, ce faisant, il s'exprime à titre personnel comme l'y pousse la culture de *common law*. Certaines opinions individuelles se présentent comme de véritables exposés de doctrine sur de grandes questions constitutionnelles [v., par ex., *infra*, l'opinion du juge Jackson sur les pouvoirs présidentiels dans l'affaire dite de la « saisie des actéries », *Youngstown Sheet & Tube Co. v. Sawyer* (1950), arrêt n° 34].

17 LE RÔLE DU PRÉSIDENT. — En principe, le président de la Cour n'est qu'un simple *primus inter pares*. En pratique, il joue un rôle considérable. Il est d'abord « *juge-en-chef* » de l'ensemble des juges fédéraux. A ce titre, il est à la tête du pouvoir judiciaire fédéral, ce qui lui donne qualité pour présider la conférence judiciaire des États-Unis (U.S.

1. J. Cranch 1 (1801).

2. V., par exemple, l'arrêt *Hindon v. Gueziler*, 4 Cranch 293 (1808), dans lequel l'opinion de la Cour est lue par le président Marshall, mais où les juges Chase et Livingston estiment nécessaire d'exprimer leur dissentiment, pratique à l'époque très rare.



pour éviter que les plus jeunes ne soient influencés par les anciens, a disparu entre 1956 et 1971, année au cours de laquelle William H. Rehnquist fut nommé à la Cour, en sorte que celui-ci, n'ayant jamais connu qu'un système dans lequel prévaut un strict ordre d'ancienneté, a pu présenter le système antérieur comme une légende<sup>1</sup>.

18 L'OPINION DE LA COUR. — La décision sur le sort à donner au jugement de la juridiction inférieure est prise par la conférence après l'audition des plaidoiries orales. Un premier vote indicatif intervient. Le jugement peut être confirmé (*affirmed*), ou renversé (*reversed*) si la juridiction inférieure s'est radicalement trompée dans le dispositif comme dans les motifs de sa décision, ou annulé (*vacated*) si la juridiction inférieure aurait pu parvenir au même résultat mais sur de meilleures bases juridiques, ou enfin renvoyé pour réexamen et nouveau jugement (*remanded*), conformément aux directives et indications contenues dans l'opinion rendue par la Cour suprême. La décision est prise à la majorité des voix.

a) *Elaboration*. Depuis la présidence de John Marshall, l'usage veut que les motifs qui sous-tendent le jugement soient consignés dans une opinion de la Cour. L'opinion de la Cour est écrite par un juge de la majorité qui est en principe désigné par le Président, sauf si celui-ci se trouve dans la minorité, auquel cas le rédacteur de l'opinion de la Cour est désigné par le juge de la majorité le plus ancien. La responsabilité du Président dans la désignation de celui (ou celle) chargé(e) de préparer le projet d'opinion est capitale. Selon le juge Frankfurter, l'un de ceux qui excella dans l'exercice de ce pouvoir, par l'astuce, la sagesse et le désintéressement de ses choix fut le président Hughes. Le Président peut évidemment se réserver certaines affaires, et parfois il doit le faire au regard de l'importance toute particulière de celles-ci. Ce fut le cas du président Warren dans l'affaire *Brown v. Board of Education of Topeka* (1954) [v. *infra*, arrêt n° 35] ou encore du président Burger pour l'affaire *United States v. Nixon* (1974) [v. *infra*, arrêt n° 50]. On sait aujourd'hui le rôle décisif qu'a joué Earl Warren pour obtenir des opinions unanimes dans les affaires de ségrégation [v. *infra*, les arrêts n° 35, *Brown v. Board of Education of Topeka* (1954) et n° 36, *Cooper v. Aaron* (1956)]. Avant lui, John Marshall avait agi de même dans les grandes affaires mettant en cause l'unité nationale.

Qu'il s'agisse du Président ou de l'un de ses collègues, le juge qui est chargé de rédiger l'opinion de la Cour commence en pratique à rédiger un projet d'opinion. Ce projet suit invariablement le même « parcours du combattant ». Il circule à travers les juges, chacun d'entre eux pouvant

1. V. William H. Rehnquist, *The Supreme Court, How It Was, How It Is*, New York, W. Morrow Co., 1987, p. 283-290.

*Judicial Conference*) qui est l'organe au sein duquel sont élaborées toutes les règles de pratique et de procédure (civile et pénale) ainsi que toutes les directives concernant la pratique des juridictions fédérales (depuis l'harmonisation des condamnations pénales jusqu'aux règles de déontologie professionnelle). En tant que président de la Cour suprême, il exerce une fonction capitale : celle de présider la conférence de la Cour.

Lorsque la Cour est en session, elle tient « conférence » deux fois par semaine (depuis la présidence Burger, il s'agit du vendredi et du mercredi après-midi). Il s'agit d'une réunion privée, tenue à huis clos dans la salle des conférences (*conference room*) de la Cour et à laquelle personne, hormis les juges, ne peut assister. La conférence est la forme institutionnelle que prend la Cour comme organe collégial de décision. C'est en son sein que sont prises toutes les décisions ; par exemple, l'acceptation ou le rejet des requêtes en *certiorari*, les délibérations sur les affaires en cours de jugement, les décisions sur les affaires en l'état d'être jugées ainsi que les décisions, même les plus modestes, concernant la marche ordinaire de la Cour.

Les débats de la conférence sont dirigés par le président de la Cour. C'est une responsabilité considérable qui peut orienter l'octroi ou le refus de *certiorari* ainsi que la décision de la Cour sur le jugement de la juridiction inférieure. Il faut savoir que les requêtes en vue d'obtenir une ordonnance de *certiorari* ne sont discutées que si elles ont fait l'objet d'une inscription à l'ordre du jour d'une conférence élaboré par le Président. L'inscription à l'ordre du jour commence avec une inscription sur la liste de discussion (*discuss list*). Elle se fait à la demande d'au moins un juge auquel il appartient, le moment venu, de développer les motifs pour lesquels, à son avis, la Cour doit accorder le *certiorari* demandé. Celui-ci n'est effectivement accordé que si trois au moins de ses collègues partagent ses vues. D'autre part, la conférence est l'instance où la Cour en tant qu'organe collégial arrête sa position sur le sort du jugement rendu par la juridiction inférieure, qui est confirmé ou renversé, à la majorité des voix. Qu'il s'agisse de retenir une affaire en vue de lui accorder un *certiorari*, ou qu'il s'agisse de se prononcer sur le jugement de la juridiction inférieure, le Président est un acteur essentiel. Sur les 28 présidents qu'a comptés la Cour, chacun a eu son style, et, sur ce chapitre l'historiographie de la Cour est fournie. A la conférence, les juges prennent la parole et votent, aujourd'hui par ordre d'ancienneté. Il n'en fut pas toujours ainsi. Depuis la présidence de John Marshall, l'usage voulait que le juge le moins ancien votât en premier, puis que les votes fussent pris par ordre renversé d'ancienneté jusqu'au Président qui votait en dernier<sup>1</sup>. Ce système qui avait été conçu

1. V. Ruth Bader Ginsburg, *Remarks for American Law Institute Annual Dinner, May 19, 1994, Saint Louis University Law Journal*, vol. 38, 1994, p. 881-888, notamment p. 886.

requiert de l'auteur des modifications, faire des suggestions de rédaction, voire requérir des changements, le tout éventuellement assorti de la menace d'écrire une opinion individuelle pour faire connaître son point de vue. Si celui qui écrit l'opinion de la Cour au nom de la majorité reste sourd à ces demandes et sollicitations, le juge dont les suggestions ne sont pas entendues pourra refuser de voter pour le projet d'opinion et considérer son désaccord avec l'opinion de la Cour dans une opinion dissidente. Exceptionnellement, il peut arriver que la Cour soit incapable de réunir une majorité de cinq juges pour s'accorder sur une opinion de la Cour. Dans cette hypothèse de désunion, la Cour n'a pas d'autre solution que de rendre un jugement à la pluralité des voix (*plurality opinion*), c'est-à-dire sans opinion de la Cour. Selon le vocabulaire de la Cour, il y a dans ce cas « jugement », mais non « opinion » de la Cour. Ce jugement, souvent divisé en plusieurs parties, peut confirmer le jugement inférieur sur certains points, il peut aussi l'infirmer sur d'autres, et ce pour des motifs dont on trouve l'explication soit dans l'opinion d'un juge dont les arguments réunissent les coalitions antagonistes des autres juges [v., par ex., *infra*, à propos des mesures d'affirmative action, l'opinion-pivot du juge Powell dans l'arrêt n° 55, *Regents of University of California v. Bakke* (1978)], soit dans l'opinion d'un groupe de juges (inférieur à quatre) à laquelle d'autres juges peuvent se rallier sur certains points, formant ainsi sur le point en question une majorité [v. par ex. *infra*, à propos de la règle du précédent (*stare decisis*), l'arrêt n° 68, *Planned Parenthood of Southeastern Pennsylvania* (1992)].

b) *Forme*. Le style des opinions de la Cour est réputé. La Cour a compté en son sein des juges qui sont passés à la postérité pour la qualité de leur plume. John Marshall, Oliver W. Holmes, Louis D. Brandeis, Robert H. Jackson, William O. Douglas en sont des exemples. Depuis quelques années, la présence de nombreux assistants judiciaires (*law clerks*), bien souvent chargés par les juges eux-mêmes de préparer un avant-projet de leurs opinions, s'est conjuguée avec les nouvelles ressources qu'offre l'informatique (logiciels de traitement de texte et accès aux banques de données juridiques) pour introduire certains changements dans le style des arrêts. La multiplication des notes de bas de pages, l'abondance des références de jurisprudence dans le texte et en notes, et les citations d'articles de doctrine donnent à ces décisions un visage nouveau.

Les opinions de la Cour sont délivrées en public le jour réservé à cette fin (*Opinion Day*). Ce fut longtemps le lundi ; depuis la présidence Burger, c'est plus souvent (mais il n'y a rien de systématique) soit le mardi, soit le mercredi. A l'exception des opinions décidées *per curiam*, les opinions délivrées en public font en principe état de tout le raisonnement de la Cour et exposent les différents points de vue des juges. L'opinion de la Cour est

soit intégralement lue (pratique assez rare aujourd'hui), soit le plus souvent résumée par son auteur. En principe, les juges dissidents n'exposent pas oralement leur point de vue et l'usage est de renvoyer à la lecture de leurs opinions dissidentes. Très exceptionnellement, un juge dissident peut estimer nécessaire d'exprimer son désaccord de manière solennelle, en prenant la parole.

### Section III L'œuvre constitutionnelle de la Cour suprême

19 RÔLE DE LA COUR SUPRÊME EN GÉNÉRAL. — Aucune institution judiciaire dans aucun pays n'a joué et ne joue un rôle comparable à celui de la Cour suprême aux États-Unis. La Cour occupe dans l'histoire et dans la société américaine une place exceptionnelle qui s'explique par sa position dans les équilibres constitutionnels et juridiques des États-Unis. Les États-Unis sont, répétons-le, un État fédéral et la Cour suprême est, on l'a vu, la plus haute instance du pouvoir judiciaire fédéral (v. *supra*, § 4-5). C'est à ce titre qu'elle a joué et joue toujours un rôle capital.

En tant que plus haute instance du pouvoir judiciaire fédéral, la Cour a la charge de garantir une application effective et une interprétation uniforme du droit fédéral, c'est-à-dire de la Constitution bien sûr, mais aussi des lois fédérales, des innombrables règlements édictés par les multiples agences rattachées au gouvernement fédéral (v. *supra*, § 5), et, dans la mesure où elles peuvent subsister, des règles de *common law*. A ce dernier point de vue, il faut savoir qu'avec la prolifération des textes législatifs et réglementaires, la Cour a renoncé à l'idée qu'il pourrait exister une *fédéral common law générale* qu'elle serait chargée de faire respecter, notamment dans les domaines du droit commercial, du droit des sociétés, du droit de la propriété immobilière ou du droit de la responsabilité délictuelle, comme elle l'admit pendant presque un siècle à partir de la décision *Swift v. Tyson* (1842)<sup>1</sup>. Il faut dire que le défaut majeur de cette construction jurisprudentielle était que ces règles de droit commun fédéral n'étaient pas opposables aux États, en sorte que se développaient deux systèmes de *common law* concurrents (fédéral et d'État). La Cour abandonna l'idée d'un droit fédéral commun général dans la décision *Erie Railway Co. v. Tompkins* (1938)<sup>2</sup>. Depuis cette date, la seule *common law* admise par la Cour est celle qui

1. 41 U.S. (16 Pet.) 1 (1842).

2. 304 U.S. 64 (1938).

peut subsister et se développer au niveau des États (*state common law*). Mais ce vestige des origines anglaises du système juridique américain ne subsiste que pour autant qu'il ne s'oppose pas au droit fédéral écrit, qui est, pour la Cour suprême, le point infranchissable des pouvoirs des États.

20 LE RÔLE DE LA COUR SUPRÊME EN MATIÈRE CONSTITUTIONNELLE.  
— Dans ses fonctions de garante en dernier ressort de l'application effective et de l'interprétation uniforme du droit fédéral, la Cour suprême n'applique pas que la seule Constitution. Plus de la moitié des affaires dont elle est saisie ne mettent pas en cause la Constitution mais les lois du Congrès, de sorte que la Cour n'est pas enfermée comme les cours constitutionnelles européennes dans ce rôle exclusif de « gardienne de la Constitution ». C'est pourtant à ce titre qu'elle est la plus connue et que sa jurisprudence a dépassé les frontières nationales. Aussi bien, à la seule exception de la décision *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.* (1984) [v. *infra*, arrêt n° 60] retenue pour son intérêt en matière administrative, les arrêts rapportés dans le présent ouvrage ne concernent-ils que le rôle constitutionnel de la Cour.

Si la Cour suprême est principalement connue comme gardienne de la Constitution, bien que la part quantitativement la plus importante de sa jurisprudence ne soit pourtant pas de nature constitutionnelle mais législative, c'est essentiellement parce que la Constitution fédérale est le point de départ et le point d'aboutissement de la fonction de garante en dernier ressort de l'application effective et de l'interprétation uniforme du droit fédéral qui lui a été dévolue. C'est dans la Constitution que la Cour puise la justification de tous ses pouvoirs, constitutionnels et législatifs, et c'est pour maintenir la Constitution qu'elle les exerce. Le système fonctionnel de telle sorte que la Constitution est, par nécessité, l'alpha et l'oméga de tout le système juridique fédéral. Le génie de John Marshall, premier président de la Cour, est d'avoir admirablement compris cette mécanique si intelligemment conçue qu'elle est à la science des constitutions ce que le mouvement perpétuel est aux sciences physiques. Sa plus grande réussite, ce pour quoi il est resté le plus grand président de la Cour, est d'avoir rendu la Constitution des États-Unis opposable à tous les pouvoirs, aux pouvoirs des États bien sûr (comme l'avait prévu l'art. VI de la Constitution, relatif à la clause de suprématie), mais aussi aux pouvoirs fédéraux (comme ne l'avait pas du tout prévu, tout au moins expressément, la Constitution fédérale). Après lui, tout au long de son existence, la Cour suprême a poursuivi la même tâche que Marshall avait initialement tracée : faire respecter la Constitution fédérale par les États et par le gouvernement fédéral.

I | LA FORMATION DE L'UNITÉ NATIONALE (1790-1869)

21 LA SUPRÉMATIE DE LA CONSTITUTION FÉDÉRALE SUR LES ÉTATS. — La Constitution fédérale de 1787 avait été principalement faite pour substituer une « Union plus parfaite » à la confédération moribonde qui ressemblait alors les États. C'est donc tout naturellement sur la souveraineté de ces jeunes républiques sœurs et indépendantes que les premières grandes affaires de la Cour ont porté. Dès les origines, la Cour a tiré toutes les conséquences de l'une des créations les plus originales du constitutionnalisme américain, la notion de souveraineté limitée. Limitée, d'abord, par le caractère républicain de l'État ; l'affaire *Chisholm v. Georgia* (arrêt n° 1) dans laquelle la Cour dit en substance que le principe « monarchique » de l'immunité de juridiction n'a pas lieu d'être reconnu à des États qui sont fondés sur le principe de la souveraineté populaire, est ici topique, même si l'idée est peut-être trop neuve pour l'esprit du temps et déclenche pour la première fois une révision constitutionnelle pour renverser l'arrêt de la Cour. Limitée, ensuite et surtout, par l'appartenance des États à une « Union plus parfaite », elle-même ordonnée par le « peuple américain » (*We The People*). Dès les origines, la Cour a donné la plus grande portée à la clause de suprématie du droit fédéral sur le droit des États, en y incluant les traités passés par l'Union (v. l'arrêt n° 2, *Ware v. Hylton*) et, bien entendu, au premier chef la Constitution. La jurisprudence de la Cour Marshall reste marquée par la construction de toutes les implications du principe de suprématie de la Constitution sur le droit des États : *Fletcher v. Peck* (arrêt n° 4), *McCulloch v. Maryland* (arrêt n° 6) et *Gibbons v. Ogden* (arrêt n° 8), sans omettre la supériorité « hiérarchique » d'appel de la Cour suprême elle-même sur les cours d'États : *Martin v. Hunter's Lessee* (arrêt n° 5) et *Cohens v. Virginia* (arrêt n° 7), ce principe d'organisation étant lui-même la garantie de l'effectivité du premier. Au terme d'une évolution tumultueuse et ultimement tragique, la construction de l'État fédéral sera achevée quand, après la guerre de Sécession, la Cour pourra parler de la république américaine comme « d'une union indestructibles d'États indestructibles » (arrêt n° 11, *Texas v. White*).

22 LA SUPRÉMATIE DE LA CONSTITUTION FÉDÉRALE SUR LE GOUVERNEMENT DE L'UNION. — A l'inverse de ce qu'il disposait pour les États, le texte adopté à Philadelphie n'avait pas formellement précisé le statut de la Constitution sur les organes du gouvernement de l'Union. Dans le mémorable arrêt *Marbury v. Madison* (arrêt n° 3), la Cour suprême a considéré que la Constitution s'imposait à eux et, en particulier,

au Congrès. L'apport de la jurisprudence *Marbury* est d'avoir posé le principe du contrôle judiciaire de constitutionnalité des lois (*judicial review*) comme corollaire obligé du principe de la suprématie constitutionnelle et, ce faisant, d'avoir fait du pouvoir judiciaire l'égal des deux autres.

Le principe de la suprématie de la Constitution sur les organes du gouvernement fédéral a été appliqué avec la plus grande parcimonie par la Cour Marshall qui estima, à la seule exception de l'affaire *Marbury*, ne pas devoir y recourir. La deuxième fois où elle fut mise en œuvre, ce fut dans la funeste affaire *Dred Scott* (arrêt n° 10) qui, avec l'annulation du Compromis du Missouri, allait précipiter la guerre de Sécession. La tragédie qui est née de cette décision malheureuse montre combien le pouvoir de *judicial review* est politiquement d'un maniement délicat. C'est un pouvoir qui ne peut compter pour être effectivement respecté et obéi que sur les seuls ressorts de la puissance d'opinion, et la puissance d'opinion est, comme le disait si finement Tocqueville, « celle dont il est le plus difficile de faire usage, parce qu'il est impossible de dire exactement où sont ses limites. Il est souvent aussi dangereux de rester en deçà que de les dépasser ».

## II | DE LA RECONSTRUCTION AU NEW DEAL (1865-1937)

23 LE PROBLÈME NOIR. — Après la guerre de Sécession, trois amendements (les XIII<sup>e</sup>, XIV<sup>e</sup> et XV<sup>e</sup>) furent ajoutés à la Constitution pour mettre fin à l'esclavage et faire accéder les Noirs à l'égalité des droits civils et politiques. L'application de ces dispositions souleva d'immenses difficultés, moins peut-être parce que la Cour dans son ensemble était fondamentalement opposée à l'émancipation des noirs (encore que la question de la race ait longtemps pesé dans le débat public) que parce que, prises au pied de la lettre et interprétées pour recevoir leur plein effet, ces dispositions, et notamment le XIV<sup>e</sup> Amendement, étaient susceptibles à terme de vider le fédéralisme de tout contenu. Le jour, en effet, où les droits civils et politiques sont définis au niveau fédéral, la liberté des États de se gouverner eux-mêmes se réduit à une peau de chagrin. Préférant la liberté à l'égalité, la Cour a choisi de donner à cette disposition une interprétation restrictive, tant dans les affaires dites de l'abattoir (*Slaughterhouse Cases*, arrêt n° 12) que dans celles des « droits civils » (*Civil Rights Cases*, arrêt n° 13). Et c'est encore la même logique fédérale qui permet de comprendre l'inique décision *Plessy v. Ferguson* (arrêt n° 15) qui entérine la doctrine « Séparés, mais égaux ».

1. De la démocratie en Amérique, I, chap. VIII, Paris, GF, 1981, p. 226

24 LA LIBERTÉ ÉCONOMIQUE. — L'importance que prennent les questions économiques dans la jurisprudence de la Cour, à partir du dernier tiers du XIX<sup>e</sup> siècle, s'explique par la manière dont fonctionne le contrôle de constitutionnalité aux États-Unis. Si la Cour suprême est toujours appelée à statuer sur les grands problèmes du moment, ou si, pour reprendre le célèbre aphorisme de Tocqueville, « il n'est presque pas de question politique, aux États-Unis, qui ne se résolve tôt ou tard en question judiciaire », c'est d'une part, parce que chaque citoyen peut porter devant le pouvoir judiciaire une question politique en ayant toujours la possibilité de soulever le problème de la constitutionnalité de la loi qu'on veut lui appliquer et qu'il conteste, qu'il s'agisse d'une loi d'État ou d'une loi fédérale (*constitutional claims*), et d'autre part, parce que les cours américaines ont hérité du droit anglais, en particulier des *equitable remedies* et des pouvoirs d'injonction qui en découlent, les moyens de bloquer l'application des lois. Il n'y a pas, aux États-Unis, de « privilège du préalable » ou d'« autorité de chose décidée » ; la « puissance » d'État n'y est pas du tout reçue avec la même force que dans les systèmes juridiques qui connaissent un droit public distinct du droit privé.

Dans ces conditions, à partir du moment où les gouvernements des États et le gouvernement fédéral ont commencé à intervenir en matière économique, tous ceux qui avaient des raisons de se plaindre de cette intervention sous forme de réglementation dans le domaine des transports, des chemins de fer, des prix ou du travail, tous ont porté le problème de la constitutionnalité des mesures prises devant les tribunaux. Qu'il s'agisse des entrepreneurs, des grands magnats de l'industrie, des syndicats d'ouvriers, des artisans, des agriculteurs, tous les agents économiques ont attaqué la constitutionnalité des mesures prises devant les tribunaux contre les États ou contre le gouvernement fédéral. De la clause de commerce à celle de *due process of law*, la Cour a invariablement donné priorité à la liberté et à la libre entreprise ; ainsi, en matière de concurrence, avec la décision *United States v. E. C. Knight Co.* (arrêt n° 14), ou encore, en matière de réglementation du travail, avec la jurisprudence du *substantive due process* qui connut son apogée dans la décision *Lochner v. New York* (arrêt n° 16). La Cour interpréta la liberté économique de manière si extensive qu'elle en arriva à se croire obligée d'interdire au Congrès de réglementer, sous couvert de la clause de commerce, le travail des enfants, dans une décision *Hammer v. Dagenhart* (arrêt n° 17). Cette décision fut toutefois ultérieurement formellement renversée dans une décision *United States v. Darby* (1941)<sup>1</sup>, à la faveur des

1. *Ibid.*, II, chap. VIII, p. 370.  
2. 312 U.S. 100 (1941).

de constitutionnalité et elle en fit la première règle de toutes les méthodes de contrôle de constitutionnalité *United States v. Carolene Products Co.*, v. arrêt n° 30]. En d'autres termes, la Cour signifia aux deux autres pouvoirs que, désormais, les lois seraient présument constitutionnelles sauf à ce qu'il soit prouvé qu'elles fussent manifestement privées de tout fondement rationnel. Mais, par implication, sauf à renoncer à exercer tout contrôle sur la volonté législative, la Cour fut bien obligée d'admettre que la présomption de constitutionnalité ne pouvait pas s'appliquer à toutes les lois et qu'il y en avait certaines qui appelaient une présomption inverse [v. la célèbre note 4 (footnote 4) du même arrêt]. Ainsi est née la deuxième conséquence contentieuse du New Deal, la différenciation, ou si l'on préfère la gradation, dans les méthodes de contrôle de la Cour. En 1944, la Cour appliqua cette distinction à titre simplement illustratif (c'est-à-dire sans en tirer de conséquences en l'espèce) dans une affaire de discrimination raciale (*Korematsu v. United States*, v. arrêt n° 31), où elle affirma que toute classification entre individus fondée sur la race était *a priori* suspecte.

### III | DU NEW DEAL AU PROJET DE « GRANDE SOCIÉTÉ »

26 L'EXTENSION DES COMPÉTENCES FÉDÉRALES. — La substitution d'une nouvelle conception de l'État à celle qui existait avant le New Deal, augmentée des conséquences de la Seconde Guerre mondiale, ont permis la mise en place d'un type de gouvernement fédéral très éloigné du modèle de gouvernement aux compétences énumérées et limitées que les pères fondateurs avaient envisagé à Philadelphie. Le principal bénéficiaire de cette évolution fut le Congrès, dont les compétences se trouvèrent très largement étendues du chef de la bienveillante interprétation donnée par la Cour à la clause de commerce. L'extension du champ des compétences du gouvernement fédéral dans le domaine économique et social modifia en profondeur les équilibres fédéraux et donna au Congrès, notamment avec l'arme financière, des moyens de peser sur les États qui n'existaient pas autrefois.

L'autre grand bénéficiaire de la crise du New Deal fut évidemment le Président lui-même. Les auteurs américains s'accordent pour admettre que, sans avoir inventé la « présidence impériale », Roosevelt a puissamment contribué à en préparer l'institutionnalisation par sa maîtrise des techniques de communication (ses messages à la radio au peuple américain ont révolutionné la position politique de l'institution présidentielle dans le système américain de gouvernement), par ses talents de négociateur avec le

changements considérables que la grande crise économique de 1929 a imposé au système constitutionnel américain.

25 LA RÉVOLUTION DU NEW DEAL. — La « grande dépression » a changé le système constitutionnel des États-Unis et, avec lui, la Cour suprême. Un signe avant-coureur des grands changements qui allaient intervenir se manifesta lorsque, devant les situations de détresse financière générées par la crise, la Cour accepta en 1934 de dispenser temporairement les États de respecter la clause des contrats, dans une décision *Home Building & Loan Association v. Blaisdell* (arrêt n° 21). En revanche, lorsque l'administration Roosevelt proposa à un Congrès entièrement dévoué à sa politique de « nouvelle donne » (*New Deal*) de sortir de la crise en étendant les compétences du gouvernement fédéral, la Cour s'y opposa au nom de l'orthodoxie constitutionnelle. Trois arrêts marquèrent cette période de confrontation [*Panama Refining Co. v. Ryan* (1935), *Schechter Poultry Corp. v. United States* (1935), *Carter v. Carter Coal Co.* (1936), v. arrêts n° 22, 23 et 25]. Menacée d'être mise au pas par le vote d'une loi qui aurait permis au Président de procéder à des nominations en tournée de juges dévoués à sa politique, la Cour changea de jurisprudence et accepta de donner à la clause de commerce une interprétation qui fit passer toute la politique économique sous le contrôle des autorités fédérales [*National Labor Relations Board v. Jones & Laughlin Steel Corp.* (1937), *Wickard v. Filburn* (1942), v. arrêts n° 27 et 29].

La révolution du New Deal a eu d'innombrables conséquences. En se limitant à celles qui ont affecté directement le contentieux constitutionnel devant la Cour suprême, deux méritent d'être relevées, la seconde étant une conséquence de la première. La première conséquence de la crise qui opposa la Cour au Congrès et à la Présidence fut de mettre fin au « gouvernement des juges ». La Cour le fit comprendre aux deux autres pouvoirs lorsqu'elle indiqua que, dorénavant, elle s'inclinerait devant la volonté sortie des urnes. Concrètement, ce virage à 180 degrés avait été annoncé par les plus éclairés des juges alors sur le siège. Dès 1936, le juge Brandeis, dans une opinion individuelle très célèbre, écrite dans une affaire *Ashwander v. Tennessee Valley Authority*, avait énoncé les sept principes de prudence qui guidaient la Cour dans son examen du contrôle judiciaire de constitutionnalité des lois. Il expliqua en substance que la Cour ne se prononcerait pas sur des questions constitutionnelles lorsqu'il lui était possible de décider de l'affaire sur d'autres fondements. Deux ans plus tard, en 1938, la Cour prolongea cette approche prudentielle du contrôle de constitutionnalité en introduisant la technique de la présomption

sur les « Papiers du Pentagone » relatifs à la guerre du Vietnam, *New York Times Co. v. United States* (1971), arrêt n° 44].

27 LA FIN DE LA SÉGRÉGATION RACIALE. — La Seconde Guerre mondiale a été un facteur décisif de l'évolution du problème noir aux États-Unis au moins pour deux raisons. En premier lieu, l'armée américaine a supprimé entre soldats la ségrégation qui était autrefois officiellement reconnue et établie en application de la doctrine « séparés, mais égaux » (v. *supra*, arrêt n° 15). L'égalité des races reconnue dans la société militaire ne pouvait pas rester sans conséquences sur la société civile. En second lieu, la Seconde Guerre mondiale a entraîné, en réaction contre les horreurs du nazisme, une prise de conscience de la valeur universelle des droits de l'homme et de l'égalité de tous sans distinction de race (ou de sexe, ou d'origine nationale, ou de croyance religieuse) qui s'est exprimée dans la charte des Nations Unies et la Déclaration universelle des droits de l'homme. Ces textes de portée mondiale qui furent adoptés, il ne faut pas l'oublier, en grande partie à l'initiative des États-Unis, ne pouvaient pas, ici encore, rester sans conséquences sur la société américaine elle-même. Les organisations en faveur de l'égalité des droits civils entre les races qui existaient depuis le début du siècle y ont puisé les raisons de se faire plus pressantes. Le mouvement de revendications s'est porté bien entendu sur le terrain politique (les Noirs américains étaient déjà devenus avec le New Deal les électeurs du Parti démocrate) ; mais il s'est porté aussi — comme il est de règle aux États-Unis pour tout problème politique — sur le terrain judiciaire. Dès la fin des années 1940, la Cour suprême avait accueilli favorablement ces recours. Avant que le président Vinson ne décède subitement en 1953 d'une crise cardiaque, la Cour avait déjà accordé le *certiorari* à plusieurs affaires concernant la ségrégation scolaire. Il était donc certain que le problème serait examiné par la Cour. La désignation par le président Eisenhower de Earl Warren pour exercer les fonctions de président de la Cour a eu des conséquences capitales, moins peut-être sur la solution qui devait être adoptée dans la célèbre décision de 1954, *Brown v. Board of Education of Topeka*, à savoir l'inconstitutionnalité de la doctrine « Séparés, mais égaux », que sur le raisonnement juridique qui fut retenu pour la justifier.

Écrit par le président Warren, *Brown* (v. *infra*, arrêt n° 35) marqué, dans la jurisprudence de la Cour, une étape aussi importante que *Marbury*. Sur le plan politique, c'est la fin de la doctrine « séparés, mais égaux », la promesse implicite d'un démantèlement certain et inévitable de toutes les discriminations raciales et un bouleversement radical de la société américaine. La réaction dans les États du Sud fut considérable, voire violente (v. *Cooper v. Aaron*, arrêt n° 36) et la résistance ne put finalement être

Congrès et par les douze années qu'il passa à la Maison Blanche. En fait, la croissance des pouvoirs de l'exécutif avait commencé dès le début du XX<sup>e</sup> siècle sous les présidences de Theodore Roosevelt et Woodrow Wilson dans deux domaines très différents : d'abord, dans le domaine international où la Cour suprême avait indirectement renforcé la présidence en validant l'exercice des pouvoirs internationaux de l'exécutif [pour la conclusion des traités internationaux dont l'initiative appartient au Président, v. *Missouri v. Holland* (1920), arrêt n° 19 ; pour l'exercice de pouvoirs internationaux délégués par le Congrès, v. *United States v. Curtiss-Wright Export Corp.* (1936), arrêt n° 26] ; ensuite, dans le domaine intérieur où, sous la plume d'un énergique président de la Cour suprême qui avait été lui-même ancien président des États-Unis (Howard Taft), le Président se vit reconnaître, grâce à un pouvoir de nomination libéré du contrôle du Congrès, la possibilité de composer son administration selon des fidélités partisanses [v. *Myers v. United States* (1926), arrêt n° 20], à la seule réserve des emplois qui exigent de leurs titulaires des garanties d'impartialité et d'indépendance [v. *Humphrey's Executor v. United States* (1935), arrêt n° 24].

A comparer toutefois la manière dont la Cour suprême a traité l'extension, au sein du gouvernement fédéral, des pouvoirs législatifs et celle des pouvoirs exécutifs, il est clair que dans la culture constitutionnelle américaine les deux organes ne sont pas sur le même plan. La peur viscérale que le Président ne se transforme en monarque explique l'insistance de la théorie constitutionnelle américaine à souligner le principe fondamental que le Président est en dessous des lois et soumis au droit [v. *Youngstown Sheet & Tube Co. v. Sawyer* (1952), arrêt n° 34]. Un Président qui, sous de fallacieux prétextes, envisage de se situer au-dessus des lois encourt irrémédiablement la censure de la juridiction suprême. Ce fût le cas du Président Nixon, qui commut l'erreur fatale de croire qu'un « privilège de l'exécutif » pouvait le dispenser de contribuer à l'administration de la justice. Dans la célèbre décision qui clôtura l'affaire du Watergate, la Cour suprême rejeta ces prétentions, extravagantes au regard des circonstances de l'espèce, et souligna que, s'il était possible d'en concevoir une éventuelle application, ce ne pourrait être, le cas échéant, que dans des circonstances exceptionnelles, par exemple, si la sécurité nationale des États-Unis était en jeu [v. *United States v. Nixon* (1974), arrêt n° 50]. On relèvera que l'exception de sécurité nationale a pris une grande importance avec la guerre froide. Plusieurs décisions de la Cour s'expliquent par ce critère, selon que les juges l'ont trouvé pertinent ou non pour résoudre, selon les époques, les contentieux relatifs à la liberté d'expression dont ils furent saisis [v. la décision sur les militants du parti communiste, *Dennis v. United States* (1951), arrêt n° 33, et celle

traduite par un démantèlement systématique des vestiges d'une société puritaine et conservatrice, encore très largement représentée dans certains États au milieu des années 1960.

La Cour Burger (1969-1986) a maintenu les acquis de cette exceptionnelle période de la Cour Warren, où la société a changé à l'initiative moins du politique que du judiciaire. Elle a même en un sens développé certaines voies ouvertes par celle-ci comme, par exemple, en matière de liberté sexuelle (*v. Roe v. Wade*, arrêt n° 46, qui reconnaît, à partir du droit à la vie privée consacré par la Cour Warren, la liberté de la femme d'avorter dans les trois premiers mois de la grossesse), en matière d'égalité des sexes (*v. Craig v. Boren*, arrêt n° 54, rendu à propos d'une loi d'État qui impose un traitement différencié selon le sexe des individus et qu'elle décide de soumettre à un contrôle renforcé), ou encore en matière d'égalité de traitement devant la peine de mort selon les États (*v. Furman v. Georgia*, arrêt n° 45). Cependant, si on la considère globalement et sur le long terme, la Cour Burger n'a pas continué l'œuvre de la Cour Warren. Le climat politique ayant changé, la « révolution des droits » s'est, pour ainsi dire, arrêtée aux principes qui l'avaient commencée. Que ce soit en matière de liberté d'expression (*v. Miller v. California*, arrêt n° 48, et *Paris Adult Theater v. Slaton*, arrêt n° 49), dans le domaine de l'égalité entre riches et pauvres (*v. San Antonio Independent School District v. Rodriguez*, arrêt n° 47) ou entre races (*v. Washington v. Davis*, arrêt n° 53), la Cour Burger marque le retour du conservatisme. Politiquement, elle épouse les idées de son temps qui, avec l'effondrement du projet johnsonien de « grande société » (*Great Society*), annoncent le dépeissement de l'État-providence (comparer *Goldberg v. Kelly*, arrêt n° 43, et *Mathews v. Elridge*, arrêt n° 52), et le retour au modèle de société dans lequel, conformément à l'idéologie libérale, la régulation se fait par le marché, non par l'État (pour une application de cette théorie à la liberté d'expression, *v. Buckley v. Valeo*, arrêt n° 51).

#### IV | LE NOUVEAU LIBÉRALISME ET LA FIN DE L'ÉTAT-PROVIDENCE

29 LA RÉVOLUTION CONSERVATRICE. — L'élection de Ronald Reagan à la présidence des États-Unis marqué le retour d'une certaine orthodoxie libérale. Dans le domaine économique et social, les nouveaux conservateurs sont en fait des néo-libéraux qui, dans la plus pure tradition américaine, entretiennent une méfiance innée contre l'État fédéral. Leurs idées vont pénétrer à la Cour avec la nomination des juges O'Connor, Sca-

vaine que par le Congrès avec l'adoption de la grande loi sur les droits civils de 1964. Sur le plan juridique, l'arrêt *Brown* a bouleversé la jurisprudence constitutionnelle en inaugurant un mode de raisonnement judiciaire totalement nouveau et très original. *Brown*, dont la portée concrète et effective a consisté à renverser toute une jurisprudence antérieure, est en effet fondé, non pas sur un raisonnement juridique, mais sur des données tirées des sciences sociales. En cela, *Brown* est à l'origine d'une réflexion de la doctrine constitutionnelle qui se poursuit toujours et qui ne cesse de s'interroger sur ce que peuvent et doivent être les « bonnes » méthodes d'interprétation du texte constitutionnel au sens de méthodes qui soient intégrées, impartiales et justes.

28 LA RÉVOLUTION DES DROITS. — La Cour Warren a marqué dans l'histoire de la jurisprudence constitutionnelle américaine la période dite de l'« activisme judiciaire » (*Judicial activism*), c'est-à-dire une période au cours de laquelle, à la faveur d'une conjoncture politique favorable, elle a pu satisfaire les multiples revendications en matière de droits et libertés dont elle fut saisie contre les États dans toutes sortes de domaines. Pour ce faire, la Cour a utilisé la doctrine dite de l'« incorporation » de la manière la plus extensive que la structure fédérale de l'Union pouvait le permettre. Concrètement, elle a considéré que la clause de *due process* du XIV<sup>e</sup> Amendement avait incorporé dans le droit fédéral supérieur et opposable aux États la plupart (mais pas toutes) des garanties du *Bill of Rights*. Ainsi la doctrine de l'incorporation lui a-t-elle permis, droit après droit, liberté après liberté, d'annuler nombre de lois d'États, jugées rétrogrades et autoritaires par les libéraux ; par exemple, en matière de procédure pénale (*v. Mapp v. Ohio*, arrêt n° 37 qui prive de tout effet judiciaire les perquisitions abusives), en matière de droit électoral (*v. Baker v. Carr*, arrêt n° 38, qui décide de contrôler les découpages électoraux considérés jusqu'alors comme domaine réservé des États, suivi de *Reynolds v. Sims*, arrêt n° 41, qui impose aux États de respecter le principe « un homme, une voix » pour l'organisation des élections fédérales), dans le domaine de la liberté de la presse (*v. New York Times v. Sullivan*, arrêt n° 40, qui met un terme à la conception extensive de la diffamation retenue par certains États qui paralysait toute critique des personnages officiels), dans celui de la liberté sexuelle (*v. Griswold v. Connecticut*, arrêt n° 42, qui interdit aux États d'interdire la pilule contraceptive aux couples mariés), ou encore en matière de liberté religieuse où, prenant appui sur le « mur de séparation » qui doit selon elle séparer l'État et la religion (*v. Everson v. Board of Education*, arrêt n° 32), la Cour bannit la « prière à l'école » (*v. Engel v. Vitale*, arrêt n° 39). Cette période au cours de laquelle la Cour a procédé à une véritable « révolution des droits » s'est

raux » comme William Brennan ou Thurgood Marshall, ce ne sont pas les objectifs de réalisation d'une société parfaitement égalitaire où les chances soient les mêmes pour tous (la jurisprudence de la Cour Rehnquist sur l'égalité des sexes le prouve assez bien) que les moyens retenus pour y parvenir. Bref, c'est surtout sur le rôle de l'État, et en particulier du gouvernement fédéral, que s'articulent les différences.

31 LA LIMITATION DES POUVOIRS DU CONGRÈS ET LE RENOUVEAU DU FÉDÉRALISME. — Inaugurée sous la présidence Reagan, la politique de réduction des tâches du gouvernement fédéral s'est principalement traduite par une limitation des pouvoirs du Congrès. En termes de nouvelles compétences, le New Deal avait, en effet, profité d'abord au Congrès dont les pouvoirs s'étaient considérablement élargis et étendus. On peut considérer qu'en annulant le veto législatif et la surveillance continue du Congrès sur l'exécutif qu'il favorisait (*v. Immigration and Naturalization Service v. Chadha*, arrêt n° 59), la Cour Burger avait déjà commencé à marquer la volonté de revenir à une conception plus rigoureuse de la séparation des pouvoirs en limitant la tendance irrépressible de l'organe législatif à « tout attirer dans son impétueux vortex », comme l'avait si bien vu Madison. La Cour Rehnquist a continué dans cette voie en admettant que la détermination de principes directeurs en matière de répression pénale puisse échapper à l'organe législatif pour être confié au pouvoir judiciaire (*v. Mistretta v. United States*, arrêt n° 66).

Toutefois, c'est sur une limitation des pouvoirs du Congrès vis-à-vis des États que la Cour Rehnquist a principalement fait porter son effort. A la fin des années 1990, il est clair que son grand œuvre restera une spectaculaire renaissance du fédéralisme et des droits des États (*v. United States v. Lopez*, arrêt n° 70, et *Pritz v. United States*, arrêt n° 75). Déjà les critiques s'interrogent sur les chances de maintenir à long terme une telle jurisprudence. Mais, quelles que soient les réponses que l'avenir y donnera, par les positions qu'elle prend sur la répartition des pouvoirs entre les États et l'Union, la Cour Rehnquist reste au fond parfaitement fidèle à ce qui constitue la raison d'être de la Cour suprême et la source de son extraordinaire puissance dans le système américain de gouvernement, à savoir le maintien d'un système fédéral de gouvernement assez exceptionnel que Winston Churchill dénommait avec bonheur la « Grande République » (*The Great Republic*).

lia, Kennedy et la promotion de William Rehnquist à la présidence de l'institution.

Certes, l'arrivée de juges conservateurs sur le siège a eu pour effet de limiter la portée de certains arrêts antérieurs très libéraux qui avaient été rendus notamment en matière de procédure pénale. Les efforts déployés pour limiter la peine de mort rencontrèrent encore moins de succès sous la présidence Rehnquist que sous la présidence Burger (*v. McCleskey v. Kemp*, arrêt n° 64). Toutefois, la Cour Rehnquist n'a pas remis en cause les quelques grandes conquêtes acquises auparavant dans le domaine de la liberté des mœurs. Certes, elle n'a pas constitutionnalisé un droit à pratiquer la sodomie (*v. Bowers v. Hardwick*, arrêt n° 63). Mais, après une période d'hésitation et de fluctuation, la Cour a reconfirmé, sans doute à une faible majorité, mais reconfirmé tout de même *Roe v. Wade* et le droit à l'avortement qui en découle (*v. Planned Parenthood of Southeastern Pennsylvania v. Casey*, arrêt n° 68). De même a-t-elle poursuivi la jurisprudence antérieure sur l'égalité des sexes (*v. Roberts v. United States Jaycees*, arrêt n° 61) et, peut-être à la faveur de la nomination d'une deuxième femme sur le siège en la personne du juge Ginsburg, elle l'a même approfondie (*v. United States v. Virginia*, arrêt n° 72). Enfin, il faut aussi souligner son grand libéralisme en matière de liberté d'expression (*v. Texas v. Johnson*, arrêt n° 67).

30 LE PRIMAT DE L'INDIVIDU SUR L'ÉTAT. — La révolution conservatrice a eu un effet indéniable et très important sur la jurisprudence de la Cour en matière d'égalité des races et des moyens d'en assurer une application effective. La politique dite de l'*affirmative action* (discriminations positives), qui s'est mise en place sous l'administration Johnson d'abord au niveau de l'État fédéral, puis qui a été encouragée au niveau des États, était fondée sur la croyance dans les vertus, voire la nécessité de l'intervention d'une autorité publique pour améliorer la condition des Noirs. Cette politique de combat contre les inégalités a été avalisée par la Cour, non sans de grandes difficultés et de grands déchirements à cause des dérogations à l'égalité formelle des droits qu'elle implique (*v. Regents of the University of California v. Bakke*, arrêt n° 55), tant qu'il s'est trouvé sur le siège suffisamment d'esprits de la génération acquise à la philosophie du New Deal, laquelle repose sur la conviction qu'il n'est possible de réduire les inégalités que par voie d'autorité (*v. Fullilove v. Klutznick*, arrêt n° 56). Le discrédit dans lequel finalement cette politique est tombée à partir des années 1990 (*v. Adarand Constructors, Inc. v. Peña*, arrêt n° 71, qui en fait une politique « suspecte ») s'explique moins par l'abandon des objectifs que par un changement radical de philosophie dans les moyens pour y parvenir. Ce qui sépare les juges « conservateurs » des juges « libé-



### Pour aller plus loin

32 LES SOURCES PRIMAIRES. — Les arrêts de la Cour suprême sont reproduits dans trois éditions différentes. La première est l'édition officielle, réalisée par les soins du GPO (*Government Printing Office*). Il s'agit des *United States Reports* (cités U.S.) qui sont généralement disponibles dans les grandes bibliothèques juridiques françaises. Les deux autres, moins répandues en France, sont réalisés par le soin d'entreprises privées. Il s'agit, d'une part, de l'édition dite *Supreme Court Reporter* (cités S. Ct.), et d'autre part, de la *Lawyers' Edition* (cité L. Ed.). Dans tous les cas, les arrêts de la Cour sont toujours cités selon un mode uniforme de citation qui indique toujours obligatoirement le volume et la page et, à titre facultatif et optionnel, l'année où fut rendue la décision. Par exemple, 418 U.S. 683 (1974) signifie le volume 418 des *United States Reports* à la page 683 d'une décision rendue en 1974. Les noms des parties sont séparés par « v. ». L'abréviation du latin *versus*. C'est l'équivalent de notre « c. » et, pas plus que ce dernier, il n'est pas d'usage de l'écrire en entier. Les références qui sont faites à des arrêts antérieurs sont toujours données selon des règles précises. En principe, on indique toujours devant la page de renvoi à la citation, celle où débute l'arrêt. Par exemple, 418 U.S. 683, 697 renvoie à la page 697 de l'arrêt précité qui commence page 683 dans le volume 418 des *United States Reports*.

Il est aussi possible de consulter les arrêts de la Cour par la voie de l'édition électronique sur Internet. Les principaux sites publics et gratuits d'accès sont les suivants :

1) <http://www.fedworld.gov/supcort/index.htm>

#### FLUTE

Arrêts de la Cour suprême de 1937 à 1975. Recherches possibles à partir du nom des parties ou avec des mots clés.

2) <http://oyez.at.nyu.edu/oyez.html>

Oyez, Oyez, Oyez

Plaidoies devant la Cour présentées par dates, noms des parties et sujets. En sus de la jurisprudence, le site présente aussi de brèves biographies des juges qui ont siégé (ou siéger) à la Cour.

3) <http://supct.law.cornell.edu/supct/>

*Supreme Court Decisions*

Décisions de la Cour à partir de mai 1990. Recherches possibles à partir de dates, de thèmes et du nom des parties.

4) <http://supct.law.cornell.edu/supct/cases/historic.htm>

*Selected Historic Court Decisions*

582 décisions de la Cour choisies par le « Legal Information Institute » de l'Université Cornell. Recherches possibles à partir des thèmes, des noms des parties et du nom des juges chargés de rédiger l'opinion de la Cour.

5) <http://www.law.cornell.edu/rules/supct/overview.html>

*Supreme Court Rules*

Règlement de la Cour en vigueur depuis 1995, y compris les révisions adoptées en 1997.

33 OUVRAGES EN ANGLAIS. — La bibliographie sur la Cour suprême est gigantesque. On en trouvera une vue approfondie dans la compilation très complète réalisée par Kermit L. Hall sur l'histoire constitutionnelle et juridique des États-Unis, *A Comprehensive Bibliography of American Constitutional and Legal History, 1890-1979*, 5 vol., Millwood, New York, Kraus International Publications, 1984 (avec suppl. 1991). De dimension plus modeste, mais fort bien fait, se présente le panorama établi par Sanford Levinson dans la deuxième édition qu'il a réalisée en 1992 du grand classique de Robert McCloskey sur la Cour suprême. Son commentaire bibliographique de 25 pages rendra les plus grands services : v. McCloskey, Robert G., *The American Supreme Court*, 2<sup>d</sup> ed. revised by Sanford Levinson, Chicago, University of Chicago Press, 1994.

Une première approche de la Cour suprême doit commencer avec les ouvrages de référence que sont les « encyclopédies ». A cet égard, il faut citer une encyclopédie de la Constitution des États-Unis en plusieurs volumes qui est une mine de renseignements : Leonard Levy, Kenneth Karst et Dennis J. Mahoney (eds), *Encyclopedia of the American Constitution* (4 vol., 1986), New York, Macmillan (avec un supplément en 1992). Moins volumineux et moins complet, mais tout

aussi utile est l'ouvrage de Kermit Hall (et al.), *The Oxford Companion to the Supreme Court of the United States*, Oxford University Press, 1992.

Parmi les études historiques, la chronologie conduit à mentionner, d'abord, celui de Charles Warren, *The Supreme Court in United States History*, 2 vol., Boston, Little, Brown & Co., 1937. Cet ouvrage écrit par un juriste s'arrête en 1918 ; il est extrêmement favorable au contrôle de constitutionnalité des lois et, d'une manière générale, à la jurisprudence de la Cour. Parmi les ouvrages écrits par les historiens, l'un des plus célèbres est celui d'Alfred H. Kelly, Winifred A. Harbinson et Herman Belz, *The American Constitution*, 7<sup>th</sup> ed., New York, Norton, 1991. Il faut le compléter par Melvin L. Urofsky, *A March of Liberty: A Constitutional History of the United States*, New York, Knopf, 1988. C'est à un niveau beaucoup plus ambitieux que se situent les nombreux volumes d'une histoire d'ensemble de la Cour suprême entreprise sous la direction du comité chargé de gérer la donation faite à cette fin par l'ancien juge Oliver Wendell Holmes. Cette collection est connue sous le titre de la « Holmes Devise History of the Supreme Court ». Elle est publiée par Macmillan, New York. Sept volumes ont été déjà publiés : Julius Goebel, Jr., *Ancestrals and Beginnings to 1801* (1971) ; George L. Haskins et Herbert A. Johnson, *Foundations of Power: John Marshall, 1801-1835* (1981) ; G. Edward White, *The Marshall Court and Cultural Change, 1815-1835* (1988) ; Carl Bent Swisher, *The Taney Period, 1836-1864* (1974) ; Charles Fairman, *Reconstruction and Reunion, 1864-1888, Part One* (1971) ; *Reconstruction and Reunion, 1864-1888, Part Two* (1988) et *Supplement, Five Justices and the Electoral Commission of 1877* (1988) ; Owen Fiss, *Troubled Beginnings of the Modern State, 1888-1910* (1993) ; et Alexander M. Bickel et Benno C. Schmidt, Jr., *The Judiciary and Responsible Government, 1910-1921* (1984).

Il existe de très nombreux ouvrages de doctrine qui donnent un panorama général de la jurisprudence de la Cour. Sous un format compact, celui déjà cité de Robert McCloskey, *The American Supreme Court*, reste le meilleur. La deuxième édition qui a été réalisée par Sanford Levinson, élève et disciple de McCloskey, reste parfaitement fidèle à la première. Archibald Cox, ancien professeur de droit à Harvard, a écrit un ouvrage très clair, accessible à tous, *The Court and the Constitution*, Boston, Houghton Mifflin, 1987. Parmi les ouvrages plus ambitieux sur le plan doctrinal, il faut mentionner David Currie, *The Constitution in the Supreme Court*, 2 vol., Chicago, University of Chicago Press, 1985 et 1990 ; William Lasser, *The Limits of Judicial Power*, Chapel Hill, The University of North Carolina Press, 1988 ; Bernard Schwartz, *A History of the Supreme Court*, Oxford, Oxford University Press, 1993 ; William W. Wiecek, *Liberty Under Law: the Supreme Court in American Life*, Baltimore, John Hopkins University Press, 1988.

Dans une approche que l'on qualifierait en France moins « de droit », et plus « de science politique », l'ouvrage de David M. O'Brien, *Storm Center: The Supreme Court in American Politics*, New York, Norton, 4<sup>th</sup> ed., 1996, est un classique. Dans un registre plus polémique, il faut mentionner Robert Woodward et Scott Armstrong, *The Brethren: Inside the Supreme Court*, New York, Simon & Schuster, 1979, et dans la même veine, mais plus récent, Edward Lazarus, *Closed Chambers*, New York, Times Books, Random House, 1998.

34 OUVRAGES EN FRANÇAIS. — L'ouvrage de base demeure celui de André et Suzanne Tunc, *Le système constitutionnel des États-Unis*, 2 vol., Paris, Montchrestien, 1954. Il faut y ajouter les deux ouvrages de Roger Pinto, *Des juges qui ne gouvernent pas. Opinions dissidentes à la Cour suprême des États-Unis (1900-1933)*, Paris, Librairie du Recueil, Sirey, 1933 et *La Cour suprême et le New Deal. Jurisprudence constitutionnelle de la Cour suprême des États-Unis (1935-1936) et réforme du pouvoir judiciaire (1936-1937)*, Paris, Librairie du Recueil, Sirey, 1938. L'ouvrage très célèbre d'Édouard Lambert, *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis. L'expérience américaine du contrôle judiciaire de constitutionnalité des lois*, Paris, Marcel Giard, 1971, demeure une référence utile, voire indispensable pour comprendre le sentiment longtemps négatif de l'opinion française sur l'institution.

Réserve faite de la traduction de l'ouvrage de McCloskey (*La Cour suprême des États-Unis*, Paris, Seghers, coll. « Vent d'ouest », 1965) aujourd'hui épuisé, les ouvrages généraux sur la Cour suprême sont rares. La revue *Pouvoirs* a consacré tout un numéro à l'institution (n° 59, 1991). Dans un format plus compact, il existe aussi Marie-France Toinet, *La Cour suprême. Les grands arrêts*, Nancy, Presses universitaires de Nancy, 1989 ainsi que C. Lerat, *La Cour suprême des États-Unis: pouvoirs et évolution historique*, Bordeaux, Presses universitaires de Bordeaux, 1987.

## Droit constitutionnel comparé

30 hrs.,  
Master en droit

Aperçu général du droit des États-Unis d'Amérique  
- partim 2 -

### De la jeune république à la guerre de sécession

- Judiciary Act 1789, section 13, et Cour suprême des États-Unis, arrêt *Marbury v. Madison*, 5 US 137 (1803),
- Cour suprême des États-Unis, arrêt *Fletcher v. Peck*, 10 US 87 (1810) [extraits],
- Judiciary Act 1789, section 25, et Cour suprême des États-Unis, arrêts *Martin v. Hunter's Lessee*, 14 US 304 (1816) [extraits], et *Cohens v. Virginia*, 19 US 264 (1821) [extraits],
- Cour suprême des États-Unis, arrêt *McCulloch v. Maryland*, 17 US 316 (1819) [extraits],
- Cour suprême des États-Unis, arrêt *Dred Scott v. Sandford*, 60 US 393 (1856) [extraits],
- Cour suprême des États-Unis, arrêt *Texas v. White*, 74 US 700 (1868) [extraits].

## The Judiciary Act of 1789

An Act to establish the Judicial Courts of the United States

(...)

Sec. 13. That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors or other public ministers, or in which a consul or vice-consul shall be a party. And the trial of issues in fact in the Supreme Court in all actions at law against citizens of the United States shall be by jury. The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states in the cases hereinafter specially provided for and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of mandamus, in cases warranted by the principle and usages of law, to any courts appointed, or persons holding office under the authority of the United States. . . .

(...)

## U.S. Supreme Court

MARBURY v. MADISON, 5 U.S. 137 (1803)

5 U.S. 137 (Cranch)

WILLIAM MARBURY

v.

JAMES MADISON, Secretary of State of the United States.

February Term, 1803

AT the December term 1801, William Marbury, Dennis Ramsay, Robert Townsend Hooe, and William Harper, by their counsel [5 U.S. 137, 138] severally moved the court for a rule to James Madison, secretary of state of the United States, to show cause why a mandamus should not issue commanding him to cause to be delivered to them respectively their several commissions as justices of the peace in the district of Columbia.

This motion was supported by affidavits of the following facts: that notice of this motion had been given to Mr. Madison; that Mr. Adams, the late president of the United States, nominated the applicants to the senate for their advice and consent to be appointed justices of the peace of the district of Columbia; that the senate advised and consented to the appointments; that commissions in due form were signed by the said president appointing them justices, &c. and that the seal of the United States was in due form affixed to the said commissions by the secretary of state; that the applicants have requested Mr. Madison to deliver them their said commissions, who has not complied with that request; and that their said commissions are withheld from them; that the applicants have made application to Mr. Madison as secretary of state of the United States at his office, for information whether the commissions were signed and sealed as aforesaid; that explicit and satisfactory information has not been given in answer to that inquiry, either by the secretary of state, or any officer in the department of state; that application has been made to the secretary of the senate for a certificate of the nomination of the applicants, and of the advice and consent of the senate, who has declined giving such a certificate; whereupon a rule was made to show cause on the fourth day of this term. This rule having been duly served— [5 U.S. 137, 139] Mr. Jacob Wagner and Mr. Daniel Brent, who had been summoned to attend the court, and were required to give evidence, objected to be sworn, alleging that they were clerks in the department of state, and not bound to disclose any facts relating to the business or transactions of the office.

The court ordered the witnesses to be sworn, and their answers taken in writing; but informed them that when the questions were asked they might state their objections to answering each particular question, if they had any.

Mr. Lincoln, who had been the acting secretary of state, when the circumstances stated in the affidavits occurred, was called upon to give testimony. He objected to answering. The questions were put in writing.

The court said there was nothing confidential required to be disclosed. If there had been, he was not obliged to answer it, and if he thought any thing was communicated to him confidentially he was not bound to disclose, nor was he obliged to state any thing which would criminate himself.

The questions argued by the counsel for the relators were, 1. Whether the supreme court can award the writ of mandamus in any case. 2. Whether it will lie to a secretary of state, in any case whatever. 3. Whether in the

present case the court may award a mandamus to James Madison, secretary of state.

[5 U.S. 137, 153]

Mr. Chief Justice MARSHALL delivered the opinion of the court.

At the last term, on the affidavits then read and filed with the clerk, a rule was granted in this case, requiring the secretary of state to show cause why a mandamus [5 U.S. 137, 154] should not issue, directing him to deliver to William Marbury his commission as a justice of the peace for the county of Washington, in the district of Columbia.

No cause has been shown, and the present motion is for a mandamus. The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles on which the opinion to be given by the court is founded.

These principles have been, on the side of the applicant, very ably argued at the bar. In rendering the opinion of the court, there will be some departure in form, though not in substance, from the points stated in that argument.

In the order in which the court has viewed this subject, the following questions have been considered and decided.

1. Has the applicant a right to the commission he demands?
2. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?
3. If they do afford him a remedy, is it a mandamus issuing from this court?

The first object of inquiry is,

1. Has the applicant a right to the commission he demands?

His right originates in an act of congress passed in February 1801, concerning the district of Columbia.

After dividing the district into two counties, the eleventh section of this law enacts, 'that there shall be appointed in and for each of the said counties, such number of discreet persons to be justices of the peace as the president of the United States shall, from time to time, think expedient, to continue in office for five years. [5 U.S. 137, 155] It appears from the affidavits, that in compliance with this law, a commission for William Marbury as a justice of peace for the county of Washington was signed by John Adams, then president of the United States; after which the seal of the United States was affixed to it; but the commission has never reached the person for whom it was made out.

In order to determine whether he is entitled to this commission, it becomes necessary to inquire whether he has been appointed to the office. For if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property.

The second section of the second article of the constitution declares, 'the president shall nominate, and, by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, and all other officers of the United States, whose appointments are not otherwise provided for.'

The third section declares, that 'he shall commission all the officers of the United States.'

An act of congress directs the secretary of state to keep the seal of the United States, 'to make out and record, and affix the said seal to all civil commissions to officers of the United States to be appointed by the president, by and with the consent of the senate, or by the president alone; provided that the said seal shall not be affixed to any commission before the same shall have been signed by the president of the United States.'

These are the clauses of the constitution and laws of the United States, which affect this part of the case. They seem to contemplate three distinct operations:

1. The nomination. This is the sole act of the president, and is completely voluntary.
2. The appointment. This is also the act of the president, and is also a voluntary act, though it can only be performed by and with the advice and consent of the senate. [5 U.S. 137, 156]
3. The commission. To grant a commission to a person appointed, might perhaps be deemed a duty enjoined by the constitution. 'He shall,' says that instrument, 'commission all the officers of the United States.'

The acts of appointing to office, and commissioning the person appointed, can scarcely be considered as one and the same; since the power to perform them is given in two separate and distinct sections of the constitution. The distinction between the appointment and the commission will be rendered more apparent by adverting to that provision in the second section of the second article of the constitution, which authorises congress 'to vest by law the appointment of such inferior officers as they think proper, in the president alone, in the courts of law, or in the heads of departments;' thus contemplating cases where the law may direct the president to commission an officer appointed by the courts or by the heads of departments. In such a case, to issue a commission would be apparently a duty distinct from the appointment, the performance of which perhaps, could not legally be refused.

Although that clause of the constitution which requires the president to commission all the officers of the United States, may never have been applied to officers appointed otherwise than by himself, yet it would be difficult to deny the legislative power to apply it to such cases. Of consequence the constitutional distinction between the appointment to an office and the commission of an officer who has been appointed, remains the same as if in practice the president had commissioned officers appointed by an authority other than his own.

It follows too, from the existence of this distinction, that, if an appointment was to be evidenced by any public act other than the commission, the performance of such public act would create the officer; and if he was not removable at the will of the president, would either give him a right to his commission, or enable him to perform the duties without it.

These observations are premised solely for the purpose of rendering more intelligible those which apply more directly to the particular case under consideration. [5 U.S. 137, 157] This is an appointment made by the president, by and with the advice and consent of the senate, and is evidenced by no act but the commission itself. In such a case therefore the commission and the appointment seem inseparable; it being almost impossible to show an appointment otherwise than by proving the existence of a commission: still the commission is not necessarily the appointment; though conclusive evidence of it.

But at what stage does it amount to this conclusive evidence?

The answer to this question seems an obvious one. The appointment being the sole act of the president, must be completely evidenced, when it is shown that he has done every thing to be performed by him.

Should the commission, instead of being evidence of an appointment, even be considered as constituting the appointment itself; still it would be made when the last act to be done by the president was performed, or, at furthest, when the commission was complete.

The last act to be done by the president, is the signature of the commission. He has then acted on the advice

and consent of the senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the senate concurring with his nomination, has been made, and the officer is appointed. This appointment is evidenced by an open, unequivocal act; and being the last act required from the person making it, necessarily excludes the idea of its being, so far as it respects the appointment, an inchoate and incomplete transaction.

Some point of time must be taken when the power of the executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act, required from the person possessing the power, has been performed. This last act is the signature of the commission. This idea seems to have prevailed with the legislature, when the act passed converting the department [5 U.S. 137, 158] of foreign affairs into the department of state. By that act it is enacted, that the secretary of state shall keep the seal of the United States, 'and shall make out and record, and shall affix the said seal to all civil commissions to officers of the United States, to be appointed by the president;' 'provided that the said seal shall not be affixed to any commission, before the same shall have been signed by the president of the United States; nor to any other instrument or act, without the special warrant of the president therefor.'

The signature is a warrant for affixing the great seal to the commission; and the great seal is only to be affixed to an instrument which is complete. It attests, by an act supposed to be of public notoriety, the verity of the presidential signature.

It is never to be affixed till the commission is signed, because the signature, which gives force and effect to the commission, is conclusive evidence that the appointment is made.

The commission being signed, the subsequent duty of the secretary of state is prescribed by law, and not to be guided by the will of the president. He is to affix the seal of the United States to the commission, and is to record it.

This is not a proceeding which may be varied, if the judgment of the executive shall suggest one more eligible, but is a precise course accurately marked out by law, and is to be strictly pursued. It is the duty of the secretary of state to conform to the law, and in this he is an officer of the United States, bound to obey the laws. He acts, in this respect, as has been very properly stated at the bar, under the authority of law, and not by the instructions of the president. It is a ministerial act which the law enjoins on a particular officer for a particular purpose.

If it should be supposed, that the solemnity of affixing the seal, is necessary not only to the validity of the commission, but even to the completion of an appointment, still when the seal is affixed the appointment is made, and [5 U.S. 137, 159] the commission is valid. No other solemnity is required by law; no other act is to be performed on the part of government. All that the executive can do to invest the person with his office, is done; and unless the appointment be then made, the executive cannot make one without the co-operation of others.

After searching anxiously for the principles on which a contrary opinion may be supported, none have been found which appear of sufficient force to maintain the opposite doctrine.

Such as the imagination of the court could suggest, have been very deliberately examined, and after allowing them all the weight which it appears possible to give them, they do not shake the opinion which has been formed.

In considering this question, it has been conjectured that the commission may have been assimilated to a deed, to the validity of which, delivery is essential.

This idea is founded on the supposition that the commission is not merely evidence of an appointment, but is itself the actual appointment; a supposition by no means unquestionable. But for the purpose of examining this

objection fairly, let it be conceded, that the principle, claimed for its support, is established.

The appointment being, under the constitution, to be made by the president personally, the delivery of the deed of appointment, if necessary to its completion, must be made by the president also. It is not necessary that the livery should be made personally to the grantee of the office: it never is so made. The law would seem to contemplate that it should be made to the secretary of state, since it directs the secretary to affix the seal to the commission after it shall have been signed by the president. If then the act of livery be necessary to give validity to the commission, it has been delivered when executed and given to the secretary for the purpose of being sealed, recorded, and transmitted to the party.

But in all cases of letters patent, certain solemnities are required by law, which solemnities are the evidences [5 U.S. 137, 160] of the validity of the instrument. A formal delivery to the person is not among them. In cases of commissions, the sign manual of the president, and the seal of the United States, are those solemnities. This objection therefore does not touch the case.

It has also occurred as possible, and barely possible, that the transmission of the commission, and the acceptance thereof, might be deemed necessary to complete the right of the plaintiff.

The transmission of the commission is a practice directed by convenience, but not by law. It cannot therefore be necessary to constitute the appointment which must precede it, and which is the mere act of the president. If the executive required that every person appointed to an office, should himself take means to procure his commission, the appointment would not be the less valid on that account. The appointment is the sole act of the president; the transmission of the commission is the sole act of the officer to whom that duty is assigned, and may be accelerated or retarded by circumstances which can have no influence on the appointment. A commission is transmitted to a person already appointed; not to a person to be appointed or not, as the letter enclosing the commission should happen to get into the post-office and reach him in safety, or to miscarry.

It may have some tendency to elucidate this point, to inquire, whether the possession of the original commission be indispensably necessary to authorize a person, appointed to any office, to perform the duties of that office. If it was necessary, then a loss of the commission would lose the office. Not only negligence, but accident or fraud, fire or theft, might deprive an individual of his office. In such a case, I presume it could not be doubted, but that a copy from the record of the office of the secretary of state, would be, to every intent and purpose, equal to the original. The act of congress has expressly made it so. To give that copy validity, it would not be necessary to prove that the original had been transmitted and afterwards lost. The copy would be complete evidence that the original had existed, and that the appointment had been made, but not that the original had been transmitted. If indeed it should appear that [5 U.S. 137, 161] the original had been mislaid in the office of state, that circumstance would not affect the operation of the copy. When all the requisites have been performed which authorize a recording officer to record any instrument whatever, and the order for that purpose has been given, the instrument is in law considered as recorded, although the manual labour of inserting it in a book kept for that purpose may not have been performed.

In the case of commissions, the law orders the secretary of state to record them. When therefore they are signed and sealed, the order for their being recorded is given; and whether inserted in the book or not, they are in law recorded.

A copy of this record is declared equal to the original, and the fees to be paid by a person requiring a copy are ascertained by law. Can a keeper of a public record erase therefrom a commission which has been recorded? Or can he refuse a copy thereof to a person demanding it on the terms prescribed by law?

Such a copy would, equally with the original, authorize the justice of peace to proceed in the performance of his duty, because it would, equally with the original, attest his appointment.

If the transmission of a commission be not considered as necessary to give validity to an appointment; still less



is its acceptance. The appointment is the sole act of the president; the acceptance is the sole act of the officer, and is, in plain common sense, posterior to the appointment. As he may resign, so may he refuse to accept: but neither the one nor the other is capable of rendering the appointment a nonentity.

That this is the understanding of the government, is apparent from the whole tenor of its conduct.

A commission bears date, and the salary of the officer commences from his appointment; not from the transmission or acceptance of his commission. When a person, appointed to any office, refuses to accept that office, the successor is nominated in the place of the person who [5 U.S. 137, 162] has declined to accept, and not in the place of the person who had been previously in office and had created the original vacancy.

It is therefore decidedly the opinion of the court, that when a commission has been signed by the president, the appointment is made; and that the commission is complete when the seal of the United States has been affixed to it by the secretary of state.

Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern; because the act is at any time revocable; and the commission may be arrested, if still in the office. But when the officer is not removable at the will of the executive, the appointment is not revocable and cannot be annulled. It has conferred legal rights which cannot be resumed.

The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where by law the officer is not removable by him. The right to the office is then in the person appointed, and he has the absolute, unconditional power of accepting or rejecting it.

Mr. Marbury, then, since his commission was signed by the president and sealed by the secretary of state, was appointed; and as the law creating the office gave the officer a right to hold for five years independent of the executive, the appointment was not revocable; but vested in the officer legal rights which are protected by the laws of his country.

To withhold the commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

This brings us to the second inquiry; which is,

2. If he has a right, and that right has been violated, do the laws of his country afford him a remedy? [5 U.S. 137, 163] The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.

In the third volume of his Commentaries, page 23, Blackstone states two cases in which a remedy is afforded by mere operation of law.

'In all other cases,' he says, 'it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded.'

And afterwards, page 109 of the same volume, he says, 'I am next to consider such injuries as are cognizable by the courts of common law. And herein I shall for the present only remark, that all possible injuries whatsoever, that did not fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals, are, for that very reason, within the cognizance of the common law courts of justice; for it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.'

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case.

It behoves us then to inquire whether there be in its composition any ingredient which shall exempt from legal investigation, or exclude the injured party from legal redress. In pursuing this inquiry the first question which presents itself, is, whether this can be arranged [5 U.S. 137, 164] with that class of cases which come under the description of *damnum absque injuria*-a loss without an injury.

This description of cases never has been considered, and it is believed never can be considered as comprehending offices of trust, of honour or of profit. The office of justice of peace in the district of Columbia is such an office; it is therefore worthy of the attention and guardianship of the laws. It has received that attention and guardianship. It has been created by special act of congress, and has been secured, so far as the laws can give security to the person appointed to fill it, for five years. It is not then on account of the worthlessness of the thing pursued, that the injured party can be alleged to be without remedy.

Is it in the nature of the transaction? Is the act of delivering or withholding a commission to be considered as a mere political act belonging to the executive department alone, for the performance of which entire confidence is placed by our constitution in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy.

That there may be such cases is not to be questioned; but that every act of duty to be performed in any of the great departments of government constitutes such a case, is not to be admitted.

By the act concerning invalids, passed in June 1794, the secretary at war is ordered to place on the pension list all persons whose names are contained in a report previously made by him to congress: If he should refuse to do so, would the wounded veteran be without remedy? Is it to be contended that where the law in precise terms directs the performance of an act in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country?

Whatever the practice on particular occasions may be, the theory of this principle will certainly never be maintained. No act of the legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law. After stating that personal injury from the king to a subject is presumed to be impossible, Blackstone, Vol. III. p. 255, says, 'but injuries to the rights of property can scarcely be committed by the crown without the intervention of its officers: for whom, the law, in matters of right, entertains no respect or delicacy; but furnishes various methods of detecting the errors and misconduct of those agents by whom the king has been deceived and induced to do a temporary injustice.'

By the act passed in 1796, authorizing the sale of the lands above the mouth of Kentucky river, the purchaser, on paying his purchase money, becomes completely entitled to the property purchased; and on producing to the secretary of state the receipt of the treasurer upon a certificate required by the law, the president of the United States is authorized to grant him a patent. It is further enacted that all patents shall be countersigned by the secretary of state, and recorded in his office. If the secretary of state should choose to withhold this patent, or the patent being lost, should refuse a copy of it; can it be imagined that the law furnishes to the injured person no remedy?

It is not believed that any person whatever would attempt to maintain such a proposition.

It follows then that the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act.

If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction.

In some instances there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.

By the constitution of the United States, the president is invested with certain important political powers, in the [5 U.S. 137, 166] exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy.

If this be the rule, let us inquire how it applies to the case under the consideration of the court. [5 U.S. 137, 167] The power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the president according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. If, by law, the officer be removable at the will of the president, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed cannot be made never to have existed, the appointment cannot be annihilated; and consequently if the officer is by law not removable at the will of the president, the rights he has acquired are protected by the law, and are not resumable by the president. They cannot be extinguished by executive authority, and he has the privilege of asserting them in like manner as if they had been derived from any other source.

The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority, if, for example, Mr. Marbury had taken the oaths of a magistrate, and proceeded to act as one; in consequence of which a suit had been instituted against him, in which his defence had depended on his being a magistrate; the validity of his appointment must have been determined by judicial authority.

So, if he conceives that by virtue of his appointment he has a legal right either to the commission which has been made out for him or to a copy of that commission, it is equally a question examinable in a court, and the decision of the court upon it must depend on the opinion entertained of his appointment.

That question has been discussed, and the opinion is, that the latest point of time which can be taken as that at which the appointment was complete, and evidenced, was when, after the signature of the president, the seal of the United States was affixed to the commission.

It is then the opinion of the court,

1. That by signing the commission of Mr. Marbury, the president of the United States appointed him a justice [5 U.S. 137, 168] of peace for the county of Washington in the district of Columbia; and that the seal of the United States, affixed thereto by the secretary of state, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years.

2. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.

It remains to be inquired whether,

3. He is entitled to the remedy for which he applies. This depends on,

1. The nature of the writ applied for. And,

2. The power of this court.

1. The nature of the writ.

Blackstone, in the third volume of his Commentaries, page 110, defines a mandamus to be, 'a command issuing in the king's name from the court of king's bench, and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some particular thing therein specified which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes, to be consonant to right and justice.'

Lord Mansfield, in 3 Burrows, 1266, in the case of *The King v. Baker et al.* states with much precision and explicitness the cases in which this writ may be used.

'Whenever,' says that very able judge, 'there is a right to execute an office, perform a service, or exercise a franchise (more especially if it be in a matter of public concern or attended with profit), and a person is kept out of possession, or dispossessed of such right, and [5 U.S. 137, 169] has no other specific legal remedy, this court ought to assist by mandamus, upon reasons of justice, as the writ expresses, and upon reasons of public policy, to preserve peace, order and good government.' In the same case he says, 'this writ ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.'

In addition to the authorities now particularly cited, many others were relied on at the bar, which show how far the practice has conformed to the general doctrines that have been just quoted.

This writ, if awarded, would be directed to an officer of government, and its mandate to him would be, to use the words of Blackstone, 'to do a particular thing therein specified, which appertains to his office and duty, and which the court has previously determined or at least supposes to be consonant to right and justice.' Or, in the words of Lord Mansfield, the applicant, in this case, has a right to execute an office of public concern, and is kept out of possession of that right.

These circumstances certainly concur in this case.

[http://caselaw.lp.findlaw.com/scripts/printer\\_friendly.pl?page=us/5/137.html](http://caselaw.lp.findlaw.com/scripts/printer_friendly.pl?page=us/5/137.html)

Still, to render the mandamus a proper remedy, the officer to whom it is to be directed, must be one to whom, on legal principles, such writ may be directed; and the person applying for it must be without any other specific and legal remedy.

1. With respect to the officer to whom it would be directed. The intimate political relation, subsisting between the president of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received without much reflection or examination; and it is not wonderful that in such a case as this, the assertion, by an individual, of his legal claims in a court of justice, to which claims it is the duty of that court to attend, should at first view be considered [5 U.S. 137, 170] by some, as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive.

It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

But, if this be not such a question; if so far from being an intrusion into the secrets of the cabinet, it respects a paper, which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents; if it be no intermeddling with a subject, over which the executive can be considered as having exercised any control; what is there in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim; or to issue a mandamus, directing the performance of a duty, not depending on executive discretion, but on particular acts of congress and the general principles of law?

If one of the heads of departments commits any illegal act, under colour of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How then can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process?

It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined. Where the head of a department acts in a case in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is [5 U.S. 137, 171] again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.

But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the president, and the performance of which the president cannot lawfully forbid, and therefore is never presumed to have forbidden; as for example, to record a commission, or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment, than if the same services were to be performed by a person not the head of a department.

This opinion seems not now for the first time to be taken up in this country.

It must be well recollected that in 1792 an act passed, directing the secretary at war to place on the pension list such disabled officers and soldiers as should be reported to him by the circuit courts, which act, so far as the duty was imposed on the courts, was deemed unconstitutional; but some of the judges, thinking that the

law might be executed by them in the character of commissioners, proceeded to act and to report in that character.

This law being deemed unconstitutional at the circuits, was repealed, and a different system was established; but the question whether those persons, who had been reported by the judges, as commissioners, were entitled, in consequence of that report, to be placed on the pension list, was a legal question, properly determinable in the courts, although the act of placing such persons on the list was to be performed by the head of a department.

That this question might be properly settled, congress passed an act in February 1793, making it the duty of the secretary of war, in conjunction with the attorney general, to take such measures as might be necessary to obtain an adjudication of the supreme court of the United [5 U.S. 137, 172] States on the validity of any such rights, claimed under the act aforesaid.

After the passage of this act, a mandamus was moved for, to be directed to the secretary at war, commanding him to place on the pension list a person stating himself to be on the report of the judges.

There is, therefore, much reason to believe, that this mode of trying the legal right of the complainant, was deemed by the head of a department, and by the highest law officer of the United States, the most proper which could be selected for the purpose.

When the subject was brought before the court the decision was, not, that a mandamus would not lie to the head of a department, directing him to perform an act, enjoined by law, in the performance of which an individual had a vested interest; but that a mandamus ought not to issue in that case—the decision necessarily to be made if the report of the commissioners did not confer on the applicant a legal right.

The judgment in that case is understood to have decided the merits of all claims of that description; and the persons, on the report of the commissioners, found it necessary to pursue the mode prescribed by the law subsequent to that which had been deemed unconstitutional, in order to place themselves on the pension list.

The doctrine, therefore, now advanced is by no means a novel one.

It is true that the mandamus, now moved for, is not for the performance of an act expressly enjoined by statute.

It is to deliver a commission; on which subjects the acts of congress are silent. This difference is not considered as affecting the case. It has already been stated that the applicant has, to that commission, a vested legal right, of which the executive cannot deprive him. He has been appointed to an office, from which he is not removable at the will of the executive; and being so [5 U.S. 137, 173] appointed, he has a right to the commission which the secretary has received from the president for his use. The act of congress does not indeed order the secretary of state to send it to him, but it is placed in his hands for the person entitled to it; and cannot be more lawfully withheld by him, than by another person.

It was at first doubted whether the action of detinue was not a specific legal remedy for the commission which has been withheld from Mr. Marbury; in which case a mandamus would be improper. But this doubt has yielded to the consideration that the judgment in detinue is for the thing itself, or its value. The value of a public office not to be sold, is incapable of being ascertained; and the applicant has a right to the office itself, or to nothing. He will obtain the office by obtaining the commission, or a copy of it from the record.

This, then, is a plain case of a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired,

Whether it can issue from this court.

The act to establish the judicial courts of the United States authorizes the supreme court 'to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.'

Section 13 Judiciary Act 1789

The secretary of state, being a person, holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present [5 U.S. 137, 174] case; because the right claimed is given by a law of the United States.

In the distribution of this power it is declared that 'the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction.'

It has been insisted at the bar, that as the original grant of jurisdiction to the supreme and inferior courts is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words; the power remains to the legislature to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction made in the constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.

It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such construction is inadmissible, unless the words require it. [5 U.S. 137, 175] If the solicitude of the convention, respecting our peace with foreign powers, induced a provision that the supreme court should take original jurisdiction in cases which might be supposed to affect them; yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as congress might make, is no restriction; unless the words be deemed exclusive of original jurisdiction.

When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction, the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to the obvious meaning.

To enable this court then to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true; yet the jurisdiction must be appellate, not original.

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that case. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and therefore seems not to belong to [5 U.S. 137, 176] appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to inquire whether a jurisdiction, so conferred, can be exercised.

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognise certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void.

This theory is essentially attached to a written constitution, and is consequently to be considered by this court as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.



If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

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. [5 U.S. 137, 178] So if a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions—a written constitution, would of itself be sufficient, in America where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution. [5 U.S. 137, 179] Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that 'no tax or duty shall be laid on articles exported from any state.' Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law.

The constitution declares that 'no bill of attainder or ex post facto law shall be passed.'

If, however, such a bill should be passed and a person should be prosecuted under it, must the court condemn

to death those victims whom the constitution endeavours to preserve?

'No person,' says the constitution, 'shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.'

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: 'I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States.'

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him and cannot be inspected by him.

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void, and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

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## U.S. Supreme Court

FLETCHER v. PECK, 10 U.S. 87 (1810)

10 U.S. 87 (Cranch)

FLETCHER  
v.  
PECK.

February Term, 1810

ERROR to the circuit court for the district of Massachusetts, in an action of covenant brought by Flecher against Peck.

The first count of the declaration states that Peck, by his deed of bargain and sale dated the 14th of May, 1803, in consideration of 3,000 dollars, sold and conveyed to Fletcher, 15,000 acres of land lying in common and undivided in a tract described as follows: beginning on the river Mississippi, where the latitude 32 deg. 40 min. north of the equator intersects the same, running thence along the same parallel of latitude a due east course to the Tombigby river, thence up the said Tombigby river to where the latitude of 32 deg. 43 min. 52 sec. intersects the same, thence along the same parallel of latitude a due west course to the Mississippi; thence down the said river, to the place of beginning; the said described tract containing 500,000 acres, and is the same which was conveyed by Nathaniel Prime to Oliver Phelps, by deed dated the 27th of February, 1796, and of which the said Phelps conveyed four fifths to Benjamin Hichborn, and the said Peck by deed dated the 8th of December, 1800; the said tract of 500,000 acres, being part of a tract which James Greenleaf conveyed to the said N. Prime, by deed dated the 23d of September, 1795, and is parcel of that tract which James Gunn, Mathew M'Allister, George Walker, Zachariah Cox, Jacob Walburger, William Longstreet and Wade Hampton, by deed dated 22d of August, 1795, conveyed to the said James Greenleaf; the same being part of that tract which was granted by letters patent under the great seal of the state of Georgia, and the signature of George Matthews, Esq. governor of that state, dated the 13th of January, 1795, to the said James Gunn and others, under the name of James Gunn, Mathew M'Allister, and George [10 U.S. 87, 88] Walker and their associates, and their heirs and assigns in fee-simple, under the name of the Georgia company; which patent was issued by virtue of an act of the legislature of Georgia, passed the 7th of January, 1795, entitled 'An act supplementary to an act for appropriating part of the unlocated territory of this state for the payment of the late state troops, and for other purposes therein mentioned, and declaring the right of this state to the unappropriated territory thereof, for the protection and support of the frontiers of this state, and for other purposes.'

That Peck, in his deed to Fletcher, covenanted 'that the state of Georgia aforesaid was, at the time of the passing of the act of the legislature thereof, (entitled as aforesaid,) legally seised in fee of the soil thereof, subject only to the extinguishment of part of the Indian title thereon. And that the legislature of the said state at the time of passing the act of sale aforesaid, had good right to sell and dispose of the same in manner pointed out by the said act. And that the governor of the said state had lawful authority to issue his grant aforesaid, by virtue of the said act. And further, that all the title which the said state of Georgia ever had in the aforegranted premises has been legally conveyed to the said John Peck by force of the conveyances aforesaid. And further, that the title to the premises so conveyed by the state of Georgia, and finally vested in the said Peck, has been in no way constitutionally or legally impaired by virtue of any subsequent act of any subsequent legislature of the said state of Georgia.'

The breach assigned in the first count was, that at the time the said act of 7th of January, 1795, was passed, 'the said legislature had no authority to sell and dispose of the tenements aforesaid, or of any part thereof, in the manner pointed out in the said act.'

The 2d count, after stating the covenants in the deed as stated in the first count, averred, that at Augusta, in the said state of Georgia, on the 7th day of January, 1795, the said James Gunn, Mathew M'Allister [10 U.S. 87, 89] and George Walker, promised and assured divers members of the legislature of the said state then duly and legally sitting in general assembly of the said state, that if the said members would assent to and vote for the passing of the act of the said general assembly, entitled as aforesaid, the same then being before the said general assembly in the form of a bill, and if the said bill should pass into a law, that such members should have a share of, and be interested in, all the lands, which they the said Gunn, M'Allister and Walker, and their associates, should purchase of the said state by virtue of and under authority of the same law: and that divers of the said members to whom the said promise and assurance was so made as aforesaid, were unduly influenced thereby, and under such influence did then and there vote for the passing the said bill into a law; by reason whereof the said law was a nullity, and from the time of passing the same as aforesaid was, ever since has been, and now is, absolutely void and of no effect whatever; and that the title which the said state of Georgia had in the aforegranted premises at any time whatever was never legally conveyed to the said Peck, by force of the conveyances aforesaid.'

The third count, after repeating all the averments and recitals contained in the second, further averred, that after the passing of the said act, and of the execution of the patent aforesaid, the general assembly of the state of Georgia, being a legislature of that state subsequent to that which passed the said act, at a session thereof, duly and legally holden at Augusta, in the said state, did, on the 13th of February, 1796, because of the undue influence used as aforesaid, in procuring the said act to be passed, and for other causes, pass another certain act in the words following, that is to say, 'An act declaring null and void a certain usurped act passed by the last legislature of this state at Augusta, the 7th day of January, 1795, under the pretended title of 'An act supplementary to an act entitled an act for appropriating a part of the unlocated [10 U.S. 87, 90] territory of the state for the payment of the late state troops, and for other purposes therein mentioned, declaring the right of this state to the unappropriated territory thereof for the protection of the frontiers, and for other purposes' and for expunging from the public records the said usurped act, and declaring the right of this state to all lands lying within the boundaries therein mentioned.'

By which, after a long preamble, it is enacted, 'That the said usurped act passed on the 7th of January, 1795, entitled, &c. be, and the same is hereby declared, null and void, and the grant or grants right or rights, claim or claims, issued, deduced, or derived therefrom, or from any clause, letter or spirit of the same, or any part of the same, is hereby also annulled, rendered void, and of no effect; and as the same was made without constitutional authority, and fraudulently obtained, it is hereby declared of no binding force or effect on this state, or the people thereof, but is and are to be considered, both law and grant, as they ought to be, ipso facto, of themselves, void, and the territory therein mentioned is also hereby declared to be the sole property of the state, subject only to the right of treaty of the United States to enable the state to purchase under its pre-emption right, the Indian title to the same.'

The 2d section directs the enrolled law, the grant, and all deeds, contracts, &c. relative to the purchase, to be expunged from the records of the state, &c.

The 3d section declares that neither the law nor the grant, nor any other conveyance, or agreement relative thereto, shall be received in evidence in any court of law or equity in the state so far as to establish a right to the territory or any part thereof, but they may be received in evidence in private actions between individuals for the recovery of money paid upon pretended sales, &c.

The 4th section provides for the repayment of money, funded stock, &c. which may have been paid into the treasury, provided it was then remaining [10 U.S. 87, 91] therein, and provided the repayment should be

demanded within eight months from that time.

The 5th section prohibits any application to congress, or the general government of the United States for the extinguishment of the Indian claim; and

The 6th section provides for the promulgation of the act.

The count then assigns a breach of the covenant in the following words, viz. 'And by reason of the passing of the said last-mentioned act, and by virtue thereof, the title which the said Peck had, as aforesaid, in and to the tenements aforesaid, and in and to any part thereof, was constitutionally and legally impaired, and rendered null and void.'

The 4th count, after reciting the covenants as in the first, assigned as a breach, 'that at the time of passing of the act of the 7th of January, 1795, the United States of America were seised in fee-simple of all the tenements aforesaid, and of all the soil thereof, and that at that time the State of Georgia was not seised in fee-simple of the tenements aforesaid, or of any part thereof, nor of any part of the soil thereof, subject only to the extinguishment of part of the Indian title thereon.'

The defendant pleaded four pleas, viz.

1st plea. As to the breach assigned in the first count, he says,

That on the 6th of May, 1789, at Augusta, in the State of Georgia, the people of that state by their delegates, duly authorized and empowered to form, declare, ratify, and confirm a constitution for the government of the said state, did form, declare, ratify, and confirm such constitution, in the words following:

Here was inserted the whole constitution, the 16th section of which declares, that the general assembly shall have power to make all laws and ordinances [10 U.S. 87, 92] which they shall deem necessary and proper for the good of the state which shall not be repugnant to this constitution. The plea then avers, that until and at the ratification and confirmation aforesaid of the said constitution, the people of the said state were seised, among other large parcels of land, and tracts of country, of all the tenements described by the said Fletcher in his said first count, and of the soil thereof in absolute sovereignty, and in fee-simple; (subject only to the extinguishment of the Indian title to part thereon;) and that upon the confirmation and ratification of the said constitution, and by force thereof, the said State of Georgia became seised in absolute sovereignty, and in fee-simple, of all the tenements aforesaid, with the soil thereof, subject as aforesaid; the same being within the territory and jurisdiction of the said state, and the same state continued so seised in fee-simple, until the said tenements and soil were conveyed by letters patent under the great seal of the said state, and under the signature of George Matthews, Esq. governor thereof, in the manner and form mentioned by the said Fletcher in his said first count. And the said Peck further saith, that on the 7th of January, 1795, at a session of the general assembly of the said state duly holden at Augusta within the same, according to the provisions of the said constitution, the said general assembly, then and there possessing all the powers vested in the legislature of the said state by virtue of the said constitution, passed the act above mentioned by the said Fletcher in the assignment of the breach aforesaid, which act is in the words following, that is to say, 'An act supplementary,' &c.

Here was recited the whole act, which, after a long preamble, declares the jurisdictional and territorial rights, and the fee-simple to be in the state, and then enacts, that certain portions of the vacant lands should be sold to four distinct associations of individuals, calling themselves respectively, 'The Georgia Company,' 'The Georgia Mississippi Company,' 'The Upper Mississippi Company,' and 'The Tennessee Company.'

The tract ordered to be sold to James Gunn and [10 U.S. 87, 93] others, (the Georgia Company,) was described as follows: 'All that tract or parcel of land, including islands, situate, lying and being within the following boundaries; that is to say, beginning on the Mobile bay where the latitude 31 deg. north of the equator, intersects the same, running thence up the said bay to the mouth of lake Tensaw; thence up the said

The cause having been again argued at this term,

March 16, 1810,

MARSHALL, Ch. J. delivered the opinion of the court as follows:

The pleadings being now amended, this cause comes on again to be heard on sundry demurrers, and on a special verdict.

The suit was instituted on several covenants contained in a deed made by John Peck, the defendant in error, conveying to Robert Fletcher, the plaintiff in error, certain lands which were part of a large purchase made by James Gunn and others, in the year 1795, from the state of Georgia, the contract for which was made in the form of a bill passed by the legislature of that state.

The first count in the declaration set forth a breach [10 U.S. 87, 128] in the second covenant contained in the deed. The covenant is, 'that the legislature of the state of Georgia, at the time of passing the act of sale aforesaid, had good right to sell and dispose of the same in manner pointed out by the said act.' The breach assigned is, that the legislature had no power to sell.

The plea in bar sets forth the constitution of the state of Georgia, and avers that the lands sold by the defendant to the plaintiff, were within that state. It then sets forth the granting act, and avers the power of the legislature to sell and dispose of the premises as pointed out by the act.

To this plea the plaintiff below demurred, and the defendant joined in demurrer.

That the legislature of Georgia, unless restrained by its own constitution, possesses the power of disposing of the unappropriated lands within its own limits, in such manner as its own judgment shall dictate, is a proposition not to be controverted. The only question, then, presented by this demurrer, for the consideration of the court, is this, did the then constitution of the state of Georgia prohibit the legislature to dispose of the lands, which were the subject of this contract, in the manner stipulated by the contract?

The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

In this case the court can perceive no such opposition. In the constitution of Georgia, adopted in the [10 U.S. 87, 129] year 1789, the court can perceive no restriction on the legislative power, which inhibits the passage of the act of 1795. The court cannot say that, in passing that act, the legislature has transcended its powers, and violated the constitution.

In overruling the demurrer, therefore, to the first plea, the circuit court committed no error.

The 3d covenant is, that all the title which the state of Georgia ever had in the premises had been legally conveyed to John Peck, the grantor.

The 2d count assigns, in substance, as a breach of this covenant, that the original grantees from the state of Georgia promised and assured divers members of the legislature, then sitting in general assembly, that if the said members would assent to, and vote for, the passing of the act, and if the said bill should pass, such

acquired it, of which he had no notice, that concealed defect cannot be set up against him. He has paid his money for a title good at law, he is innocent, whatever may be the guilt of others, and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and the intercourse [10 U.S. 87, 134] between man and man would be very seriously obstructed, if this principle be overturned.

A court of chancery, therefore, had a bill been brought to set aside the conveyance made to James Gunn and others, as being obtained by improper practices with the legislature, whatever might have been its decision as respected the original grantees, would have been bound, by its own rules, and by the clearest principles of equity, to leave unmolested those who were purchasers, without notice, for a valuable consideration.

If the legislature felt itself absolved from those rules of property which are common to all the citizens of the United States, and from those principles of equity which are acknowledged in all our courts, its act is to be supported by its power alone, and the same power may divest any other individual of his lands, if it shall be the will of the legislature so to exert it.

It is not intended to speak with disrespect of the legislature of Georgia, or of its acts. Far from it. The question is a general question, and is treated as one. For although such powerful objections to a legislative grant, as are alleged against this, may not again exist, yet the principle, on which alone this rescinding act is to be supported, may be applied to every case to which it shall be the will of any legislature to apply it. The principle is this; that a legislature may, by its own act, divest the vested estate of any man whatever, for reasons which shall, by itself, be deemed sufficient.

In this case the legislature may have had ample proof that the original grant was obtained by practices which can never be too much reprobated, and which would have justified its abrogation so far as respected those to whom crime was imputable. But the grant, when issued, conveyed an estate in fee-simple to the grantee, clothed with all the solemnities which law can bestow. This estate was transferrable; and those who purchased parts of it were not stained by that [10 U.S. 87, 135] guilt which infected the original transaction. Their case is not distinguishable from the ordinary case of purchasers of a legal estate without knowledge of any secret fraud which might have led to the emanation of the original grant. According to the well known course of equity, their rights could not be affected by such fraud. Their situation was the same, their title was the same, with that of every other member of the community who holds land by regular conveyances from the original patentee.

Is the power of the legislature competent to the annihilation of such title, and to a resumption of the property thus held?

The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature.

The correctness of this principle, so far as respects general legislation, can never be controverted. But, if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estate, and, if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact.

When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community.

It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation. [10 U.S. 87, 136] To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection.

It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments. How far the power of giving the law may involve every other power, in cases where the constitution is silent, never has been, and perhaps never can be, definitely stated.

The validity of this rescinding act, then, might well be doubted, were Georgia a single sovereign power. But Georgia cannot be viewed as a single, unconnected, sovereign power, on whose legislature no other restrictions are imposed than may be found in its own constitution. She is a part of a large empire; she is a member of the American union; and that union has a constitution the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several states, which none claim a right to pass. The constitution of the United States declares that no state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts.

Does the case now under consideration come within this prohibitory section of the constitution?

In considering this very interesting question, we immediately ask ourselves what is a contract? Is a grant a contract?

A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the governor. A contract executed is one in which the object [10 U.S. 87, 137] of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.

Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and since the constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seised of their former estates, notwithstanding those grants, would be as repugnant to the constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the constitution, while an absolute conveyance remained unprotected.

If, under a fair construction the constitution, grants are comprehended under the terms contracts, is a grant from the state excluded from the operation of the provision? Is the clause to be considered as inhibiting the state from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself?

The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the state are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed.

Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, [10 U.S. 87, 138] the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each state.



No state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts.

A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.

In this form the power of the legislature over the lives and fortunes of individuals is expressly restrained. What motive, then, for implying, in words which import a general prohibition to impair the obligation of contracts, an exception in favour of the right to impair the obligation of those contracts into which the state may enter?

The state legislatures can pass no ex post facto law. An ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual in the form of a law annulling the title by which he holds that estate? The court can perceive no sufficient grounds for making this distinction. This rescinding act would have the effect of an ex post facto law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. [10 U.S. 87, 139] This cannot be effected in the form of an ex post facto law, or bill of attainder, why, then, is it allowable in the form of a law annulling the original grant?

The argument in favour of presuming an intention to except a case, not excepted by the words of the constitution, is susceptible of some illustration from a principle originally ingrafted in that instrument, though no longer a part of it. The constitution, as passed, gave the courts of the United States jurisdiction in suits brought against individual states. A state, then, which violated its own contract was suable in the courts of the United States for that violation. Would it have been a defence in such a suit to say that the state had passed a law absolving itself from the contract? It is scarcely to be conceived that such a defence could be set up. And yet, if a state is neither restrained by the general principles of our political institutions, nor by the words of the constitution, from impairing the obligation of its own contracts, such a defence would be a valid one. This feature is no longer found in the constitution; but it aids in the construction of those clauses with which it was originally associated.

It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the state of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.

In overruling the demurrer to the 3d plea, therefore, there is no error.

The first covenant in the deed is, that the state of Georgia, at the time of the act of the legislature thereof, entitled as aforesaid, was legally seised in fee of the soil thereof subject only to the extinguishment of part of the Indian title thereon. [10 U.S. 87, 140] The 4th count assigns, as a breach of this covenant, that the right to the soil was in the United States, and not in Georgia.

To this court the defendant pleads, that the state of Georgia was seised; and tenders an issue on the fact in which the plaintiff joins. On this issue a special verdict is found.

The jury find the grant of Carolina by Charles second to the Earl of Clarendon and others, comprehending the whole country from 36 deg. 30 min. north lat. to 29 deg. north lat., and from the Atlantic to the South Sea.

They find that the northern part of this territory was afterwards erected into a separate colony, and that the most northern part of the 35 deg. of north lat. was the boundary line between North and South Carolina.

The question, whether the vacant lands within the United States became a joint property, or belonged to the separate states, was a momentous question which, at one time, threatened to shake the American confederacy to its foundation. This important and dangerous contest has been compromised, and the compromise is not now to be disturbed.

It is the opinion of the court, that the particular land stated in the declaration appears, from this special verdict, to lie within the state of Georgia, and that the state of Georgia had power to grant it.

Some difficulty was produced by the language of the covenant, and of the pleadings: It was doubted whether a state can be seised in fee of lands, subject to the Indian title, and whether a decision that they were seised in fee, might not be construed to amount to a decision that their grantee might maintain an ejectment for them, notwithstanding that title.

The majority of the court is of opinion that the nature of the Indian title, which is certainly to be respected [10 U.S. 87, 143] by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state.

Judgment affirmed with costs.

JOHNSON, J.

In this case I entertain, on two points, an opinion different from that which has been delivered by the court.

I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things: a principle which will impose laws even on the deity.

A contrary opinion can only be maintained upon the ground that no existing legislature can abridge the powers of those which will succeed it. To a certain extent this is certainly correct; but the distinction lies between power and interest, the right of jurisdiction and the right of soil.

The right of jurisdiction is essentially connected to, or rather identified with, the national sovereignty. To part with it is to commit a species of political suicide. In fact, a power to produce its own annihilation is an absurdity in terms. It is a power as utterly incommunicable to a political as to a natural person. But it is not so with the interests or property of a nation. Its possessions nationally are in nowise necessary to its political existence; they are entirely accidental, and may be parted with in every respect similarly to those of the individuals who compose the community. When the legislature have once conveyed their interest or property in any subject to the individual, they have lost all control over it; have nothing to act upon; it has passed from them; is vested in the individual; becomes intimately blended with his existence, as essentially so as the blood that circulates through his system. The government may indeed demand of him the one or the other, not because they are not his, but because whatever is his is his country's. [10 U.S. 87, 144] As to the idea, that the grants of a legislature may be void because the legislature are corrupt, it appears to me to be subject to insuperable difficulties. The acts of the supreme power of a country must be considered pure for the same reason that all sovereign acts must be considered just; because there is no power that can declare them otherwise. The absurdity in this case would have been strikingly perceived, could the party who passed the act of cession have got again into power; and declared themselves pure, and the intermediate legislature corrupt.

The security of a people against the misconduct of their rulers, must lie in the frequent recurrence to first principles, and the imposition of adequate constitutional restrictions. Nor would it be difficult, with the same view, for laws to be framed which would bring the conduct of individuals under the review of adequate tribunals, and make them suffer under the consequences of their own immoral conduct.

I have thrown out these ideas that I may have it distinctly understood that my opinion on this point is not founded on the provision in the constitution of the United States, relative to laws impairing the obligation of

## The Judiciary Act of 1789

An Act to establish the Judicial Courts of the United States

(...)

Sec. 25. 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 question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question 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, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision is against the title, right, privilege, or exemption, specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute, or commission, may be re-examined, and reversed or affirmed in the Supreme Court of the United States upon a writ of error, the citation being signed by the chief justice, or judge or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States, in the same manner and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a circuit court, and the proceedings upon the reversal shall also be the same, except that the Supreme Court, instead of remanding the cause for a final decision as before provided, may, at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before-mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute.

(...)

## U.S. Supreme Court

MARTIN v. HUNTER'S LESSEE, 14 U.S. 304 (1816)

14 U.S. 304 (Wheat.)

MARTIN, Heir at law and devisee of FAIRFAX,

v.

HUNTER'S Lessee.

March 20, 1816 [14 U.S. 304, 305] THIS was a writ of error to the court of appeals of the state of Virginia, founded upon the refusal of that court to obey the mandate of this court, requiring the judgment rendered in this same cause, at February term, 1813, to be carried into due execution. The following is the judgment of the court of appeals, rendered on the mandate: 'The court is unanimously of opinion that the appellate power of the supreme court of the United States does not [14 U.S. 304, 306] extend to this court under a sound construction of the constitution of the United States; that so much of the 25th section of the act of congress, to establish the judicial courts of the United States, as extends the appellate jurisdiction of the supreme court to this court, is not in pursuance of the constitution of the United States. That the writ of error in this cause was improvidently allowed under the authority of that act; that the proceedings thereon in the supreme court were coram non iudice in relation to this court, and that obedience to its mandate be declined by the court.'

The original suit was an action of ejectment, brought by the defendant in error, in one of the district courts of Virginia, holden at Winchester, for the recovery of a parcel of land, situate within that tract, called the northern neck of Virginia, and part and parcel thereof. A declaration in ejectment was served (April, 1791) on the tenants in possession; whereupon Deany Fairfax, (late Denny Martin,) a British subject, holding the land in question, under the devise of the late Thomas Lord Fairfax, was admitted to defend the suit, and plead the general issue, upon the usual terms of confessing lease, entry, and ouster, &c., and agreeing to insist, at the trial, on the title only, &c. The facts being settled in the form of a case agreed to be taken and considered as a special verdict, the court, on consideration thereof, gave judgment (24th of April, 1794) in favour of the defendant in ejectment. From that judgment the plaintiff in ejectment (now defendant in error) appealed to the court of appeals, [14 U.S. 304, 307] being the highest court of law of Virginia. At April term, 1810, the court of appeals reversed the judgment of the district court, and gave judgment for the then appellant, now defendant in error, and thereupon the case was removed into this court.

State of the facts as settled by the case agreed.

1st. The title of the late Lord Fairfax to all that entire territory and tract of land, called the Northern Neck of Virginia, the nature of his estate in the same, as he inherited it, and the purport of the several charters and grants from the kings Charles II. and James II., under which his ancestor held, are agreed to be truly recited in an act of the assembly of Virginia, passed in the year 1736, [Vide Rev. Code, v. 1. ch. 3. p. 5.] 'For the confirming and better securing the titles to lands in the Northern Neck, held under the Rt. Hon. Thomas Lord Fairfax,' &c.

From the recitals of the act, it appears that the first letters patent (1 Car. II.) granting the land in

necessary to send a writ of error to the state court; you may cite the parties themselves to appear in your forum, as soon as a question touching a treaty arises. There is no necessary connection between an appellate tribunal and the court appealed from; it is sufficient that the parties have originally litigated before the court of first instance. The house of lords, an English common law court, holds appeals from the court of sessions, in Scotland, a civil law tribunal. The union between that country and England is similar to our federative constitution. In whatever mode the appellate jurisdiction may be exercised, it is still liable to the difficulties suggested. The process by which a cause is to be removed from the state court, before judgment, must be addressed to that court; and if it still proceeds, the remedy must be as offensive as at present. But it would, also, be ineffectual and dilatory. Suppose, in a case of original jurisdiction, an ambassador prosecuted for a supposed crime in a state court, he might be imprisoned, or put to death, before the national authority could be interposed, unless it act directly on the state judicature. In this case, the court may act directly on the cause and the parties, in order to carry into complete effect the appellate powers with which it is invested by the constitution and [14 U.S. 304, 323] laws. There is nothing in the record importing that the court of appeals determined on the ground of the party's title merely. Nor is it necessary that the treaty, under which that title is set up, should be specified in a bill of exceptions, or propounded in argument. It is sufficient that the claim is stated upon the record, and that the title depends upon the treaty. This court is not to pronounce a mere abstract opinion upon the validity, or construction, of the treaty; it may, therefore, decide on other incidental matters; and, if the party has a good title under the treaty, it is to enforce and protect that title. As to the sufficiency of the return, the law merely requires a transcript of the record to be removed, and, by the rules of this court, a return by the clerk is sufficient.

March 20th.

STORY, J., delivered the opinion of the court.

This is a writ of error from the court of appeals of Virginia, founded upon the refusal of that court to obey the mandate of this court, requiring the judgment rendered in this very cause, at February term, 1813, to be carried into due execution. The following is the judgment of the court of appeals rendered on the mandate: "The court is unanimously of opinion, that the appellate power of the supreme court of the United States does not extend to this court, under a sound construction of the constitution of the United States; that so much of the 25th section of the act of congress to establish the judicial courts of the United States, as extends the appellate jurisdiction of the supreme court to this court, is not in pursuance of the constitution of the [14 U.S. 304, 324] United States; that the writ of error, in this cause, was improvidently allowed under the authority of that act; that the proceedings thereon in the supreme court were, coram non iudice, in relation to this court, and that obedience to its mandate be declined by the court."

The questions involved in this judgment are of great importance and delicacy. Perhaps it is not too much to affirm, that, upon their right decision, rest some of the most solid principles which have hitherto been supposed to sustain and protect the constitution itself. The great respectability, too, of the court whose decisions we are called upon to review, and the entire deference which we entertain for the learning and ability of that court, add much to the difficulty of the task which has so unwelcomely fallen upon us. It is, however, a source of consolation, that we have had the assistance of most able and learned arguments to aid our inquiries; and that the opinion which is now to be pronounced has been weighed with every solicitude to come to a correct result, and matured after solemn deliberation.

Before proceeding to the principal questions, it may not be unfit to dispose of some preliminary considerations which have grown out of the arguments at the bar.

The constitution of the United States was ordained and established, not by the states in their

sovereign capacities, but emphatically, as the preamble of the constitution declares, by 'the people of the United States.' There can be no doubt that it was competent to the people to invest the general government [14 U.S. 304, 325] with all the powers which they might deem proper and necessary; to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be, that the people had a right to prohibit to the states the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact; to make the powers of the state governments, in given cases, subordinate to those of the nation, or to reserve to themselves those sovereign authorities which they might not choose to delegate to either. The constitution was not, therefore, necessarily carved out of existing state sovereignties, nor a surrender of powers already existing in state institutions, for the powers of the states depend upon their own constitutions; and the people of every state had the right to modify and restrain them, according to their own views of the policy or principle. On the other hand, it is perfectly clear that the sovereign powers vested in the state governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States.

These deductions do not rest upon general reasoning, plain and obvious as they seem to be. They have been positively recognised by one of the articles in amendment of the constitution, which declares, that 'the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.' [14 U.S. 304, 326] The government, then, of the United States, can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication. On the other hand, this instrument, like every other grant, is to have a reasonable construction, according to the import of its terms; and where a power is expressly given in general terms, it is not to be restrained to particular cases, unless that construction grow out of the context expressly, or by necessary implication. The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged.

The constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time [14 U.S. 304, 327] time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom, and the public interests, should require.

With these principles in view, principles in respect to which no difference of opinion ought to be indulged, let us now proceed to the interpretation of the constitution, so far as regards the great points in controversy.

The third article of the constitution is that which must principally attract our attention. The 1st. section declares, 'the judicial power of the United States shall be vested in one supreme court, and in such other inferior courts as the congress may, from time to time, ordain and establish.' The 2d section declares, that 'the judicial power shall extend to all cases in law or equity, arising under this constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state, claiming lands under the grants of

We do not, however, profess to place any implicit reliance upon the distinction which has here been stated and endeavoured to be illustrated. It has the rather been brought into view in deference to the legislative opinion, which has so long acted upon, and enforced, this distinction. But there is, certainly, vast weight in the argument which has been urged, that the constitution is imperative upon congress to vest all the judicial power of the United States, in the shape of original jurisdiction, in the supreme and inferior courts created under its own authority. At all events, whether the one construction or the other prevail, it is manifest that the judicial power of the [14 U.S. 304, 337] United States is unavoidably, in some cases, exclusive of all state authority, and in all others, may be made so at the election of congress. No part of the criminal jurisdiction of the United States can, consistently with the constitution, be delegated to state tribunals. The admiralty and maritime jurisdiction is of the same exclusive cognizance; and it can only be in those cases where, previous to the constitution, state tribunals possessed jurisdiction independent of national authority, that they can now constitutionally exercise a concurrent jurisdiction. Congress, throughout the judicial act, and particularly in the 9th, 11th, and 13th sections, have legislated upon the supposition that in all the cases to which the judicial powers of the United States extended, they might rightfully vest exclusive jurisdiction in their own courts.

But, even admitting that the language of the constitution is not mandatory, and that congress may constitutionally omit to vest the judicial power in courts of the United States, it cannot be demed that when it is vested, it may be exercised to the utmost constitutional extent.

This leads us to the consideration of the great question as to the nature and extent of the appellate jurisdiction of the United States. We have already seen that appellate jurisdiction is given by the constitution to the supreme court in all cases where it has not original jurisdiction; subject, however, to such exceptions and regulations as congress may prescribe. It is, therefore, capable of embracing every case enumerated in the constitution, which is not exclusively to be decided by way of original [14 U.S. 304, 338] jurisdiction. But the exercise of appellate jurisdiction is far from being limited by the terms of the constitution to the supreme court. There can be no doubt that congress may create a succession of inferior tribunals, in each of which it may vest appellate as well as original jurisdiction. The judicial power is delegated by the constitution in the most general terms, and may, therefore, be exercised by congress under every variety of form, of appellate or original jurisdiction. And as there is nothing in the constitution which restrains or limits this power, it must, therefore, in all other cases, subsist in the utmost latitude of which, in its own nature, it is susceptible.

As, then, by the terms of the constitution, the appellate jurisdiction is not limited as to the supreme court, and as to this court it may be exercised in all other cases than those of which it has original cognizance, what is there to restrain its exercise over state tribunals in the enumerated cases? The appellate power is not limited by the terms of the third article to any particular courts. The words are, 'the judicial power (which includes appellate power) shall extend to all cases,' &c., and 'in all other cases before mentioned the supreme court shall have appellate jurisdiction.' It is the case, then, and not the court, that gives the jurisdiction. If the judicial power extends to the case, it will be in-vain to search in the letter of the constitution for any qualification as to the tribunal where it depends. It is incumbent, then, upon those who assert such a qualification to show its existence by necessary implication. If the [14 U.S. 304; 339] text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible.

If the constitution meant to limit the appellate jurisdiction to cases pending in the courts of the United States, it would necessarily follow that the jurisdiction of these courts would, in all the cases enumerated in the constitution, be exclusive of state tribunals. How otherwise could the jurisdiction extend to all cases arising under the constitution, laws, and treaties of the United States, or to all cases of admiralty and maritime jurisdiction? If some of these cases might be entertained by state tribunals, and no appellate jurisdiction as to them should exist, then the appellate power would not

extend to all, but to some, cases. If state tribunals might exercise concurrent jurisdiction over all or some of the other classes of cases in the constitution without control, then the appellate jurisdiction of the United States might, as to such cases, have no real existence, contrary to the manifest intent of the constitution. Under such circumstances, to give effect to the judicial power, it must be construed to be exclusive; and this not only when the *casus foederis* should arise directly, but when it should arise, incidentally, in cases pending in state courts. This construction would abridge the jurisdiction of such court far more than has been ever contemplated in any act of congress.

On the other hand, if, as has been contended, a discretion be vested in congress to establish, or not to establish, inferior courts at their own pleasure, and [14 U.S. 304, 340] congress should not establish such courts, the appellate jurisdiction of the supreme Court would have nothing to act upon, unless it could act upon cases pending in the state courts. Under such circumstances it must be held that the appellate power would extend to state courts; for the constitution is peremptory that it shall extend to certain enumerated cases, which cases could exist in no other courts. Any other construction, upon this supposition, would involve this strange contradiction, that a discretionary power vested in congress, and which they might rightfully omit to exercise, would defeat the absolute injunctions of the constitution in relation to the whole appellate power.

But it is plain that the framers of the constitution did contemplate that cases within the judicial cognizance of the United States not only might but would arise in the state courts, in the exercise of their ordinary jurisdiction. With this view the sixth article declares, that 'this constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.' It is obvious that this obligation is imperative upon the state judges in their official, and not merely in their private, capacities. From the very nature of their judicial duties they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely [14 U.S. 304, 341] according to the laws or constitution of the state, but according to the constitution, laws and treaties of the United States-'the supreme law of the land.'

A moment's consideration will show us the necessity and propriety of this provision in cases where the jurisdiction of the state courts is unquestionable. Suppose a contract for the payment of money is made between citizens of the same state, and performance thereof is sought in the courts of that state; no person can doubt that the jurisdiction completely and exclusively attaches, in the first instance, to such courts. Suppose at the trial the defendant sets up in his defence a tender under a state law, making paper money a good tender, or a state law, impairing the obligation of such contract, which law, if binding, would defeat the suit. The constitution of the United States has declared that no state shall make any thing but gold or silver coin a tender in payment of debts, or pass a law impairing the obligation of contracts. If congress shall not have passed a law providing for the removal of such a suit to the courts of the United States, must not the state court proceed to hear and determine it? Can a mere plea in defence be of itself a bar to further proceedings, so as to prohibit an inquiry into its truth or legal propriety, when no other tribunal exists to whom judicial cognizance of such cases is confided? Suppose an indictment for a crime in a state court, and the defendant should allege in his defence that the crime was created by an *ex post facto* act of the state, must not the state court, in the exercise of a jurisdiction which has already rightfully attached, have a [14 U.S. 304, 342] right to pronounce on the validity and sufficiency of the defence? It would be extremely difficult, upon any legal principles, to give a negative answer to these inquiries. Innumerable instances of the same sort might be stated, in illustration of the position; and unless the state courts could sustain jurisdiction in such cases, this clause of the sixth article would be without meaning or effect, and public mischiefs, of a most enormous magnitude, would inevitably ensue.

It must, therefore, be conceded that the constitution not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States, which might yet depend before



state tribunals. It was foreseen that in the exercise of their ordinary jurisdiction, state courts would incidentally take cognizance of cases arising under the constitution, the laws, and treaties of the United States. Yet to all these cases the judicial power, by the very terms of the constitution, is to extend. It cannot extend by original jurisdiction if that was already rightfully and exclusively attached in the state courts, which (as has been already shown) may occur; it must, therefore, extend by appellate jurisdiction, or not at all. It would seem to follow that the appellate power of the United States must, in such cases, extend to state tribunals; and if in such cases, there is no reason why it should not equally attach upon all others within the purview of the constitution.

It has been argued that such an appellate jurisdiction over state courts is inconsistent with the genius [14 U.S. 304, 343] of our governments, and the spirit of the constitution. That the latter was never designed to act upon state sovereignties, but only upon the people, and that if the power exists, it will materially impair the sovereignty of the states, and the independence of their courts. We cannot yield to the force of this reasoning; it assumes principles which we cannot admit, and draws conclusions to which we do not yield our assent.

It is a mistake that the constitution was not designed to operate upon states, in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the states in some of the highest branches of their prerogatives. The tenth section of the first article contains a long list of disabilities and prohibitions imposed upon the states. Surely, when such essential portions of state sovereignty are taken away, or prohibited to be exercised, it cannot be correctly asserted that the constitution does not act upon the states. The language of the constitution is also imperative upon the states as to the performance of many duties. It is imperative upon the state legislatures to make laws prescribing the time, places, and manner of holding elections for senators and representatives, and for electors of president and vice-president. And in these, as well as some other cases, congress have a right to revise, amend, or supercede the laws which may be passed by state legislatures. When, therefore, the states are stripped of some of the highest attributes of sovereignty, and the same are given to the United States; when the legislatures of the states are, in some [14 U.S. 304, 344] respects, under the control of congress, and in every case are, under the constitution, bound by the paramount authority of the United States; it is certainly difficult to support the argument that the appellate power over the decisions of state courts is contrary to the genius of our institutions. The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the states, and if they are found to be contrary to the constitution, may declare them to be of no legal validity. Surely the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power.

Nor can such a right be deemed to impair the independence of state judges. It is assuming the very ground in controversy to assert that they possess an absolute independence of the United States. In respect to the powers granted to the United States, they are not independent; they are expressly bound to obedience by the letter of the constitution; and if they should unintentionally transcend their authority, or misconstrue the constitution, there is no more reason for giving their judgments an absolute and irresistible force, than for giving it to the acts of the other co-ordinate departments of state sovereignty.

The argument urged from the possibility of the abuse of the revising power, is equally unsatisfactory. It is always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse. It is still more difficult, by such an argument, to ingraft upon a general power a restriction [14 U.S. 304, 345] which is not to be found in the terms in which it is given. From the very nature of things, the absolute right of decision, in the last resort, must rest somewhere—wherever it may be vested it is susceptible of abuse. In all questions of jurisdiction the inferior, or appellate court, must pronounce the final judgment; and common sense, as well as legal reasoning, has conferred it upon the latter.

It has been further argued against the existence of this appellate power, that it would form a novelty in our judicial institutions. This is certainly a mistake. In the articles of confederation, an instrument framed with infinitely more deference to state rights and state jealousies, a power was given to congress to establish 'courts for revising and determining, finally, appeals in all cases of captures.'

It is remarkable, that no power was given to entertain original jurisdiction in such cases; and, consequently, the appellate power (although not so expressed in terms) was altogether to be exercised in revising the decisions of state tribunals. This was, undoubtedly, so far a surrender of state sovereignty; but it never was supposed to be a power fraught with public danger, or destructive of the independence of state judges. On the contrary, it was supposed to be a power indispensable to the public safety, inasmuch as our national rights might otherwise be compromised, and our national peace be endangered. Under the present constitution the prize jurisdiction is confined to the courts of the United States; and a power to revise the decisions of state courts, if they should assert jurisdiction over prize causes, cannot be less [14 U.S. 304, 346] important, or less useful, than it was under the confederation.

In this connexion we are led again to the construction of the words of the constitution; 'the judicial power shall extend,' &c. If, as has been contended at the bar, the term 'extend' have a relative signification, and mean to widen an existing power, it will then follow, that, as the confederation gave an appellate power over state tribunals, the constitution enlarged or widened that appellate power to all the other cases in which jurisdiction is given to the courts of the United States. It is not presumed that the learned counsel would choose to adopt such a conclusion.

It is further argued, that no great public mischief can result from a construction which shall limit the appellate power of the United States to cases in their own courts: first, because state judges are bound by an oath to support the constitution of the United States, and must be presumed to be men of learning and integrity; and, secondly, because congress must have an unquestionable right to remove all cases within the scope of the judicial power from the state courts to the courts of the United States, at any time before final judgment, thought not after final judgment. As to the first reason-admitting that the judges of the state courts are, and always will be, of as much learning, integrity, and wisdom, as those of the courts of the United States, (which we very cheerfully admit,) it does not aid the argument. It is manifest that the constitution has proceeded upon a theory of its own, and given or withheld [14 U.S. 304, 347] powers according to the judgment of the American people, by whom it was adopted. We can only construe its powers, and cannot inquire into the policy or principles which induced the grant of them. The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might some times obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. Hence, in controversies between states; between citizens of different states; between citizens claiming grants under different states; between a state and its citizens, or foreigners, and between citizens and foreigners, it enables the parties, under the authority of congress, to have the controversies heard, tried, and determined before the national tribunals. No other reason than that which has been stated can be assigned, why some, at least, of those cases should not have been left to the cognizance of the state courts. In respect to the other enumerated cases-the cases arising under the constitution, laws, and treaties of the United States, cases affecting ambassadors and other public ministers, and cases of admiralty and maritime jurisdiction-reasons of a higher and more extensive nature, touching the safety, peace, and sovereignty of the nation; might well justify a grant of exclusive jurisdiction.

This is not all. A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of uniformity of decisions [14 U.S. 304, 348] throughout the whole United States, upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the

constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution. What, indeed, might then have been only prophecy, has now become fact; and the appellate jurisdiction must continue to be the only adequate remedy for such evils.

There is an additional consideration, which is entitled to great weight. The constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum. Yet, if the construction contended for be correct, it will follow, that as the plaintiff may always elect the state court, the defendant [14 U.S. 304, 349] may be deprived of all the security which the constitution intended in aid of his rights. Such a state of things can, in no respect, be considered as giving equal rights. To obviate this difficulty, we are referred to the power which it is admitted congress possess to remove suits from state courts to the national courts; and this forms the second ground upon which the argument we are considering has been attempted to be sustained.

This power of removal is not to be found in express terms in any part of the constitution; if it be given, it is only given by implication, as a power necessary and proper to carry into effect some express power. The power of removal is certainly not, in strictness of language; it presupposes an exercise of original jurisdiction to have attached elsewhere. The existence of this power of removal is familiar in courts acting according to the course of the common law in criminal as well as civil cases, and it is exercised before as well as after judgment. But this is always deemed in both cases an exercise of appellate, and not of original jurisdiction. If, then, the right of removal be included in the appellate jurisdiction, it is only because it is one mode of exercising that power, and as congress is not limited by the constitution to any particular mode, or time of exercising it, it may authorize a removal either before or after judgment. The time, the process, and the manner, must be subject to its absolute legislative control. A writ of error is, indeed, but a process which removes the record of one court to the possession of another court, [14 U.S. 304, 350] and enables the latter to inspect the proceedings, and give such judgment as its own opinion of the law and justice of the case may warrant. There is nothing in the nature of the process which forbids it from being applied by the legislature to interlocutory as well as final judgments. And if the right of removal from state courts exist before judgment, because it is included in the appellate power, it must, for the same reason, exist after judgment. And if the appellate power by the constitution does not include cases pending in state courts, the right of removal, which is but a mode of exercising that power, cannot be applied to them. Precisely the same objections, therefore, exist as to the right of removal before judgment, as after, and both must stand or fall together. Nor, indeed, would the force of the arguments on either side materially vary, if the right of removal were an exercise of original jurisdiction. It would equally trench upon the jurisdiction and independence of state tribunals.

The remedy, too, of removal of suits would be utterly inadequate to the purposes of the constitution, if it could act only on the parties, and not upon the state courts. In respect to criminal prosecutions, the difficulty seems admitted to be insurmountable; and in respect to civil suits, there would, in many cases, be rights without corresponding remedies. If state courts should deny the constitutionality of the authority to remove suits from their cognizance, in what manner could they be compelled to relinquish the jurisdiction? In respect to criminal cases, there would at once be an end of all control, and the [14 U.S. 304, 351] state decisions would be paramount to the constitution; and though in civil suits the courts of the United States might act upon the parties, yet the state courts might act in the same way; and this conflict of jurisdictions would not only jeopardise private rights, but bring into imminent peril the public interests.

It has been asserted at the bar that, in point of fact, the court of appeals did not decide either upon the treaty or the title apparent upon the record, but upon a compromise made under an act of the legislature of Virginia. If it be true (as we are informed) that this was a private act, to take effect only upon a certain condition, viz. the execution of a deed of release of certain lands, which was matter in pais, it is somewhat difficult to understand how the court could take judicial cognizance of the act, or of the performance of the condition, unless spread upon the record. At all events, we are bound to consider that the court did decide upon the facts actually before them. The treaty of peace was not necessary to have been stated, for it was the supreme law of the land, of which all courts must take notice. And at the time of the decision in the court of appeals and in this court, another treaty had intervened, which attached itself to the title in controversy, and, of course, must have been the supreme law to govern the decision, if it should be found applicable to the case. It was in this view that this court did not deem it necessary to rest its former decision upon the treaty of peace, believing that the title of the defendant was, at all events, perfect under the treaty of 1794. [14 U.S. 304, 361] The remaining questions respect more the practice than the principles of this court. The forms of process, and the modes of proceeding in the exercise of jurisdiction are, with few exceptions, left by the legislature to be regulated and changed as this court may, in its discretion, deem expedient. By a rule of this court, the return of a copy of a record of the proper court, under the seal of that court, annexed to the writ of error, is declared to be 'a sufficient compliance with the mandate of the writ.' The record, in this case, is duly certified by the clerk of the court of appeals, and annexed to the writ of error. The objection, therefore, which has been urged to the sufficiency of the return, cannot prevail.

Another objection is, that it does not appear that the judge who granted the writ of error did, upon issuing the citation, take the bond required by the 22d section of the judiciary act.

We consider that provision as merely directory to the judge; and that an omission does not avoid the writ of error. If any party be prejudiced by the omission, this court can grant him summary relief, by imposing such terms on the other party as, under all the circumstances, may be legal and proper. But there is nothing in the record by which we can judicially know whether a bond has been taken or not; for the statute does not require the bond to be returned to this court, and it might, with equal propriety, be lodged in the court below, who would ordinarily execute the judgment to be rendered on the writ. And the presumption of law is, until the contrary [14 U.S. 304, 362] appears, that every judge who signs a citation has obeyed the injunctions of the act.

We have thus gone over all the principal questions in the cause, and we deliver our judgment with entire confidence, that it is consistent with the constitution and laws of the land.

We have not thought it incumbent on us to give any opinion upon the question, whether this court have authority to issue a writ of mandamus to the court of appeals to enforce the former judgments, as we do not think it necessarily involved in the decision of this cause.

It is the opinion of the whole court, that the judgment of the court of appeals of Virginia, rendered on the mandate in this cause, be reversed, and the judgment of the district court, held at Winchester, be; and the same is hereby affirmed.

JOHNSON, J.

It will be observed in this case, that the court disavows all intention to decide on the right to issue compulsory process to the state courts; thus leaving us, in my opinion, where the constitution and laws place us—supreme over persons and cases as far as our judicial powers extend, but not asserting any compulsory control over the state tribunals.

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## U.S. Supreme Court

COHENS v. COM. OF VIRGINIA, 19 U.S. 264 (1821)

19 U.S. 264 (Wheat.)

COHENS  
v.  
VIRGINIA.

March 3, 1821 [19 U.S. 264, 265] THIS was a writ of error to the Quarterly Session Court for the borough of Norfolk, in the State of Virginia, under the 25th section of the judiciary act of 1789, c. 20. it being the highest Court of law or equity of that State having jurisdiction of the case.

Pleas at the Court House of Norfolk borough, before the Mayor, Recorder, and Aldermen of the said borough, on Saturday, the second day of September, one thousand eight hundred and twenty, and in the forty-fifth year of the Commonwealth.

Be it remembered, that heretofore, to wit: At a Quarterly Session Court, held the twenty-sixth day of June, one thousand eight hundred and twenty, the grand jury, duly summoned and impaneled for the said borough of Norfolk, and sworn and charged according to law, made a presentment in these words:

We present P. J. and M. J. Cohen, for vending and selling two-halves and four-quarter lottery tickets of the National Lottery, to be drawn at Washington, to William H. Jennings, at their office at the corner of Maxwell's wharf; contrary to the act thus made and provided in that case, since January, 1820. On the information of William H. Jennings. [19 U.S. 264, 266] Whereupon the regular process of law was awarded against the said defendants, to answer the said presentment, returnable to the next succeeding term, which was duly returned by the Sergeant of the borough of Norfolk-'Executed.'

And at another Quarterly Session Court, held for the said borough of Norfolk, the twenty-ninth day of August, one thousand eight hundred and twenty, came, as well the attorney prosecuting for the Commonwealth, in this Court, as the defendants, by their attorney, and on the motion of the said attorney, leave is given by the Court to file an information against the defendants on the presentment aforesaid, which was accordingly filed, and is in these words:

Norfolk borough, to wit: Be it remembered, that James Nimmo, attorney for the Commonwealth of Virginia, in the Court of the said borough of Norfolk, cometh into Court, in his proper person, and with leave of the Court, giveth the said Court to understand and be informed, that by an act of the General Assembly of the said Commonwealth of Virginia, entitled, 'An act to reduce into one, the several acts, and parts of acts, to prevent unlawful gaming.' It is, among other things, enacted and declared, that no person or persons shall buy, or sell, within the said Commonwealth, any lottery, or part or share of a lottery ticket, except in such lottery or lotteries as may be authorized by the laws thereof: and the said James Nimmo, as attorney aforesaid, further giveth the Court to understand and be informed, that P. J. and M. J. Cohen, traders and partners, late of the parish of Elizabeth River, and [19 U.S. 264, 267] borough of Norfolk aforesaid, being evil disposed persons, and totally

regardless of the laws and statutes of the said Commonwealth, since the first day of January, in the year of our Lord one thousand eight hundred and twenty, that is to say, on the first day of June, in that year, and within the said Commonwealth of Virginia, to wit, at the parish of Elizabeth River, in the said borough of Norfolk, and within the jurisdiction of this Court, did then and there unlawfully vend, sell, and deliver to a certain William H. Jennings, two half lottery tickets, and four-quarter lottery tickets, of the National Lottery, to be drawn in the City of Washington, that being a lottery not authorized by the laws of this Commonwealth, to the evil example of all other persons, in the like case offending, and against the form of the act of the General Assembly, in that case made and provided.

JAMES NIMMO, for the Commonwealth.

And at this same Quarterly Session Court, continued by adjournment, and held for the said borough of Norfolk, the second day of September, eighteen hundred and twenty, came, as well the attorney prosecuting for the Commonwealth, in this Court, as the defendants, by their attorney, and the said defendants, for plea, say, that they are not guilty in manner and form, as in the information against them is alleged, and of this they put themselves upon the country, and the attorney for the Commonwealth doth the same; whereupon a case [19 U.S. 264, 268] was agreed by them to be argued in lieu of a special verdict, and is in these words:

Commonwealth against Cohens-case agreed.

In this case, the following statement is admitted and agreed by the parties in lieu of a special verdict: that the defendants, on the first day of June, in the year of our Lord eighteen hundred and twenty, within the borough of Norfolk, in the Commonwealth of Virginia, sold to William H. Jennings a lottery ticket, in the lottery called, and denominated, the National Lottery, to be drawn in the City of Washington, within the District of Columbia.

That the General Assembly of the State of Virginia enacted a statute, or act of Assembly, which went into operation on the first day of January, in the year of our Lord 1820, and which is still unrepealed, in the words following.

No person, in order to raise money for himself or another, shall, publicly or privately, put up a lottery to be drawn or adventured for, or any prize or thing to be raffled or played for: And whosoever shall offend herein, shall forfeit the whole sum of money proposed to be raised by such lottery, raffling or playing, to be recovered by action of debt, in the name of any one who shall sue for the same, or by indictment or information in the name of the commonwealth, in either case, for the use and benefit of the literary fund. Nor shall any person or persons buy or sell, within this Commonwealth, any lottery ticket, or part or share of a lottery ticket, except in such lottery or lotteries as may be authorized by the laws [19 U.S. 264, 269] thereof; and any person or persons offending herein, shall forfeit and pay, for every such offence, the sum of one hundred dollars, to be recovered and appropriated in manner last aforesaid.

That the Congress of the United States enacted a statute on the third day of May, in the year of our Lord 1802, entitled, An Act, &c. in the words and figures following:

An Act to incorporate the inhabitants of the City of Washington, in the District of Columbia.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the inhabitants of the City of Washington be constituted a body politic and corporate, by the name of a Mayor and Council of the City of Washington, and by their corporate name, may sue and be sued, implead and be impleaded, grant, receive, and do all other acts as natural persons, and may purchase and hold real, personal and mixed property, or dispose of

constitute a quorum to do business. In case vacancies shall occur in the Council, the chamber in which the same may happen, shall supply the same by an election by ballot, from the three persons next highest on the list to those elected at the preceding election, and a majority of the whole number of the chamber in which such vacancy may happen, shall be necessary to make an election.

Sec. 3. And be it further enacted, That the Council shall have power to establish and regulate the inspection of flour, tobacco, and salted provisions, the gauging of casks and liquors, the storage of gunpowder, and all naval and military stores, not the property of the United States, to regulate the weight and quality of bread, to tax and license hawkers and peddlers, to restrain or prohibit tipping houses, lotteries, and all kinds of gaming, to superintend the health of the City, to preserve the navigation of the Potomac and Anacostia rivers adjoining the City, to erect, repair, and regulate public wharves, and to deepen docks and basins, to provide for the establishment and superintendence of public schools, to license and regulate, exclusively, hackney coaches, ordinary keepers, retailers and ferries, to provide for the appointment of inspectors, constables, and such other officers as may be necessary to execute the [19 U.S. 264, 276] laws of the Corporation, and to give such compensation to the Mayor of the City as they may deem fit.

Sec. 4. And be it further enacted, That the Levy Court of the county of Washington shall not hereafter possess the power of imposing any tax on the inhabitants of the City of Washington.'

That the Congress of the United States, on the 4th day of May, in the year of our Lord 1812, enacted another statute, entitled, An Act further to amend the Charter of the City of Washington.

'Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That from and after the first Monday in June next, the Corporation of the City of Washington shall be composed of a Mayor, a Board of Aldermen, and a Board of Common Council, to be elected by ballot, as hereafter directed; the Board of Aldermen shall consist of eight members, to be elected for two years, two to be residents of, and chosen from, each ward, by the qualified voters therein; and the Board of Common Council shall consist of twelve members, to be elected for one year, three to be residents of, and chosen from, each ward, in manner aforesaid: and each board shall meet at the Council Chamber on the second Monday in June next, (for the despatch of business,) at ten o'clock in the morning, and on the same day, and at the same hour, annually, thereafter. A majority of each board shall be necessary to form a quorum to do business, but a less number may adjourn from day to day.

The Board of Aldermen, immediately after they shall [19 U.S. 264, 277] have assembled in consequence of the first election, shall divide themselves by lot into two classes; the seats of the first class shall be vacated at the expiration of one year, and the seats of the second class shall be vacated at the expiration of two years, so that one half may be chosen every year. Each board shall appoint its own President from among its own members, who shall preside during the sessions of the board, and shall have a casting vote on all questions where there is an equal division; provided such equality shall not have been occasioned by his previous vote.

Sec. 2. And be it further enacted, That no person shall be eligible to a seat in the Board of Aldermen or Board of Common Council, unless he shall be more than twenty-five years of age, a free white male citizen of the United States, and shall have been a resident of the City of Washington one whole year next preceding the day of the election; and shall, at the time of his election, be a resident of the ward for which he shall be elected, and possessed of a freehold estate in the said City of Washington, and shall have been assessed two months preceding the day of election. And every free white male citizen of lawful age, who shall have resided in the City of Washington for the space of one year next preceding the day of election, and shall be a resident of the ward in which he shall offer to vote, and who shall have been assessed on the books of the Corporation, not less than two months prior to the day of election, shall be qualified to vote for members to serve in the said Board of Aldermen and Board of Common [19 U.S. 264/278] Council, and no other person whatever shall

and the one person at all subsequent elections, having the greatest number of legal votes for the Board of Aldermen; and the three persons having the greatest number of legal votes for the Board of Common Council, shall be duly elected; and in all cases of an equality of votes, the commissioners shall decide by lot. The said returns shall be delivered to the Mayor of the City, on the succeeding day, who shall cause the same to be published in some news-paper printed in the city of Washington. A duplicate return, together with a list of the persons who voted at such election, shall also be made by the said commissioners; to the Register of the City, on the day succeeding the election, who shall preserve and record the same, and shall, within two days thereafter, notify the several persons so returned, of their election; and each board shall judge of the legality of the elections, returns and qualifications of its own members, and shall supply vacancies in its own body, by causing elections to be made to fill the same, in the ward, and for the Board in which such vacancies shall happen, giving at least five days notice previous thereto; and each Board shall have full power to pass all rules necessary and requisite to enable itself to come to a just decision in cases of a contested election of its own members: and the several members of each Board shall, before entering upon the duties of their office, take the following oath or affirmation: [19 U.S. 264, 282] 'I do swear, (or solemnly, sincerely, and truly affirm and declare, as the case may be,) that I will faithfully execute the office of to the best of my knowledge and ability,' which oath or affirmation shall be administered by the Mayor, or some Justice of the Peace, for the county of Washington.

Sec. 5. And be it further enacted, That in addition to the powers heretofore granted to the Corporation of the City of Washington, by an act, entitled, 'An Act to incorporate the inhabitants of the City of Washington, in the District of Columbia,' and an act, entitled, 'An Act, supplementary to an act, entitled, an act to incorporate the inhabitants of the City of Washington, in the District of Columbia,' the said Corporation shall have power to lay taxes on particular wards, parts, or sections of the City, for their particular local improvements.

That after providing for all objects of a general nature, the taxes raised on the assessable property in each ward, shall be expended therein, and in no other; in regulating, filling up and repairing of streets and avenues, building of bridges, sinking of wells, erecting pumps, and keeping them in repair; in conveying water in pumps, and in the preservation of springs; in erecting and repairing wharves; in providing fire engines and other apparatus for the extinction of fires, and for other local improvements and purposes, in such manner as the said Board of Aldermen and Board of Common Council shall provide; but the sums raised for the support of the poor, [19 U.S. 264, 283] aged and infirm, shall be a charge on each ward in proportion to its population or taxation, as the two Boards shall decide. That whenever the proprietors of two thirds of the inhabited houses, fronting on both sides of a street, or part of a street, shall by petition to the two branches, express the desire of improving the same, by laying the curbstone of the foot pavement, and paving the gutters or carriage way thereof, or otherwise improving said street, agreeably to its graduation, the said Corporation shall have power to cause to be done at any expense, not exceeding two dollars and fifty cents per front foot, of the lots fronting on such improved street or part of a street, and charge the same to the owners of the lots fronting on said street, or part of a street, in due proportion; and also on a like petition to provide for erecting lamps for lighting any street or part of a street, and to defray the expense thereof by a tax on the proprietors or inhabitants of such houses, in proportion to their rental or valuation, as the two Boards shall decide.

Sec. 6. And be it further enacted, That the said Corporation shall have full power and authority to erect and establish hospitals or pest houses, work houses, houses of correction, penitentiary, and other public buildings for the use of the City, and to lay and collect taxes for the defraying the expenses thereof; to regulate party and other fences, and to determine by whom the same shall be made and kept in repair; to lay open streets, avenues, lanes and alleys, and to regulate or prohibit all inclosures thereof, and to occupy and improve for public purposes, by [19 U.S. 264, 284] and with the consent of the President of the United States, any part of the public and open spaces or squares in said city, not interfering with any private rights; to regulate the measurement of, and weight, by which all articles brought into the city for sale shall be disposed of; to provide for the appointment of



appraisers, and measurers of builders' work and materials, and also of wood, coal, grain and lumber; to restrain and prohibit the nightly and other disorderly meetings of slaves, free negroes and mulattoes, and to punish such slaves by whipping, not exceeding forty stripes, or by imprisonment not exceeding six calendar months, for any one offence; and to punish such free negroes and mulattoes for such offences, by fixed penalties, not exceeding twenty dollars for any one offence; and in case of inability of any such free negro or mulatto to pay and satisfy and such penalty and costs thereon, to cause such free negro or mulatto to be confined to labour for such reasonable time, not exceeding six calendar months, for any one offence, as may be deemed equivalent to such penalty and costs; to cause all vagrants, idle or disorderly persons, all persons of evil life or ill fame, and all such as have no visible means of support, or are likely to become chargeable to the City as paupers, or are found begging or drunk in or about the streets, or loitering in or about tippling houses, or who can show no reasonable cause of business or employment in the City; and all suspicious persons, and all who have no fixed place of residence, or cannot give a good account of themselves, all eves-droppers and night walkers, all who [19 U.S. 264, 285] are guilty of open profanity, or grossly indecent language or behaviour publicly in the streets, all public prostitutes, and such as lead a notoriously lewd or lascivious course of life, and all such as keep public gaming tables, or gaming houses, to give security for their good behaviour for a reasonable time, and to indemnify the City against any charge for their support, and in case of their refusal or inability to give such security, to cause them to be confined to labour for a limited time, not exceeding one year at a time, unless such security should be sooner given. But if they shall afterwards be found again offending, such security may be again required, and for want thereof, the like proceedings may again be had, from time to time, as often as may be necessary; to prescribe the terms and conditions upon which free negroes and mulattoes, and others who can show no visible means of support, may reside in the City; to cause the avenues, streets, lanes and alleys to be kept clean, and to appoint officers for that purpose. To authorize the drawing of lotteries for effecting any important improvement in the City, which the ordinary funds or revenue thereof will not accomplish. Provided, That the amount to be raised in each year, shall not exceed the sum of ten thousand dollars: And provided also, that the object for which the money is intended to be raised, shall be first submitted to the President of the United States, and shall be approved of by him. To take care of, preserve and regulate the several burying grounds within the City; to provide for registering of births, deaths and marriages; to cause abstracts or minutes [19 U.S. 264, 286] of all transfers of real property, both freehold and leasehold, to be lodged in the Registry of the City, at stated periods; to authorize night watches and patrols, and the taking up and confining by them, in the night time, of all suspected persons; to punish by law corporally any servant or slave guilty of a breach of any of their by-laws or ordinances, unless the owner or holder of such servant or slave, shall pay the fine annexed to the offence; and to pass all laws which shall be deemed necessary and proper for carrying into execution the foregoing powers, and all other powers vested in the Corporation, or any of its officers, either by this act, or any former act.

Sec. 7. And be it further enacted, That the Marshal of the District of Columbia shall receive, and safely keep, within the jail for Washington county, at the expense of the City, all persons committed thereto under the sixth section of this act, until other arrangements be made by the Corporation for the confinement of offenders, within the provisions of the said section; and in all cases where suit shall be brought before a Justice of the Peace, for the recovery of any fine or penalty arising or incurred for a breach of any by-law or ordinance of the Corporation, upon a return of 'nulla bona' to any fieri facias issued against the property of the defendant or defendants, it shall be the duty of the Clerk of the Circuit Court for the County of Washington, when required, to issue a writ of *capias ad satisfaciendum* against every such defendant, returnable to the next Circuit Court for the County of Washington thereafter, [19 U.S. 264, 287] and which shall be proceeded on as in other writs of the like kind.

Sec. 8. And be it further enacted, That unimproved lots in the City of Washington, on which two years taxes remain due and unpaid, or so much thereof as may be necessary to pay such taxes, may be sold at public sale for such taxes due thereon: Provided, that public notice be given of the time

and place of sale, by advertising in some newspaper printed in the City of Washington, at least six months, where the property belongs to persons residing out of the United States; three months where the property belongs to persons residing in the United States, but without the limits of the District of Columbia; and six weeks where the property belongs to persons residing within the District of Columbia or City of Washington; in which notice shall be stated the number of the lot or lots, the number of the square or squares, the name of the person or persons to whom the same may have been assessed, and also the amount of taxes due thereon: And provided, also, that the purchaser shall not be obliged to pay at the time of such sale, more than the taxes due, and the expenses of sale; and that, if within two years from the day of such sale, the proprietor or proprietors of such lot or lots, or his or their heirs, representatives, or agents, shall repay to such purchaser the moneys paid for the taxes and expenses as aforesaid, together with ten per centum per annum as interest thereon, or make a tender of the same, he shall be reinstated in his original right and title; but if no such payment or tender be made [19 U.S. 264, 288] within two years next after the said sale, then the purchaser shall pay the balance of the purchase money of such lot or lots into the City Treasury, where it shall remain subject to the order of the original proprietor or proprietors, his or their heirs, or legal representatives; and the purchaser shall receive a title in fee simple to the said lot or lots, under the hand of the Mayor, and seal of the Corporation, which shall be deemed good and valid in law and equity.

Sec. 9. And be it further enacted, That the said Corporation shall, in future, be named and styled, 'The Mayor, Aldermen, and Common Council of the City of Washington;' and that if there shall have been a non-election or informality of a City Council, on the first Monday in June last, it shall not be taken, construed, or adjudged, in any manner, to have operated as a dissolution of the said Corporation, or to affect any of its rights, privileges, or laws passed previous to the second Monday in June last, but the same are hereby declared to exist in full force.

Sec. 10. And be it further enacted, That the Corporation shall, from time to time, cause the several wards of the City to be so located, as to give, as nearly as may be, an equal number of votes to each ward; and it shall be the duty of the Register of the City, or such officer as the Corporation may hereafter appoint, to furnish the commissioners of election for each ward, on the first Monday in June, annually, previous to the opening of the polls, a list of the persons having a right to vote, agreeably to the provisions of the second section of this act. [19 U.S. 264, 289] Sec. 11. And be it further enacted, That so much of any former act as shall be repugnant to the provisions of this act, be, and the same is hereby repealed.

Which statutes are still in force and unrepealed. That the lottery, denominated the National Lottery, before mentioned, the ticket of which was sold by the defendants as aforesaid, was duly created by the said Corporation of Washington, and the drawing thereof, and the sale of the said ticket, was duly authorized by the said Corporation, for the objects and purposes, and in the mode directed by the said statute of the Congress of the United States. If, upon this case, the Court shall be of opinion, that the acts of Congress before mentioned were valid, and on the true construction of these acts, the lottery ticket sold by the said defendants as aforesaid, might lawfully be sold within the State of Virginia, notwithstanding the act or statute of the General Assembly of Virginia prohibiting such sale, then judgment to be entered for the defendants. But if the Court should be of opinion, that the statute or act of the General Assembly of the State of Virginia, prohibiting such sale, is valid, notwithstanding the said acts of Congress, then judgment to be entered, that the defendants are guilty, and that the Commonwealth recover against them one hundred dollars and costs.

TAYLOR, for defendants.

And thereupon the matters of law arising upon the said case agreed being argued, it seems to the Court here, that the law is for the Commonwealth, and [19 U.S. 264, 290] that the defendants are

forbearing [19 U.S. 264, 374] to elect Senators, and to provide for the election of a President and Representatives, and that the authority of the Union is incompetent to coerce them. Such extreme arguments prove nothing to the present purpose: but suppose the States could not be coerced in such a case to do their duty, because no intervening Court or agent is necessary to the accomplishment of such a desperate purpose, does this prove that you cannot defensively control active violations of the constitution or laws, when a controllable judicature or agent intervenes to perpetrate these violations?

It is also said, that this is a prosecution under a penal statute, and that criminal cases peculiarly belong to the domestic forum. The answer is, that so was the case of *M'Culloch v. Maryland*, a qui tam action, under a penal law of that State, giving one half of the penalty to the State, and the other half to the informer; yet this Court did not consider the nature of the suit, or the circumstance of a State being a party, as forming a valid objection to the jurisdiction. 30 Nobody objects to a State enforcing its own penal laws: all that is claimed is, that in executing them, it should not violate the laws of the Union, which are paramount: *Sic utere tuo ut alienum non laedas*.

The other suppositions which have been stated of bills of attainder and ex post facto laws passed by the States, and attempted to be executed, but decided by this Court to be unconstitutional, and yet the [19 U.S. 264, 375] State Courts persisting in carrying them into effect, even in capital cases, are too wild and extravagant, to illustrate any question which can ever practically arise.

March 3d.

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

This is a writ of error to a judgment rendered in the Court of Hustings for the borough of Norfolk, on an information for selling lottery tickets, contrary to an act of the Legislature of Virginia. In the State Court, the defendant claimed the protection of an act of Congress. A case was agreed between the parties, which states the act of Assembly on which the prosecution was founded, and the act of Congress on which the defendant relied, and concludes in these words: 'If upon this case the Court shall be of opinion that the acts of Congress before mentioned were valid, and, on the true construction of those acts, the lottery tickets sold by the defendants as aforesaid, might lawfully be sold within the State of Virginia, notwithstanding the act or statute of the general assembly of Virginia prohibiting such sale, then judgment to be entered for the defendants; And if the Court should be of opinion that the statute or act of the General Assembly of the State of Virginia, prohibiting such sale, is valid, notwithstanding the said acts of Congress, then judgment to be entered that the defendants are guilty, and that the Commonwealth recover against them one hundred dollars and costs.' [19 U.S. 264, 376] Judgment was rendered against the defendants; and the Court in which it was rendered being the highest Court of the State in which the cause was cognizable, the record has been brought into this Court by writ of error. 31

The defendant in error moves to dismiss this writ, for want of jurisdiction.

In support of this motion, three points have been made, and argued with the ability which the importance of the question merits. These points are-

1st. That a State is a defendant.

2d. That no writ of error lies from this Court to a State Court.

3d. The third point has been presented in different forms by the gentlemen who have argued it. The counsel who opened the cause said, that the want of jurisdiction was shown by the subject matter of the case. The counsel who followed him said, that jurisdiction was not given by the judiciary act. The

Court has bestowed all its attention on the arguments of both gentlemen, and supposes that their tendency is to show that this Court has no jurisdiction of the case, or, in other words, has no right to review the judgment of the State Court, because neither the constitution nor any law of the United States has been violated by that judgment.

The questions presented to the Court by the two first [19 U.S. 264, 377] points made at the bar are of great magnitude, and may be truly said vitally to affect the Union. They exclude the inquiry whether the constitution and laws of the United States have been violated by the judgment which the plaintiffs in error seek to review; and maintain that, admitting such violation, it is not in the power of the government to apply a corrective. They maintain that the nation does not possess a department capable of restraining peaceably, and by authority of law, any attempts which may be made, by a part, against the legitimate powers of the whole; and that the government is reduced to the alternative of submitting to such attempts, or of resisting them by force. They maintain that the constitution of the United States has provided no tribunal for the final construction of itself, or of the laws or treaties of the nation; but that this power may be exercised in the last resort by the Courts of every State in the Union. That the constitution, laws, and treaties, may receive as many constructions as there are States; and that this is not a mischief, or, if a mischief, is irremediable. These abstract propositions are to be determined; for he who demands decision without permitting inquiry, affirms that the decision he asks does not depend on inquiry.

If such be the constitution, it is the duty of the Court to bow with respectful submission to its provisions. If such be not the constitution, it is equally the duty of this Court to say so; and to perform that task which the American people have assigned to the judicial department. [19 U.S. 264, 378] 1st. The first question to be considered is, whether the jurisdiction of this Court is excluded by the character of the parties, one of them being a State, and the other a citizen of that State?

The second section of the third article of the constitution defines the extent of the judicial power of the United States. Jurisdiction is given to the Courts of the Union in two classes of cases. In the first, their jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends 'all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.' This clause extends the jurisdiction of the Court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there by any exception, it is to be implied against the express words of the article.

In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended 'controversies between two or more States, between a State and citizens of another State,' 'and between a State and foreign States, citizens or subjects.' If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the Courts of the Union.

The counsel for the defendant in error have stated that the cases which arise under the constitution must grow out of those provisions which are capable [19 U.S. 264, 379] of self-execution; examples of which are to be found in the 2d section of the 4th article, and in the 10th section of the 1st article.

A case which arises under a law of the United States must, we are likewise told, be a right given by some act which becomes necessary to execute the powers given in the constitution, of which the law of naturalization is mentioned as an example.

The use intended to be made of this exposition of the first part of the section, defining the extent of the judicial power, is not clearly understood. If the intention be merely to distinguish cases arising under the constitution, from those arising under a law, for the sake of precision in the application of this argument, these propositions will not be controverted. If it be to maintain that a case arising

under the constitution, or a law, must be one in which a party comes into Court to demand something conferred on him by the constitution or a law, we think the construction too narrow. A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either. Congress seems to have intended to give its own construction of this part of the constitution in the 25th section of the judiciary act; and we perceive no reason to depart from that construction.

The jurisdiction of the Court, then, being extended by the letter of the constitution to all cases arising under it, or under the laws of the United States, it follows that those who would withdraw [19 U.S. 264, 380] any case of this description from that jurisdiction, must sustain the exemption they claim on the spirit and true meaning of the constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed.

The counsel for the defendant in error have undertaken to do this; and have laid down the general proposition, that a sovereign independent State is not suable, except by its own consent.

This general proposition will not be controverted. But its consent is not requisite in each particular case. It may be given in a general law. And if a State has surrendered any portion of its sovereignty, the question whether a liability to suit be a part of this portion, depends on the instrument by which the surrender is made. If, upon a just construction of that instrument, it shall appear that the State has submitted to be sued, then it has parted with this sovereign right of judging in every case on the justice of its own pretensions, and has entrusted that power to a tribunal in whose impartiality it confides.

The American States, as well as the American people, have believed a close and firm Union to be essential to their liberty and to their happiness. They have been taught by experience, that this Union cannot exist without a government for the whole; and they have been taught by the same experience that this government would be a mere shadow, that must disappoint all their hopes, unless invested with large portions of that sovereignty which belongs to independent States. Under the influence of this opinion, and thus instructed by experience, [19 U.S. 264; 381] the American people, in the conventions of their respective States, adopted the present constitution.

If it could be doubted, whether from its nature, it were not supreme in all cases where it is empowered to act, that doubt would be removed by the declaration, that 'this constitution, and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby; any thing in the constitution or laws of any State to the contrary notwithstanding.'

This is the authoritative language of the American people; and, if gentlemen please, of the American States. It marks, with lines too strong to be mistaken, the characteristic distinction between the government of the Union, and those of the States. The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the constitution; and if there be any who deny its necessity, none can deny its authority.

To this supreme government ample powers are confided; and if it were possible to doubt the great purposes for which they were so confided, the people of the United States have declared, that they are given 'in order to form a more perfect union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to themselves and their posterity.' [19 U.S. 264, 382] With the ample powers confided to this supreme government, for these interesting purposes, are connected many express and important limitations on the sovereignty of the States, which are made for the same purposes. The powers of the Union,

on the great subjects of war, peace, and commerce, and on many others, are in themselves limitations of the sovereignty of the States; but in addition to these, the sovereignty of the States is surrendered in many instances where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on Congress than a conservative power to maintain the principles established in the constitution. The maintenance of these principles in their purity, is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed, is the judicial department. It is authorized to decide all cases of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a State may be a party. When we consider the situation of the government of the Union and of a State, in relation to each other; the nature of our constitution; the subordination of the State governments to that constitution; the great purpose for which jurisdiction over all cases arising under the constitution and laws of the United States, is confided to the judicial department; are we at liberty to insert in this general grant, an exception of those cases in which a State may be a [19 U.S. 264, 383] party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of the United States, is cognizable in the Courts of the Union, whoever may be the parties to that case.

Had any doubt existed with respect to the just construction of this part of the section, that doubt would have been removed by the enumeration of those cases to which the jurisdiction of the federal Courts is extended, in consequence of the character of the parties. In that enumeration, we find 'controversies between two or more States, between a State and citizens of another State,' 'and between a State and foreign States, citizens, or subjects.'

On of the express objects, then, for which the judicial department was established, is the decision of controversies between States, and between a State and individuals. The mere circumstance, that a State is a party, gives jurisdiction to the Court. How, then, can it be contended, that the very same instrument, in the very same section, should be so construed, as that this same circumstance should withdraw a case from the jurisdiction of the Court, where the constitution or laws of the United States are supposed to have been violated? The constitution gave to every person having a claim upon a State, a right to submit his case to the Court of the nation. However unimportant his claim might be, however little the community might be interested in its decision, the framers of our constitution thought it necessary for the purposes of justice, to provide a [19 U.S. 264, 384] tribunal as superior to influence as possible, in which that claim might be decided. Can it be imagined, that the same persons considered a case involving the constitution of our country and the majesty of the laws, questions in which every American citizen must be deeply interested, as withdrawn from this tribunal, because a State is a party?

While weighing arguments drawn from the nature of government, and from the general spirit of an instrument, and urged for the purpose of narrowing the construction which the words of that instrument seem to require, it is proper to place in the opposite scale those principles, drawn from the same sources, which go to sustain the words in their full operation and natural import. One of these, which has been pressed with great force by the counsel for the plaintiffs in error, is, that the judicial power of every well constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws.

If any proposition may be considered as a political axiom, this, we think, may be so considered. In reasoning upon it as an abstract question, there would, probably, exist no contrariety of opinion respecting it. Every argument, proving the necessity of the department, proves also the propriety of giving this extent to it. We do not mean to say, that the jurisdiction of the Courts of the Union should be construed to be co-extensive with the legislative, merely because it is fit that it should be so; but we mean to say, that this fitness furnishes an argument [19 U.S. 264, 385] in construing the constitution which ought never to be overlooked, and which is most especially entitled to consideration, when we are inquiring, whether the words of the instrument which purport to establish

Courts of justice are the means most usually employed; and it is reasonable to expect that a government should repose on its [19 U.S. 264, 388] own Courts, rather than on others. There is certainly nothing in the circumstances under which our constitution was formed; nothing in the history of the times, which would justify the opinion that the confidence reposed in the States was so implicit as to leave in them and their tribunals the power of resisting or defeating, in the form of law, the legitimate measures of the Union. The requisitions of Congress, under the confederation, were as constitutionally obligatory as the laws enacted by the present Congress. That they were habitually disregarded, is a fact of universal notoriety. With the knowledge of this fact, and under its full pressure, a convention was assembled to change the system. Is it so improbable that they should confer on the judicial department the power of construing the constitution and laws of the Union in every case, in the last resort, and of preserving them from all violation from every quarter, so far as judicial decisions can preserve them, that this improbability should essentially affect the construction of the new system? We are told, and we are truly told, that the great change which is to give efficacy to the present system, is its ability to act on individuals directly, instead of acting through the instrumentality of State governments. But, ought not this ability, in reason and sound policy, to be applied directly to the protection of individuals employed in the execution of the laws, as well as to their coercion. Your laws reach the individual without the aid of any other power; why may they not protect him from punishment for performing his duty in executing them? [19 U.S. 264, 389] The counsel for Virginia endeavor to obviate the force of these arguments by saying, that the dangers they suggest, if not imaginary, are inevitable; that the constitution can make no provision against them; and that, therefore, in construing that instrument, they ought to be excluded from our consideration. This state of things, they say, cannot arise until there shall be a disposition so hostile to the present political system as to produce a determination to destroy it; and, when that determination shall be produced, its effects will not be restrained by parchment stipulations. The fate of the constitution will not then depend on judicial decisions. But, should no appeal be made to force, the States can put an end to the government by refusing to act. They have only not to elect Senators, and it expires without a struggle.

It is very true that, whenever hostility to the existing system shall become universal, it will be also irresistible. The people made the constitution, and the people can unmake it. It is the creature of their will, and lives only by their will. But this supreme and irresistible power to make or to unmake, resides only in the whole body of the people; not in any sub-division of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it.

The acknowledged inability of the government, then, to sustain itself against the public will, and, by force or otherwise, to control the whole nation, is no sound argument in support of its constitutional [19 U.S. 264, 390] inability to preserve itself against a section of the nation acting in opposition to the general will.

It is true, that if all the States, or a majority of them, refuse to elect Senators, the legislative powers of the Union will be suspended. But if any one State shall refuse to elect them, the Senate will not, on that account, be the less capable of performing all its functions. The argument founded on this fact would seem rather to prove the subordination of the parts to the whole, than the complete independence of any one of them. The framers of the constitution were, indeed, unable to make any provisions which should protect that instrument against a general combination of the States, or of the people, for its destruction; and, conscious of this inability, they have not made the attempt. But they were able to provide against the operation of measures adopted in any one State, whose tendency might be to arrest the execution of the laws, and this it was the part of true wisdom to attempt. We think they have attempted it.

It has been also urged, as an additional objection to the jurisdiction of the Court, that cases between a State and one of its own citizens, do not come within the general scope of the constitution; and were obviously never intended to be made cognizable in the federal Courts. The State tribunals

might be suspected of partiality in cases between itself or its citizens and aliens, or the citizens of another State, but not in proceedings by a State against its own citizens. That jealousy which might exist in the first case, could not exist in the last, and therefore the judicial power is not extended to the last. [19 U.S. 264, 391] This is very true, so far as jurisdiction depends on the character of the parties; and the argument would have great force if urged to prove that this Court could not establish the demand of a citizen upon his State, but is not entitled to the same force when urged to prove that this Court cannot inquire whether the constitution or laws of the United States protect a citizen from a prosecution instituted against him by a State. If jurisdiction depended entirely on the character of the parties, and was not given where the parties have not an original right to come into Court, that part of the 2d section of the 3d article, which extends the judicial power to all cases arising under the constitution and laws of the United States, would be mere surplusage. It is to give jurisdiction where the character of the parties would not give it, that this very important part of the clause was inserted. It may be true, that the partiality of the State tribunals, in ordinary controversies between a State and its citizens, was not apprehended, and therefore the judicial power of the Union was not extended to such cases; but this was not the sole nor the greatest object for which this department was created. A more important, a much more interesting object, was the preservation of the constitution and laws of the United States, so far as they can be preserved by judicial authority; and therefore the jurisdiction of the Courts of the Union was expressly extended to all cases arising under that constitution and those laws. If the constitution or laws may be violated by proceedings [19 U.S. 264, 392] instituted by a State against its own citizens, and if that violation may be such as essentially to affect the constitution and the laws, such as to arrest the progress of government in its constitutional course, why should these cases be excepted from that provision which expressly extends the judicial power of the Union to all cases arising under the constitution and laws?

After bestowing on this subject the most attentive consideration, the Court can perceive no reason founded on the character of the parties for introducing an exception which the constitution has not made; and we think that the judicial power, as originally given, extends to all cases arising under the constitution or a law of the United States, whoever may be the parties.

It has been also contended, that this jurisdiction, if given, is original, and cannot be exercised in the appellate form.

The words of the constitution are, 'in all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction.'

This distinction between original and appellate jurisdiction, excludes, we are told, in all cases, the exercise of the one where the other is given.

The constitution gives the Supreme Court original jurisdiction in certain enumerated cases, and gives it appellate jurisdiction in all others. Among those in which jurisdiction must be exercised in the appellate. [19 U.S. 264, 393] form, are cases arising under the constitution and laws of the United States. These provisions of the constitution are equally obligatory, and are to be equally respected. If a State be a party, the jurisdiction of this Court is original; if the case arise under a constitution or a law, the jurisdiction is appellate. But a case to which a State is a party may arise under the constitution or a law of the United States. What rule is applicable to such a case? What, then, becomes the duty of the Court? Certainly, we think, so to construe the constitution as to give effect to both provisions, as far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other. We must endeavor so to construe them as to preserve the true intent and meaning of the instrument.



submit the judgment of the inferior tribunal to re-examination. It does not in any manner act upon the parties; it acts only on the record. It removes the record into the supervising tribunal. Where, then, a State obtains a judgment against an individual, and the Court, rendering such judgment, overrules a defence set up under the constitution or laws of the United States, the transfer of this record into the Supreme Court; for the sole purpose of inquiring whether the judgment violates the constitution or laws of the United States, can, with no propriety, we think, be denominated a suit commenced or prosecuted against the State whose judgment is so far re-examined. Nothing is demanded from the State. No claim against it of any description is asserted or prosecuted. The party is not to be restored to the possession of any thing. Essentially, it is an appeal on a single point; and the defendant who appeals from a judgment rendered against him, is never said to commence or prosecute a suit against the plaintiff who has obtained the judgment. The writ of error is given rather than an appeal, because it is the more usual mode of removing suits at common law; and because, perhaps, it is more technically proper where a single point of law, and not the whole case, is to [19 U.S. 264, 411]. be re-examined. But an appeal might be given, and might be so regulated as to effect every purpose of a writ of error. The mode of removal is form, and not substance. Whether it be by writ of error or appeal, no claim is asserted, no demand is made by the original defendant; he only asserts the constitutional right to have his defence examined by that tribunal whose province it is to construe the constitution and laws of the Union.

The only part of the proceeding which is in any manner personal, is the citation. And what is the citation? It is simply notice to the opposite party that the record is transferred into another Court, where he may appear, or decline to appear, as his judgment or inclination may determine. As the party who has obtained a judgment is out of Court, and may, therefore, not know that his cause is removed, common justice requires that notice of the fact should be given him. But this notice is not a suit, nor has it the effect of process. If the party does not choose to appear, he cannot be brought into Court, nor is his failure to appear considered as a default. Judgment cannot be given against him for his nonappearance, but the judgment is to be re-examined, and reversed or affirmed, in like manner as if the party had appeared and argued his cause.

The point of view in which this writ of error, with its citation, has been considered uniformly in the Courts of the Union, has been well illustrated by a reference to the course of this Court in suits instituted by the United States. The universally received opinion is, that no suit can be commenced [19 U.S. 264, 412] or prosecuted against the United States; that the judiciary act does not authorize such suits. Yet writs of error, accompanied with citations, have uniformly issued for the removal of judgments in favour of the United States into a superior Court, where they have, like those in favour of an individual, been re-examined, and affirmed or reversed. It has never been suggested, that such writ of error was a suit against the United States, and, therefore, not within the jurisdiction of the appellate Court.

It is, then, the opinion of the Court, that the defendant who removes a judgment rendered against him by a State Court into this Court, for the purpose of re-examining the question, whether that judgment be in violation of the constitution or laws of the United States, does not commence or prosecute a suit against the State, whatever may be its opinion where the effect of the writ may be to restore the party to the possession of a thing which he demands.

But should we in this be mistaken, the error does not affect the case now before the Court. If this writ of error be a suit in the sense of the 11th amendment, it is not a suit commenced or prosecuted 'by a citizen of another State, or by a citizen or subject of any foreign State.' It is not then within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen, that in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties. [19 U.S. 264, 413] 2d. The second objection to the jurisdiction of the Court is, that its appellate power cannot be exercised, in any case, over the judgment of a State Court.

This objection is sustained chiefly by arguments drawn from the supposed total separation of the judiciary of a State from that of the Union, and their entire independence of each other. The argument considers the federal judiciary as completely foreign to that of a State; and as being no more connected with it in any respect whatever, than the Court of a foreign State. If this hypothesis be just, the argument founded on it is equally so; but if the hypothesis be not supported by the constitution, the argument fails with it.

This hypothesis is not founded on any words in the constitution, which might seem to countenance it, but on the unreasonableness of giving a contrary construction to words which seem to require it; and on the incompatibility of the application of the appellate jurisdiction to the judgments of State Courts, with that constitutional relation which subsists between the government of the Union and the governments of those States which compose it.

Let this unreasonableness, this total incompatibility, be examined.

That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In [19 U.S. 264, 414] many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests in all these respects, is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes, her government is complete; to all these objects, it is competent. The people have declared, that in the exercise of all powers given for these objects, it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The constitution and laws of a State, so far as they are repugnant to the constitution and laws of the United States, are absolutely void. These States are constituent parts of the United States. They are members of one great empire—for some purposes sovereign, for some purposes subordinate.

In a government so constituted, is it unreasonable that the judicial power should be competent to give efficacy to the constitutional laws of the legislature? That department can decide on the validity of the constitution or law of a State, if it be repugnant to the constitution or to a law of the United States. Is it unreasonable that it should also be empowered to decide on the judgment of a State tribunal enforcing such unconstitutional law? Is it so very unreasonable as to furnish a justification for controlling the words of the constitution?

We think it is not. We think that in a government [19 U.S. 264, 415] acknowledgedly supreme, with respect to objects of vital interest to the nation, there is nothing inconsistent with sound reason, nothing incompatible with the nature of government, in making all its departments supreme, so far as respects those objects, and so far as is necessary to their attainment. The exercise of the appellate power over those judgments of the State tribunals which may contravene the constitution or laws of the United States, is, we believe, essential to the attainment of those objects.

The propriety of entrusting the construction of the constitution, and laws made in pursuance thereof, to the judiciary of the Union, has not, we believe, as yet, been drawn into question. It seems to be a corollary from this political axiom, that the federal Courts should either possess exclusive jurisdiction in such cases, or a power to revise the judgment rendered in them, by the State tribunals. If the federal and State Courts have concurrent jurisdiction in all cases arising under the constitution, laws, and treaties of the United States; and if a case of this description brought in a State Court cannot be removed before judgment, nor revised after judgment, then the construction of the constitution, laws, and treaties of the United States, is not confided particularly to their judicial department, but is confided equally to that department and to the State Courts, however they may be constituted. 'Thirteen independent Courts,' says a very celebrated statesman, (and we

have now more than twenty such Courts,) 'of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from [19 U.S. 264, 416] which nothing but contradiction and confusion can proceed.'

Dismissing the unpleasant suggestion, that any motives which may not be fairly avowed, or which ought not to exist, can ever influence a State or its Courts, the necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved.

We are not restrained, then, by the political relations between the general and State governments, from construing the words of the constitution, defining the judicial power, in their true sense. We are not bound to construe them more restrictively than they naturally import.

They give to the Supreme Court appellate jurisdiction in all cases arising under the constitution, laws, and treaties of the United States. The words are broad enough to comprehend all cases of this description, in whatever Court they may be decided. In expounding them, we may be permitted to take into view those considerations to which Courts have always allowed great weight in the exposition of laws.

The framers of the constitution would naturally examine the state of things existing at the time; and their work sufficiently attests that they did so. All acknowledge that they were convened for the purpose of strengthening the confederation by enlarging the powers of the government, and by giving efficacy [19 U.S. 264, 417] to those which it before possessed, but could not exercise. They inform us themselves, in the instrument they presented to the American public, that one of its objects was to form a more perfect union. Under such circumstances, we certainly should not expect to find, in that instrument, a diminution of the powers of the actual government.

Previous to the adoption of the confederation, Congress established Courts which received appeals in prize causes decided in the Courts of the respective States. This power of the government, to establish tribunals for these appeals, was thought consistent with, and was founded on, its political relations with the States. These Courts did exercise appellate jurisdiction over those cases decided in the State Courts, to which the judicial power of the federal government extended.

The confederation gave to Congress the power 'of establishing Courts for receiving and determining finally appeals in all cases of captures.'

This power was uniformly construed to authorize those Courts to receive appeals from the sentences of State Courts, and to affirm or reverse them. State tribunals are not mentioned; but this clause in the confederation necessarily comprises them. Yet the relation between the general and State governments was much weaker, much more lax, under the confederation than under the present constitution; and the States being much more completely sovereign, their institutions were much more independent.

The Convention which framed the constitution, on [19 U.S. 264, 418] turning their attention to the judicial power, found it limited to a few objects, but exercised, with respect to some of those objects, in its appellate form, over the judgments of the State Courts. They extend it, among other objects, to all cases arising under the constitution, laws, and treaties of the United States; and in a subsequent clause declare, that in such cases, the Supreme Court shall exercise appellate jurisdiction. Nothing seems to be given which would justify the withdrawal of a judgment rendered in a State Court, on the constitution, laws, or treaties of the United States, from this appellate jurisdiction.

Great weight has always been attached, and very rightly attached, to contemporaneous exposition. No question, it is believed, has arisen to which this principle applies more unequivocally than to that now under consideration.

The opinion of the Federalist has always been considered as of great authority. It is a complete commentary on our constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed. These essays having been published while the constitution was before the nation for adoption or rejection, and having been written in answer to objections founded entirely on the extent of its powers, and on its diminution of State sovereignty, are entitled to the more consideration where they [19 U.S. 264, 419] frankly avow that the power objected to is given, and defend it.

In discussing the extent of the judicial power, the Federalist says, 'Here another question occurs: what relation would subsist between the national and State Courts in these instances of concurrent jurisdiction? I answer, that an appeal would certainly lie from the latter, to the Supreme Court of the United States. 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. Either this must be the case, or the local Courts must be excluded from a concurrent jurisdiction in matters of national concern, else the judicial authority of the Union may be eluded at the pleasure of every plaintiff or prosecutor. Neither of these consequences ought, without evident necessity, to be involved; the latter would be entirely inadmissible, as it would defeat some of the most important and avowed purposes of the proposed government, and would essentially embarrass its measures. Nor do I perceive any foundation for such a supposition. Agreeably to the remark already made, the national and State systems are to be regarded as ONE WHOLE. The Courts of the latter will of course be natural auxiliaries to the execution [19 U.S. 264, 420] of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of natural justice, and the rules of national decision. 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. To confine, therefore, the general expressions which give appellate jurisdiction to the Supreme Court, to appeals from the subordinate federal Courts, instead of allowing their extension to the State Courts, would be to abridge the latitude of the terms, in subversion of the intent, contrary to every sound rule of interpretation.'

A contemporaneous exposition of the constitution, certainly of not less authority than that which has been just cited, is the judiciary act itself. We know that in the Congress which passed that act were many eminent members of the Convention which formed the constitution. Not a single individual, so far as is known, supposed that part of the act which gives the Supreme Court appellate jurisdiction over the judgments of the State Courts in the cases therein specified, to be unauthorized by the constitution.

While on this part of the argument, it may be also material to observe that the uniform decisions of this Court on the point now under consideration, have been assented to, with a single exception, by the Courts of every State in the Union whose judgments have been revised. It has been the unwelcome [19 U.S. 264, 421] duty of this tribunal to reverse the judgments of many State Courts in cases in which the strongest State feelings were engaged. Judges, whose talents and character would grace any bench, to whom a disposition to submit to jurisdiction that is usurped, or to surrender their legitimate powers, will certainly not be imputed, have yielded without hesitation to the authority by which their judgments were reversed, while they, perhaps, disapproved the judgment of reversal.

This concurrence of statesmen, of legislators, and of judges, in the same construction of the constitution, may justly inspire some confidence in that construction.

In opposition to it, the counsel who made this point has presented in a great variety of forms, the idea already noticed, that the federal and State Courts must, of necessity, and from the nature of the constitution, be in all things totally distinct and independent of each other. If this Court can correct the errors of the Court of Virginia, he says it makes them Courts of the United States, or becomes itself a part of the judiciary of Virginia.

But, it has been already shown that neither of these consequences necessarily follows: The American people may certainly give to a national tribunal a supervising power over those judgments of the State Courts, which may conflict with the constitution, laws, or treaties, of the United States, without converting them into federal Courts, or converting the national into a State tribunal. The one Court [19 U.S. 264, 422] still derives its authority from the State, the other still derives its authority from the nation.

If it shall be established, he says, that this Court has appellate jurisdiction over the State Courts in all cases enumerated in the 3d article of the constitution, a complete consolidation of the States, so far as respects judicial power is produced.

But, certainly, the mind of the gentleman who urged this argument is too accurate not to perceive that he has carried it too far; that the premises by no means justify the conclusion. 'A complete consolidation of the States, so far as respects the judicial power,' would authorize the legislature to confer on the federal Courts appellate jurisdiction from the State Courts in all cases whatsoever. The distinction between such a power, and that of giving appellate jurisdiction in a few specified cases in the decision of which the nation takes an interest, is too obvious not to be perceived by all.

This opinion has been already drawn out to too great a length to admit of entering into a particular consideration of the various forms in which the counsel who made this point has, with much ingenuity, presented his argument to the Court. The argument in all its forms is essentially the same. It is founded, not on the words of the constitution, but on its spirit, a spirit extracted, not from the words of the instrument, but from his view of the nature of our Union, and of the great fundamental principles on which the fabric stands.

To this argument, in all its forms, the same answer may be given. Let the nature and objects of [19 U.S. 264, 423] our Union be considered; let the great fundamental principles, on which the fabric stands, be examined; and we think the result must be, that there is nothing so extravagantly absurd in giving to the Court of the nation the power of revising the decisions of local tribunals on questions which affect the nation, as to require that words which import this power should be restricted by a forced construction. The question then must depend on the words themselves: and on their construction we shall be the more readily excused for not adding to the observations already made, because the subject was fully discussed and exhausted in the case of *Martin v. Hunter*.

3d. We come now to the third objection, which, though differently stated by the counsel, is substantially the same. One gentleman has said that the judiciary act does not give jurisdiction in the case.

The cause was argued in the State Court, on a case agreed by the parties, which states the prosecution under a law for selling lottery tickets, which is set forth, and further states the act of Congress by which the City of Washington was authorized to establish the lottery. It then states that the lottery was regularly established by virtue of the act, and concludes with referring to the Court the questions, whether the act of Congress be valid? whether, on its just construction, it constitutes

a bar to the prosecution? and, whether the act of Assembly, on which the prosecution is founded, be not itself invalid? These questions were decided against the operation of the act of Congress, and in favour of the operation of the act of the State. [19 U.S. 264, 424] If the 25th section of the judiciary act be inspected, it will at once be perceived that it comprehends expressly the case under consideration.

But it is not upon the letter of the act that the gentleman who stated this point in this form, founds his argument. Both gentlemen concur substantially in their views of this part of the case. They deny that the act of Congress, on which the plaintiff in error relies, is a law of the United States; or, if a law of the United States, is within the second clause of the sixth article:

In the enumeration of the powers of Congress, which is made in the 8th section of the first article, we find that of exercising exclusive legislation over such District as shall become the seat of government. This power, like all others which are specified, is conferred on Congress as the legislature of the Union: for, strip them of that character, and they would not possess it. In no other character can it be exercised. In legislating for the District, they necessarily preserve the character of the legislature of the Union; for, it is in that character alone that the constitution confers on them this power of exclusive legislation. This proposition need not be enforced.

The 2d clause of the 6th article declares, that 'This constitution, and the laws of the United States, which shall be made in pursuance thereof, shall be the supreme law of the land.'

The clause which gives exclusive jurisdiction is, unquestionably, a part of the constitution, and, as such, binds all the United States. Those who contend that acts of Congress, made in pursuance of [19 U.S. 264, 425] this power, do not, like acts made in pursuance of other powers, bind the nation, ought to show some safe and clear rule which shall support this construction, and prove that an act of Congress, clothed in all the forms which attend other legislative acts, and passed in virtue of a power conferred on, and exercised by Congress, as the legislature of the Union, is not a law of the United States, and does not bind them.

One of the gentlemen sought to illustrate his proposition that Congress, when legislating for the District, assumed a distinct character, and was reduced to a mere local legislature, whose laws could possess no obligation out of the ten miles square, by a reference to the complex character of this Court. It is, they say, a Court of common law and a Court of equity. Its character, when sitting as a Court of common law, is as distinct from its character when sitting as a Court of equity, as if the powers belonging to those departments were vested in different tribunals. Though united in the same tribunal, they are never confounded with each other.

Without inquiring how far the union of different characters in one Court, may be applicable, in principle, to the union in Congress of the power of exclusive legislation in some places, and of limited legislation in others, it may be observed, that the forms of proceedings in a Court of law are so totally unlike the forms of proceedings in a Court of equity, that a mere inspection of the record gives decisive information of the character in which the Court sits, and consequently of the extent of its powers. But [19 U.S. 264, 426] if the forms of proceeding were precisely the same, and the Court the same, the distinction would disappear.

Since Congress legislates in the same forms, and in the same character, in virtue of powers of equal obligation, conferred in the same instrument, when exercising its exclusive powers of legislation, as well as when exercising those which are limited, we must inquire whether there be any thing in the nature of this exclusive legislation, which necessarily confines the operation of the laws made in virtue of this power to the place with a view to which they are made.

Connected with the power to legislate within this District, is a similar power in forts, arsenals, dock

its high character, as the legislature of the Union. The American people thought it a necessary power, and they conferred it for their own benefit. Being so conferred, it carries with it all those incidental powers which are necessary to its complete and effectual execution.

Whether any particular law be designed to operate without the District or not, depends on the words of that law. If it be designed so to operate, then the question, whether the power so exercised be incidental to the power of exclusive legislation, and be warranted by the constitution, requires a consideration of that instrument. In such cases the constitution and the law must be compared and construed. This is the exercise of jurisdiction. It is the only exercise of it which is allowed in such a case. For the act of Congress directs, that 'no other error shall be assigned or regarded as a ground or reversal, in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, &c.'

The whole merits of this case, then, consist in the construction of the constitution and the act of Congress. [19 U.S. 264, 430] The jurisdiction of the Court, if acknowledged, goes no farther. This we are required to do without the exercise of jurisdiction.

The counsel for the State of Virginia have, in support of this motion, urged many arguments of great weight against the application of the act of Congress to such a case as this; but those arguments go to the construction of the constitution, or of the law, or of both; and seem, therefore, rather calculated to sustain their cause upon its merits, than to prove a failure of jurisdiction in the Court.

After having bestowed upon this question the most deliberate consideration of which we are capable, the Court is unanimously of opinion, that the objections to its jurisdiction are not sustained, and that the motion ought to be overruled.

Motion denied.

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March 2d.

The cause was this day argued on the merits.

Mr. D. B. Ogden, for the plaintiffs in error, stated, that the question of conflict between the act of Congress and the State law, which arose upon the record, depended upon the 8th section of the first article of the constitution, giving to Congress the exclusive power of legislation, in all cases whatsoever, over the District which had become the seat of the government of the United States, by cession from the States to whom it formerly belonged. Under this power, Congress has authorized the establishment of a lottery at the seat of government. Can [19 U.S. 264, 431] the State of Virginia prevent the sale of tickets in that lottery within her territory, consistently with the constitution? This question must depend upon the nature of the constitutional power of Congress, and of the law by which it is exercised. It was said by the counsel for the defendant in error, on the former argument, that the power is municipal, to be exercised over the District only, and, of course, confined in its operation to the limits of the District. But, in order to determine whether this is the true interpretation of the clause in question, we must more minutely examine what is the nature of the authority granted. The clause was not intended to give to Congress an unlimited power to legislate in all cases, without reference to other provisions of the constitution. Otherwise Congress might pass bills of attainder and ex post facto laws, and exercise a despotic authority over the District of Columbia, and its citizens would thus be deprived of their rights entirely. Nor was it intended to authorize the exercise by Congress of its general powers as a national legislature, within the District. Nor to exempt the District from the operation of those general powers. But the clause was inserted for the purpose of securing the independence of the national legislature, and government, from State control. The object in view was, therefore, strictly a national object. The District was

represent Congress as succeeding merely to the same degree of power which Maryland and Virginia formerly had over this territory. Could those States have taxed the other States, or borrowed money on their credit, for the improvement of this territory, as Congress have done?

Although the jurisdiction of the States who formerly held the sovereignty and domain of this territory has been supplanted by Congress, the substituted jurisdiction is far more extensive than that which they held. It is a jurisdiction, which in the instances mentioned, and many others which might be enumerated, is capable of affecting all the States. It cannot be denied that the character of the jurisdiction which Congress has over the District, is widely different from that which it has over the States; for, over them, Congress has not exclusive jurisdiction. Its powers over the States are those only which are specifically given, and those which are necessary to carry them into effect: whilst over the District it has all the powers which it has over the States, and in addition to these, a power of legislation exclusive of [19 U.S. 264, 439] all the States. But although the jurisdiction over the District is of a different and more extensive character, yet it is not so circumscribed that it may not incidentally affect the States, although exerted for a local purpose, as it is called. Such is sometimes the delusive effect of single words and phrases, that the position, that in legislating for the District of Columbia, Congress is a local legislature, for local purposes, and therefore cannot affect the States by its laws, has almost become an aphorism with indolent or prejudiced inquirers. But in what sense can that be called a local government which proceeds from the whole body of the nation? And how can that be termed a local object, which is closely and inseparably connected with the general interest of the whole people of the Union? As well might it be asserted that Congress acted as a local legislature, when it established offices for the sale of lands in the western States, or

fortifications at particular points on the sea-coast. It will not be pretended that the first establishment of the seat of government in this District, was an act done by Congress in its character of a local legislature, and for local purposes. How then can the subsequent acts for the improvement and embellishment of the City be so regarded? The act of May 6th, 1796, authorized the commissioners for erecting the public buildings to borrow money for that purpose. Would it have been competent for the legislatures of the States to have impeded this loan by punishing their citizens for subscribing to this stock? And could the States prohibit the sale of the City lots within their territory, and thus arrest [19 U.S. 264, 440] the improvement of the City? And if they could not, is it not because what Congress in the legitimate exercise of its powers has made it lawful to sell, the States cannot make it unlawful to buy? Let us test by these considerations the question before the Court: and let us distinguish between Congress legislating for the municipal government of the City, and Congress, in its national character, providing the means of adding necessary public improvements to the national capital. Congress has itself made this distinction. When a regulation for the mere internal police of the City is to be made, it is done by the Corporation, or some other inferior agent, without the interference of the President of the United States. But, when an alteration of the plan of the City, or a public improvement affecting the whole of the City in a national point of view, is to be made, it is uniformly subjected to the control of the President. So here the specific purpose in view, and for which the lottery was authorized by the President, was, the establishment of a City Hall, a necessary consequence of the establishment of the City, which last was also a necessary consequence of the establishment of the seat of government.

March 5th.

The opinion of the Court was delivered by Mr. Chief Justice MARSHALL.

This case was stated in the opinion given on the motion for dismissing the writ of error for want of jurisdiction in the Court. It now comes on to be decided on the question whether the Borough Court of Norfolk, in overruling the defence set up under [19 U.S. 264, 441] the act of Congress, has misconstrued that act. It is in these words:

'The said Corporation shall have full power to authorize the drawing of lotteries for effecting any important improvement in the City, which the ordinary funds or revenue thereof will not accomplish: Provided, that the sum to be raised in each year shall not exceed the amount of



10,000 dollars: And provided, also, that the object for which the money is intended to be raised shall be first submitted to the President of the United States, and shall be approved of by him.'

Two questions arise on this act.

1st. Does it purport to authorize the Corporation to force the sale of these lottery tickets in States where such sales may be prohibited by law? If it does,

2d. Is the law constitutional?

If the first question be answered in the affirmative, it will become necessary to consider the second: If it should be answered in the negative, it will be unnecessary, and consequently improper, to pursue any inquiries, which would then be merely speculative, respecting the power of Congress in the case.

In inquiring into the extent of the power granted to the Corporation of Washington, we must first examine the words of the grant. We find in them no expression which looks beyond the limits of the City. The powers granted are all of them local in their nature, and all of them such as would, in the common course of things, if not necessarily, be exercised [19 U.S. 264, 442] within the city. The subject on which Congress was employed when framing this act was a local subject; it was not the establishment of a lottery, but the formation of a separate body for the management of the internal affairs of the City, for its internal government, for its police. Congress must have considered itself as delegating to this corporate body powers for these objects, and for these objects solely. In delegating these powers, therefore, it seems reasonable to suppose that the mind of the legislature was directed to the City alone, to the action of the being they were creating within the City, and not to any extra-territorial operations. In describing the powers of such a being, no words of limitation need be used. They are limited by the subject. But, if it be intended to give its acts a binding efficacy beyond the natural limits of its power, and within the jurisdiction of a distinct power, we should expect to find, in the language of the incorporating act, some words indicating such intention.

Without such words, we cannot suppose that Congress designed to give to the acts of the Corporation any other effect, beyond its limits, than attends every act having the sanction of local law, when any thing depends upon it which is to be transacted elsewhere.

If this would be the reasonable construction of corporate powers generally it is more especially proper in a case where an attempt is made so to exercise those powers as to control and limit the penal laws of a State. This is an operation which was not, [19 U.S. 264, 443] we think, in the contemplation of the legislature, while incorporating the City of Washington.

To interfere with the penal laws of a State, where they are not levelled against the legitimate powers of the Union, but have for their sole object the internal government of the country, is a very serious measure, which Congress cannot be supposed to adopt lightly, or inconsiderately. The motives for it must be serious and weighty. It would be taken deliberately, and the intention would be clearly and unequivocally expressed.

An act, such as that under consideration, ought not, we think, to be so construed as to imply this intention, unless its provisions were such as to render the construction inevitable.

We do not think it essential to the corporate power in question, that it should be exercised out of the City. Could the lottery be drawn in any State of the Union? Does the corporate power to authorize the drawing of a lottery imply a power to authorize its being drawn without the jurisdiction of a Corporation, in a place where it may be prohibited by law? This, we think, would scarcely be

asserted. And what clear legal distinction can be taken between a power to draw a lottery in a place where it is prohibited by law, and a power to establish an office for the sale of tickets in a place where it is prohibited by law? It may be urged, that the place where the lottery is drawn is of no importance to the Corporation, and therefore the act need not be so construed as to give power over the place, but that the right to sell tickets throughout the United [19 U.S. 264, 444] States is of importance, and therefore ought to be implied.

That the power to sell tickets in every part of the United States might facilitate their sale, is not to be denied; but it does not follow that Congress designed, for the purpose of giving this increased facility, to overrule the penal laws of the several States. In the City of Washington, the great metropolis of the nation, visited by individuals, from every part of the Union, tickets may be freely sold to all who are willing to purchase. Can it be affirmed that this is so limited a market, that the incorporating act must be extended beyond its words, and made to conflict with the internal police of the States, unless it be construed to give a more extensive market?

It has been said, that the States cannot make it unlawful to buy that which Congress has made it lawful to sell.

This proposition is not denied; and, therefore, the validity of a law punishing a citizen of Virginia for purchasing a ticket in the City of Washington, might well be drawn into question. Such a law would be a direct attempt to counteract and defeat a measure authorized by the United States. But a law to punish the sale of lottery tickets in Virginia, is of a different character. Before we can impeach its validity, we must inquire whether Congress intended to empower this Corporation to do any act within a State which the laws of that State might prohibit. [19 U.S. 264, 445] In addition to the very important circumstance, that the act contains no words indicating such intention, and that this extensive construction is not essential to the execution of the corporate power, the Court cannot resist the conviction, that the intention ascribed to this act, had it existed, would have been executed by very different means from those which have been employed.

Had Congress intended to establish a lottery for those improvements in the City which are deemed national, the lottery itself would have become the subject of legislative consideration. It would be organized by law, and agents for its execution would be appointed by the President, or in such other manner as the law might direct. If such agents were to act out of the District, there would be, probably, some provision made for such a state of things, and in making such provisions Congress would examine its power to make them. The whole subject would be under the control of the government, or of persons appointed by the government.

But in this case no lottery is established by law, no control is exercised by the government over any which may be established. The lottery emanates from a corporate power. The Corporation may authorize, or not authorize it, and may select the purposes to which the proceeds are to be applied. This Corporation is a being intended for local objects only. All its capacities are limited to the City. This, as well as every other law it is capable of making, is a by-law, and, from its nature, is only co-extensive with the City. It is not probable that [19 U.S. 264, 446] such an agent would be employed in the execution of a lottery established by Congress; but when it acts, not as the agent for carrying into effect a lottery established by Congress, but in its own corporate capacity, from its own corporate powers, it is reasonable to suppose that its acts were intended to partake of the nature of that capacity and of those powers; and, like all its other acts, be merely local in its nature.

The proceeds of these lotteries are to come in aid of the revenues of the City. These revenues are raised by laws whose operation is entirely local, and for objects which are also local; for no person will suppose, that the President's house, the Capitol, the Navy Yard, or other public institution, was to be benefitted by these lotteries, or was to form a charge on the City revenue. Coming in aid of the City revenue, they are of the same character with it; the mere creature of a corporate power.

The circumstances, that the lottery cannot be drawn without the permission of the President, and that this resource is to be used only for important improvements, have been relied on as giving to this corporate power a more extensive operation than is given to those with which it is associated. We do not think so.

The President has no agency in the lottery. It does not originate with him, nor is the improvement to which its profits are to be applied to be selected by him. Congress has not enlarged the corporate power by restricting its exercise to cases of which the President might approve. [19 U.S. 264, 447] We very readily admit, that the act establishing the seat of government, and the act appointing commissioners to superintend the public buildings, are laws of universal obligation. We admit, too, that the laws of any State to defeat the loan authorized by Congress, would have been void, as would have been any attempt to arrest the progress of the canal, or of any other measure which Congress may adopt. These, and all other laws relative to the District, have the authority which may be claimed by other acts of the national legislature; but their extent is to be determined by those rules of construction which are applicable to all laws. The act incorporating the City of Washington is, unquestionably, of universal obligation; but the extent of the corporate powers conferred by that act, is to be determined by those considerations which belong to the case.

Whether we consider the general character of a law incorporating a City, the objects for which such law is usually made, or the words in which this particular power is conferred, we arrive at the same result. The Corporation was merely empowered to authorize the drawing of lotteries; and the mind of Congress was not directed to any provision for the sale of the tickets beyond the limits of the Corporation. That subject does not seem to have been taken into view. It is the unanimous opinion of the Court, that the law cannot be construed to embrace it.

Judgment affirmed. [19 U.S. 264, 448] JUDGMENT. This cause came on to be heard on the transcript of the record of the Quarterly Session Court for the Borough of Norfolk, in the Commonwealth of Virginia, and was argued by counsel. On consideration whereof, it is ADJUDGED and ORDERED, that the judgment of the said Quarterly Session Court for the Borough of Norfolk, in this case, be, and the same is hereby affirmed, with costs.

#### Footnotes

[ Footnote 1 ] 2 Cranch, 445.

[ Footnote 2 ] 1 Cranch, 174.

[ Footnote 3 ] 1 Wheat. Rep. 305.

[ Footnote 4 ] Mr. Barbour observed, in reply, that he wished to be distinctly understood, as not yielding his assent to the doctrine of Hunter v. Martin. On the contrary, that he decidedly concurred with the Court of Appeals of Virginia, that the appellate jurisdiction of the Supreme Court was in relation to inferior federal Courts, not State Courts. But, as that question had been solemnly decided otherwise by this Court, with the argument of the Court of Appeals of Virginia before them, he had forbore to discuss it; he had referred to it, however, because, whilst this Court acted upon the principle of that case, there was a controlling power, on the part of the federal, over the State judiciaries, in practical operation.

[ Footnote 5 ] 1 Wheat. Rep. 305.

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**VISA****U.S. Supreme Court****M'CULLOCH v. STATE, 17 U.S. 316 (1819)**

17 U.S. 316 (Wheat.)

**M'CULLOCH**

v.

**STATE OF MARYLAND et al.****February Term, 1819**

[17 U.S. 316, 317] ERROR to the Court of Appeals of the State of Maryland. This was an action of debt, brought by the defendant in error, John James, who sued as well for himself as for the state of Maryland, in the county court of Baltimore county, in the said state, against the plaintiff in error, McCulloch, to recover certain penalties, under the act of the legislature of Maryland, hereafter mentioned. Judgment being rendered against the plaintiff in error, upon the following statement of facts, agreed and submitted to the court by the parties, was affirmed by the court of appeals of the state of Maryland, the highest court of law of said state, and the cause was brought, by writ of error, to this court.

It is admitted by the parties in this cause, by their counsel, that there was passed, on the 10th day of April 1816, by the congress of the United States, an act, entitled, 'an act to incorporate the subscribers to the Bank of the United States,' and that there was passed on the 11th day of February 1818, by the general assembly of Maryland, an act, entitled, 'an act to impose a tax on all banks, or branches thereof, in the state of Maryland, not chartered by the legislature,' [17 U.S. 316, 318] which said acts are made part of this statement, and it is agreed, may be read from the statute books in which they are respectively printed. It is further admitted, that the president, directors and company of the Bank of the United States, incorporated by the act of congress aforesaid, did organize themselves, and go into full operation, in the city of Philadelphia, in the state of Pennsylvania, in pursuance of the said act, and that they did on the \_\_\_ day of \_\_\_ 1817, establish a branch of the said bank, or an office of discount and deposit, in the city of Baltimore, in the state of Maryland, which has, from that time, until the first day of May 1818, ever since transacted and carried on business as a bank, or office of discount and deposit, and as a branch of the said Bank of the United States, by issuing bank-notes and discounting promissory notes, and performing other operations usual and customary for banks to do and perform, under the authority and by the direction of the said president, directors and company of the Bank of the United States, established at Philadelphia as aforesaid. It is further admitted, that the said president, directors and company of the said bank, had no authority to establish the said branch, or office of discount and deposit, at the city of Baltimore, from the state of Maryland, otherwise than the said state having adopted the constitution of the United States and composing one of the states of the Union. It is further admitted, that James William McCulloch, the defendant below, being the cashier of the said branch, or office of discount and [17 U.S. 316, 319] deposit, did, on the several days set forth in the declaration in this cause, issue the said respective bank-notes therein described, from the said branch or office, to a certain George Williams, in the city of Baltimore, in part payment of a promissory note of the said Williams, discounted by the said branch or office, which said respective bank-notes were not, nor was either of them, so issued, on stamped paper, in the manner prescribed by the act of assembly aforesaid. It is further admitted, that the said president, directors and company of the Bank of the United States, and the said branch, or office of discount and deposit, have not, nor has either of them, paid in advance, or otherwise, the sum of \$15,000; to the treasurer of the Western Shore, for the use of the state of Maryland, before the issuing of the said notes, or any of them, nor since those periods. And it is further admitted, that the treasurer of the Western Shore of Maryland, under the direction of

the governor and council of the said state, was ready, and offered to deliver to the said president, directors and company of the said bank, and to the said branch, or office of discount and deposit, stamped paper of the kind and denomination required and described in the said act of assembly.

The question submitted to the court for their decision in this case, is, as to the validity of the said act of the general assembly of Maryland, on the ground of its being repugnant to the constitution of the United States, and the act of congress aforesaid, or to one of them. Upon the foregoing statement of facts, and the pleadings in this cause (all errors in [17 U.S. 316, 320] which are hereby agreed to be mutually released), if the court should be of opinion, that the plaintiffs are entitled to recover, then judgment, it is agreed, shall be entered for the plaintiffs for \$2500, and costs of suit. But if the court should be of opinion, that the plaintiffs are not entitled to recover upon the statement and pleadings aforesaid, then judgment of non pros shall be entered, with costs to the defendant.

It is agreed, that either party may appeal from the decision of the county court, to the court of appeals, and from the decision of the court of appeals to the supreme court of the United States, according to the modes and usages of law, and have the same benefit of this statement of facts, in the same manner as could be had, if a jury had been sworn and impannelled in this cause, and a special verdict had been found, or these facts had appeared and been stated in an exception taken to the opinion of the court, and the court's direction to the jury thereon.

Copy of the act of the Legislature of the State of Maryland, referred to in the preceding statement.

An act to impose a tax on all banks or branches thereof, in the state of Maryland, not chartered by the legislature.

Be it enacted by the general assembly of Maryland, that if any bank has established, or shall, without authority from the state first had and obtained, establish any branch, office of discount and [17 U.S. 316, 321] deposit, or office of pay and receipt in any part of this state, it shall not be lawful for the said branch, office of discount and deposit, or office of pay and receipt, to issue notes, in any manner, of any other denomination than five, ten, twenty, fifty, one hundred, five hundred and one thousand dollars, and no note shall be issued, except upon stamped paper of the following denominations; that is to say, every five dollar note shall be upon a stamp of ten cents; every ten dollar note, upon a stamp of twenty cents; every twenty dollar note, upon a stamp of thirty cents; every fifty dollar note, upon a stamp of fifty cents; every one hundred dollar note, upon a stamp of one dollar; every five hundred dollar note, upon a stamp of ten dollars; and every thousand dollar note, upon a stamp of twenty dollars; which paper shall be furnished by the treasurer of the Western Shore, under the direction of the governor and council, to be paid for upon delivery; provided always, that any institution of the above description may relieve itself from the operation of the provisions aforesaid, by paying annually, in advance, to the treasurer of the Western Shore, for the use of state, the sum of \$15,000.

And be it enacted, that the president, cashier, each of the directors and officers of every institution established, or to be established as aforesaid, offending against the provisions aforesaid, shall forfeit a sum of \$500 for each and every offence, and every person having any agency in circulating any note aforesaid, not stamped as aforesaid directed, shall forfeit a sum not exceeding \$100 [17 U.S. 316, 322] every penalty aforesaid, to be recovered by indictment, or action of debt, in the county court of the county where the offence shall be committed, one-half to the informer, and the other half to the use of the state.

And be it enacted, that this act shall be in full force and effect from and after the first day of May next.

February 22d-27th, and March 1st-3d.

Webster, for the plaintiff in error, stated: 1. That the question whether congress constitutionally possesses the power to incorporate a bank, might be raised upon this record, and it was in the discretion of the defendant's counsel to agitate it. But it might have been hoped, that it was not now to be considered as an open question.

the legislature by whom they are chosen. But there is no correspondent responsibility of the local legislature of Maryland, for example, to the people of the other states of the Union. The people of other states are not represented in the legislature of Maryland, and can have no control, directly or indirectly, over its proceedings. The legislature of Maryland is responsible only to the people of that state. The national [17 U.S. 316, 399] government can withdraw nothing from the taxing power of the states, which is not for the purpose of national benefit and the common welfare, and within its defined powers. But the local interests of the states are in perpetual conflict with the interests of the Union; which shows the danger of adding power to the partial views and local prejudices of the states. If the tax imposed by this law be not a tax on the property of the United States, it is not a tax on any property; and it must, consequently, be a tax on the faculty or franchise. It is, then, a tax on the legislative faculty of the Union, on the charter of the bank. It imposes a stamp duty upon the notes of the bank, and thus stops the very source of its circulation and life. It is as much a direct interference with the legislative faculty of congress, as would be a tax on patents, or copyrights, or custom-house papers or judicial proceedings.

Since, then, the constitutional government of this republican empire cannot be practically enforced, so as to secure the permanent glory, safety and felicity of this great country, but by a fair and liberal interpretation of its powers; since those powers could not all be expressed in the constitution, but many of them must be taken by implication; since the sovereign powers of the Union are supreme, and, wherever they come in direct conflict and repugnancy with those of the state governments, the latter must give way; since it has been proved, that this is the case as to the institution of the bank, and the general power of taxation by the states; since this power unlimited and unchecked, as it necessarily must be, by the [17 U.S. 316, 400] very nature of the subject, is absolutely inconsistent with, and repugnant to, the right of the United States to establish a national bank; if the power of taxation be applied to the corporate property, or franchise, or property of the bank, and might be applied in the same manner, to destroy any other of the great institutions and establishments of the Union, and the whole machine of the national government might be arrested in its motions, by the exertion, in other cases, of the same power which is here attempted to be exerted upon the bank: no other alternative remains, but for this court to interpose its authority, and save the nation from the consequences of this dangerous attempt.

March 7th, 1819.

MARSHALL, Ch. J., delivered the opinion of the court.

In the case now to be determined, the defendant, a sovereign state, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that state. The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of [17 U.S. 316, 401] hostile legislation, perhaps, of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the supreme court of the United States has the constitution of our country devolved this important duty.

The first question made in the cause is has congress power to incorporate a bank? It has been truly said, that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognised by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.

It will not be denied, that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this. But it is conceived, that a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be

adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice. An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.

The power now contested was exercised by the first congress elected under the present constitution. [17 U.S. 316, 402] The bill for incorporating the Bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first, in the fair and open field of debate, and afterwards, in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. The original act was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law. It would require no ordinary share of intrepidity to assert that a measure adopted under these circumstances, was a bold and plain usurpation, to which the constitution gave no countenance. These observations belong to the cause; but they are not made under the impression, that, were the question entirely new, the law would be found irreconcilable with the constitution.

In discussing this question, the counsel for the state of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument, not as emanating from the people, but as the act of sovereign and independent states. The powers of the general government, it has been said, are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states, who alone possess supreme dominion. [17 U.S. 316, 403] It would be difficult to sustain this proposition. The convention which framed the constitution was indeed elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing congress of the United States, with a request that it might be submitted to a convention of delegates, chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification. This mode of proceeding was adopted; and by the convention, by congress, and by the state legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several states-and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass. Of consequence, when they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments.

From these conventions, the constitution derives its whole authority. The government proceeds directly from the people; is 'ordained and established,' in the name of the people; and is declared to be ordained, 'in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure [17 U.S. 316, 404] the blessings of liberty to themselves and to their posterity.' The assent of the states, in their sovereign capacity, is implied, in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the state governments. The constitution, when thus adopted, was of complete obligation, and bound the state sovereignties.

It has been said, that the people had already surrendered all their powers to the state sovereignties, and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted to government, does not remain to be settled in this country. Much more might the legitimacy of the general government be doubted, had it been created by the states. The powers delegated to the state sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves. To the formation of a league, such as was the confederation, the state sovereignties were certainly competent. But when, 'in order to form a more perfect union,' it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people; and of deriving its powers directly from them, was felt and acknowledged by all. The government of the Union, then ( whatever may be the influence of this fact on the case), is, [17 U.S. 316, 405]

emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, so long as our system shall exist. In discussing these questions, the conflicting powers of the general and state governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.

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. This would seem to result, necessarily, from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, [17 U.S. 316, 406] 'this constitution, and the laws of the United States, which shall be made in pursuance thereof,' 'shall be the supreme law of the land,' and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states, shall take the oath of fidelity to it. The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, 'anything in the constitution or laws of any state to the contrary notwithstanding.'

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word 'expressly,' and declares only, that the powers 'not delegated to the United States, nor prohibited to the states, are reserved to the states or to the people;' thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the articles [17 U.S. 316, 407] of confederation, and probably omitted it, to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the 9th section of the 1st article, introduced? It is also, in some degree, warranted, by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is a constitution we are expounding.

Although, among the enumerated powers of government, we do not find the word 'bank' or 'incorporation,' we find the great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. It can never be pretended, [17 U.S. 316, 408] that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended, that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and



cannot be presumed to have been their intention, to clog and embarrass its execution, by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require, that the treasure raised in the north should be transported to the south, that raised in the east, conveyed to the west, or that this order should be reversed. Is that construction of the constitution to be preferred, which would render these operations difficult, hazardous and expensive? Can we adopt that construction (unless the words imperiously require it), which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise, by withholding a choice of means? If, indeed, such be the mandate of the constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, [17 U.S. 316, 409] if the existence of such a being be essential, to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed.

It is not denied, that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. But it is denied, that the government has its choice of means; or, that it may employ the most convenient means, if, to employ them, it be necessary to erect a corporation. On what foundation does this argument rest? On this alone: the power of creating a corporation, is one appertaining to sovereignty, and is not expressly conferred on congress. This is true. But all legislative powers appertain to sovereignty. The original power of giving the law on any subject whatever, is a sovereign power, and if the government of the Union is restrained from creating a corporation, as a means for performing its functions, on the single reason that the creation of a corporation is an act of sovereignty; if the sufficiency of this reason be acknowledged, there would be some difficulty in sustaining the authority of congress to pass other laws for the accomplishment of the same objects. The government which has a right to do an act, and has imposed on it, the duty of performing that act, must, according to the dictates of reason, be allowed [17 U.S. 316, 410] to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.

The creation of a corporation, it is said, appertains to sovereignty. This is admitted. But to what portion of sovereignty does it appertain? Does it belong to one more than to another? In America, the powers of sovereignty are divided between the government of the Union, and those of the states. They are each sovereign, with respect to the objects committed to it, and neither sovereign, with respect to the objects committed to the other. We cannot comprehend that train of reasoning, which would maintain, that the extent of power granted by the people is to be ascertained, not by the nature and terms of the grant, but by its date. Some state constitutions were formed before, some since that of the United States. We cannot believe, that their relation to each other is in any degree dependent upon this circumstance. Their respective powers must, we think, be precisely the same, as if they had been formed at the same time. Had they been formed at the same time, and had the people conferred on the general government the power contained in the constitution, and on the states the whole residuum of power, would it have been asserted, that the government of the Union was not sovereign, with respect to those objects which were intrusted to it, in relation to which its laws were declared to be supreme? If this could not have been asserted, we cannot well comprehend the process of reasoning [17 U.S. 316, 411] which maintains, that a power appertaining to sovereignty cannot be connected with that vast portion of it which is granted to the general government, so far as it is calculated to subserve the legitimate objects of that government. The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. No contributions are made to charity, for the sake of an incorporation, but a corporation is created to administer the charity; no seminary of learning is instituted, in order to be incorporated, but the corporate character is conferred to subserve the purposes of education. No city was ever built, with the sole object of being incorporated, but is incorporated as affording the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of

effecting something else. No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.

But the constitution of the United States has not left the right of congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added, that of making 'all [17 U.S. 316, 412] laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof.' The counsel for the state of Maryland have urged various arguments, to prove that this clause, though, in terms, a grant of power, is not so, in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers. In support of this proposition, they have found it necessary to contend, that this clause was inserted for the purpose of conferring on congress the power of making laws. That, without it, doubts might be entertained, whether congress could exercise its powers in the form of legislation.

But could this be the object for which it was inserted? A government is created by the people, having legislative, executive and judicial powers. Its legislative powers are vested in a congress, which is to consist of a senate and house of representatives. Each house may determine the rule of its proceedings; and it is declared, that every bill which shall have passed both houses, shall, before it becomes a law, be presented to the president of the United States. The 7th section describes the course of proceedings, by which a bill shall become a law; and, then, the 8th section enumerates the powers of congress. Could it be necessary to say, that a legislature should exercise legislative powers, in the shape of legislation? After allowing each house to prescribe [17 U.S. 316, 413] its own course of proceeding, after describing the manner in which a bill should become a law, would it have entered into the mind of a single member of the convention, that an express power to make laws was necessary, to enable the legislature to make them? That a legislature, endowed with legislative powers, can legislate, is a proposition too self-evident to have been questioned.

But the argument on which most reliance is placed, is drawn from that peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be 'necessary and proper' for carrying them into execution. The word 'necessary' is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to congress, in each case, that only which is most direct and simple.

Is it true, that this is the sense in which the word 'necessary' is always used? Does it always import an absolute physical necessity, so strong, that one thing to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to [17 U.S. 316, 414] produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in a their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies. The word 'necessary' is of this description. It has not a fixed character, peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. The comment on the word is well illustrated by the passage cited at the bar, from the 10th section of the 1st article of the constitution. It is, we think, impossible to compare the sentence which prohibits a state from laying 'imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws,' with that which authorizes congress 'to make all laws which shall be necessary and proper for carrying into execution' the powers of the general government, without feeling a conviction, that the

convention understood itself to change materially [17 U.S. 316, 415] the meaning of the word 'necessary,' by prefixing the word 'absolutely.' This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, so far as human prudence could insure, their beneficial execution. This could not be done, by confiding the choice of means to such narrow limits as not to leave it in the power of congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared, that the best means shall not be used, but those alone, without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. [17 U.S. 316, 416] If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it. The powers vested in congress may certainly be carried into execution, without prescribing an oath of office. The power to exact this security for the faithful performance of duty, is not given, nor is it indispensably necessary. The different departments may be established; taxes may be imposed and collected; armies and navies may be raised and maintained; and money may be borrowed, without requiring an oath of office. It might be argued, with as much plausibility as other incidental powers have been assailed, that the convention was not unmindful of this subject. The oath which might be exacted—that of fidelity to the constitution—is prescribed, and no other can be required. Yet, he would be charged with insanity, who should contend, that the legislature might not superadd, to the oath directed by the constitution, such other oath of office as its wisdom might suggest.

So, with respect to the whole penal code of the United States: whence arises the power to punish, in cases not prescribed by the constitution? All admit, that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of congress. The right to enforce the observance of law, by punishing its infraction, might be denied, with the more plausibility, because it is expressly given in some cases.

Congress is empowered 'to provide for the punishment [17 U.S. 316, 417] of counterfeiting the securities and current coin of the United States,' and 'to define and punish piracies and felonies committed on the high seas, and offences against the law of nations.' The several powers of congress may exist, in a very imperfect state, to be sure, but they may exist and be carried into execution, although no punishment should be inflicted, in cases where the right to punish is not expressly given.

Take, for example, the power 'to establish post-offices and post-roads.' This power is executed, by the single act of making the establishment. But, from this has been inferred the power and duty of carrying the mail along the post-road, from one post-office to another. And from this implied power, has again been inferred the right to punish those who steal letters from the post-office, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post-office and post-road. This right is indeed essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So, of the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court. To punish these offences, is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment.

The baneful influence of this narrow construction on all the operations of the government, and the absolute [17 U.S. 316, 418] impracticability of maintaining it, without rendering the government incompetent to its great objects, might be illustrated by numerous examples drawn from the constitution, and from our laws. The good

sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised, whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise.

If this limited construction of the word 'necessary' must be abandoned, in order to punish, whence is derived the rule which would reinstate it, when the government would carry its powers into execution, by means not vindictive in their nature? If the word 'necessary' means 'needful,' 'requisite,' 'essential,' 'conducive to,' in order to let in the power of punishment for the infraction of law; why is it not equally comprehensive, when required to authorize the use of means which facilitate the execution of the powers of government, without the infliction of punishment?

In ascertaining the sense in which the word 'necessary' is used in this clause of the constitution, we may derive some aid from that with which it is associated. Congress shall have power 'to make all laws which shall be necessary and proper to carry into execution' the powers of the government. If the word 'necessary' was used in that strict and rigorous sense for which the counsel for the state of Maryland contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word, the only possible effect of which is, to qualify that strict and rigorous meaning; to present to the mind the idea of some choice of means of legislation, not strained and compressed within the narrow limits for which gentlemen contend.

But the argument which most conclusively demonstrates the error of the construction contended for by the counsel for the state of Maryland, is founded on the intention of the convention, as manifested in the whole clause. To waste time and argument in proving that, without it, congress might carry its powers into execution, would be not much less idle, than to hold a lighted taper to the sun. As little can it be required to prove, that in the absence of this clause, congress would have some choice of means. That it might employ those which, in its judgment, would most advantageously effect the object to be accomplished. That any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the government, were in themselves constitutional. This clause, as construed by the state of Maryland, would abridge, and almost annihilate, this useful and necessary right of the legislature to select its means. That this could not be intended, is, we should think, had it not been already controverted, too apparent for controversy.

We think so for the following reasons: 1st. The clause is placed among the powers of congress, not among the limitations on those powers. [17 U.S. 316, 420] 2d. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted. No reason has been, or can be assigned, for thus concealing an intention to narrow the discretion of the national legislature, under words which purport to enlarge it. The framers of the constitution wished its adoption, and well knew that it would be endangered by its strength, not by its weakness. Had they been capable of using language which would convey to the eye one idea, and, after deep reflection, impress on the mind, another, they would rather have disguised the grant of power, than its limitation. If, then, their intention had been, by this clause, to restrain the free use of means which might otherwise have been implied, that intention would have been inserted in another place, and would have been expressed in terms resembling these. 'In carrying into execution the foregoing powers, and all others,' &c., 'no laws shall be passed but such as are necessary and proper.' Had the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect.

The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. If no other  motive for its insertion can be suggested,  a sufficient one is found in the desire to remove all doubts respecting [17 U.S. 316, 421] the right to legislate on that vast mass of incidental powers which must be involved in the constitution, if that instrument be not a splendid bauble.

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. 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, are constitutional. 7

That a corporation must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means, has been sufficiently proved. If we look to the origin of corporations, to the manner in which they have been framed in that government from which we have derived most of our legal principles and ideas, or to the uses to which they have been applied, we find no reason to suppose, that a constitution, omitting, and wisely omitting, to enumerate all the means for carrying into execution the great powers vested in government, ought to have specified this. Had it been intended to grant this power, as one which should be distinct and independent, to be exercised in any case whatever, it [17 U.S. 316, 422] would have found a place among the enumerated powers of the government. But being considered merely as a means, to be employed only for the purpose of carrying into execution the given powers, there could be no motive for particularly mentioning it.

The propriety of this remark would seem to be generally acknowledged, by the universal acquiescence in the construction which has been uniformly put on the 3d section of the 4th article of the constitution. The power to 'make all needful rules and regulations respecting the territory or other property belonging to the United States,' is not more comprehensive, than the power 'to make all laws which shall be necessary and proper for carrying into execution' the powers of the government. Yet all admit the constitutionality of a territorial government, which is a corporate body.

If a corporation may be employed, indiscriminately with other means, to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one, must be within the discretion of congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations, is not now a subject of controversy. All those who have been concerned in the administration of our finances, have concurred in representing its importance and necessity; and so strongly have they been felt, that statesmen of the first class, whose previous opinions [17 U.S. 316, 423] against it had been confirmed by every circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the nation. Under the confederation, congress, justifying the measure by its necessity, transcended, perhaps, its powers, to obtain the advantage of a bank; and our own legislation attests the universal conviction of the utility of this measure. The time has passed away, when it can be necessary to enter into any discussion, in order to prove the importance of this instrument, as a means to effect the legitimate objects of the government.

But were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the decree of its necessity, as has been very justly observed, is to be discussed in another place. Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or 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, should a case requiring such a decision come before it, to say, that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the decree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power. [17 U.S. 316, 424] After this declaration, it can scarcely be necessary to say, that the existence of state banks can have no possible influence on the question. No trace is to be found in the constitution, of an intention to create a dependence of the government of the Union on those of the states, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence

on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution. But were it otherwise, the choice of means implies a right to choose a national bank in preference to state banks, and congress alone can make the election.

After the most deliberate consideration, it is the unanimous and decided opinion of this court, that the act to incorporate the Bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land.

The branches, proceeding from the same stock, and being conducive to the complete accomplishment of the object, are equally constitutional. It would have been unwise, to locate them in the charter, and it would be unnecessarily inconvenient, to employ the legislative power, in making those subordinate arrangements. The great duties of the bank are prescribed; those duties require branches; and the bank itself [17 U.S. 316, 425] may, we think, be safely trusted with the selection of places where those branches shall be fixed; reserving always to the government the right to require that a branch shall be located where it may be deemed necessary.

It being the opinion of the court, that the act incorporating the bank is constitutional; and that the power of establishing a branch in the state of Maryland might be properly exercised by the bank itself, we proceed to inquire—

2. Whether the state of Maryland may, without violating the constitution, tax that branch? That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments—are truths which have never been denied. But such is the paramount character of the constitution, that its capacity to withdraw any subject from the action of even this power, is admitted. The states are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded—if it may restrain a state from the exercise of its taxing power on imports and exports—the same paramount character would seem to restrain, as it certainly may restrain, a state from such other exercise of this power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law, absolutely repugnant to another, as entirely [17 U.S. 316, 426] repeals that other as if express terms of repeal were used.

On this ground, the counsel for the bank place its claim to be exempted from the power of a state to tax its operations. There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds. This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. That a power to create implies a power to preserve: 2d. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve: 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.

These propositions, as abstract truths, would, perhaps, never be controverted. Their application to this case, however, has been denied; and both in maintaining the affirmative and the negative, a splendor of eloquence, and strength of argument, seldom, if ever, surpassed, have been displayed. [17 U.S. 316, 427] The power of congress to create, and of course, to continue, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable. That the power of taxing it by the states may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and like sovereign power of every other description, is intrusted to the discretion of those who use it. But the very terms of this argument admit, that the sovereignty of the state, in the article of taxation itself, is subordinate to, and may be controlled by the constitution of the United States. How far it has been controlled by that instrument, must be a question

of construction. In making this construction, no principle, not declared, can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view, while construing the constitution.

The argument on the part of the state of Maryland, is, not that the states may directly resist a law of congress, but that they may exercise their [17 U.S. 316, 428] acknowledged powers upon it, and that the constitution leaves them this right, in the confidence that they will not abuse it. Before we proceed to examine this argument, and to subject it to test of the constitution, we must be permitted to bestow a few considerations on the nature and extent of this original right of taxation, which is acknowledged to remain with the states. It is admitted, that the power of taxing the people and their property, is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation.

The people of a state, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituent over their representative, to guard them against its abuse. But the means employed by the government of the Union have no such security, nor is the right of a state to tax them sustained by the same theory. Those means are not given by the people of a particular state, not given by the constituents of the legislature, which claim the right to tax them, but by the people of all the states. They are given by all, [17 U.S. 316, 429] for the benefit of all-and upon theory, should be subjected to that government only which belongs to all.

It may be objected to this definition, that the power of taxation is not confined to the people and property of a state. It may be exercised upon every object brought within its jurisdiction. This is true. But to what source do we trace this right? It is obvious, that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.

The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable, that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them.

If we measure the power of taxation residing in a state, by the extent of sovereignty which the people of a single state possess, and can confer on its government, we have an intelligible standard, applicable [17 U.S. 316, 430] to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a state unimpaired; which leaves to a state the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the states, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down, what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy, what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the

government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give. We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers. The right never existed, and the question whether it has been surrendered, cannot arise.

But, waiving this theory for the present, let us resume the inquiry, whether this power can be exercised [17 U.S. 316, 431] by the respective states, consistently with a fair construction of the constitution? That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word confidence. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction, would be an abuse, to presume which, would banish that confidence which is essential to all government. But is this a case of confidence? Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose, that the people of any one state should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it as it really is. [17 U.S. 316, 432] If we apply the principle for which the state of Maryland contends, to the constitution, generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the states. The American people have declared their constitution and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the states. If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent-rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the states.

Gentlemen say, they do not claim the right to extend state taxation to these objects. They limit their pretensions to property. But on what principle, is this distinction made? Those who make it have furnished no reason for it, and the principle for which they contend denies it. They contend, that the power of taxation has no other limit than is found in the 10th section of the 1st article of the constitution; that, with respect to everything else, the power of the states is supreme, and admits of no control. If this be true, the distinction between property and [17 U.S. 316, 433] other subjects to which the power of taxation is applicable, is merely arbitrary, and can never be sustained. This is not all. If the controlling power of the states be established; if their supremacy as to taxation be acknowledged; what is to restrain their exercising control in any shape they may please to give it? Their sovereignty is not confined to taxation; that is not the only mode in which it might be displayed. The question is, in truth, a question of supremacy; and if the right of the states to tax the means employed by the general government be conceded, the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation.

In the course of the argument, the Federalist has been quoted; and the opinions expressed by the authors of that work have been justly supposed to be entitled to great respect in expounding the constitution. No tribute can be paid to them which exceeds their merit; but in applying their opinions to the cases which may arise in the progress of our government, a right to judge of their correctness must be retained; and to understand the argument, we must examine the proposition it maintains, and the objections against which it is directed. The subject of those numbers, from which passages have been cited, is the unlimited power of taxation which is vested in the general government. The objection to this unlimited power, which the argument seeks to remove, is stated with fulness and clearness. It is, that an indefinite power of taxation in the latter (the government [17 U.S. 316, 434] of the Union) might, and probably would, in time, deprive the former (the government of the states) of the means of providing for their own necessities; and would subject them entirely to the mercy of the



national legislature. As the laws of the Union are to become the supreme law of the land; as it is to have power to pass all laws that may be necessary for carrying into execution the authorities with which it is proposed to vest it; the national government might, at any time, abolish the taxes imposed for state objects, upon the pretence of an interference with its own. It might allege a necessity for doing this, in order to give efficacy to the national revenues; and thus, all the resources of taxation might, by degrees, become the subjects of federal monopoly, to the entire exclusion and destruction of the state governments.'

The objections to the constitution which are noticed in these numbers, were to the undefined power of the government to tax, not to the incidental privilege of exempting its own measures from state taxation. The consequences apprehended from this undefined power were, that it would absorb all the objects of taxation, to the exclusion and destruction of the state governments.' The arguments of the Federalist are intended to prove the fallacy of these apprehensions; not to prove that the government was incapable of executing any of its powers, without exposing the means it employed to the embarrassments of state taxation. Arguments urged against these objections, and these apprehensions, are to be understood as relating to the points they [17 U.S. 316, 435] mean to prove. Had the authors of those excellent essays been asked, whether they contended for that construction of the constitution, which would place within the reach of the states those measures which the government might adopt for the execution of its powers; no man, who has read their instructive pages, will hesitate to admit, that their answer must have been in the negative.

It has also been insisted, that, as the power of taxation in the general and state governments is acknowledged to be concurrent, every argument which would sustain the right of the general government to tax banks chartered by the states, will equally sustain the right of the states to tax banks chartered by the general government. But the two cases are not on the same reason. The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a [17 U.S. 316, 436] part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme.

But if the full application of this argument could be admitted, it might bring into question the right of congress to tax the state banks, and could not prove the rights of the states to tax the Bank of the United States.

The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared. We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government [17 U.S. 316, 437] of the Union to carry its powers into execution. Such a tax must be unconstitutional.

JUDGMENT.—This cause came on to be heard, on the transcript of the record of the court of appeals of the state of Maryland; and was argued by counsel: on consideration whereof, it is the opinion of this court, that the act of the legislature of Maryland is contrary to the constitution of the United States, and void; and therefore,

that the said court of appeals of the state of Maryland erred, in affirming the judgment of the Baltimore county court, in which judgment was rendered against James W. McCulloch; but that the said court of appeals of Maryland ought to have reversed the said judgment of the said Baltimore county court, and ought to have given judgment for the said appellant, McCulloch: It is, therefore, adjudged and ordered, that the said judgment of the said court of appeals of the state of Maryland in this case, be, and the same hereby is, reversed and annulled. And this court, proceeding to render such judgment as the said court of appeals should have rendered; it is further adjudged and ordered, that the judgment of the said Baltimore county court be reversed and annulled, and that judgment be entered in the said Baltimore county court for the said James W. McCulloch.

## Footnotes

[ Footnote 1 ] See Hepburn v. Griswold, 8 Wall. 603; Knox v. Lee, 12 Id. 533.

[ Footnote 2 ] But it is competent for congress to confer on the state governments the power to tax the shares of the national banks, within certain limitations; the power of taxation under the constitution, is a concurrent one. Van Allen v. The Assessors, 3 Wall. 585, NELSON, J. But, says the learned judge, congress may, by reason of its paramount authority, exclude the states from the exercise of such power. Ibid. It is difficult, however, to perceive in what part of the constitution, the power is conferred on congress to erect a multitude of moneyed corporations, in the several states, absorbing \$400,000,000 of the capital of the country, and to exempt it from state taxation.

[ Footnote 3 ] This case involving a constitutional question of great public importance, and the sovereign rights of the United States and the state of Maryland; and the government of the United States having directed their attorney general to appear for the plaintiff in error, the court dispensed with its general rule, permitting only two counsel to argue for each party.

[ Footnote 4 ] See Roach v. Philadelphia County, 2 Am. L.J. 444; United v. Weise, 3 Wall. Jr. C. C. 72, 79.

[ Footnote 5 ] Letters of Publius, or The Federalist, Nos. 31-36.

[ Footnote 6 ] See Sturges v. Crowninshield, ante, p. 122.

[ Footnote 7 ] See Montague v. Richardson, 24 Conn. 348.

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## U.S. Supreme Court

DRED SCOTT v. SANDFORD, 60 U.S. 393 (1856)

60 U.S. 393 (How.)

DRED SCOTT, PLAINTIFF IN ERROR,

v.

JOHN F. A. SANDFORD.

December Term, 1856

[60 U.S. 393, 396] THIS case was brought up, by writ of error, from the Circuit Court of the United States for the district of Missouri.

It was an action of trespass vi et armis instituted in the Circuit Court by Scott against Sandford.

Prior to the institution of the present suit, an action was brought by Scott for his freedom in the Circuit Court of St. Louis county, (State court,) where there was a verdict and judgment in his favor. On a writ of error to the Supreme Court of the State, the judgment below was reversed, and the case remanded to the Circuit Court, where it was continued to await the decision of the case now in question.

The declaration of Scott contained three counts: one, that Sandford had assaulted the plaintiff; one, that he had assaulted Harriet Scott, his wife; and one, that he had assaulted Eliza Scott and Lizzie Scott, his children.

Sandford appeared, and filed the following plea

DRED SCOTT

v.

JOHN F. A. SANDFORD.

Plea to the Jurisdiction of the Court.

APRIL TERM, 1854.

And the said John F. A. Sandford, in his own proper person, comes and says that this court ought not to have or take further cognizance of the action aforesaid, because he says that said cause of action, and each and every of them, (if any such have accrued to the said Dred Scott,) accrued to the said Dred Scott out of the jurisdiction of this court, and exclusively within the jurisdiction of the courts of the State of Missouri, for that, to wit: the said plaintiff, Dred Scott, is not a citizen of the State of Missouri, as alleged in his declaration, because [60 U.S. 393, 397] he is a negro of African descent; his ancestors were of pure African blood, and were brought into this country and sold as negro slaves, and this the said Sandford is ready to verify. Wherefore, he prays judgment whether this court can or will take further cognizance of the action aforesaid.

JOHN F. A. SANDFORD.

To this plea there was a demurrer in the usual form, which was argued in April, 1854, when the court gave

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Further proof may be given on the trial for either party.

It is agreed that Dred Scott brought suit for his freedom in the Circuit Court of St. Louis county; that there was a verdict and judgment in his favor; that on a writ of error to the Supreme Court, the judgment below was reversed, and the same remanded to the Circuit Court, where it has been continued to await the decision of this case.

In May, 1854, the cause went before a jury, who found the following verdict, viz: 'As to the first issue joined in this case, we of the jury find the defendant not guilty; and as to the issue secondly above joined, we of the jury find that before and at the time when, &c., in the first count mentioned, the said Dred Scott was a negro slave, the lawful property of the defendant; and as to the issue thirdly above joined, we, the jury, find that before and at the time when, &c., in the second and third counts mentioned, the said Harriet, wife of [60 U.S. 393, 399] said Dred Scott, and Eliza and Lizzie, the daughters of the said Dred Scott, were negro slaves, the lawful property of the defendant.'

Whereupon, the court gave judgment for the defendant.

After an ineffectual motion for a new trial, the plaintiff filed the following bill of exceptions.

On the trial of this cause by the jury, the plaintiff, to maintain the issues on his part, read to the jury the following agreed statement of facts, (see agreement above.) No further testimony was given to the jury by either party. Thereupon the plaintiff moved the court to give to the jury the following instruction, viz:

'That, upon the facts agreed to by the parties, they ought to find for the plaintiff. The court refused to give such instruction to the jury, and the plaintiff, to such refusal, then and there duly excepted.'

The court then gave the following instruction to the jury, on motion of the defendant:

'The jury are instructed, that upon the facts in this case, the law is with the defendant.' The plaintiff excepted to this instruction.

Upon these exceptions, the case came up to this court.

It was argued at December term, 1855, and ordered to be reargued at the present term.

It was now argued by Mr. Blair and Mr. G. F. Curtis for the plaintiff in error, and by Mr. Geyer and Mr. Johnson for the defendant in error.

The reporter regrets that want of room will not allow him to give the arguments of counsel; but he regrets it the less, because the subject is thoroughly examined in the opinion of the court, the opinions of the concurring judges, and the opinions of the judges who dissented from the judgment of the court.

Mr. Chief Justice TANEY delivered the opinion of the court.

This case has been twice argued. After the argument at the last term, differences of opinion were found to exist among the members of the court; and as the questions in controversy are of the highest importance, and the court was at that time much pressed by the ordinary business of the term, it was deemed advisable to continue the case, and direct a re-argument on some of the points, in order that we might have an opportunity of giving to the whole subject a more deliberate (60 U.S. 393, 400) consideration. It has accordingly been again argued by counsel, and considered by the court; and I now proceed to deliver its opinion. There are two leading questions presented by the record: 1. Had the Circuit Court of the United States jurisdiction to hear and determine the case between these parties? And 2. If it had jurisdiction, is the judgment it has given erroneous.

before the appellate court, must show, affirmatively, that the inferior court had authority, under the Constitution, to hear and determine the case. And if the plaintiff claims a right to sue in a Circuit Court of the United States, under that provision of the Constitution which gives jurisdiction in controversies between citizens of different States, he must distinctly aver in his pleading that they are citizens of different States; and he cannot maintain his suit without showing that fact in the pleadings.

This point was decided in the case of *Bingham v. Cabot*, (in 3 Dall., 382,) and ever since adhered to by the court. And in *Jackson v. Ashton*, (8 Pet., 148,) it was held that the objection to which it was open could not be waived by the opposite party, because consent of parties could not give jurisdiction.

It is needless to accumulate cases on this subject. Those already referred to, and the cases of *Capron v. Van Noorden*, (in 2 Cr., 126,) and *Montalet v. Murray*, (4 Cr., 46,) are sufficient to show the rule of which we have spoken. The case of *Capron v. Van Noorden* strikingly illustrates the difference between a common-law court and a court of the United States.

If, however, the fact of citizenship is averred in the declaration, and the defendant does not deny it, and put it in issue by plea in abatement, he cannot offer evidence at the trial to disprove it, and consequently cannot avail himself of the objection in the appellate court, unless the defect should be apparent in some other part of the record. For if there is no plea in abatement, and the want of jurisdiction does not appear in any other part of the transcript brought up by the writ of error, the undisputed averment of citizenship in the declaration must be taken in this court to be true. In this case, the citizenship is averred, but it is denied by the defendant in the manner required by the rules of pleading, and the fact upon which the denial is based is admitted by the demurrer. And, if the plea and demurrer, and judgment of the court below upon it, are before us upon this record, the question to be decided is, whether the facts stated in the plea are sufficient to show that the plaintiff is not entitled to sue as a citizen in a court of the United States. [60 U.S. 393, 403] We think they are before us. The plea in abatement and the judgment of the court upon it, are a part of the judicial proceedings in the Circuit Court, and are there recorded as such; and a writ of error always brings up to the superior court the whole record of the proceedings in the court below. And in the case of *United States v. Smith*, (11 Wheat., 172,) this court said, that the case being brought up by writ of error, the whole record was under the consideration of this court. And this being the case in the present instance, the plea in abatement is necessarily under consideration; and it becomes, therefore, our duty to decide whether the facts stated in the plea are or are not sufficient to show that the plaintiff is not entitled to sue as a citizen in a court of the United States.

This is certainly a very serious question, and one that now for the first time has been brought for decision before this court. But it is brought here by those who have a right to bring it, and it is our duty to meet it and decide it.

The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.

It will be observed, that the plea applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country, and sold and held as slaves. The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State, in the sense in which the word citizen is used in the Constitution of the United States. And this being the only matter in dispute on the pleadings, the court must be understood as speaking in this opinion of that class only, that is, of those persons who are the descendants of Africans who were imported into this country, and sold as slaves.

The situation of this population was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or in government.

But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate [60 U.S. 393, 404] right of dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they thought proper, and neither the English nor colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it. These Indian Governments were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different Governments which succeeded each other. Treaties have been negotiated with them, and their alliance sought for in war; and the people who compose these Indian political communities have always been treated as foreigners not living under our Government. It is true that the course of events has brought the Indian tribes within the limits of the United States under subjection to the white race; and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over them and the territory they occupy. But they may, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.

We proceed to examine the case as presented by the pleadings.

The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate [60 U.S. 393, 405] and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.

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. Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them. The Constitution has conferred on Congress the right to establish an

uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no State, since the adoption of the Constitution, can by naturalizing an alien invest him with the rights and privileges secured to a citizen of a State under the Federal Government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the Constitution and laws of the State attached to that character. [60 U.S. 393, 406]

It is very clear, therefore, that no State can, by any act or law of its own, passed since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States. It cannot make him a member of this community by making him a member of its own. And for the same reason it cannot introduce any person, or description of persons, who were not intended to be embraced in this new political family, which the Constitution brought into existence, but were intended to be excluded from it.

The question then arises, whether the provisions of the Constitution, in relation to the personal rights and privileges to which the citizen of a State should be entitled, embraced the negro African race, at that time in this country, or who might afterwards be imported, who had then or should afterwards be made free in any State; and to put it in the power of a single State to make him a citizen of the United States, and endue him with the full rights of citizenship in every other State without their consent? Does the Constitution of the United States act upon him whenever he shall be made free under the laws of a State, and raised there to the rank of a citizen, and immediately clothe him with all the privileges of a citizen in every other State, and in its own courts?

The court think the affirmative of these propositions cannot be maintained. And if it cannot, the plaintiff in error could not be a citizen of the State of Missouri, within the meaning of the Constitution of the United States, and, consequently, was not entitled to sue in its courts.

It is true, every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognised as citizens in the several States, became also citizens of this new political body; but none other; it was formed by them, and for them and their posterity, but for no one else. And the personal rights and privileges guaranteed to citizens of this new sovereignty were intended to embrace those only who were then members of the several State communities, or who should afterwards by birthright or otherwise become members, according to the provisions of the Constitution and the principles on which it was founded. It was the union of those who were at that time members of distinct and separate political communities into one political family, whose power, for certain specified purposes, was to extend over the whole territory of the United States. And it gave to each citizen rights and privileges outside of his State [60 U.S. 393, 407] which he did not before possess, and placed him in every other State upon a perfect equality with its own citizens as to rights of person and rights of property; it made him a citizen of the United States.

It becomes necessary, therefore, to determine who were citizens of the several States when the Constitution was adopted. And in order to do this, we must recur to the Governments and institutions of the thirteen colonies, when they separated from Great Britain and formed new sovereignties, and took their places in the family of independent nations. We must inquire who, at that time, were recognised as the people or citizens of a State, whose rights and liberties had been outraged by the English Government; and who declared their independence, and assumed the powers of Government to defend their rights by force of arms.

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation

displays it in a manner too plain to be mistaken.

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

And in no nation was this opinion more firmly fixed or more [60 U.S. 393, 408] uniformly acted upon than by the English Government and English people. They not only seized them on the coast of Africa, and sold them or held them in slavery for their own use; but they took them as ordinary articles of merchandise to every country where they could make a profit on them, and were far more extensively engaged in this commerce than any other nation in the world.

The opinion thus entertained and acted upon in England was naturally impressed upon the colonies they founded on this side of the Atlantic. And, accordingly, a negro of the African race was regarded by them as an article of property, and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence, and afterwards formed the Constitution of the United States. The slaves were more or less numerous in the different colonies, as slave labor was found more or less profitable. But no one seems to have doubted the correctness of the prevailing opinion of the time.

The legislation of the different colonies furnishes positive and indisputable proof of this fact.

It would be tedious, in this opinion, to enumerate the various laws they passed upon this subject. It will be sufficient, as a sample of the legislation which then generally prevailed throughout the British colonies, to give the laws of two of them; one being still a large slaveholding State, and the other the first State in which slavery ceased to exist.

The province of Maryland, in 1717, (ch. 13, s. 5,) passed a law declaring 'that if any free negro or mulatto intermarry with any white woman, or if any white man shall intermarry with any negro or mulatto woman, such negro or mulatto shall become a slave during life, excepting mulattoes born of white women, who, for such intermarriage, shall only become servants for seven years, to be disposed of as the justices of the county court, where such marriage so happens, shall think fit; to be applied by them towards the support of a public school within the said county. And any white man or white woman who shall intermarry as aforesaid, with any negro or mulatto, such white man or white woman shall become servants during the term of seven years, and shall be disposed of by the justices as aforesaid, and be applied to the uses aforesaid.'

The other colonial law to which we refer was passed by Massachusetts in 1705, (chap. 6.) It is entitled 'An act for the better preventing of a spurious and mixed issue,' &c.; and it provides, that 'if any negro or mulatto shall presume to smite or strike any person of the English or other Christian nation, such negro or mulatto shall be severely whipped, at [60 U.S. 393, 409] the discretion of the justices before whom the offender shall be convicted.'

And 'that none of her Majesty's English or Scottish subjects, nor of any other Christian nation, within this province, shall contract matrimony with any negro or mulatto; nor shall any person, duly authorized to solemnize marriage, presume to join any such in marriage, on pain of forfeiting the sum of fifty pounds; one moiety thereof to her Majesty, for and towards the support of the Government within this province; and the other moiety to him or them that shall inform and sue for the same, in any of her Majesty's courts of record within the province, by bill, plaint, or information.'



We give both of these laws in the words used by the respective legislative bodies, because the language in which they are framed, as well as the provisions contained in them, show, too plainly to be misunderstood, the degraded condition of this unhappy race. They were still in force when the Revolution began, and are a faithful index to the state of feeling towards the class of persons of whom they speak, and of the position they occupied throughout the thirteen colonies, in the eyes and thoughts of the men who framed the Declaration of Independence and established the State Constitutions and Governments. They show that a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power, and which they then looked upon as so far below them in the scale of created beings, that intermarriages between white persons and negroes or mulattoes were regarded as unnatural and immoral, and punished as crimes, not only in the parties, but in the person who joined them in marriage. And no distinction in this respect was made between the free negro or mulatto and the slave, but this stigma, of the deepest degradation, was fixed upon the whole race.

We refer to these historical facts for the purpose of showing the fixed opinions concerning that race, upon which the statesmen of that day spoke and acted. It is necessary to do this, in order to determine whether the general terms used in the Constitution of the United States, as to the rights of man and the rights of the people, was intended to include them, or to give to them or their posterity the benefit of any of its provisions.

The language of the Declaration of Independence is equally conclusive:

It begins by declaring that, '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 [60 U.S. 393, 410] assume among the powers of the earth the separate and equal station to which the laws of nature and nature's God entitle them, a decent respect for the opinions of mankind requires that they should declare the causes which impel them to the separation.'

It then proceeds to say: '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 them is life, liberty, and the pursuit of happiness; that to secure these rights, Governments are instituted, deriving their just powers from the consent of the governed.'

The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration: for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.

Yet the men who framed this declaration were great men-high in literary acquirements-high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting. They perfectly understood the meaning of the language they used, and how it would be understood by others: and they knew that it would not in any part of the civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized Governments and the family of nations, and doomed to slavery. They spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them. The unhappy black race were separated from the white by indelible marks, and laws long before established, and were never thought of or spoken of except as property, and when the claims of the owner or the profit of the trader were supposed to need protection.

This state of public opinion had undergone no change when the Constitution was adopted, as is equally evident from its provisions and language.

The brief preamble sets forth by whom it was formed, for what purposes, and for whose benefit and

protection. It declares [60 U.S. 393, 411] that it is formed by the people of the United States; that is to say, by those who were members of the different political communities in the several States; and its great object is declared to be to secure the blessings of liberty to themselves and their posterity. It speaks in general terms of the people of the United States, and of citizens of the several States, when it is providing for the exercise of the powers granted or the privileges secured to the citizen. It does not define what description of persons are intended to be included under these terms, or who shall be regarded as a citizen and one of the people. It uses them as terms so well understood, that no further description or definition was necessary.

But there are two clauses in the Constitution which point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed.

One of these clauses reserves to each of the thirteen States the right to import slaves until the year 1808, if it thinks proper. And the importation which it thus sanctions was unquestionably of persons of the race of which we are speaking, as the traffic in slaves in the United States had always been confined to them. And by the other provision the States pledge themselves to each other to maintain the right of property of the master, by delivering up to him any slave who may have escaped from his service, and be found within their respective territories. By the first above-mentioned clause, therefore, the right to purchase and hold this property is directly sanctioned and authorized for twenty years by the people who framed the Constitution. And by the second, they pledge themselves to maintain and uphold the right of the master in the manner specified, as long as the Government they then formed should endure. And these two provisions show, conclusively, that neither the description of persons therein referred to, nor their descendants, were embraced in any of the other provisions of the Constitution; for certainly these two clauses were not intended to confer on them or their posterity the blessings of liberty, or any of the personal rights so carefully provided for the citizen.

No one of that race had ever migrated to the United States voluntarily; all of them had been brought here as articles of merchandise. The number that had been emancipated at that time were but few in comparison with those held in slavery; and they were identified in the public mind with the race to which they belonged, and regarded as a part of the slave population rather than the free. It is obvious that they were not [60 U.S. 393, 412] even in the minds of the framers of the Constitution when they were conferring special rights and privileges upon the citizens of a State in every other part of the Union.

Indeed, when we look to the condition of this race in the several States at the time, it is impossible to believe that these rights and privileges were intended to be extended to them.

It is very true, that in that portion of the Union where the labor of the negro race was found to be unsuited to the climate and unprofitable to the master, but few slaves were held at the time of the Declaration of Independence; and when the Constitution was adopted, it had entirely worn out in one of them, and measures had been taken for its gradual abolition in several others. But this change had not been produced by any change of opinion in relation to this race; but because it was discovered, from experience, that slave labor was unsuited to the climate and productions of these States: for some of the States, where it had ceased or nearly ceased to exist, were actively engaged in the slave trade, procuring cargoes on the coast of Africa, and transporting them for sale to those parts of the Union where their labor was found to be profitable, and suited to the climate and productions. And this traffic was openly carried on, and fortunes accumulated by it, without reproach from the people of the States where they resided. And it can hardly be supposed that, in the States where it was then countenanced in its worst form—that is, in the seizure and transportation—the people could have regarded those who were emancipated as entitled to equal rights with themselves.

And we may here again refer, in support of this proposition, to the plain and unequivocal language of the laws of the several States, some passed after the Declaration of Independence and before the Constitution was adopted, and some since the Government went into operation.

We need not refer, on this point, particularly to the laws of the present slaveholding States. Their statute books

would seem that to call persons thus marked and stigmatized, 'citizens' of the United States, 'fellow-citizens,' a constituent part of the sovereignty, would be an abuse of terms, and not calculated to exalt the character of an American citizen in the eyes of other nations.

The conduct of the Executive Department of the Government has been in perfect harmony upon this subject with this course of legislation. The question was brought officially before the late William Wirt, when he was the Attorney General of the United States, in 1821, and he decided that the words 'citizens of the United States' were used in the acts of Congress in the same sense as in the Constitution; and that free persons of color were not citizens, within the meaning of the Constitution and laws; and this opinion has been confirmed by that of the late Attorney General, Caleb Cushing, in a recent case, and acted upon by the Secretary of State, who refused to grant passports to them as 'citizens of the United States.'

But it is said that a person may be a citizen, and entitled to [60 U.S. 393, 422] that character, although he does not possess all the rights which may belong to other citizens; as, for example, the right to vote, or to hold particular offices; and that yet, when he goes into another State, he is entitled to be recognised there as a citizen, although the State may measure his rights by the rights which it allows to persons of a like character or class resident in the State, and refuse to him the full rights of citizenship.

This argument overlooks the language of the provision in the Constitution of which we are speaking.

Undoubtedly, a person may be a citizen, that is, a member of the community who form the sovereignty, although he exercises no share of the political power, and is incapacitated from holding particular offices. Women and minors, who form a part of the political family, cannot vote; and when a property qualification is required to vote or hold a particular office, those who have not the necessary qualification cannot vote or hold the office, yet they are citizens.

So, too, a person may be entitled to vote by the law of the State, who is not a citizen even of the State itself. And in some of the States of the Union foreigners not naturalized are allowed to vote. And the State may give the right to free negroes and mulattoes, but that does not make them citizens of the State, and still less of the United States. And the provision in the Constitution giving privileges and immunities in other States, does not apply to them.

Neither does it apply to a person who, being the citizen of a State, migrates to another State. For then he becomes subject to the laws of the State in which he lives, and he is no longer a citizen of the State from which he removed. And the State in which he resides may then, unquestionably, determine his status or condition, and place him among the class of persons who are not recognised as citizens, but belong to an inferior and subject race; and may deny him the privileges and immunities enjoyed by its citizens.

But so far as mere rights of person are concerned, the provision in question is confined to citizens of a State who are temporarily in another State without taking up their residence there. It gives them no political rights in the State, as to voting or holding office, or in any other respect. For a citizen of one State has no right to participate in the government of another. But if he ranks as a citizen in the State to which he belongs, within the meaning of the Constitution of the United States, then, whenever he goes into another State, the Constitution clothes him, as to the rights of person, with all the privileges and immunities which belong to citizens of the [60 U.S. 393, 423] State. And if persons of the African race are citizens of a State, and of the United States, they would be entitled to all of these privileges and immunities in every State, and the State could not restrict them; for they would hold these privileges and immunities under the paramount authority of the Federal Government, and its courts would be bound to maintain and enforce them, the Constitution and laws of the State to the contrary notwithstanding. And if the States could limit or restrict them, or place the party in an inferior grade, this clause of the Constitution would be unmeaning, and could have no operation; and would give no rights to the citizen when in another State. He would have none but what the State itself chose to allow him. This is evidently not the construction or meaning of the clause in question. It guaranties rights to the citizen, and the State cannot withhold them. And these rights are of a character and would lead to consequences which make

it absolutely certain that the African race were not included under the name of citizens of a State, and were not in the contemplation of the framers of the Constitution when these privileges and immunities were provided for the protection of the citizen in other States.

The case of *Legrand v. Darnall* (2 Peters, 664) has been referred to for the purpose of showing that this court has decided that the descendant of a slave may sue as a citizen in a court of the United States; but the case itself shows that the question did not arise and could not have arisen in the case.

It appears from the report, that Darnall was born in Maryland, and was the son of a white man by one of his slaves, and his father executed certain instruments to manumit him, and devised to him some landed property in the State. This property Darnall afterwards sold to Legrand, the appellant, who gave his notes for the purchase-money. But becoming afterwards apprehensive that the appellee had not been emancipated according to the laws of Maryland, he refused to pay the notes until he could be better satisfied as to Darnall's right to convey. Darnall, in the mean time, had taken up his residence in Pennsylvania, and brought suit on the notes, and recovered judgment in the Circuit Court for the district of Maryland.

The whole proceeding, as appears by the report, was an amicable one; Legrand being perfectly willing to pay the money, if he could obtain a title, and Darnall not wishing him to pay unless he could make him a good one. In point of fact, the whole proceeding was under the direction of the counsel who argued the case for the appellee, who was the mutual friend of the parties, and confided in by both of them, and whose only [60 U.S. 393, 424] object was to have the rights of both parties established by judicial decision in the most speedy and least expensive manner.

Legrand, therefore, raised no objection to the jurisdiction of the court in the suit at law, because he was himself anxious to obtain the judgment of the court upon his title. Consequently, there was nothing in the record before the court to show that Darnall was of African descent, and the usual judgment and award of execution was entered. And Legrand thereupon filed his bill on the equity side of the Circuit Court, stating that Darnall was born a slave, and had not been legally emancipated, and could not therefore take the land devised to him, nor make Legrand a good title; and praying an injunction to restrain Darnall from proceeding to execution on the judgment, which was granted. Darnall answered, averring in his answer that he was a free man, and capable of conveying a good title. Testimony was taken on this point, and at the hearing the Circuit Court was of opinion that Darnall was a free man and his title good; and dissolved the injunction and dismissed the bill; and that decree was affirmed here, upon the appeal of Legrand.

Now, it is difficult to imagine how any question about the citizenship of Darnall, or his right to sue in that character, can be supposed to have arisen or been decided in that case. The fact that he was of African descent was first brought before the court upon the bill in equity. The suit at law had then passed into judgment and award of execution, and the Circuit Court, as a court of law, had no longer any authority over it. It was a valid and legal judgment, which the court that rendered it had not the power to reverse or set aside. And unless it had jurisdiction as a court of equity to restrain him from using its process as a court of law, Darnall, if he thought proper, would have been at liberty to proceed on his judgment, and compel the payment of the money, although the allegations in the bill were true, and he was incapable of making a title. No other court could have enjoined him, for certainly no State equity court could interfere in that way with the judgment of a Circuit Court of the United States.

But the Circuit Court as a court of equity certainly had equity jurisdiction over its own judgment as a court of law, without regard to the character of the parties; and had not only the right, but it was its duty—no matter who were the parties in the judgment—to prevent them from proceeding to enforce it by execution, if the court was satisfied that the money was not justly and equitably due. The ability of Darnall to convey did not depend upon his citizenship, but upon his title to freedom. And if he was free, he could hold and [60 U.S. 393, 425] convey property, by the laws of Maryland, although he was not a citizen. But if he was by law still a slave, he could not. It was therefore the duty of the court, sitting as a court of equity in the latter case, to prevent him from using its process, as a court of common law, to compel the payment of the purchase-money, when it was

evident that the purchaser must lose the land. But if he was free, and could make a title, it was equally the duty of the court not to suffer Legrand to keep the land, and refuse the payment of the money, upon the ground that Darnall was incapable of suing or being sued as a citizen in a court of the United States. The character or citizenship of the parties had no connection with the question of jurisdiction, and the matter in dispute had no relation to the citizenship of Darnall. Nor is such a question alluded to in the opinion of the court.

Besides, we are by no means prepared to say that there are not many cases, civil as well as criminal, in which a Circuit Court of the United States may exercise jurisdiction, although one of the African race is a party; that broad question is not before the court. The question with which we are now dealing is, whether a person of the African race can be a citizen of the United States, and become thereby entitled to a special privilege, by virtue of his title to that character, and which, under the Constitution, no one but a citizen can claim. It is manifest that the case of Legrand and Darnall has no bearing on that question, and can have no application to the case now before the court.

This case, however, strikingly illustrates the consequences that would follow the construction of the Constitution which would give the power contended for to a State. It would in effect give it also to an individual. For if the father of young Darnall had manumitted him in his lifetime, and sent him to reside in a State which recognised him as a citizen, he might have visited and sojourned in Maryland when he pleased, and as long as he pleased, as a citizen of the United States; and the State officers and tribunals would be compelled, by the paramount authority of the Constitution, to receive him and treat him as one of its citizens, exempt from the laws and police of the State in relation to a person of that description, and allow him to enjoy all the rights and privileges of citizenship, without respect to the laws of Maryland, although such laws were deemed by it absolutely essential to its own safety.

The only two provisions which point to them and include them, treat them as property, and make it the duty of the Government to protect it; no other power, in relation to this race, is to be found in the Constitution; and as it is a Government [60 U.S. 393, 426] of special, delegated, powers, no authority beyond these two provisions can be constitutionally exercised. The Government of the United States had no right to interfere for any other purpose but that of protecting the rights of the owner, leaving it altogether with the several States to deal with this race, whether emancipated or not, as each State may think justice, humanity, and the interests and safety of society, require. The States evidently intended to reserve this power exclusively to themselves.

No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day. This court was not created by the Constitution for such purposes. Higher and graver trusts have been confided to it, and it must not falter in the path of duty.

What the construction was at that time, we think can hardly admit of doubt. We have the language of the Declaration of Independence and of the Articles of Confederation, in addition to the plain words of the Constitution itself; we have the legislation of the different States, before, about the time, and since, the Constitution was adopted; we have the legislation of Congress, from the time of its adoption to a recent period; and we have the constant and uniform action of the Executive Department, all concurring together, and leading to the same result. And if anything in relation to the construction of the Constitution can be regarded as settled, it is that which we now give to the word 'citizen' and the word 'people.'

And upon a full and careful consideration of the subject, [60 U.S. 393, 427] the court is of opinion, that, upon the facts stated in the plea in abatement, Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts; and, consequently, that the Circuit Court had no jurisdiction of the case, and that the judgment on the plea in abatement is erroneous.

We are aware that doubts are entertained by some of the members of the court, whether the plea in abatement is legally before the court upon this writ of error; but if that plea is regarded as waived, or out of the case upon any other ground, yet the question as to the jurisdiction of the Circuit Court is presented on the face of the bill of exception itself, taken by the plaintiff at the trial; for he admits that he and his wife were born slaves, but endeavors to make out his title to freedom and citizenship by showing that they were taken by their owner to certain places, hereinafter mentioned, where slavery could not by law exist, and that they thereby became free, and upon their return to Missouri became citizens of that State.

Now, if the removal of which he speaks did not give them their freedom, then by his own admission he is still a slave; and whatever opinions may be entertained in favor of the citizenship of a free person of the African race, no one supposes that a slave is a citizen of the State or of the United States. If, therefore, the acts done by his owner did not make them free persons, he is still a slave, and certainly incapable of suing in the character of a citizen.

The principle of law is too well settled to be disputed, that a court can give no judgment for either party, where it has no jurisdiction; and if, upon the showing of Scott himself, it appeared that he was still a slave, the case ought to have been dismissed, and the judgment against him and in favor of the defendant for costs, is, like that on the plea in abatement, erroneous, and the suit ought to have been dismissed by the Circuit Court for want of jurisdiction in that court.

But, before we proceed to examine this part of the case, it may be proper to notice an objection taken to the judicial authority of this court to decide it; and it has been said, that as this court has decided against the jurisdiction of the Circuit Court on the plea in abatement, it has no right to examine any question presented by the exception; and that anything it may say upon that part of the case will be extra-judicial, and mere obiter dicta.

This is a manifest mistake; there can be no doubt as to the jurisdiction of this court to revise the judgment of a Circuit Court, and to reverse it for any error apparent on the record, [60 U.S. 393, 428] whether it be the error of giving judgment in a case over which it had no jurisdiction, or any other material error; and this, too, whether there is a plea in abatement or not.

The objection appears to have arisen from confounding writs of error to a State court, with writs of error to a Circuit Court of the United States. Undoubtedly, upon a writ of error to a State court, unless the record shows a case that gives jurisdiction, the case must be dismissed for want of jurisdiction in this court. And if it is dismissed on that ground, we have no right to examine and decide upon any question presented by the bill of exceptions, or any other part of the record. But writs of error to a State court, and to a Circuit Court of the United States, are regulated by different laws, and stand upon entirely different principles. And in a writ of error to a Circuit Court of the United States, the whole record is before this court for examination and decision; and if the sum in controversy is large enough to give jurisdiction, it is not only the right, but it is the judicial duty of the court, to examine the whole case as presented by the record; and if it appears upon its face that any material error or errors have been committed by the court below, it is the duty of this court to reverse the judgment, and remand the case. And certainly an error in passing a judgment upon the merits in favor of either party, in a case which it was not authorized to try, and over which it had no jurisdiction, is as grave an error as a court can commit.

The plea in abatement is not a plea to the jurisdiction of this court, but to the jurisdiction of the Circuit Court. And it appears by the record before us, that the Circuit Court committed an error, in deciding that it had jurisdiction, upon the facts in the case, admitted by the pleadings. It is the duty of the appellate tribunal to

any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident.

We have so far examined the case, as it stands under the Constitution of the United States, and the powers thereby delegated to the Federal Government.

But there is another point in the case which depends on State power and State law. And it is contended, on the part of the plaintiff, that he is made free by being taken to Rock Island, in the State of Illinois, independently of his residence in the territory of the United States; and being so made free, he was not again reduced to a state of slavery by being brought back to Missouri.

Our notice of this part of the case will be very brief, for the principle on which it depends was decided in this court, upon much consideration, in the case of Strader et al. v. Graham, reported in 10th Howard, 82. In that case, the slaves had been taken from Kentucky to Ohio, with the consent of the owner, and afterwards brought back to Kentucky. And this court held that their status or condition, as free or slave, depended upon the laws of Kentucky, when they were brought back into that State, and not of Ohio; and that this court had no jurisdiction to revise the judgment of a State court upon its own laws. This was the point directly before the court, and the decision that this court had not jurisdiction turned upon it, as will be seen by the report of the case.

So in this case. As Scott was a slave when taken into the State of Illinois by his owner, and was there held as such, and brought back in that character, his status, as free or slave, depended on the laws of Missouri, and not of Illinois.

It has, however, been urged in the argument, that by the laws of Missouri he was free on his return, and that this case, [60 U.S. 393, 453] therefore, cannot be governed by the case of Strader et al. v. Graham, where it appeared, by the laws of Kentucky, that the plaintiffs continued to be slaves on their return from Ohio. But whatever doubts or opinions may, at one time, have been entertained upon this subject, we are satisfied, upon a careful examination of all the cases decided in the State courts of Missouri referred to, that it is now firmly settled by the decisions of the highest court in the State, that Scott and his family upon their return were not free, but were, by the laws of Missouri, the property of the defendant; and that the Circuit Court of the United States had no jurisdiction, when, by the laws of the State, the plaintiff was a slave, and not a citizen.

Moreover, the plaintiff, it appears, brought a similar action against the defendant in the State court of Missouri, claiming the freedom of himself and his family upon the same grounds and the same evidence upon which he relies in the case before the court. The case was carried before the Supreme Court of the State; was fully argued there; and that court decided that neither the plaintiff nor his family were entitled to freedom, and were still the slaves of the defendant; and reversed the judgment of the inferior State court, which had given a different decision. If the plaintiff supposed that this judgment of the Supreme Court of the State was erroneous, and that this court had jurisdiction to revise and reverse it, the only mode by which he could legally bring it before this court was by writ of error directed to the Supreme Court of the State, requiring it to transmit the record to this court. If this had been done, it is too plain for argument that the writ must have been dismissed for want of jurisdiction in this court. The case of Strader and others v. Graham is directly in point; and, indeed, independent of any decision, the language of the 25th section of the act of 1789 is too clear and precise to admit of controversy.

But the plaintiff did not pursue the mode prescribed by law for bringing the judgment of a State court before this court for revision, but suffered the case to be remanded to the inferior State court, where it is still continued, and is, by agreement of parties, to await the judgment of this court on the point. All of this appears on the record before us, and by the printed report of the case.

And while the case is yet open and pending in the inferior State court, the plaintiff goes into the Circuit Court of the United States, upon the same case and the same evidence, and against the same party, and proceeds to

judgment, and then brings here the same case from the Circuit Court, which the law would not have permitted him to bring directly from the [60 U.S. 393, 454] State court. And if this court takes jurisdiction in this form, the result, so far as the rights of the respective parties are concerned, is in every respect substantially the same as if it had in open violation of law entertained jurisdiction over the judgment of the State court upon a writ of error, and revised and reversed its judgment upon the ground that its opinion upon the question of law was erroneous. It would ill become this court to sanction such an attempt to evade the law, or to exercise an appellate power in this circuitous way, which it is forbidden to exercise in the direct and regular and invariable forms of judicial proceedings.

Upon the whole, therefore, it is the judgment of this court, that it appears by the record before us that the plaintiff in error is not a citizen of Missouri, in the sense in which that word is used in the Constitution; and that the Circuit Court of the United States, for that reason, had no jurisdiction in the case, and could give no judgment in it. Its judgment for the defendant must, consequently, be reversed, and a mandate issued, directing the suit to be dismissed for want of jurisdiction.

Mr. Justice WAYNE.

Concurring as I do entirely in the opinion of the court, as it has been written and read by the Chief Justice-without any qualification of its reasoning or its conclusions-I shall neither read nor file an opinion of my own in this case, which I prepared when I supposed it might be necessary and proper for me to do so.

The opinion of the court meets fully and decides every point which was made in the argument of the case by the counsel on either side of it. Nothing belonging to the case has been left undecided, nor has any point been discussed and decided which was not called for by the record, or which was not necessary for the judicial disposition of it, in the way that it has been done, by more than a majority of the court.

In doing this, the court neither sought nor made the case. It was brought to us in the course of that administration of the laws which Congress has enacted, for the review of cases from the Circuit Courts by the Supreme Court.

In our action upon it, we have only discharged our duty as a distinct and efficient department of the Government, as the framers of the Constitution meant the judiciary to be, and as the States of the Union and the people of those States intended it should be, when they ratified the Constitution of the United States.

The case involves private rights of value, and constitutional principles of the highest importance, about which there had [60 U.S. 393, 455] become such a difference of opinion, that the peace and harmony of the country required the settlement of them by judicial decision.

It would certainly be a subject of regret, that the conclusions of the court have not been assented to by all of its members, if I did not know from its history and my own experience how rarely it has happened that the judges have been unanimous upon constitutional questions of moment, and if our decision in this case had not been made by as large a majority of them as has been usually had on constitutional questions of importance.

Two of the judges, Mr. Justices McLean and Curtis, dissent from the opinion of the court. A third, Mr. Justice Nelson, gives a separate opinion upon a single point in the case, with which I concur, assuming that the Circuit Court had jurisdiction; but he abstains altogether from expressing any opinion upon the eighth section of the act of 1820, known commonly as the Missouri Compromise law; and six of us declare that it was unconstitutional.

But it has been assumed, that this court has acted extra-judicially in giving an opinion upon the eighth section of the act of 1820, because, as it has decided that the Circuit Court had no jurisdiction of the case, this court had no jurisdiction to examine the case upon its merits.



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**VISA****U.S. Supreme Court****STATE OF TEXAS v. WHITE, 74 U.S. 700 (1868)**

74 U.S. 700 (Wall.)

TEXAS

v.

WHITE ET AL.

December Term, 1868

[74 U.S. 700, 702] ON original bill.

The Constitution ordains that the judicial power of the United States shall extend to certain cases, and among them 'to controversies between a State and citizens of another State; . . . and between a State, or the citizens thereof, and foreign States, citizens or subjects.' It ordains further, that in cases in which 'a State' shall be a party, the Supreme Court shall have original jurisdiction.

With these provisions in force as fundamental law, Texas, entitling herself 'the State of Texas, one of the United States of America,' filed, on the 15th of February, 1867, an original bill against different persons; White and Chiles, one Hardenberg, a certain firm, Birch, Murray & Co., and some others, 1 citizens of New York and other States; praying [74 U.S. 700, 703] an injunction against their asking or receiving payment from the United States of certain bonds of the Federal government, known as Texan indemnity bonds; and that the bonds might be delivered up to the complainant, and for other and further relief.

The case was this:

In 1851 the United States issued its bonds-five thousand bonds for \$ 1000 each, and numbered successively from No. 1 to No. 5000, and thus making the sum of \$5,000,000-to the State of Texas, in arrangement of certain boundary claims made by that State. The bonds, which were dated January 1st, 1851, were coupon bonds, payable, by their terms, to the State of Texas or bearer, with interest at 5 per cent. semi-annually, and 'redeemable after the 31st day of December, 1864.' Each bond contained a statement on its face that the debt was authorized by act of Congress, and was 'transferable on delivery,' and to each were attached six-month coupons, extending to December 31, 1864.2

In pursuance of an act of the legislature of Texas, the controller of public accounts of the State was authorized to go to Washington, and to receive there the bonds; the statute making it his duty to deposit them, when received, in the treasury of the State of Texas, to be disposed of 'as may be provided by law;' and enacting further, that no bond, issued as aforesaid and payable to bearer, should be 'available in the hands of any holder until the same shall have been indorsed, in the city of Austin, by the governor of the State of Texas.'

Most of the bonds were indorsed and sold according to law, and paid on presentation by the United States prior to 1860. A part of them, however, -appropriated by act of legislature as a school fund-were still in the treasury of Texas, in January, 1861, when the late Southern rebellion broke out.

The part which Texas took in that event, and the position [74 U.S. 700, 704] in which the close of it left her, are necessary to be here adverted to.

At the time of that outbreak, Texas was confessedly one of the United States of America, having a State constitution in accordance with that of the United States, and represented by senators and representatives in the Congress at Washington. In January, 1861, a call for a convention of the people of the State was issued, signed by sixty-one individuals. The call was without authority and revolutionary. Under it delegates were elected from some sections of the State, whilst in others no vote was taken. These delegates assembled in State convention, and on the 1st of February, 1861, the convention adopted an ordinance 'to dissolve the union between the State of Texas and the other States, united under the compact styled, 'the Constitution of the United States of America.'" The ordinance contained a provision requiring it to be submitted to the people of Texas, for ratification or rejection by the qualified voters thereof, on the 23d of February, 1861. The legislature of the State, convened in extra session, on the 22d of January, 1861, passed an act ratifying the election of the delegates, chosen in the irregular manner above mentioned, to the convention. The ordinance of secession submitted to the people was adopted by a vote of 34,794 against 11,235. The convention, which had adjourned immediately on passing the ordinance, reassembled. On the 4th of March, 1861, it declared that the ordinance of secession had been ratified by the people, and that Texas had withdrawn from the union of the States under the Federal Constitution. It also passed a resolution requiring the officers of the State government to take an oath to support the provisional government of the Confederate States, and providing, that if 'any officer refused to take such oath, in the manner and within the time prescribed, his office should be deemed vacant, and the same filled as though he were dead.' On the 16th of March, the convention passed an ordinance, declaring, that whereas the governor and the secretary of state had refused or omitted to take the oath prescribed, their offices were vacant; that [74 U.S. 700, 705] the lieutenant-governor should exercise the authority and perform the duties appertaining to the office of governor, and that the deposed officers should deliver to their successors in office the great seal of the State, and all papers, archives, and property in their possession belonging or appertaining to the State. The convention further assumed to exercise and administer the political power and authority of the State.

Thus was established the rebel government of Texas.

The senators and representatives of the State in Congress now withdrew from that body at Washington. Delegates were sent to the Congress of the so-called Confederate States at Montgomery, Alabama, and electors for a president and vice-president of these States appointed. War having become necessary to complete the purposed destruction by the South of the Federal government; Texas joined the other Southern States, and made war upon the United States, whose authority was now recognized in no manner within her borders. The oath of allegiance of all persons exercising public functions was to both the State of Texas, and to the Confederate States of America; and no officer of any kind representing the United States was within the limits of the State except military officers, who had been made prisoners. Such was and had been for several months the condition of things in the beginning of 1862.

On the 11th of January, of that year, the legislature of the usurping government of Texas passed an act 'to provide arms and ammunition, and for the manufacture of arms and ordnance for the military defences of the State.' And by it created a 'military board,' to carry out the purpose indicated in the title. Under the authority of this act, military forces were organized.

On the same day the legislature passed a further act, entitled 'An act to provide funds for military purposes,' and therein directed the board, which it had previously organized, 'to dispose of any bonds and coupons which may be in the treasury on any account, and use such funds or their proceeds for the defence of the State;' and passed an additional act repealing the act [74 U.S. 700, 706] which made an indorsement of the bonds by the governor of Texas necessary to make them available in the hands of the holder.

Under these acts, the military board, on the 12th January, 1865, a date at which the success of the Federal arms seemed probable, agreed to sell to White & Chiles one hundred and thirty-five of these bonds, then in the treasury of Texas, and seventy-six others deposited with certain bankers in England, in payment for which White & Chiles were to deliver to the board a large quantity of cotton cards and medicines. The former bonds were delivered to White & Chiles on the 15th March following; none of them being indorsed by any governor of Texas.

It appeared that in February, 1862, after the rebellion had broken out, it was made known to the Secretary of the Treasury of the United States, in writing, by the Hon. G. W. Paschal, of Texas, who had remained constant to the Union, that an effort would be made by the rebel authorities of Texas to use the bonds remaining in the treasury in

aid of the rebellion; and that they could be identified, because all that had been circulated before the war were indorsed by different governors of Texas. The Secretary of the Treasury acted on this information, and refused in general to pay bonds that had not been indorsed. On the 4th of October, 1865, Mr. Paschal, as agent of the State of Texas, caused to appear in the money report and editorial of the New York Herald, a notice of the transaction between the rebel government of Texas and White & Chiles, and a statement that the treasury of the United States would not pay the bonds transferred to them by such usurping government. On the 10th October, 1865, the provisional governor of the State published in the New York Tribune, a 'Caution to the Public,' in which he recited that the rebel government of Texas had, under a pretended contract, transferred to White & Chiles 'one hundred and thirty-five United States Texan indemnity bonds, issued January 1, 1851, payable in fourteen years, of the denomination of \$1000 each, and coupons attached thereto to the amount of \$ 1287.50, amounting in the aggregate, bonds and coupons, to the sum of \$156, 287.50.' [74 U.S. 700, 707] His caution did not specify, however, any particular bonds by number. The caution went on to say that the transfer was a conspiracy between the rebel governor and White & Chiles to rob the State treasury, that White & Chiles had never paid the State one farthing, that they had fled the State, and that these facts had been made known to the Secretary of the Treasury of the United States. And 'a protest was filed with him by Mr. Paschal, agent of the State of Texas, against the payment of the said bonds and coupons unless presented for payment by proper authority.' The substance of this notice, it was testified, was published in money articles of many of the various newspapers of about that date, and that financial men in New York and other places spoke to Mr. Paschal, who had caused it to be inserted in the Tribune, about it. It was testified also, that after the commencement of the suit, White & Chiles said that they had seen it.

The rebel forces being disbanded on the 25th May, 1865, and the civil officers of the usurping government of Texas having fled from the country, the President, on the 17th June, 1865, issued his proclamation appointing Mr. A. J. Hamilton, provisional governor of the State; and directing the formation by the people of a State government in Texas.

Under the provisional government thus established, the people proceeded to make a constitution, and reconstruct their State government.

But much question arose as to what was thus done, and the State was not acknowledged by the Congress of the United States as being reconstructed. On the contrary, Congress passed, in March 1867, three certain acts, known as the Reconstruction Acts. By the first of these, reciting that no legal State governments or adequate protection for life or property then existed in the rebel States of Texas, and nine other States named, and that it was necessary that peace and good order should be enforced in them until loyal and republican State governments could be legally established, Congress divided the States named into five military districts (Texas with Louisiana being the fifth), and made it the duty [74 U.S. 700, 708] of the President to assign to each an officer of the army, and to detail a sufficient military force to enable him to perform his duties and enforce authority within his district. The act made it the duty of this officer to protect all persons in their rights, to suppress insurrection, disorder, violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals, either through the local civil tribunals or through military commissions, which the act authorized. It provided, further, that when the people of any one of these States had formed a constitution in conformity with that of the United States, framed in a way which the statute went on to specify, and when the State had adopted a certain article of amendment named, to the Constitution of the United States, and when such article should have become a part of the Constitution of the United States, then that the States respectively should be declared entitled to representation in Congress, and the preceding part of the act became inoperative; and that until they were so admitted any civil governments which might exist in them should be deemed provisional only, and subject to the paramount authority of the United States, at any time to abolish, modify, control, or supersede them.

A State convention of 1866 passed an ordinance looking to the recovery of these bonds; and by act of October of that year, the governor of Texas was authorized to take such steps as he might deem best for the interests of the State in the matter, either to recover the bonds, or to compromise with holders. Under this act the governor appointed an agent of the State to look after the matter.

It was in this state of things, with the State government organized in the manner and with the status above mentioned, that this present bill was directed by this agent to be filed.

The bill was filed by Mr. R. T. Merrick and others, solicitors in this court, on behalf of the State; without precedent

Birch, Murray & Co.

The case was argued by Messrs. Paschal and Merrick, in behalf of Texas; and contra, by Mr. Phillips, for White; Mr. Pike, for Chiles; Mr. Carlisle, for Hardenberg; and Mr. Moore, for Birch, Murray & Co.

The CHIEF JUSTICE delivered the opinion of the court.

This is an original suit in this court, in which the State of Texas, claiming certain bonds of the United States as her property, asks an injunction to restrain the defendants from receiving payment from the National government, and to compel the surrender of the bonds to the State.

It appears from the bill, answers, and proofs, that the United States, by act of September 9, 1850, offered to the State of Texas, in compensation for her claims connected with the settlement of her boundary, \$ 10,000,000 in five per cent. bonds, each for the sum of \$1000; and that this offer was accepted by Texas. One-half of these bonds were retained for certain purposes in the National treasury, and the other half were delivered to the State. The bonds thus delivered [74 U.S. 700, 718] were dated January 1, 1851, and were all made payable to the State of Texas, or bearer, and redeemable after the 31st day of December, 1864. They were received in behalf of the State by the comptroller of public accounts, under authority of an act of the legislature, which, besides giving that authority, provided that no bond should be available in the hands of any holder until after indorsement by the governor of the State.

After the breaking out of the rebellion, the insurgent legislature of Texas, on the 11th of January, 1862, repealed the act requiring the indorsement of the governor,<sup>4</sup> and on the same day provided for the organization of a military board, composed of the governor, comptroller, and treasurer, and authorized a majority of that board to provide for the defence of the State by means of any bonds in the treasury upon any account, to the extent of \$1,000,000.<sup>5</sup> The defence contemplated by the act was to be made against the United States by war. Under this authority the military board entered into an agreement with George W. White and John Chiles, two of the defendants, for the sale to them of one hundred and thirty-five of these bonds, then in the treasury of the State, and seventy-six more, then deposited with Droege & Co., in England; in payment for which they engaged to deliver to the board a large quantity of cotton cards and medicines. This agreement was made on the 12th of January, 1865. On the 12th of March, 1865, White and Chiles received from the military board one hundred and thirty-five of these bonds, none of which were indorsed by any governor of Texas. Afterward, in the course of the years 1865 and 1866, some of the same bonds came into the possession of others of the defendants, by purchase, or as security for advances of money.

Such is a brief outline of the case. It will be necessary hereafter to refer more in detail to some particular circumstances of it.

The first inquiries to which our attention was directed by [74 U.S. 700, 719] counsel, arose upon the allegations of the answer of Chiles (1), that no sufficient authority is shown for the prosecution of the suit in the name and on the behalf of the State of Texas; and (2) that the State, having severed her relations with a majority of the States of the Union, and having by her ordinance of secession attempted to throw off her allegiance to the Constitution and government of the United States, has so far changed her status as to be disabled from prosecuting suits in the National courts.

The first of these allegations is disproved by the evidence. A letter of authority, the authenticity of which is not disputed, has been produced, in which J. W. Throckmorton, elected governor under the constitution adopted in 1866, and proceeding under an act of the State legislature relating to these bonds, expressly ratifies and confirms the action of the solicitors who filed the bill, and empowers them to prosecute this suit; and it is further proved by the affidavit of Mr. Paschal, counsel for the complainant, that he was duly appointed by Andrew J. Hamilton, while provisional governor of Texas, to represent the State of Texas in reference to the bonds in controversy, and that his appointment has been renewed by E. M. Pease, the actual governor. If Texas was a State of the Union at the time of these acts, and these persons, or either of them, were competent to represent the State, this proof leaves no doubt upon the question of authority.

consider the proper application of what has been said. [74 U.S. 700, 722] The Republic of Texas was admitted into the Union, as a State, on the 27th of December, 1845. By this act the new State, and the people of the new State, were invested with all the rights, and became subject to all the responsibilities and duties of the original States under the Constitution.

From the date of admission, until 1861, the State was represented in the Congress of the United States by her senators and representatives, and her relations as a member of the Union remained unimpaired. In that year, acting upon the theory that the rights of a State under the Constitution might be renounced, and her obligations thrown off at pleasure, Texas undertook to sever the bond thus formed, and to break up her constitutional relations with the United States.

On the 1st of February, 7 a convention, called without authority, but subsequently sanctioned by the legislature regularly elected, adopted an ordinance to dissolve the union between the State of Texas and the other States under the Constitution of the United States, whereby Texas was declared to be 'a separate and sovereign State,' and 'her people and citizens' to be 'absolved from all allegiance to the United States, or the government thereof.'

It was ordered by a vote of the convention<sup>8</sup> and by an act of the legislature,<sup>9</sup> that this ordinance should be submitted to the people, for approval or disapproval, on the 23d of February, 1861.

Without awaiting, however, the decision thus invoked, the convention, on the 4th of February, adopted a resolution designating seven delegates to represent the State in the convention of seceding States at Montgomery, 'in order', as the resolution declared, 'that the wishes and interests of the people of Texas may be consulted in reference to the constitution and provisional government that may be established by said convention.'

Before the passage of this resolution the convention had [74 U.S. 700, 723] appointed a committee of public safety, and adopted an ordinance giving authority to that committee to take measures for obtaining possession of the property of the United States in Texas, and for removing the National troops from her limits. The members of the committee, and all officers and agents appointed or employed by it, were sworn to secrecy and to allegiance to the State. <sup>10</sup> Commissioners were at once appointed, with instructions to repair to the headquarters of General Twiggs, then representing the United States in command of the department, and to make the demands necessary for the accomplishment of the purposes of the committee. A military force was organized in support of these demands, and an arrangement was effected with the commanding general, by which the United States troops were engaged to leave the State, and the forts and all the public property, not necessary to the removal of the troops, were surrendered to the commissioners. <sup>11</sup>

These transactions took place between the 2d and the 18th of February, and it was under these circumstances that the vote upon the ratification or rejection of the ordinance of secession was taken on the 23d of February. It was ratified by a majority of the voters of the State.

The convention, which had adjourned before the vote was taken, reassembled on the 2d of March, and instructed the delegates already sent to the Congress of the seceding States, to apply for admission into the confederation, and to give the adhesion of Texas to its provisional constitution.

It proceeded, also, to make the changes in the State constitution which this adhesion made necessary. The words 'United States,' were stricken out wherever they occurred, and the words 'Confederate States' substituted; and the members of the legislature, and all officers of the State, were required by the new constitution to take an oath of fidelity to the constitution and laws of the new confederacy.

Before, indeed, these changes in the constitution had been [74 U.S. 700, 724] completed, the officers of the State had been required to appear before the committee and take an oath of allegiance to the Confederate States.

The governor and secretary of state, refusing to comply, were summarily ejected from office.

The members of the legislature, which had also adjourned and reassembled on the 18th of March, were more compliant. They took the oath, and proceeded on the 8th of April to provide by law for the choice of electors of

president and vice-president of the Confederate States.

The representatives of the State in the Congress of the United States were withdrawn, and as soon as the seceded States became organized under a constitution, Texas sent senators and representatives to the Confederate Congress.

In all respects, so far as the object could be accomplished by ordinances of the convention, by acts of the legislature, and by votes of the citizens, the relations of Texas to the Union were broken up, and new relations to a new government were established for them.

The position thus assumed could only be maintained by arms, and Texas accordingly took part, with the other Confederate States, in the war of the rebellion, which these events made inevitable. During the whole of that war there was no governor, or judge, or any other State officer in Texas, who recognized the National authority. Nor was any officer of the United States permitted to exercise any authority whatever under the National government within the limits of the State, except under the immediate protection of the National military forces.

Did Texas, in consequence of these acts, cease to be a State? Or, if not, did the State cease to be a member of the Union?

It 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.

The Union of the States never was a purely artificial and [74 U.S. 700, 725] arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction from the Articles of Confederation. By these the Union was solemnly declared to 'be perpetual.' And when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained to form a more perfect Union. It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not?

But the perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. And we have already had occasion to remark at this term, that the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence, and that 'without the States in union, there could be no such political body as the United States.' <sup>12</sup> Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States. [74 U.S. 700, 726] When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union, and all the guaranties of republican government in the Union, attached at once to the State. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through consent of the States.

Considered therefore as transactions under the Constitution, 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. They were utterly without operation in law. The obligations of the State, as a member of the Union, and of every citizen of the State, as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the State did not cease to be a State, nor her citizens to be citizens of the Union. 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.

Our conclusion therefore is, that Texas continued to be a State, and a State of the Union, notwithstanding the transactions to which we have referred. And this conclusion, in our judgment, is not in conflict with any act or declaration of any department of the National government, but entirely in accordance with the whole series of such acts and declarations since the first outbreak of the rebellion.

But in order to the exercise, by a State, of the right to sue in this court, there needs to be a State government, competent to represent the State in its relations with the National [74 U.S. 700, 727] government, so far as least as the institution and prosecution of a suit is concerned.

And it is by no means a logical conclusion, from the premises which we have endeavored to establish, that the governmental relations of Texas to the Union remained unaltered. Obligations often remain unimpaired, while relations are greatly changed. The obligations of allegiance to the State, and of obedience to her laws, subject to the Constitution of the United States, are binding upon all citizens, whether faithful or unfaithful to them; but the relations which subsist while these obligations are performed, are essentially different from those which arise when they are disregarded and set at nought. And the same must necessarily be true of the obligations and relations of States and citizens to the Union. No one has been bold enough to contend that, while Texas was controlled by a government hostile to the United States, and in affiliation with a hostile confederation, waging war upon the United States, senators chosen by her legislature, or representatives elected by her citizens, were entitled to seats in Congress; or that any suit, instituted in her name, could be entertained in this court. All admit that, during this condition of civil war, the rights of the State as a member, and of her people as citizens of the Union, were suspended. The government and the citizens of the State, refusing to recognize their constitutional obligations, assumed the character of enemies, and incurred the consequences of rebellion.

These new relations imposed new duties upon the United States. The first was that of suppressing the rebellion. The next was that of re-establishing the broken relations of the State with the Union. The first of these duties having been performed, the next necessarily engaged the attention of the National government.

The authority for the performance of the first had been found in the power to suppress insurrection and carry on war; for the performance of the second, authority was derived from the obligation of the United States to guarantee to every State in the Union a republican form of government. [74 U.S. 700, 728] The latter, indeed, in the case of a rebellion which involves the government of a State, and for the time excludes the National authority from its limits, seems to be a necessary complement to the former.

Of this, the case of Texas furnishes a striking illustration. When the war closed there was no government in the State except that which had been organized for the purpose of waging war against the United States. That government immediately disappeared. The chief functionaries left the State. Many of the subordinate officials followed their example. Legal responsibilities were annulled or greatly impaired. It was inevitable that great confusion should prevail. If order was maintained, it was where the good sense and virtue of the citizens gave support to local acting magistrates, or supplied more directly the needful restraints.

A great social change increased the difficulty of the situation. Slaves, in the insurgent States, with certain local exceptions, had been declared free by the Proclamation of Emancipation; and whatever questions might be made as to the effect of that act, under the Constitution, it was clear, from the beginning, that its practical operation, in connection with legislative acts of like tendency, must be complete enfranchisement. Wherever the National forces obtained control, the slaves became freemen. Support to the acts of Congress and the proclamation of the President, concerning slaves, was made a condition of amnesty<sup>13</sup> by President Lincoln, in December, 1863, and by President Johnson in May, 1865.<sup>14</sup> And emancipation was confirmed, rather than ordained, in the insurgent States, by the amendment to the Constitution prohibiting slavery throughout the Union, which was proposed by Congress in February, 1865, and ratified, before the close of the following autumn, by the requisite three-fourths of the States. <sup>15</sup>

The new freemen necessarily became part of the people, and the people still constituted the State; for States, like individuals, retain their identity, though changed to some [74 U.S. 700, 729] extent in their constituent elements. And it was the State, thus constituted, which was now entitled to the benefit of the constitutional guaranty.

and all bonds of the same issue which have the indorsement of [74 U.S. 700, 736] a governor of Texas made before the date of the secession ordinance, -and there were no others indorsed by any governor, -had been paid in coin on presentation at the treasury Department; while, on the contrary, applications for the payment of bonds, without the required indorsement, and of coupons detached from such bonds, made to that department, had been denied.

As a necessary consequence, the negotiation of these bonds became difficult. They sold much below the rates they would have commanded had the title to them been unquestioned. They were bought in fact, and under the circumstances could only have been bought, upon speculation. The purchasers took the risk of a bad title, hoping, doubtless, that through the action of the National government, or of the government of Texas, it might be converted into a good one.

And it is true that the first provisional governor of Texas encouraged the expectation that these bonds would be ultimately paid to the holders. But he was not authorized to make any engagement in behalf of the State, and in fact made none. It is true, also, that the Treasury Department, influenced perhaps by these representations, departed to some extent from its original rule, and paid bonds held by some of the defendants without the required indorsement.

But it is clear that this change in the action of the department could not affect the rights of Texas as a State of the Union, having a government acknowledging her obligations to the National Constitution.

It is impossible, upon this evidence, to hold the defendants protected by absence of notice of the want of title in White and Chiles. As these persons acquired no right to payment of these bonds as against the State, purchasers could acquire none through them.

On the whole case, therefore, our conclusion is that the State of Texas is entitled to the relief sought by her bill, and a decree must be made accordingly. 20 [74 U.S. 700, 737]

Mr. Justice GRIER, dissenting.

I regret that I am compelled to dissent from the opinion of the majority of the court on all the points raised and decided in this case. § The first question in order is the jurisdiction of the court to entertain this bill in behalf of the State of Texas.

The original jurisdiction of this court can be invoked only by one of the United States. The Territories have no such right conferred on them by the Constitution, nor have the Indian tribes who are under the protection of the military authorities of the government.

Is Texas one of these United States? Or was she such at the time this bill was filed, or since?

This is to be decided as a political fact, not as a legal fiction. This court is bound to know and notice the public history of the nation.

If I regard the truth of history for the last eight years, I cannot discover the State of Texas as one of these United States. I do not think it necessary to notice any of the very astute arguments which have been advanced by the learned counsel in this case, to find the definition of a State, when we have the subject treated in a clear and common sense manner by Chief Justice Marshall, in the case of *Hepburn & Dundass v. Ellzey*. 21 As the case is short, I hope to be excused for a full report of it, as stated and decided by the court. He says:

The question is, whether the plaintiffs, as residents of the District of Columbia, can maintain an action in the Circuit Court of the United States for the District of Virginia. This depends on the act of Congress describing the jurisdiction of that court. The act gives jurisdiction to the Circuit Courts in cases between a citizen of the State in which the suit is brought, and a citizen of another State. To support the jurisdiction in this case, it must appear that Columbia is a State. On the part of the plaintiff, it has been urged that Columbia is a distinct political society, and is, therefore, a 'State' according to the [74 U.S. 700, 738] definition of writers on general law. This is true; but as the act of Congress obviously uses the word 'State' in reference to that term as used in the Constitution, it becomes necessary to inquire whether Columbia is a State in the sense of that



## Droit constitutionnel comparé

30 hrs.,  
Master en droit

Aperçu général du droit des États-Unis d'Amérique  
- partim 3 -

### L'activisme de la Cour et la crise du New Deal

- Cour suprême des États-Unis, arrêt *Lochner v. State of New York*, 198 US 45 (1905) [extraits],
- Cour suprême des États-Unis, arrêt *Hammer v. Dagenhart*, 247 US 251 (1918) [extraits],
- Cour suprême des États-Unis, arrêt *Morehead v. Tipaldo*, 298 US 587 (1936) [extraits],
- Cour suprême des États-Unis, arrêt *West Coast Hotel v. Parrish*, 300 US 379 (1937) [extraits],
- Cour suprême des États-Unis, arrêt *Wickard v. Filburn*, 317 US 111 (1942) [extraits].

PECKHAM, J., Opinion of the Court  
SUPREME COURT OF THE UNITED STATES

198 U.S. 45

Lochner v. New York

ERROR TO THE COUNTY COURT OF ONEIDA COUNTY, STATE OF NEW YORK

No. 292 Argued: February 23, 24, 1905 --- Decided: April 17, 1905

MR. JUSTICE PECKHAM, after making the foregoing statement of the facts, delivered the opinion of the court.

The indictment, it will be seen, charges that the plaintiff in error violated the one hundred and tenth section of article 8, chapter 415, of the Laws of 1897, known as the labor law of the State of New York, in that he wrongfully and unlawfully required and permitted an employee working for him to work more than sixty hours in one week. There is nothing in any of the opinions delivered in this case, either in the Supreme Court or the Court of Appeals of the State, which construes the section, in using the word "required," as referring to any physical force being used to obtain the labor of an employee. It is assumed that the word means nothing more than the requirement arising from voluntary contract for such labor in excess of the number of hours specified in the statute. There is no pretense in any of the opinions that the statute was intended to meet a case of involuntary labor in any form. All the opinions assume that there is no real distinction, so far as this question is concerned, between the words "required" and

"permitted." The mandate of the statute that "no employee shall be required or permitted to work," is the substantial equivalent of an enactment that "no employee shall contract or agree to work," more than ten hours per day, and, as there is no provision for special emergencies, the statute is mandatory in all cases. It is not an act merely fixing the number of hours which shall constitute a legal day's work, but an absolute prohibition upon the employer's permitting, under any circumstances, more than ten hours' work to be done in his establishment. The employee may desire to earn the extra money which would arise from his working more than the prescribed [p53] time, but this statute forbids the employer from permitting the employee to earn it.

The statute necessarily interferes with the right of contract between the employer and employes concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. *Allgeyer v. Louisiana*, 165

U.S. 578. Under that provision, no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere. *Mugler v. Kansas*, 123 U.S. 623; *In re Kemmler*, 136 U.S. 436; *Crowley v. Christensen*, 137 U.S. 86; *In re Converse*, 137 U.S. 624.

The State therefore has power to prevent the individual from making certain kinds of contracts, and, in regard to them, the Federal Constitution offers no protection. If the contract be one which the State, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the Fourteenth Amendment. Contracts in violation of a statute, either of the Federal or state government, or a contract to let one's property for immoral purposes, or to do any other unlawful act, could obtain no protection from the Federal Constitution as coming under the liberty of [p54] person or of free contract. Therefore, when the State, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously

limits the right to labor or the right of contract in regard to their means of livelihood between persons who are *sui juris* (both employer and employee), it becomes of great importance to determine which shall prevail -- the right of the individual to labor for such time as he may choose or the right of the State to prevent the individual from laboring or from entering into any contract to labor beyond a certain time prescribed by the State.

This court has recognized the existence and upheld the exercise of the police powers of the States in many cases which might fairly be considered as border ones, and it has, in the course of its determination of questions regarding the asserted invalidity of such statutes on the ground of their violation of the rights secured by the Federal Constitution, been guided by rules of a very liberal nature, the application of which has resulted, in numerous instances, in upholding the validity of state statutes thus assailed. Among the later cases where the state law has been upheld by this court is that of *Holden v. Hardy*, 169 U.S. 366. A provision in the act of the legislature of Utah was there under consideration, the act limiting the employment of workmen in all underground mines or workings to eight hours per day "except in cases of emergency, where life or property is in imminent danger." It also limited the hours of labor in smelting and other institutions for the reduction or refining of ores or metals to eight hours per day except in like cases of emergency. The act was held to be a valid exercise of the police powers of the State. A review of many of the cases on the subject, decided by this and other courts, is given in the opinion. It was held that the kind of employment, mining, smelting, etc., and the

character of the employes in such kinds of labor, were such as to make it reasonable and proper for the State to interfere to prevent the employes from being constrained by the rules laid down by the proprietors in regard to labor. The following citation [p55] from the observations of the Supreme Court of Utah in that case was made by the judge writing the opinion of this court, and approved:

The law in question is confined to the protection of that class of people engaged in labor in underground mines and in smelters and other works wherein ores are reduced and refined. This law applies only to the classes subjected by their employment to the peculiar conditions and effects attending underground mining and work in smelters and other works for the reduction and refining of ores. Therefore it is not necessary to discuss or decide whether the legislature can fix the hours of labor in other employments.

It will be observed that, even with regard to that class of labor, the Utah statute provided for cases of emergency wherein the provisions of the statute would not apply. The statute now before this court has no emergency clause in it, and, if the statute is valid, there are no circumstances and no emergencies under which the slightest violation of the provisions of the act would be innocent. There is nothing in *Holden v. Hardy* which covers the case now before us. Nor does *Atkin v. Kansas*, 191 U.S. 207, touch the case at bar. The *Atkin* case was decided upon the right of the State to control its municipal corporations and to prescribe the condition upon which it will permit work of a public character to be done for a municipality. *Knoxville Iron Co. v. Harbison*, 183 U.S. 13, is

equally far from an authority for this legislation. The employees in that case were held to be at a disadvantage with the employer in matters of wages, they being miners and coal workers, and the act simply provided for the cashing of coal orders when presented by the miner to the employer.

The latest case decided by this court involving the police power is that of *Jacobson v. Massachusetts*, decided at this term and reported in 197 U.S. 11. It related to compulsory vaccination, and the law was held valid as a proper exercise of the police powers with reference to the public health. It was stated in the opinion that it was a case

of an adult who, for aught that appears, was himself in perfect health and a fit [p56] subject for vaccination, and yet, while remaining in the community, refused to obey the statute and the regulation adopted in execution of its provisions for the protection of the public health and the public safety, confessedly endangered by the presence of a dangerous disease.

That case is also far from covering the one now before the court.

*Petit v. Minnesota*, 177 U.S. 164, was upheld as a proper exercise of the police power relating to the observance of Sunday, and the case held that the legislature had the right to declare that, as matter of law, keeping barber shops open on Sunday was not a work of necessity or charity.

It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy, and the legislatures of the States

would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext -- become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course, the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

This is not a question of substituting the judgment of the [p57] court for that of the legislature. If the act be within the power of the State, it is valid although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: is it within the police power of the State?, and that question must be answered by the court.

The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of

a ward:  
une personne sous tutelle

free contract by determining the hours of labor in the occupation of a baker.

There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action. They are in no sense wards of the State. Viewed in the light of a

purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals, nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labor does not come within the police power on that ground.

It is a question of which of two powers or rights shall prevail -- the power of the State to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes [p58] with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.

This case has caused much diversity of opinion in the state courts. In the Supreme Court, two of the five judges composing the Appellate Division dissented from the judgment affirming the validity of the act. In the Court of Appeals, three of the seven judges also dissented from the judgment upholding the statute. Although found in what is called a labor law of the State, the Court of Appeals has upheld the act as one relating to the public health -- in other words, as a health law. One of the judges of the Court of Appeals, in upholding the law, stated that, in his opinion, the regulation in question could not be sustained unless they were able to say, from common knowledge, that working in a bakery and candy factory was an unhealthy employment. The judge held that, while the evidence was not uniform, it still led him to the conclusion that the occupation of a baker or confectioner was unhealthy, and tended to result in diseases of the respiratory organs. Three of the judges dissented from that view, and they thought the occupation of a baker was not to such an extent unhealthy as to warrant the interference of the legislature with the liberty of the individual.

We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris*, as employer or employee, to make contracts for the labor of the latter under the protection of the provisions of the Federal Constitution, there would seem to be no length to which legislation of this nature might not go.

The case differs widely, as we have already stated, from the expressions of this court in regard to laws of this nature, as stated in *Holden v. Hardy* and *Jacobson v. Massachusetts*, *supra*. [p59]

We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee. In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding, the trade of a baker has never been regarded as an unhealthy one. Very likely, physicians would not recommend the exercise of that or of any other trade as a remedy for ill health. Some occupations are more healthy than others, but we think there are none which might not come under the power of the legislature to supervise and control the hours of working therein if the mere fact that the occupation is not absolutely and perfectly healthy is to confer that right upon the legislative department of the Government. It might be safely affirmed that almost all occupations more or less affect the health. There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank's, a lawyer's or a

physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature on this assumption. No trade, no occupation, no mode of earning one's living could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid although such limitation might seriously cripple the ability of the laborer to support himself and his family. In our large cities there are many buildings into which the sun penetrates for but a short time in each day, and these buildings are occupied by people carrying on the [p60] business of bankers, brokers, lawyers, real estate, and many other kinds of business, aided by many clerks, messengers, and other employes. Upon the assumption of the validity of this act under review, it is not possible to say that an act prohibiting lawyers' or bank clerks, or others from contracting to labor for their employers more than eight hours a day would be invalid. It might be said that it is unhealthy to work more than that number of hours in an apartment lighted by artificial light during the working hours of the day; that the occupation of the bank clerk, the lawyer's clerk, the real estate clerk, or the broker's clerk in such offices is therefore unhealthy, and the legislature, in its paternal wisdom, must therefore have the right to legislate on the subject of, and to limit the hours for, such labor, and, if it exercises that power and its validity be questioned, it is sufficient to say it has reference to the public health; it has reference to the health of the employees condemned to labor day after day in buildings where the sun never shines; it is a health law, and therefore it is valid, and cannot be questioned by the courts.

It is also urged, pursuing the same line of argument, that it is to the interest of the State that its population should be strong and robust, and therefore any legislation which may be said to tend to make people healthy must be valid as health laws, enacted under the police power. If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract is visionary wherever the law is sought to be justified as a valid exercise of the police power. Scarcely any law but might find shelter under such assumptions, and conduct, properly so called, as well as contract, would come under the restrictive sway of the legislature. Not only the hours of employees, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength [p61] of the State be impaired. We mention these extreme cases because the contention is extreme. We do not believe in the soundness of the views which uphold this law. On the contrary, we think that such a law as this, although passed in the assumed exercise of the police power, and as relating to the public health, or the health of the employees named, is not within that power, and is invalid. The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts. Statutes of the nature of that under review, limiting the hours in which grown and intelligent men

may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employees if the hours of labor are not curtailed. If this be not clearly the case, the individuals whose rights are thus made the subject of legislative interference are under the protection of the Federal Constitution regarding their liberty of contract as well as of person, and the legislature of the State has no power to limit their right as proposed in this statute. All that it could properly do has been done by it with regard to the conduct of bakeries, as provided for in the other sections of the act above set forth. These several sections provide for the inspection of the premises where the bakery is carried on, with regard to furnishing proper wash-rooms and water-closets, apart from the bake-room, also with regard to providing proper drainage, plumbing and painting; the sections, in addition, provide for the height of the ceiling, the cementing or tiling of floors, where necessary in the opinion of the factory inspector, and for other things of [p62] that nature; alterations are also provided for and are to be made where necessary in the opinion of the inspector, in order to comply with the provisions of the statute. These various sections may be wise and valid regulations, and they certainly go to the full extent of providing for the cleanliness and the healthiness, so far as possible, of the quarters in which bakeries are to be conducted. Adding to all these requirements a prohibition to enter into any contract of labor in a

bakery for more than a certain number of hours a week is, in our judgment, so wholly beside the matter of a proper, reasonable and fair provision as to run counter to that liberty of person and of free contract provided for in the Federal Constitution.

It was further urged on the argument that restricting the hours of labor in the case of bakers was valid because it tended to cleanliness on the part of the workers, as a man was more apt to be cleanly when not overworked, and, if cleanly, then his "output" was also more likely to be so. What has already been said applies with equal force to this contention. We do not admit the reasoning to be sufficient to justify the claimed right of such interference. The State in that case would assume the position of a supervisor, or *pater familias*, over every act of the individual, and its right of governmental interference with his hours of labor, his hours of exercise, the character thereof, and the extent to which it shall be carried would be recognized and upheld. In our judgment, it is not possible, in fact, to discover the connection between the number of hours a baker may work in the bakery and the healthful quality of the bread made by the workman. The connection, if any exists, is too shadowy and thin to build any argument for the interference of the legislature. If the man works ten hours a day, it is all right, but if ten and a half or eleven, his health is in danger and his bread may be unhealthful, and, therefore, he shall not be permitted to do it. This, we think, is unreasonable, and entirely arbitrary. When assertions such as we have adverted to become necessary in order to give, if possible, a plausible foundation for the contention that the law is a "health law," [p63] it gives rise to at least a suspicion that there was some other



law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being men sui juris) in a private business, not dangerous in any degree to morals or in any real and substantial degree to the health of the employees. Under such circumstances, the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with without violating the Federal Constitution.

The judgment of the Court of Appeals of New York, as well as that of the Supreme Court and of the County Court of Oneida County, must be reversed, and the case remanded to [p65] the County Court for further proceedings not inconsistent with this opinion.

Reversed.

§ 110. *Hours of labor in bakeries and confectionery establishments.* -- No employee shall be required or permitted to work in a biscuit, bread or cake bakery or confectionery establishment more than sixty hours in any one week, or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week; nor more hours in any one week than will make an average of ten hours per day for the number of days during such week in which such employee shall work.

§ 111. *Drainage and plumbing of building and rooms occupied by bakeries.* -- All buildings or rooms occupied as biscuit, bread, pie or cake bakeries shall be drained and plumbed in a manner conducive to the proper

and healthful sanitary condition thereof, and shall be constructed with air shafts, windows or ventilating pipes, sufficient to insure ventilation. The factory inspector may direct the proper drainage, plumbing and ventilation of such rooms or buildings. No cellar or basement not now used for a bakery shall hereafter be so occupied or used unless the proprietor shall comply with the sanitary provisions of this article.

§ 112. *Requirements as to rooms, furniture, utensils and manufactured products.* -- Every room used for the manufacture of flour or meal food products shall be at least eight feet in height and shall have, if deemed necessary by the factory inspector, an impermeable floor constructed of cement, or of tiles laid in cement, or an additional flooring of wood properly saturated with linseed oil. The side walls of such rooms shall be plastered or wainscoted. The factory inspector may require the side walls and ceiling to be whitewashed at least once in three months. He may also require the woodwork of such walls to be painted. The furniture and utensils shall be so arranged as to be readily cleansed and not prevent the proper cleaning of any part of a room. The manufactured flour or meal food products shall be kept in dry and airy rooms, so arranged that the floors, shelves and all other facilities for storing the same can be properly cleaned. No domestic animal, except cats, shall be allowed to remain in a room used as a biscuit, bread, pie, or cake bakery, or any room in such bakery where flour or meal product are stored.

§ 113. *Wash-rooms and closets; sleeping places.* -- Every such bakery shall be provided with a proper washroom and water-closet or water-closet apart from the bake-room, or room where the manufacture of such

food product is conducted, and no water-closet, earth-closet, privy or ash-pit shall be within or connected directly with the bake-room of any bakery, hotel or public restaurant.

No person shall sleep in a room occupied as a bake-room. Sleeping places for the persons employed in the bakery shall be separate from the rooms where flour or meal food products are manufactured or stored. If the sleeping places are on the same floor where such products are manufactured, stored or sold, the factory inspector may inspect and order them put in a proper sanitary condition.

§ 114. *Inspection of bakeries.* -- The factory inspector shall cause all bakeries to be inspected. If it be found

upon such inspection that the bakeries so inspected are constructed and conducted in compliance with the provisions of this chapter, the factory inspector shall issue a certificate to the person owning or conducting such bakeries.

§ 115. *Notice requiring alterations.* -- If, in the opinion of the factory inspector, alterations are required in or upon premises occupied and used as bakeries in order to comply with the provisions of this article, a written notice shall be served by him upon the owner, agent or lessee of such premises, either personally or by mail, requiring such alteration to be made within sixty day after such service, and such alterations shall be made accordingly.

HARLAN, J., Dissenting Opinion

CÉLÈBRE!

SUPREME COURT OF THE UNITED STATES

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198 U.S. 45

Lochner v. New York

ERROR TO THE COUNTY COURT OF ONEIDA COUNTY, STATE OF NEW YORK

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No. 292 Argued: February 23, 24, 1905 -- Decided: April 17, 1905

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MR. JUSTICE HARLAN, with whom MR. JUSTICE WHITE and MR. JUSTICE DAY concurred, dissenting.

While this court has not attempted to mark the precise boundaries of what is called the police power of the State, the existence of the power has been uniformly recognized, both by the Federal and state courts.

All the cases agree that this power extends at least to the protection of the lives, the health, and the safety of the public against the injurious exercise by any citizen of his own rights.

In *Patterson v. Kentucky*, 97 U.S. 501, after referring to the general principle that rights given by the Constitution cannot be impaired by state legislation of any kind, this court said:

Subsequently in *Gundling v. Chicago*, 177 U.S. 183, 188, this court said:

Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and [p67] to what particular trade, business or occupation they shall apply are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference.

As stated in *Crowley v. Christensen*, 137 U.S. 86,

the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community.

In *St. Louis, Iron Mountain & c. Ry. v. Paul*, 173 U.S. 404, 409, and in *Knoxville Iron Co. v. Harbison*, 183 U.S. 13, 21, 22, it was distinctly adjudged that the right of contract was not "absolute in respect to every matter, but may be subjected to the restraints demanded by the safety and welfare of the State." Those cases illustrate the extent to which the State may restrict or interfere with the exercise of the right of contracting.

The authorities on the same line are so numerous that further citations are unnecessary.

I take it to be firmly established that what is called the liberty of contract may, within certain limits, be subjected to regulations designed and calculated to promote the general welfare or to guard the public health, the public morals or the public safety. "The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import," this court has recently said,

an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good.

*Jacobson v. Massachusetts*, 197 U.S. 11. [p68]

Granting then that there is a liberty of contract which cannot be violated even under the sanction of direct legislative enactment, but assuming, as according to settled law we may assume, that such liberty of contract is subject to such regulations as the State may reasonably prescribe for the common good and the wellbeing of society, what are the conditions under which the judiciary may declare such regulations to be in excess of legislative authority and void? Upon this point there is no room for dispute, for the rule is universal that a legislative enactment, Federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power. In *Jacobson v. Massachusetts*, supra, we said that the power of the courts to review legislative action in respect of a matter

affecting the general welfare exists only

when that which the legislature has done comes within the rule that, if a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law

-- citing *Mugler v. Kansas*, 123 U.S. 623, 661; *Minnesota v. Barber*, 136 U.S. 313, 320; *Atkin v. Kansas*, 191 U.S. 207, 223. If there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation. If the end which the legislature seeks to accomplish be one to which its power extends, and if the means employed to that end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the court cannot interfere. In other words, when the validity of a statute is questioned, the burden of proof, so to speak, is upon those who assert it to be unconstitutional. *McCulloch v. Maryland*, 4 Wheat. 316, 421.

Let these principles be applied to the present case. By the statute in question, it is provided that

No employee shall be required or permitted to work in a biscuit, bread or cake [p69] bakery or confectionery establishment more than sixty hours in any one week, or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week; nor more hours in any one week than will make an average of ten hours per day for the

number of days during such week in which such employee shall work.

It is plain that this statute was enacted in order to protect the physical wellbeing of those who work in bakery and confectionery establishments. It may be that the statute had its origin, in part, in the belief that employers and employees in such establishments were not upon an equal footing, and that the necessities of the latter often compelled them to submit to such exactions as unduly taxed their strength. Be this as it may, the statute must be taken as expressing the belief of the people of New York that, as a general rule, and in the case of the average man, labor in excess of sixty hours during a week in such establishments may endanger the health of those who thus labor. Whether or not this be wise legislation it is not the province of the court to inquire. Under our systems of government, the courts are not concerned with the wisdom or policy of legislation. So that, in determining the question of power to interfere with liberty of contract, the court may inquire whether the means devised by the State are germane to an end which may be lawfully accomplished and have a real or substantial relation to the protection of health, as involved in the daily work of the persons, male and female, engaged in bakery and confectionery establishments. But when this inquiry is entered upon, I find it impossible, in view of common experience, to say that there is here no real or substantial relation between the means employed by the State and the end sought to be accomplished by its legislation. *Mugler v. Kansas*, supra. Nor can I say that the statute has no appropriate or direct connection with that protection to health which each State owes to her citizens, *Patterson v. Kentucky*, supra; or that it is not

promotive of the health of the employees in question, Holden v. Hardy, Lawton v. Steele, [p70] supra; or that the regulation prescribed by the State is utterly unreasonable and extravagant or wholly arbitrary, Gundling v. Chicago, supra. Still less can I say that the statute is, beyond question, a plain, palpable invasion of rights secured by the fundamental law. Jacobson v. Massachusetts, supra. Therefore, I submit that this court will transcend its functions if it assumes to annul the statute of New York. It must be remembered that this statute does not apply to all kinds of business. It applies only to work in bakery and confectionery establishments, in which, as all know, the air constantly breathed by workmen is not as pure and healthful as that to be found in some other establishments or out of doors.

Professor Hirt, in his treatise on the "Diseases of the Workers," has said:

The labor of the bakers is among the hardest and most laborious imaginable, because it has to be performed under conditions injurious to the health of those engaged in it. It is hard, very hard work, not only because it requires a great deal of physical exertion in an overheated workshop and during unreasonably long hours, but more so because of the erratic demands of the public, compelling the baker to perform the greater part of his work at night, thus depriving him of an opportunity to enjoy the necessary rest and sleep, a fact which is highly injurious to his health.

Another writer says:

The constant inhaling of flour dust causes inflammation of the lungs and of the bronchial tubes. The eyes also suffer through this dust, which is responsible for the many cases of

running eyes among the bakers. The long hours of toil to which all bakers are subjected produce rheumatism, cramps and swollen legs. The intense heat in the workshops induces the workers to resort to cooling drinks, which, together with their habit of exposing the greater part of their bodies to the change in the atmosphere, is another source of a number of diseases of various organs. Nearly all bakers are pale-faced and of more delicate health than the workers of other crafts, which is chiefly due to their hard work and their irregular and unnatural mode of living, whereby the power of resistance against disease is [p71] greatly diminished. The average age of a baker is below that of other workmen; they seldom live over their fiftieth year, most of them dying between the ages of forty and fifty.

During periods of epidemic diseases, the bakers are generally the first to succumb to the disease, and the number swept away during such periods far exceeds the number of other crafts in comparison to the men employed in the respective industries. When, in 1720, the plague visited the city of Marseilles, France, every baker in the city succumbed to the epidemic, which caused considerable excitement in the neighboring cities and resulted in measures for the sanitary protection of the bakers.

In the Eighteenth Annual Report by the New York Bureau of Statistics of Labor it is stated that, among the occupations involving exposure to conditions that interfere with nutrition is that of a baker (p. 52). In that Report, it is also stated that,

from a social point of view, production will be increased by any change in industrial organization which diminishes the number of idlers, paupers and criminals. Shorter hours

of work, by allowing higher standards of comfort and purer family life, promise to enhance the industrial efficiency of the wage-working class -- improved health, longer life, more content and greater intelligence and inventiveness.

(P. 82).

Statistics show that the average daily working time among workmen in different countries is, in Australia, 8 hours; in Great Britain, 9; in the United States, 9; in Denmark, 9; in Norway, 10; Sweden, France and Switzerland, 10; Germany, 10; Belgium, Italy and Austria, 11, and in Russia, 12 hours.

We judicially know that the question of the number of hours during which a workman should continuously labor has been, for a long period, and is yet, a subject of serious consideration among civilized peoples and by those having special knowledge of the laws of health. Suppose the statute prohibited labor in bakery and confectionery establishments in excess of eighteen hours each day. No one, I take it, could dispute the power of the State to enact such a statute. But the statute [p72] before us does not embrace extreme or exceptional cases. It may be said to occupy a middle ground in respect of the hours of labor. What is the true ground for the State to take between legitimate protection, by legislation, of the public health and liberty of contract is not a question easily solved, nor one in respect of which there is or can be absolute certainty. There are very few, if any, questions in political economy about which entire certainty may be predicated. One writer on relation of the State to labor has well said:

The manner, occasion, and degree in which the State may interfere with the

industrial freedom of its citizens is one of the most debatable and difficult questions of social science.

Jevons, 33.

We also judicially know that the number of hours that should constitute a day's labor in particular occupations involving the physical strength and safety of workmen has been the subject of enactments by Congress and by nearly all of the States. Many if not most of those enactments fix eight hours as the proper basis of a day's labor.

I do not stop to consider whether any particular view of this economic question presents the sounder theory. What the precise facts are it may be difficult to say. It is enough for the determination of this case, and it is enough for this court to know, that the question is one about which there is room for debate and for an honest difference of opinion. There are many reasons of a weighty, substantial character, based upon the experience of mankind, in support of the theory that, all things considered, more than ten hours' steady work each day, from week to week, in a bakery or confectionery establishment, may endanger the health, and shorten the lives of the workmen, thereby diminishing their physical and mental capacity to serve the State, and to provide for those dependent upon them.

If such reasons exist, that ought to be the end of this case, for the State is not amenable to the judiciary in respect of its legislative enactments unless such enactments are plainly, palpably, beyond all question, inconsistent with the Constitution [p73] of the United States. We are not to presume that the State of New York has acted in bad

faith. Nor can we assume that its legislature acted without due deliberation, or that it did not determine this question upon the fullest attainable information, and for the common good. We cannot say that the State has acted without reason, nor ought we to proceed upon the theory that its action is a mere sham. Our duty, I submit, is to sustain the statute as (not being in conflict with the Federal Constitution for the reason -- and such is an all-sufficient reason -- it is not shown to be plainly and palpably inconsistent with that instrument. Let the State alone in the management of its purely domestic affairs so long as it does not appear beyond all question that it has violated the Federal Constitution. This view necessarily results from the principle that the health and safety of the people of a State are primarily for the State to guard and protect.

I take leave to say that the New York statute, in the particulars here involved, cannot be held to be in conflict with the Fourteenth Amendment without enlarging the scope of the Amendment far beyond its original purpose and without bringing under the supervision of this court matters which have been supposed to belong exclusively to the legislative departments of the several States when exerting their conceded power to guard the health and safety of their citizens by such regulations as they in their wisdom deem best. Health laws of every description constitute, said Chief Justice Marshall, a part of that mass of legislation which

embraces everything within the territory of a State not surrendered to the General Government; all which can be most advantageously exercised by the States themselves.

Gibbons v. Ogden, 9 Wheat. 1, 203. A decision that the New York statute is

void under the Fourteenth Amendment will, in my opinion, involve consequences of a far-reaching and mischievous character; for such a decision would seriously cripple the inherent power of the States to care for the lives, health and wellbeing of their citizens. Those are matters which can be best controlled by the States. [p74] The preservation of the just powers of the States is quite as vital as the preservation of the powers of the General Government.

When this court had before it the question of the constitutionality of a statute of Kansas making it a criminal offense for a contractor for public work to permit or require his employees to perform labor upon such work in excess of eight hours each day, it was contended that the statute was in derogation of the liberty both of employees and employer. It was further contended that the Kansas statute was mischievous in its tendencies. This court, while disposing of the question only as it affected public work, held that the Kansas statute was not void under the Fourteenth Amendment. But it took occasion to say what may well be here repeated:

The responsibility therefor rests upon legislators, not upon the courts. No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom, annul statutes that had received the sanction of the people's representatives. We are reminded by counsel that it is the solemn duty of the courts in cases before them to guard the constitutional rights of the citizen

against merely arbitrary power. That is unquestionably true. But it is equally true -- indeed, the public interests imperatively demand -- that legislative enactments should be recognized and enforced by the courts as embodying the will of the people unless they are plainly and palpably, beyond all  
HOLMES, J., Dissenting Opinion

question, in violation of the fundamental law of the Constitution.

Atkin v. Kansas, 191 U.S. 207, 223.

The judgment in my opinion should be affirmed.

SUPREME COURT OF THE UNITED STATES

198 U.S. 45

CÉLÈBRE!

Lochner v. New York

ERROR TO THE COUNTY COURT OF ONEIDA COUNTY, STATE OF NEW YORK

No. 292 Argued: February 23, 24, 1905 --- Decided: April 17, 1905

MR. JUSTICE HOLMES dissenting.

I regret sincerely that I am unable to agree with the judgment [p75] in this case, and that I think it my duty to express my dissent.

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we, as legislators, might think as injudicious, or, if you like, as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The

liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. The other day, we sustained the Massachusetts vaccination law. Jacobson v. Massachusetts, 197 U.S. 11, United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court. Northern Securities Co. v. United States, 193 U.S. 197. Two years ago, we upheld the prohibition of sales of stock on margins or for future delivery in the constitution of California. Otis v. Parker, 187 U.S. 606. The decision sustaining an eight hour law for miners is still recent. Holden v. Hardy, 169 U.S. 366. Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But



a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. [p76] It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss.

DAY, J., Opinion of the Court  
SUPREME COURT OF THE UNITED STATES

247 U.S. 251

Hammer v. Dagenhart

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

No. 704 Argued: April 15, 16, 1918 — Decided: June 3, 1918

MR. JUSTICE DAY delivered the opinion of the court.

A bill was filed in the United States District Court for the Western District of North Carolina by a father in his own behalf and as next friend of his two minor sons, one under the age of fourteen years and the other between the ages of fourteen and sixteen years, employees in a cotton mill at Charlotte, North Carolina, to enjoin the enforcement of the act of Congress intended to prevent interstate commerce in the products of child labor. Act of Sept. 1, 1916, c. 432, 39 Stat. 675.

The District Court held the act unconstitutional and entered a decree enjoining its enforcement. This appeal brings the case here. The first section of the act is in the margin. [\*] [p269]

Other sections of the act contain provisions for its enforcement and prescribe penalties for its violation.

The attack upon the act rests upon three propositions: first: it is not a regulation of interstate and foreign commerce; second: it contravenes the Tenth Amendment to the Constitution;

third: it conflicts with the Fifth Amendment to the Constitution.

The controlling question for decision is: is it within the authority of Congress in regulating commerce among the States to prohibit the transportation in interstate commerce of manufactured goods, the product of a factory in which, within thirty days prior to their removal therefrom, children under the age of fourteen have been employed or permitted to work, (or) children between the ages of fourteen and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of seven o'clock P.M. or before the hour of 6 o'clock A.M.?

The power essential to the passage of this act, the Government contends, is found in the commerce clause of the Constitution, which authorizes Congress to regulate commerce with foreign nations and among the States.

In *Gibbons v. Ogden*, 9 Wheat. 1, Chief Justice Marshall, speaking for this court and defining the extent and nature of the commerce power, said, "It is the power to regulate; that is, to prescribe the rule by which commerce

things which it may not, consistently with the guarantees of the Constitution, embrace.

In each of these instances, the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended.

This element is wanting in the present case. The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the States who employ children within the prohibited ages. The act, in its effect, does not regulate [p272] transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States.

The goods shipped are, of themselves, harmless. The act permits them to be freely shipped after thirty days from the time of their removal from the factory. When offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to federal control under the commerce power.

#### Commerce

consists of intercourse and traffic, and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities.

The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in

interstate commerce make their production a part thereof. *Delaware, Lackawanna & Western R.R. Co. v. Yurkonis*, 238 U.S. 439.

Over interstate transportation or its incidents, the regulatory power of Congress is ample, but the production of articles intended for interstate commerce is a matter of local regulation.

When the commerce begins is determined not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state.

(Mr. Justice Jackson in *In re Green*, 52 Fed. Rep. 113.) This principle has been recognized often in this court. *Coe v. Errol*, 116 U.S. 517; *Bacon v. Illinois*, 227 U.S. 504, and cases cited. If it were otherwise, all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the States, a result certainly not contemplated by the [p273] framers of the Constitution when they vested in Congress the authority to regulate commerce among the States. *Kidd v. Pearson*, 128 U.S. 1, 21.

It is further contended that the authority of Congress may be exerted to control interstate commerce in the shipment of child-made goods because of the effect of the circulation of such goods in other States where the evil of this class of labor has been recognized by local legislation, and the right to thus employ child labor has been more rigorously restrained than in the State of production. In other words, that the unfair competition thus engendered

may be controlled by closing the channels of interstate commerce to manufacturers in those States where the local laws do not meet what Congress deems to be the more just standard of other States.

There is no power vested in Congress to require the States to exercise their police power so as to prevent possible unfair competition. Many causes may cooperate to give one State, by reason of local laws or conditions, an economic advantage over others. The Commerce Clause was not intended to give to Congress a general authority to equalize such conditions. In some of the States, laws have been passed fixing minimum wages for women, in others, the local law regulates the hours of labor of women in various employments. Business done in such States may be at an economic disadvantage when compared with States which have no such regulations; surely, this fact does not give Congress the power to deny transportation in interstate commerce to those who carry on business where the hours of labor and the rate of compensation for women have not been fixed by a standard in use in other States and approved by Congress.

The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the [p274] States in their exercise of the police power over local trade and manufacture.

The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution.

Police regulations relating to the internal trade and affairs of the States have been uniformly recognized as within such control. "This," said this court in *United States v. Dewitt*, 9 Wall. 41, 45,

has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions that we think it unnecessary to enter again upon the discussion.

See *Keller v. United States*, 213 U.S. 138, 144, 145, 146. Cooley's Constitutional Limitations, 7th ed., p. 11.

In the judgment which established the broad power of Congress over interstate commerce, Chief Justice Marshall said (9 Wheat. 203):

They [inspection laws] act upon the subject before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government, all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state and those which respect turnpike roads, ferries, &c., are component parts of this mass.

And in *Dartmouth College v. Woodward*, 4 Wheat. 518, 629, the same great judge said:

That the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions,

adopted for internal government, and that [p275] the instrument they have given us is not to be so construed may be admitted.

That there should be limitations upon the right to employ children in mines and factories in the interest of their own and the public welfare, all will admit. That such employment is generally deemed to require regulation is shown by the fact that the brief of counsel states that every State in the Union has a law upon the subject, limiting the right to thus employ children. In North Carolina, the State wherein is located the factory in which the employment was had in the present case, no child under twelve years of age is permitted to work.

It may be desirable that such laws be uniform, but our Federal Government is one of enumerated powers; "this principle," declared Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, "is universally admitted."

A statute must be judged by its natural and reasonable effect. *Collins v. New Hampshire*, 171 U.S. 30, 33, 34. The control by Congress over interstate commerce cannot authorize the exercise of authority not entrusted to it by the Constitution. *Pipe Line Cases*, 234 U.S. 548, 560. The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions, as is the conservation of the supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution.

In interpreting the Constitution, it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly

delegated to the National Government are reserved. *Lane County v. Oregon*, 7 Wall. 71, 76. The power of the States to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent, and has never been surrendered to the general government. [p276] *New York v. Miln*, 11 Pet. 102, 139; *Slaughter House Cases*, 16 Wall. 36, 63; *Kidd v. Pearson, supra*. To sustain this statute would not be, in our judgment, a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the States.

We have neither authority nor disposition to question the motives of Congress in enacting this legislation. The purposes intended must be attained consistently with constitutional limitations, and not by an invasion of the powers of the States. This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, federal and state, to the end that each may continue to discharge, harmoniously with the other, the duties entrusted to it by the Constitution.

In our view, the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the States, a purely state authority. Thus, the act in a two-fold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over

commerce, but also exerts a power as to a purely local matter to which the federal authority does not extend. The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that, if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and, thus, our system of government be practically destroyed. [p277]

For these reasons, we hold that this law exceeds the constitutional authority of Congress. It follows that the decree of the District Court must be

Affirmed.

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Texte de la loi fédérale:

"That no producer, manufacturer, or dealer shall ship or deliver for shipment in interstate or foreign commerce any article or commodity the product of any mine or quarry, situated in the United States, in which within thirty days prior to the time of the removal of such product therefrom children under the age of sixteen years have been employed or permitted to work, or any article or commodity the product of ~~any~~ mill, cannery, workshop, factory, or manufacturing establishment, situated in the United States, in which within thirty days prior to the removal of such product therefrom children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen years and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of seven o'clock postmeridian, or before the hour of six o'clock antemeridian."

HOLMES, J., Dissenting Opinion

SUPREME COURT OF THE UNITED STATES

247 U.S. 251

Hammer v. Dagenhart

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE  
WESTERN DISTRICT OF NORTH CAROLINA

No. 704 Argued: April 15, 16, 1918 --- Decided: June 3, 1918

MR. JUSTICE HOLMES, dissenting.

The single question in this case is whether Congress has power to prohibit the shipment in interstate or foreign commerce of any product of a cotton mill situated in the United States

in which, within thirty days before the removal of the product, children under fourteen have been employed or children between fourteen and sixteen have been employed more than eight

hours in a day, or more than six days in any week, or between seven in the evening and six in the morning. The objection urged against the power is that the States have exclusive control over their methods of production, and that Congress cannot meddle with them, and, taking the proposition in the sense of direct intermeddling, I agree to it, and suppose that no one denies it. But if an act is within the powers specifically conferred upon Congress, it seems to me that it is not made any less constitutional because of the indirect effects that it may have, however obvious it may be that it will have those effects, and that we are not at liberty upon such grounds to hold it void.

The first step in my argument is to make plain what no one is likely to dispute — that the statute in question is within the power expressly given to Congress if considered only as to its immediate effects, and that, if invalid, it is so only upon some collateral ground. The statute confines itself to prohibiting the carriage of certain goods in interstate or foreign commerce. Congress is given power to regulate such commerce in unqualified terms. It would not be argued today that the power to regulate does not include the power to prohibit. Regulation means the prohibition of something, and when interstate [p278] commerce is the matter to be regulated, I cannot doubt that the regulation may prohibit any part of such commerce that Congress sees fit to forbid. At all events, it is established by the Lottery Case and others that have followed it that a law is not beyond the regulative power of Congress merely because it prohibits certain transportation out and out. *Champion v. Ames*, 188 U.S. 321, 355, 359, et seq. So I repeat that this statute, in its immediate operation, is

clearly within the Congress' constitutional power.

The question, then, is narrowed to whether the exercise of its otherwise constitutional power by Congress can be pronounced unconstitutional because of its possible reaction upon the conduct of the States in a matter upon which I have admitted that they are free from direct control. I should have thought that that matter had been disposed of so fully as to leave no room for doubt. I should have thought that the most conspicuous decisions of this Court had made it clear that the power to regulate commerce and other constitutional powers could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any State.

The manufacture of oleomargarine is as much a matter of state regulation as the manufacture of cotton cloth. Congress levied a tax upon the compound when colored so as to resemble butter that was so great as obviously to prohibit the manufacture and sale. In a very elaborate discussion, the present Chief Justice excluded any inquiry into the purpose of an act which, apart from that purpose, was within the power of Congress. *McCray v. United States*, 195 U.S. 27. As to foreign commerce see *Weber v. Freed*, 239 U.S. 325, 329; *Brolan v. United States*, 236 U.S. 216, 217; *Buttfield v. Stranahan*, 192 U.S. 470. Fifty years ago, a tax on state banks the obvious purpose and actual effect of which was to drive them, or at least [p279] their circulation, out of existence was sustained although the result was one that Congress had no constitutional power to require. The Court made short work of the argument as to the purpose of the act. "The judicial cannot prescribe to the legislative department

of the government limitations upon the exercise of its acknowledged powers." *Veazie Bank v. Fenno*, 8 Wall. 533. So it well might have been argued that the corporation tax was intended, under the guise of a revenue measure, to secure a control not otherwise belonging to Congress, but the tax was sustained, and the objection, so far as noticed, was disposed of by citing *McCray v. United States*. *Flint v. Stone Tracy Co.*, 220 U.S. 107. And to come to cases upon interstate commerce, notwithstanding *United States v. E. C. Knight Co.*, 156 U.S. 1, the Sherman Act has been made an instrument for the breaking up of combinations in restraint of trade and monopolies, using the power to regulate commerce as a foothold, but not proceeding because that commerce was the end actually in mind. The objection that the control of the States over production was interfered with was urged again and again, but always in vain. *Standard Oil Co. v. United States*, 221 U.S. 1, 68, 69. *United States v. American Tobacco Co.*, 221 U.S. 106, 184. *Hoke v. United States*, 227 U.S. 308, 321, 322. See finally and especially *Seven Cases of Eckman's Alternative v. United States*, 239 U.S. 510, 514, 515. The Pure Food and Drug Act which was sustained in *Hipolite Egg Co. v. United States*, 220 U.S. 45, with the intimation that "no trade can be carried on between the States to which it [the power of Congress to regulate commerce] does not extend," 57, applies not merely to articles that the changing opinions of the time condemn as intrinsically harmful, but to others innocent in themselves, simply on the ground that the order for them was induced by a preliminary fraud. *Weeks v. United States*, 245 U.S. 618. It does not matter whether the supposed [p280] evil precedes or follows the transportation. It is enough that, in the

opinion of Congress, the transportation encourages the evil. I may add that, in the cases on the so-called White Slave Act, it was established that the means adopted by Congress as convenient to the exercise of its power might have the character of police regulations. *Hoke v. United States*, 227 U.S. 308, 323. *Caminetti v. United States*, 242 U.S. 470, 492. In *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311, 328, *Leisy v. Hardin*, 135 U.S. 100, 108, is quoted with seeming approval to the effect that

a subject matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State unless placed there by congressional action. I see no reason for that proposition not applying here.

The notion that prohibition is any less prohibition when applied to things now thought evil I do not understand. But if there is any matter upon which civilized countries have agreed -- far more unanimously than they have with regard to intoxicants and some other matters over which this country is now emotionally aroused -- it is the evil of premature and excessive child labor. I should have thought that, if we were to introduce our own moral conceptions where in my opinion they do not belong, this was preeminently a case for upholding the exercise of all its powers by the United States.

But I had thought that the propriety of the exercise of a power admitted to exist in some cases was for the consideration of Congress alone, and that this Court always had disavowed the right to intrude its judgment upon questions of policy or morals. It is not for this Court to pronounce when prohibition is necessary to regulation -- if it ever may be necessary -- to say



that it is permissible as against strong drink, but not as against the product of ruined lives. [p281]

The act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line, they are no longer within their rights. If there were no Constitution and no Congress, their power to cross the line would depend upon their neighbors. Under the Constitution, such commerce belongs not to the States, but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the States. Instead of being encountered by a prohibitive tariff at her boundaries, the State encounters the public policy of the United States, which it is for Congress to express. The public policy of the United States

is shaped with a view to the benefit of the nation as a whole. If, as has been the case within the memory of men still living, a State should take a different view of the propriety of sustaining a lottery from that which generally prevails, I cannot believe that the fact would require a different decision from that reached in *Champion v. Ames*. Yet, in that case, it would be said with quite as much force as in this that Congress was attempting to intermeddle with the State's domestic affairs. The national welfare, as understood by Congress, may require a different attitude within its sphere from that of some self-seeking State. It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command.

MR. JUSTICE McKENNA MR. JUSTICE BRANDEIS and MR. JUSTICE CLARKE concur in this opinion.

# U.S. Supreme Court

MOREHEAD v. PEOPLE OF STATE OF NEW YORK,

298 U.S. 587 (1936)

298 U.S. 587

MOREHEAD, Warden,

v.

PEOPLE OF STATE OF NEW YORK ex rel. TIPALDO.\*

No. 838.

Argued April 28, 29, 1936.

Decided June 1, 1936.

[298 U.S. 587, 588] Mr. Henry Epstein, of Albany, N.Y., for petitioner.

Messrs. Nathan L. Miller and Arthur Levitt, both of New York City, for respondent.

[298 U.S. 587, 602] Mr. Dean G. Acheson, of Washington, D.C., for the States of Connecticut, Illinois, Massachusetts, New Hampshire, New Jersey, and Rhode Island, as amici curiae by special leave of Court.

Mr. Paul Windels, Corp. Counsel, of New York City (Messrs. Paxton Blair and Paul J. Kern, both of New York City, on the brief), amici curiae.

Mr. Justice BUTLER delivered the opinion of the Court.

This is a habeas corpus case originating in the supreme court of New York. Relator was indicted in the

county court of Kings county and sent to jail to await trial upon the charge that as manager of a laundry he failed to obey the mandatory order of the state industrial commissioner prescribing minimum wages for women employees. [298 U.S. 587, 603] The relator's petition for the writ avers that the statute, chapter 584 of the Laws of 1933 adding article 19 to the Labor Law N.Y. (Consol. Law, c. 31), under which the commissioner made the order, in so far as it purports to authorize him to fix women's wages, is repugnant to the due process clause, article 1, 6, of the Constitution of the State and the due process clause of the Fourteenth Amendment to the Constitution of the United States. The application for the writ is grounded upon the claim that the state statute is substantially identical with the minimum wage law enacted by Congress for the District of Columbia, 40 Stat. 960, which in 1923 was condemned by this court as repugnant to the due process clause of the Fifth N.Y.

Opinion of the Court:  
BUTLER  
SUTHERLAND  
VAN DEVANTER  
Mc REYNOLDS  
ROBERTS

dissenters:  
HUGHES  
BRANDEIS  
CARDOZO  
STONE

Amendment. Adkins v. Children's  
Hospital, 261 U.S. 525, 43 S. Ct. 394,  
24 A.L.R. 1238

The warden's return, without disclosing the commissioner's order, the prescribed wages, the findings essential to his jurisdiction to establish them, things done in pursuance of the act, or the allegations of the indictment, merely shows that under an order of the county court he was detaining relator for trial. The case was submitted on petition and return. The court dismissed the writ. People ex rel. Tipaldo v. Morehead, 156 Misc. 522, 282 N.Y.S. 576. Relator took the case to the Court of Appeals. It held the act repugnant to the due process clauses of the State and Federal Constitutions. 270 N.Y. 233, 200 N.E. 799. The remittitur directed that the order appealed from be reversed, the writ sustained, and the prisoner discharged; it certified that the federal constitutional question was presented and necessarily passed on. The supreme court entered judgment as directed. We granted a writ of certiorari. Morehead v. People of State of New York ex rel. Tipaldo, 297 U.S. 702, 56 S.Ct. 670.

*of New York*  
The act extends to women and minors in any 'occupation' which 'shall mean an industry, trade or business or branch thereof or class of work therein in which women or minors are gainfully employed, but shall not include domestic service in the home of the employer or labor [298 U.S. 587, 604] on a farm.' Section 551(6). It is not an emergency law. It does not regulate hours or any conditions affecting safety or protection of employees. It relates only to wages of adult women and minors. As the record is barren of details in respect of investigation, findings, amounts being paid women

workers in laundries or elsewhere prior to the order, or of things done to ascertain the minimum prescribed, we must take it as granted that, if the state is permitted as against employers and their women employees to establish and enforce minimum wages, that power has been validly exerted. It is to be assumed that the rates have been fairly made in accordance with the procedure prescribed by the act and in full compliance with the defined standards. If, consistently with the due process clause, the state may not enter upon regulation of the sort undertaken by the challenged enactment, then plainly it cannot by diligence to insure the establishment of just minima create power to enter that field. Cf. St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. -; Baltimore & Ohio R.R. v. United States, 298 U.S. 349, 56 S.Ct. 797, 80 L.Ed. -.

The Adkins Case, unless distinguishable, requires affirmance of the judgment below. The petition for the writ sought review upon the ground that this case is distinguishable from that one. No application has been made for reconsideration of the constitutional question there decided. 1 The validity of the principles upon which that decision rests is not challenged. This court confines itself to the ground upon which the writ was [298 U.S. 587/605] asked or granted. Alice State Bank v. Houston Pasture Co., 247 U.S. 240, 242, 38 S.Ct. 496; Clark v. Willard, 294 U.S. 211, 216, 55 S.Ct. 356, 98 A.L.R. 347. Here the review granted was no broader than that sought by the petitioner. Johnson v. Manhattan Ry. Co., 289 U.S. 479, 494, 53 S.Ct. 721. He is not entitled and does not ask to be heard upon the question whether the Adkins Case should be overruled. He maintains that

it may be distinguished on the ground that the statutes are vitally dissimilar.

The District of Columbia Act provided for a board to ascertain and declare 'standards of minimum wages' for women in any occupation and what wages were 'inadequate to supply the necessary cost of living to any such women workers to maintain them in good health and to protect their morals.' Section 9. Violations were punishable by fine and imprisonment. Section 18. The declared purposes were to protect women from conditions detrimental to their health and morals, resulting from wages inadequate to maintain decent standards of living. Section 23.

The New York act declares it to be against public policy for any employer to employ any woman at an oppressive and unreasonable wage ( section 552) defined as one which is 'both less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health.' Section 551(7). 'A fair wage' is one 'fairly and reasonably commensurate with the value of the service or class of service rendered.' Section 551(8). If the commissioner is of opinion that any substantial number of women in any occupation are receiving oppressive and unreasonable wages he shall appoint a wage board to report upon the establishment of minimum fair wage rates. Section 554. After investigation, the board shall submit a report including its recommendations as to minimum fair wage standards. Section 555.

And for administrative guidance, the act declares: 'In establishing a minimum fair wage for any service or class [298 U.S. 587, 606] of service under this article the commissioner and

the wages board without being bound by any technical rules of evidence or procedure (1) may take into account all relevant circumstances affecting the value of the service or class of service rendered, and (2) may be guided by like considerations as would guide a court in a suit for the reasonable value of services rendered where services are rendered at the request of an employer without contract as to the amount of the wage to be paid, and (3) may consider the wages paid in the state for work of like or comparable character by employers who voluntarily maintain minimum fair wage standards.' Section 551(8).

If the commissioner accepts the report, he shall publish it and a public hearing must be held. Section 556. If after the hearing he approves the report, he 'shall make a directory order which shall define minimum fair wage rates.' Section 557. Upon hearing and finding of disobedience the commissioner may publish the name of an employer as having failed to observe the directory order. Section 559: If, after a directory order has been in effect for nine months, the commissioner is of opinion that persistent nonobservance is a threat to the maintenance of the prescribed standards, he may after hearing make the order mandatory. Section 560. Violation of a mandatory order is a misdemeanor punishable by fine, imprisonment or both. Section 565(2).

Thus it appears: The minimum wage provided for in the District act was one not less than adequate 'to supply the necessary cost of living to any such women workers to maintain them in good health and to protect their morals.' Section 9. The New York act defines an oppressive and unreasonable wage as containing two elements. The one first mentioned is:

'less than the fair and reasonable value of the services rendered.' The other is: 'less than sufficient to meet the minimum cost of living necessary for health.' Section 551(7). The basis last mentioned is not to be distinguished from the living wage defined in the District act. The exertion of the granted power to prescribe minimum wages is by the state act conditioned upon a finding by the commissioner or other administrative agency that a substantial number of women in any occupation are receiving wages that are oppressive and unreasonable, i.e., less than value of the service and less than a living wage. That finding is essential to jurisdiction of the commissioner. In the state court there was controversy between the parties as to whether the 'minimum fair wage rates' are required to be established solely upon value of service or upon that value and the living wage. Against the contention of the attorney general, the Court of Appeals held that the minimum wage must be based on both elements.

Speaking through its chief judge, that court said (270 N.Y. 233, 200 N.E. 799, 800): 'We find no material difference between the act of Congress and this act of the New York State Legislature. The act of Congress, it is said, was to protect women from conditions resulting from wages which were inadequate to maintain decent standards of living.' The opinion then quotes from the brief of the attorney general: "The purpose of the statute in the Adkins Case was to guarantee a wage based solely upon the necessities of the workers. The statute did not provide for the wages to have any relationship to earning power; was applicable to all vocations and not to the character of the work. ... As contrasted with this statute, the New

York Minimum Wage Law provides a definite standard for wages paid. It provides that the worker is to be paid at least the value of the services rendered." The opinion continues: "This is a difference in phraseology and not in principle. The New York act, as above stated, prohibits an oppressive and unreasonable wage, which means both less than the fair and reasonable value of the services rendered and [298 U.S. 587, 608] less than sufficient to meet the minimum cost of living necessary for health. The act of Congress had one standard, the living wage; this state act has added another, reasonable value. The minimum wage must include both. What was vague before has not been made any clearer. One of the elements, therefore, in fixing the fair wage is the very matter which was the basis of the congressional act. Forcing the payment of wages at a reasonable value does not make inapplicable the principle and ruling of the Adkins Case. The distinctions between this case and the Adkins Case are difference in details, methods, and time; the exercise of legislative power to fix wages in any employment is the same.'

The petitioner does not suggest and reasonably it cannot be thought that, so far as concerns repugnancy to the due process clause, there is any difference between the minimum wage law for the District of Columbia and the clause of the New York act, 'less than sufficient to meet the minimum cost of living necessary for health.' Petitioner does not claim that element was validated by including with it the other ingredient, 'less than the fair and reasonable value of the services rendered.'

His brief repeats the state court's declaration: "The act of Congress had

one standard, the living wage; this State act has added another, reasonable value. The minimum wage must include both. What was vague before has not been made any clearer. One of the elements, therefore, in fixing the fair wage is the very matter which was the basis of the congressional act." Then he says: 'The italicized lines carry the Court's misconception of the statute. It is a basic misconception. From it flows the erroneous conclusion of the Court of Appeals that there exists no material difference between the two statutes .... Those two factors do not enter into the determination of the minimum 'fair wage' as in the statute defined, nor as determined in this case. The only basis for [298 U.S. 587, 609] evaluating and arriving at the 'fair minimum wage' is the fair value of the services rendered.'

There is no blinking the fact that the state court construed the prescribed standard to include cost of living or that petitioner here refuses to accept that construction. Petitioner's contention that the Court of Appeals misconstrued the act cannot be entertained. This court is without power to put a different construction upon the state enactment from that adopted by the highest court of the state. We are not at liberty to consider petitioner's argument based on the construction repudiated by that court. The meaning of the statute as fixed by its decision must be accepted here as if the meaning had been specifically expressed in the enactment. *Supreme Lodge, Knights of Pythias v. Meyer*, 265 U.S. 30, 32, 44 S.Ct. 432. Exclusive authority to enact carries with it final authority to say what the measure means. *Jones v. Prairie Oil & Gas Co.*, 273 U.S. 195, 200, 47 S.Ct. 338. The standard of 'minimum fair wage rates' for women workers to be prescribed must be considered as if both elements-value of service and

living wage-were embodied in the statutory definition itself. *International Harvester Co. v. Kentucky*, 234 U.S. 216, 220, 34 S.Ct. 853. As our construction of an act of Congress must be deemed by state courts to be the law of the United States, so this New York Act as construed by her court of last resort, must here be taken to express the intention and purpose of her lawmakers. *Green v. Lessee of Neal*, 6 Pet. 291, 295-298.

The state court rightly held that the Adkins Case controls this one and requires that relator be discharged upon the ground that the legislation under which he was indicted and imprisoned is repugnant to the due process clause of the Fourteenth Amendment.

The general statement in the New York Act of the fields of labor it includes, taken in connection with the work not covered, indicates legislative intention to reach [298 U.S. 587, 610] nearly all private employers of women. The act does not extend to men. It does extend to boys and girls under the age of 21 years but there is here involved no question as to its validity in respect of wages to be prescribed for them. Relator's petition for the writ shows that the charge against him is that as manager of a laundry he 'disobeyed a mandatory order prescribing certain minimum wages for certain adult women employees of the said laundry.' The rights of no other class of workers are here involved.

Upon the face of the act the question arises whether the state may impose upon the employers state-made minimum wage rates for all competent experienced women workers whom they may have in their service. That question involves another one. It is: Whether the state has power similarly

to subject to state-made wages all adult women employed in trade, industry or business, other than house and farm work. These were the questions decided in the Adkins Case. So far at least as concerns the validity of the enactment under consideration, the restraint imposed by the due process clause of the Fourteenth Amendment upon legislative power of the state is the same as that imposed by the corresponding provision of the Fifth Amendment upon the legislative power of the United States.

This court's opinion shows ( 261 U.S. 525, at pages 545, 546, 43 S.Ct. 394, 24 A.L.R. 1238): The right to make contracts about one's affairs is a part of the liberty protected by the due process clause. Within this liberty are provisions of contracts between employer and employee fixing the wages to be paid. In making contracts of employment, generally speaking, the parties have equal right to obtain from each other the best terms they can by private bargaining. Legislative abridgement of that freedom can only be justified by the existence of exceptional circumstances. Freedom of contract is the [298 U.S. 587, 611] general rule and restraint the exception. This court has found not repugnant to the due process clause statutes fixing rates and charges to be exacted by businesses impressed with a public interest, relating to contracts for the performance of public work, prescribing the character, methods and time of payment of wages, fixing hours of labor. Physical differences between men and women must be recognized in proper cases and legislation fixing hours or conditions of work may properly take them into account, but ( 261 U.S. 525, at page 553, 43 S.Ct. 394, 24 A. L.R. 1238) 'we cannot accept the doctrine that women of mature age, sui juris, require or may be

subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships. ... Enough has been said to show that the authority to fix hours of labor cannot be exercised except in respect of those occupations where work of long continued duration is detrimental to health. This court has been careful in every case where the question has been raised, to place its decision upon this limited authority of the Legislature to regulate hours of labor and to disclaim any purpose to uphold the legislation as fixing wages, thus recognizing an essential difference between the two. It seems plain that these decisions afford no real support for any form of law establishing minimum wages.'

The decision and the reasoning upon which it rests clearly show that the state is without power by any form of legislation to prohibit, change or nullify contracts between employers and adult women workers as to the amount of wages to be paid. [298 U.S. 587, 612] Then, the opinion emphasizes objections specifically applicable to the requirement that the minimum wages to be prescribed under the District act shall be adequate 'to supply the necessary cost of living to any such women workers to maintain them in good health and to protect their morals.' Section 9. Some of them were: The price fixed by the board need have no relation to earning powers, hours or place or character of work; it is based wholly on opinion of the board as to

what amount will be necessary to comply with the standard; it applies to every occupation without regard to the kind of work; the standard is so vague as to be impossible of practical application; the act takes account of the necessities of only the employee; to the extent that the sum fixed exceeds fair value of service rendered, it amounts to a compulsory exaction for the support of a partially indigent person for whose condition there rests upon the employer no peculiar responsibility; the statute exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business or the contract or the work the employee engages to do; the declared basis is not the value of the service rendered but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health and morals. The court said: The ethical right of every worker, man or woman, to have a living wage may be conceded. The fallacy of the proposed method of attaining it is that it assumes that every employer is bound at all events to furnish it. The moral requirement, implicit in every contract of employment, viz., that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored. The necessities of the employee are alone considered and these arise outside of the employment and are as great in one occupation as in another. [298 U.S. 587, 613] Illustrating particular constitutional difficulties encountered by the enactment then before us, the opinion proceeds ( 261 U.S. 525, at page 559, 43 S.Ct. 394, 401, 24 A.L.R. 1238): 'Should a statute undertake to vest in a commission power to determine the quantity of food necessary for individual support, and require the shopkeeper if he sell to the

individual at all, to furnish that quantity at not more than a fixed maximum, it would undoubtedly fall before the constitutional test. The fallacy of any argument in support of the validity of such a statute would be quickly exposed. The argument in support of that now being considered is equally fallacious, though the weakness of it may not be so plain. A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable. But a statute which prescribes payment without regard to any of these things, and solely with relation to circumstances apart from the contract of employment, the business affected by it, and the work done under it, is so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States.'

Petitioner does not attempt to support the act as construed by the state court. His claim is that it is to be tested here as if it did not include the cost of living and as if value of service was the sole standard. Plainly that position is untenable. If the state has power to single out for regulation the amount of wages to be paid women, the value of their services would be a material consideration. But that fact has no relevancy upon the question whether the state has any such power. And utterly without significance upon the question of power is the suggestion that the New York prescribed standard includes value of service with cost of living whereas the District of Columbia standard was based upon the latter- [298 U.S. 587, 614] alone. As shown above, the dominant issue in the Adkins Case was whether Congress had power to establish minimum



wages for adult women workers in the District of Columbia. The opinion directly answers in the negative. The ruling that defects in the prescribed standard stamped that act as arbitrary and invalid was an additional ground of subordinate consequence.

The dissenting opinion of Mr. Chief Justice Taft (in which Mr. Justice Sanford concurred) assumes ( 261 U.S. 525, at page 564, 43 S.Ct. 394, 403, 24 A.L.R. 1238) that the conclusion in this ( Adkins) Case rests on the distinction between a minimum of wages and a maximum of hours.' That is the only point he discussed; he did not refer to the validity of the standard prescribed by the act. The dissenting opinion of Mr. Justice Holmes begins ( 261 U.S. 525, at page 567, 43 S.Ct. 394, 404, 24 A.L.R. 1238): 'The question in this case is the broad one, Whether Congress can establish minimum rates of wages for women in the District of Columbia with due provision for special circumstances, or whether we must say that Congress had no power to meddle with the matter at all.' And, after assuming that women would not be employed at the wages fixed unless they were earned or unless the employer could pay them, the opinion says ( 261 U.S. 525, at page 570, 43 S.Ct. 394, 406, 24 A.L.R. 1238): 'But the ground on which the law is held to fail is fundamental and therefore it is unnecessary to consider matters of detail.' If the decision of the court turned upon the question of the validity of the particular standard, that question could not have been ignored by the justices who were in favor of upholding the act. Clearly they understood and rightly that, by the opinion of the court, it was held that Congress was without power to deal with the subject at all.

To distinguish this from the Adkins Case, petitioner refers to changes in conditions that have come since that decision, cites great increase during recent years in the number of women wage earners and invokes the first section of the act, called 'Factual background.' [298 U.S. 587, 615] The act is not to meet an emergency; it discloses a permanent policy; the increasing number of women workers suggests that more and more they are getting and holding jobs that otherwise would belong to men. The 'factual background' must be read in the light of the circumstances attending its enactment. The New York legislature passed two minimum wage measures and contemporaneously submitted them to the governor. One was approved; it is the act now before us. The other was vetoed and did not become law. They contained the same definitions of oppressive wage and fair wage and in general provided the same machinery and procedure culminating in fixing minimum wages by directory orders. The one vetoed was for an emergency; it extended to men as well as to women employees; it did not provide for the enforcement of wages by mandatory orders.

It is significant that their 'factual backgrounds' are much alike. They are indicated in the margin. 2 These [298 U.S. 587, 616] legislative declarations, in form of findings or recitals of fact, serve well to illustrate why any measure that deprives employers and adult women of freedom to agree upon wages, leaving employers and men employees free so to do, is necessarily arbitrary. Much, if not all that in them is said in justification of the regulations that the act imposes in respect of women's wages apply with equal force in support of the same regulation of men's wages. While men are left free.

to fix their wages by agreement with employers, it would be fanciful to suppose that the regulation of women's wages would be useful to prevent or lessen the evils listed in the first section of the act. Men in need of work are as likely as women to accept the low wages offered by unscrupulous employers. Men in greater number than women support themselves and dependents and because of need will work for whatever wages they can get and that without regard to the value of the service and even though the pay is less than minima prescribed in accordance with this act. It is plain that, under circumstances such as those por- [298 U.S. 587, 617] trayed in the 'factual background,' prescribing of minimum wages for women alone would unreasonably restrain them in competition with men and tend arbitrarily to deprive them of employment and a fair chance to find work.

This court, on the authority of the Adkins Case and with the acquiescence of all the justices who dissented from the decision,<sup>3</sup> held repugnant to the due process clause of the Fourteenth Amendment statutes of Arizona and Arkansas,<sup>4</sup> respectively, fixing minimum wages for women. Murphy v. Sardell, 269 U.S. 530, 46 S.Ct. 22; Donham v. West- Nelson Mfg. Co., 273 U.S. 657, 47 S.Ct. 343. We have adhered to the principle there applied and cited it as a guide in other cases. Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 29 A.L. R. 1446; Wolff Packing Co. v. Industrial Court, 262 U.S. 522, 534, 43 S.Ct. 630, 27 A.L.R. 1280; Ribnik v. McBride, 277 U.S. 350, 356, 48 S.Ct. 545, 56 A.L.R. 1327. See Near v. Minnesota, 283 U.S. 697, 707, 708 S., 51 S.Ct. 625. States having similar enactments have construed it to prevent the fixing of wages for adult

women. Topeka Laundry Co. v. Court of In- [298 U.S. 587, 618] dustrial Relations, 119 Kan. 12, 237 P. 1041; Stevenson v. St. Clair, 161 Minn. 444, 201 N.W. 629. See Folding Furniture Works v. Industrial Commission (D.C.) 300 F. 991; People v. Successors of Lournaga & Co., 32 Porto Rico, 766.

The New York court's decision conforms to ours in the Adkins Case, and the later rulings that we have made on the authority of that case. That decision was deliberately made upon careful consideration of the oral arguments and briefs of the respective parties and also of briefs submitted on behalf of states and others as amici curiae. In the Arizona case the attorney general sought to distinguish the District of Columbia act from the legislation then before us and insisted that the latter was a valid exertion of the police power of the state. Counsel for the California commission submitted a brief amicus curiae in which he elaborately argued that our decision in the Adkins Case was erroneous and ought to be overruled: In the Arkansas case the state officers, appellants there, by painstaking and thorough brief presented arguments in favor of the same contention. But this court, after thoughtful attention to all that was suggested against that decision, adhered to it as sound. And in each case, being clearly of opinion that no discussion was required to show that, having regard to the principles applied in the Adkins Case, the state legislation fixing wages for women was repugnant to the due process clause of the Fourteenth Amendment, we so held and upon the authority of that case affirmed per curiam the decree enjoining its enforcement. It is equally plain that the judgment in the case now before us must also be affirmed.

It is so ordered.

Mr. Chief Justice HUGHES, dissenting.

I am unable to concur in the opinion in this case. In view of the difference between the statutes involved, I [298 U.S. 587, 619] cannot agree that the case should be regarded as controlled by Adkins v. Children's Hospital, 261 U.S. 525, 43 S.Ct. 394, 24 A.L.R. 1238. And I can find nothing in the Federal Constitution which denies to the state the power to protect women from being exploited by overreaching employers through the refusal of a fair wage as defined in the New York statute and ascertained in a reasonable manner by competent authority.

First. Relator in his petition for habeas corpus raises no question as to the fairness of the minimum wage he was required to pay. He does not challenge the regularity of the proceedings by which the amount of that wage was determined. We must assume that none of the safeguards of the statute was ignored and that its provisions for careful and deliberate procedure were followed in all respects. It is important at the outset to note the requirements of that procedure, as they at once dispose of any question of arbitrary procedural action.

The statute states its objectives. It defines an 'oppressive and unreasonable wage' as one which 'is both less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health.' (Section 551(7)). It defines a 'fair wage' as one 'fairly and reasonably commensurate with the value of the service or class of service rendered.' Section 551 (8). It relates to an

industry, trade or business, other than domestic service or labor on a farm. The industrial commissioner is authorized to investigate and ascertain the wages of women and minors. If he is of the opinion that any substantial number of women or minors are receiving 'oppressive and unreasonable' wages, he must appoint a wage board to make report. That board is to be composed of not more than three representatives of employers, an equal number of representatives of employees, and not more than three disinterested persons representing the public. The wage board is fully equipped with [298 U.S. 587, 620] authority to conduct a comprehensive investigation. It may differentiate and classify employments in any occupation according to the nature of the service rendered. It may recommend minimum fair wage rates varying with localities. It may recommend a suitable scale of rates for learners and apprentices which may be less than those recommended for experienced women or minor workers. The wage board may take into account all relevant circumstances affecting the value of the service or class of service. It may be guided by such considerations as would guide a court in a suit for the reasonable value of services rendered. It may consider the wages paid in the state for work of like or comparable character by employers who voluntarily maintain minimum fair wage standards.

The commissioner may approve or disapprove the report of the wage board. If the commissioner disapproves, he may resubmit the matter to the same or a new board. In case the report is approved, the commissioner is to make a 'directory order' which defines minimum 'fair wage rates' and is to include appropriate administrative regulations.

wage may be conceded. One of the declared and important purposes of trade organizations is to secure it. And with that principle and with every legitimate effort to realize it in fact, no one can quarrel; but the fallacy of the proposed method of attaining it is that it assumes that every employer is bound at all events to furnish it. The moral requirement implicit in every contract of employment, viz. that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored. ... A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable. But a statute which prescribes payment without regard to any of these things, and solely with relation to circumstances apart from the contract of employment, the business affected by it, and the work done under it, is so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States.'

As the New York act is free of that feature, so strongly denounced, the question comes before us in a new aspect. The Court was closely divided in the Adkins Case, and that decision followed an equal division of the Court, after reargument, in Stettler v. O'Hara, 243 U.S. 629, 37 S. Ct. 475, with respect to the validity of the minimum wage law of Oregon. Such divisions are at times unavoidable, but they point to the desirability of fresh consideration when there are material differences in the cases presented. The fact that in the Adkins Case there were dissenting opinions maintaining the validity of

the federal statute, despite the nature of the standard it set up, brings out in stronger relief the ground which was taken most emphatically by the majority in that case, and that there would have been a majority for the decision in the absence of that ground must be a matter of conjecture. With that ground absent, the Adkins Case ceases to be a precise authority.

We have here a question of constitutional law of grave importance, applying to the statutes of several states in a matter of profound public interest. I think that we should deal with that question upon its merits, without feeling that we are bound by a decision which on its facts is not strictly in point.

Fourth. The validity of the New York act must be considered in the light of the conditions to which the exercise of the protective power of the state was addressed.

The statute itself recites these conditions and the state has submitted a voluminous factual brief for the purpose of showing from various official statistics that these recitals have abundant support. Judge Lehman, in his dissenting opinion in the Court of Appeals (270 N.Y. 233, 200 N.E. 799, 804), states that the relator 'does not challenge these findings of fact by the Legislature, nor does he challenge the statements in the 'factual brief' submitted by the respondent to sustain and amplify these findings.' The majority opinion in the Court of Appeals has nothing to the contrary. Nor is the statement of the conditions which influenced the legislative action challenged, or challengeable, upon the record here. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-80, 31 S.Ct. 337, Ann. Cas. 1912C, 160; Radice v. New York, 264 U.S. 292, 294

, 44 S. Ct. 325; State of Ohio ex rel. Clarke v. Deckebach, 274 U.S. 392, 397, 47 S.Ct. 630; O'Gorman & Young v. Hartford Fire Insurance Co., 282 U.S. 251, 257, 258 S., 51 S.Ct. 130, 72 A.L.R. 1163; ebbia v. New York, 291 U.S. 502, 530, 54 S.Ct. 505, 89 A.L.R. 1469; Borden's Farm Products Co. v. Baldwin, 293 U.S. 194, 209, 55 S.Ct. 187. [298 U.S. 587, 626] The Legislature finds that the employment of women and minors in trade and industry in the state of New York at wages unreasonably low and not fairly commensurate with the value of the services rendered is a matter of vital public concern; that many women and minors are not as a class upon a level of equality in bargaining with their employers in regard to minimum fair wage standards, and that 'freedom of contract' as applied to their relations with employers is illusory; that, by reason of the necessity of seeking support for themselves and their dependents, they are forced to accept whatever wages are offered; and that judged by any reasonable standard, wages in many instances are fixed by chance and caprice and the wages accepted are often found to bear no relation to the fair value of the service. The Legislature further states that women and minors are peculiarly subject 'to the over-reaching of inefficient, harsh or ignorant employers,' and that, in the absence of effective minimum fair wage rates, the constant lowering of wages by unscrupulous employers constitutes a serious form of unfair competition against other employers, reduces the purchasing power of the workers, and threatens the stability of industry. The Legislature deemed it essential to seek the correction of these evils by the exercise of the police power for the protection of industry and of the women and minors employed therein and of the public interest of the

community at large in their health and well-being and in the prevention of the deterioration of the race.' Section 550 (Labor Law).

In the factual brief, statistics are presented showing the increasing number of wage-earning women, and that women are in industry and in other fields of employment because they must support themselves and their dependents. Data are submitted, from reports of the Women's Bureau of the United States Department of Labor, showing such discrepancies and variations in wages paid for [298 U.S. 587, 627] identical work as to indicate that no relationship exists between the value of the services rendered and the wages paid. It also appears that working women are largely unorganized and that their bargaining power is relatively weak. The seriousness of the social problem is presented. Inquiries by the New York State Department of Labor in cooperation with the Emergency Relief Bureau of New York City disclosed the large number of women employed in industry whose wages were insufficient for the support of themselves and those dependent upon them. For that reason they had been accepted for relief and their wages were being supplemented by payments from the Emergency Relief Bureau. Thus the failure of over-reaching employers to pay to women the wages commensurate with the value of services rendered has imposed a direct and heavy burden upon the taxpayers. The weight of this burden and the necessity for taking reasonable measures to reduce it, in the light of the enormous annual budgetary appropriation for the Department of Public Welfare of New York City, is strikingly exhibited in the brief filed by the corporation counsel of the city as an amicus curiae.

We are not at liberty to disregard these facts. We must assume that they exist and examine respondent's argument from that standpoint. That argument is addressed to the fundamental postulate of liberty of contract. I think that the argument fails to take account of established principles and ignores the historic relation of the state to the protection of women.

Fifth. We have had frequent occasion to consider the limitations of liberty of contract. While it is highly important to preserve that liberty from arbitrary and capricious interference, it is also necessary to prevent its abuse, as otherwise it could be used to override all public interests and thus in the end destroy the very freedom of opportunity which it is designed to safeguard. [298 U.S. 587, 628] We have repeatedly said that liberty of contract is a qualified and not an absolute right. 'There is no absolute freedom to do as one wills or to contract as one chooses. ... Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.' Chicago, Burlington & Quincy R. R. Co. v. McGuire, 219 U.S. 549, 567, 31 S.Ct. 259, 262. The numerous restraints that have been sustained have often been recited. Id., 219 U.S. 549, at page 568, 31 S.Ct. 259; Nebbia v. New York, supra, 291 U.S. 502, at pages 526-528, 54 S.Ct. 505, 89 A.L. R. 1469. Thus we have upheld the limitation of hours of employment in mines and smelters (Holden v. Hardy, 169 U.S. 366, 18 S.Ct. 383); the requiring of redemption in cash of store orders or other evidences of indebtedness issued in payment of wages (Knoxville Iron Co. v. Harbison, 183 U.S. 13, 22 S.Ct. 4); the prohibition of contracts for options to sell or buy grain or other commodities

at a future time (Booth v. Illinois, 184 U.S. 425, 22 S.Ct. 425); the forbidding of advance payments to seamen (Patterson v. The Bark Eudora, 190 U.S. 169, 23 S.Ct. 821); the prohibition of contracts to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as originally produced in the mine (McLean v. Arkansas, 211 U.S. 539, 29 S.Ct. 206); the regulation of the size and weight of loaves of bread (Schmidinger v. Chicago, 226 U.S. 578, 33 S.Ct. 182, Ann.Cas.1914B, 284; Petersen Baking Co. v. Bryan, 290 U.S. 570, 54 S.Ct. 277, 90 A.L.R. 1285); the regulation of insurance rates (German Alliance Insurance Co. v. Lewis, 233 U.S. 389, 34 S.Ct. 612, L.R.A.1915C, 1189; O'Gorman & Young v. Hartford Fire Insurance Co., supra); the regulation of the size and character of packages in which goods are sold (Armour & Co. v. North Dakota, 240 U.S. 510, 36 S.Ct. 440); the limitation of hours of employment in manufacturing establishments with a specified allowance of overtime payment (Bunting v. Oregon, 243 U.S. 426, 37 S.Ct. 435, Ann.Cas.1918A, 1043); the regulation of sales of stocks and bonds to prevent fraud (Hall v. Geiger-Jones Co., 242 U.S. 539, 37 S.Ct. 217, L.R.A.1917F, 514, Ann.Cas.1917C, 643); the regulation of the price of milk (Nebbia v. New York, [298 U.S. 587, 629] supra). The test of validity is not artificial. It is whether the limitation upon the freedom of contract is arbitrary and capricious or one reasonably required in order appropriately to serve the public interest in the light of the particular conditions to which the power is addressed.

When there are conditions which specially touch the health and well-being of women, the state may exert its

power in a reasonable manner for their protection, whether or not a similar regulation is, or could be, applied to men. The distinctive nature and function of women-their particular relation to the social welfare-has put them in a separate class. This separation and corresponding distinctions in legislation is one of the outstanding traditions of legal history. The Fourteenth Amendment found the states with that protective power and did not take it away or remove the reasons for its exercise. Changes have been effected within the domain of state policy and upon an appraisal of state interests. We have not yet arrived at a time when we are at liberty to override the judgment of the state and decide that women are not the special subject of exploitation because they are women and as such are not in a relatively defenceless position.

More than forty years after the adoption of the Fourteenth Amendment, we said that it did not interfere with state power by creating 'a fictitious equality.' Quong Wing v. Kirkendall, 223 U.S. 59, 63, 32 S.Ct. 92, 193. We called attention to the ample precedents in regulatory provisions for a classification on the basis of sex. We said: 'It has been recognized with regard to hours of work. ... It is recognized in the respective rights of husband and wife in land during life in the inheritance after the death of the spouse. Often it is expressed in the time fixed for coming of age. ... The particular points at which that difference shall be emphasized by legislation are [298 U.S. 587, 630] largely in the power of the state.' Id. Not long before the decision in the Quong Wing Case, the question had received elaborate consideration in Muller v. Oregon, 208 U.S. 412, 28 S.Ct. 324, 326, 13 Ann. Cas. 957, where a regulation of the

working hours of women was sustained. We thought that the disadvantage at which woman was placed in the struggle for subsistence was obvious and we emphasized the point that she 'becomes an object of public interest and care in order to preserve the strength and vigor of the race.' We added that 'though limitations upon personal and contractual rights may be removed by legislation,' woman will still be in a situation 'where some legislation to protect her seems necessary to secure a real equality of right.' She therefore still may be 'properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained.' Muller v. Oregon, supra, 208 U.S. 412, at pages 421, 422, 28 S.Ct. 324, 327, 13 Ann.Cas. 957. This ruling has been followed in Riley v. Massachusetts, 232 U.S. 671, 34 S.Ct. 469, Miller v. Wilson, 236 U.S. 373, 35 S.Ct. 342, L.R.A.1915F, 829, and Bosley v. McLaughlin, 236 U.S. 385, 35 S.Ct. 345, with respect to hours of work, and in Radice v. New York, supra, in relation to night work.

If liberty of contract were viewed from the standpoint of absolute right, there would be as much to be said against a regulation of the hours of labor of women as against the fixing of a minimum wage. Restriction upon hours is a restriction upon the making of contracts and upon earning power. But the right being a qualified one, we must apply in each case the test of reasonableness in the circumstances disclosed. Here, the special conditions calling for the protection of women, and for the protection of society itself, are abundantly shown. The legislation is not less in the interest of the community as a whole than in the interest of the women employees who

are paid less than the value of their services. That lack must be made goods out of the public [298 U.S. 587, 631] purse. Granted that the burden of the support of women who do not receive a living wage cannot be transferred to employers who pay the equivalent of the service they obtain, there is no reason why the burden caused by the failure to pay that equivalent should not be placed upon those who create it. The fact that the state cannot secure the benefit to society of a living wage for women employees by any enactment which bears unreasonably upon employers does not preclude the state from seeking its objective by means entirely fair both to employers and the women employed.

In the statute before us, no unreasonableness appears. The end is legitimate and the means appropriate. I think that the act should be upheld.

I am authorized to state that Mr. Justice BRANDEIS, Mr. Justice STONE, and Mr. Justice CARDOZO join in this opinion.

Mr. Justice STONE.

While I agree with all that the CHIEF JUSTICE has said, I would not make the differences between the present statute and that involved in the Adkins Case the sole basis of decision. I attach little importance to the fact that the earlier statute was aimed only at a starvation wage and that the present one does not prohibit such a wage unless it is also less than the reasonable value of the service. Since neither statute compels employment at any wage, I do not assume that employer in one case, more than in the other, would pay the minimum wage if the service were worth less.

The vague and general pronouncement of the Fourteenth Amendment against deprivation of liberty without due process of law is a limitation of legislative power, not a formula for its exercise. It does not purport to say in what particular manner that power shall be exerted. [298 U.S. 587, 632] It makes no finespun distinctions between methods which the legislature may and which it may not choose to solve a pressing problem of government. It is plain too, that, unless the language of the amendment and the decisions of this Court are to be ignored, the liberty which the amendment protects is not freedom from restraint of all law or of any law which reasonable men may think an appropriate means for dealing with any of those matters of public concern with which it is the business of government to deal. There is grim irony in speaking of the freedom of contract of those who, because of their economic necessities, give their service for less than is needful to keep body and soul together. But if this is freedom of contract no one has ever denied that it is freedom which may be restrained, notwithstanding the Fourteenth Amendment, by a statute passed in the public interest.

In many cases this Court has sustained the power of legislatures to prohibit or restrict the terms of a contract, including the price term, in order to accomplish what the legislative body may reasonably consider a public purpose. They include cases, which have neither been overruled nor discredited, in which the sole basis of regulation was the fact that circumstances, beyond the control of the parties, had so seriously curtailed the regulative power of competition as to place buyers or sellers at a disadvantage in the



# U.S. Supreme Court

WEST COAST HOTEL CO. V. PARRISH , 300 U.S. 379  
(1937)

Opinion of the Court:

HUGHES  
BRANDEIS  
CARDOZO  
STONE  
ROBERTS

300 U.S. 379

WEST COAST HOTEL CO.  
V.  
PARRISH et ux.  
No. 293.

dissenters:

SUTHERLAND  
VAN DEVANTER  
Mc REYNOLDS  
BUTLER

Argued Dec. 16, 17, 1936.  
Decided March 29, 1937.

Appeal from the Supreme Court of the State of Washington. [ West Coast Hotel Co. v. Parrish 300 U.S. 379 (1937) ] [300 U.S. 379 , 380]

Messrs. E. L. Skeel and John W. Roberts, both of Seattle, Wash., for appellant.

Messrs. W. A. Toner, of Olympia, Wash., and

[300 U.S. 379 , 381] Sam M. Driver, of Wenatchee, Wash., for appellees.

[300 U.S. 379 , 386]

Mr. Chief Justice HUGHES delivered the opinion of the Court.

This case presents the question of the constitutional validity of the minimum wage law of the state of Washington.

The act, entitled 'Minimum Wages for Women,' authorizes the fixing of minimum wages for women and

minors. Laws 1913 (Washington) c. 174, p. 602, Remington's Rev.Stat.(1932) 7623 et seq. It provides:

'Section 1. The welfare of the State of Washington demands that women and minors be protected from conditions of labor which have a pernicious effect on their health and morals. The State of Washington, therefore, exercising herein its police and sovereign power declares that inadequate wages and unsanitary conditions of labor exert such pernicious effect.

'Sec. 2. It shall be unlawful to employ women or minors in any industry or occupation within the State of Washington under conditions of labor detrimental to their health or morals; and it shall be unlawful to employ [300 U.S. 379 , 387] women workers in any industry within the State of Washington at wages which are not adequate for their maintenance.

'Sec. 3. There is hereby created a commission to be known as the 'Industrial Welfare Commission' for the State of Washington, to establish such standards of wages and conditions of labor for women and minors employed within the State of Washington, as shall be held hereunder to be reasonable and not detrimental to health and morals, and which shall be sufficient for the decent maintenance of women.'

Further provisions required the commission to ascertain the wages and conditions of labor of women and minors within the state. Public hearings were to be held. If after investigation the commission found that in any occupation, trade, or industry the wages paid to women were 'inadequate to supply them necessary cost of living and to maintain the workers in health,' the commission was empowered to call a conference of representatives of employers and employees together with disinterested persons representing the public. The conference was to recommend to the commission, on its request, an estimate of a minimum wage adequate for the purpose above stated, and on the approval of such a recommendation it became the duty of the commission to issue an obligatory order fixing minimum wages. Any such order might be reopened and the question reconsidered with the aid of the former conference or a new one. Special licenses were authorized for the employment of women who were 'physically defective or crippled by age or otherwise,' and also for apprentices, at less than the prescribed minimum wage.

By a later act the Industrial Welfare Commission was abolished and its duties were assigned to the Industrial Welfare Committee consisting of the

Director of Labor and Industries, the Supervisor of Industrial Insurance, [300 U.S. 379, 388] the Supervisor of Industrial Relations, the Industrial Statistician, and the Supervisor of Women in Industry. Laws 1921 (Washington) c. 7, p. 12, Remington's Rev.Stat.(1932) 10840, 10893.

The appellant conducts a hotel. The appellee Elsie Parrish was employed as a chambermaid and (with her husband) brought this suit to recover the difference between the wages paid her and the minimum wage fixed pursuant to the state law. The minimum wage was \$14.50 per week of 48 hours. The appellant challenged the act as repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States. The Supreme Court of the state, reversing the trial court, sustained the statute and directed judgment for the plaintiffs. Parrish v. West Coast Hotel Co., 185 Wash. 581, 55 P.(2d) 1083. The case is here on appeal.

The appellant relies upon the decision of this Court in Adkins v. Children's Hospital, 261 U.S. 525, 24 A.L.R. 1238, which held invalid the District of Columbia Minimum Wage Act (40 Stat. 960) which was attacked under the due process clause of the Fifth Amendment. On the argument at bar, counsel for the appellees attempted to distinguish the Adkins Case upon the ground that the appellee was employed in a hotel and that the business of an innkeeper was affected with a public interest. That effort at distinction is obviously futile, as it appears that in one of the cases ruled by the Adkins opinion the employee was a woman employed as an elevator operator in a hotel. Adkins v. Lyons, 261 U.S. 525, at page 542, 395, 24 A.L.R. 1238.

The recent case of Morehead v. New York ex rel. Tiplado, 298 U.S. 587, 103 A.L.R. 1445, came here on certiorari to the New York court which had held the New York minimum wage act for women to be invalid. A minority of this Court thought that the New York statute was distinguishable in a material feature from that involved in the Adkins Case and that for that and other reasons the New [300 U.S. 379, 389] York statute should be sustained. But the Court of Appeals of New York had said that it found no material difference between the two statutes and this Court held that the 'meaning of the statute' as fixed by the decision of the state court 'must be accepted here as if the meaning had been specifically expressed in the enactment.' 298 U.S. 587, at page 609, 56 S. Ct. 918, 922, 103 A.L.R. 1445. That view led to the affirmance by this Court of the judgment in the Morehead Case, as the Court considered that the only question before it was whether the Adkins Case was distinguishable and that reconsideration of that decision\* had not been sought. Upon that point the Court said: The petition for the writ sought review upon the ground that this case (Morehead) is distinguishable from that one (Adkins). No application has been made for reconsideration of the constitutional question there decided. The validity of the principles upon which that decision rests is not challenged. This court confines itself to the ground upon which the writ was asked or granted. \* \* \* Here the review granted was no broader than sought by the petitioner. \* \* \* He is not entitled and does not ask to be heard upon the question whether the Adkins Case should be overruled. He maintains that it may be distinguished on the ground that the statutes are vitally dissimilar.

\*i.e.  
Adkins

298 U.S. 587, at pp. 604, 605, 920, 103 A.L.R. 1445.

We think that the question which was not deemed to be open in the Morehead Case is open and is necessarily presented here. The Supreme Court of Washington has upheld the minimum wage statute of that state. It has decided that the statute is a reasonable exercise of the police power of the state. In reaching that conclusion, the state court has invoked principles long established by this Court in the application of the Fourteenth Amendment. The state court has refused to regard the decision in the Adkins Case as determinative and has pointed to our decisions both before and since that case as justifying its position. We are of the opinion that this ruling of [300 U.S. 379, 390] the state court demands on our part a re-examination of the Adkins Case. The importance of the question, in which many states having similar laws are concerned, the close division by which the decision in the Adkins Case was reached, and the economic conditions which have supervened, and in the light of which the reasonableness of the exercise of the protective power of the state must be considered, make it not only appropriate, but we think imperative, that in deciding the present case the subject should receive fresh consideration.

The history of the litigation of this question may be briefly stated. The minimum wage statute of Washington was enacted over twenty-three years ago. Prior to the decision in the instant case, it had twice been held valid by the Supreme Court of the state. Larsen v. Rice, 100 Wash. 642, 171 P. 1037; Spokane Hotel Co. v. Younger, 113 Wash. 359, 194 P. 595. The Washington statute is essentially the

same as that enacted in Oregon in the same year. Laws 1913 (Oregon) c. 62, p. 92. The validity of the latter act was sustained by the Supreme Court of Oregon in *Stettler v. O'Hara*, 69 Or. 519, 139 P. 743, L.R.A. 1917C, 944, Ann.Cas.1916A, 217, and *Simpson v. O'Hara*, 70 Or. 261, 141 P. 158. These cases, after reargument, were affirmed here by an equally divided court, in 1917. 243 U.S. 629. The law of Oregon thus continued in effect. The District of Columbia Minimum Wage Law (40 Stat. 960) was enacted in 1918. The statute was sustained by the Supreme Court of the District in the *Adkins Case*. Upon appeal the Court of Appeals of the District first affirmed that ruling, but on rehearing reversed it and the case came before this Court in 1923. The judgment of the Court of Appeals holding the act invalid was affirmed, but with Chief Justice Taft, Mr. Justice Holmes, and Mr. Justice Sanford dissenting, and Mr. Justice Brandeis taking no part. The dissenting opinions took the ground that the decision was at variance with the [300 U.S. 379, 391] principles which this Court had frequently announced and applied. In 1925 and 1927, the similar minimum wage statutes of Arizona and Arkansas were held invalid upon the authority of the *Adkins Case*. The Justices who had dissented in that case bowed to the ruling and Mr. Justice Brandeis dissented. *Murphy v. Sardell*, 269 U.S. 530; *Donham v. West-Nelson Co.*, 273 U.S. 657. The question did not come before us again until the last term in the *Morehead Case*, as already noted. In that case, briefs supporting the New York statute were submitted by the states of Ohio, Connecticut, Illinois, Massachusetts, New Hampshire, New Jersey, and Rhode Island. 298 U.S. page 604, note, 103 A.L.R. 1445. Throughout this entire period the Washington statute

now under consideration has been in force.

The principle which must control our decision is not in doubt. The constitutional provision invoked is the due process clause of the Fourteenth Amendment governing the states, as the due process clause invoked in the *Adkins Case* governed Congress. In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process. [300 U.S. 379, 392] This essential limitation of liberty in general governs freedom of contract in particular. More than twenty-five years ago we set forth the applicable principle in these words, after referring to the cases where the liberty guaranteed by the Fourteenth Amendment had been broadly described. 1

'But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified, and not an absolute, right. There is no absolute freedom to do as one wills or to

contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.' Chicago, Burlington & Quincy R. Co. v. McGuire, 219 U.S. 549, 565, 262.

This power under the Constitution to restrict freedom of contract has had many illustrations. 2 That it may be exercised in the public interest with respect to contracts [300 U.S. 379, 393] between employer and employee is undeniable. Thus statutes have been sustained limiting employment in underground mines and smelters to eight hours a day (Holden v. Hardy, 169 U.S. 366); in requiring redemption in cash of store orders or other evidences of indebtedness issued in the payment of wages (Knoxville Iron Co. v. Harbison, 183 U.S. 13); in forbidding the payment of seamen's wages in advance (Patterson v. The Bark Eudora, 190 U.S. 169); in making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as originally produced in the mine (McLean v. Arkansas, 211 U.S. 539); in prohibiting contracts limiting liability for injuries to employees (Chicago, Burlington & Quincy R. Co. v. McGuire, supra); in limiting hours of work of employees in manufacturing establishments (Bunting v. Oregon, 243 U.S. 426, Ann.Cas.1918A, 1043); and in maintaining workmen's compensation laws (New York Central R. Co. v. White, 243 U.S. 188, L.R.A.1917D, 1, Ann.Cas.1917D, 629; Mountain Timber Co. v. Washington,

243 U.S. 219, Ann.Cas.1917D, 642). In dealing with the relation of employer and employed, the Legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. Chicago, Burlington & Quincy R. Co. v. McGuire, supra, 219 U.S. 549, at page 570.

The point that has been strongly stressed that adult employees should be deemed competent to make their own contracts was decisively met nearly forty years ago in Holden v. Hardy, supra, where we pointed out the inequality in the footing of the parties. We said (Id., 169 U.S. 366, 397, 390):

'The legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that [300 U.S. 379, 394] their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employes, 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.'

And we added that the fact 'that both parties are of full age, and competent to contract, does not necessarily

deprive the state of the power to interfere, where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. 'The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer.'

It is manifest that this established principle is peculiarly applicable in relation to the employment of women in whose protection the state has a special interest. That phase of the subject received elaborate consideration in *Muller v. Oregon* (1908) 208 U.S. 412, 326, 13 Ann.Cas. 957, where the constitutional authority of the state to limit the working hours of women was sustained. We emphasized the consideration that 'woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence' and that her physical well-being 'becomes an object of public interest and care in order to preserve the strength and vigor of the race.' We emphasized the need of protecting women against oppression despite her possession of contractual rights. We said that 'though limitations upon personal and contractual rights may be removed by legislation, there is that in her [300 U.S. 379, 395] disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right.' Hence she was 'properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained.'

We concluded that the limitations which the statute there in question 'places upon her contractual powers, upon her right to agree with her employer, as to the time she shall labor' were 'not imposed solely for her benefit, but also largely for the benefit of all.' Again, in *Quong Wing v. Kirkendall*, 223 U.S. 59, 63, in referring to a differentiation with respect to the employment of women, we said that the Fourteenth Amendment did not interfere with state power by creating a 'fictitious equality.' We referred to recognized classifications on the basis of sex with regard to hours of work and in other matters, and we observed that the particular points at which that difference shall be enforced by legislation were largely in the power of the state. In later rulings this Court sustained the regulation of hours of work of women employees in *Riley v. Massachusetts*, 212 U.S. 671 (factories), *Miller v. Wilson*, 236 U.S. 373, L.R.A. 1915F, 829 (hotels), and *Bosley v. McLaughlin*, 236 U.S. 385 (hospitals).

This array of precedents and the principles they applied were thought by the dissenting Justices in the *Adkins* Case to demand that the minimum wage statute be sustained. The validity of the distinction made by the Court between a minimum wage and a maximum of hours in limiting liberty of contract was especially challenged. 261 U.S. 525, at page 564, 403, 24 A.L.R. 1238. That challenge persists and is without any satisfactory answer. As Chief Justice Taft observed: 'In absolute freedom of contract the one term is as important as the other, for both enter equally into the consideration given and received, a restriction as to [300 U.S. 379, 396] the one is not any greater in essence than the other, and is of the same kind.'

One is the multiplier and the other the multiplicand.' And Mr. Justice Holmes, while recognizing that 'the distinctions of the law are distinctions of degree,' could 'perceive no difference in the kind or degree of interference with liberty, the only matter with which we have any concern, between the one case and the other. The bargain is equally affected whichever half you regulate.' Id., 261 U.S. 525, at p. 569, 43 S. Ct. 394, 405, 24 A.L.R. 1238.

One of the points which was pressed by the Court in supporting its ruling in the Adkins Case was that the standard set up by the District of Columbia Act did not take appropriate account of the value of the services rendered. In the Morehead Case, the minority thought that the New York statute had met that point in its definition of a 'fair wage' and that it accordingly presented a distinguishable feature which the Court could recognize within the limits which the Morehead petition for certiorari was deemed to present. The Court, however, did not take that view and the New York Act was held to be essentially the same as that for the District of Columbia. The statute now before us is like the latter, but we are unable to conclude that in its minimum wage requirement the state has passed beyond the boundary of its broad protective power.

The minimum wage to be paid under the Washington statute is fixed after full consideration by representatives of employers, employees, and the public. It may be assumed that the minimum wage is fixed in consideration of the services that are performed in the particular occupations under normal conditions. Provision is made for special licenses at less wages in the case of women who are incapable of full service. The statement of Mr. Justice Holmes in the Adkins Case is

pertinent: 'This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as [300 U.S. 379, 397] the minimum requirement of health and right living. It is safe to assume that women will not be employed at even the lowest wages allowed unless they earn them, or unless the employer's business can sustain the burden. In short the law in its character and operation is like hundreds of so-called police laws that have been up-held.' 261 U.S. 525, at page 570, 406, 24 A.L.R. 1238. And Chief Justice Taft forcibly pointed out the consideration which is basic in a statute of this character: 'Legislatures which adopt a requirement of maximum hours or minimum wages may be presumed to believe that when sweating employers are prevented from paying unduly low wages by positive law they will continue their business, abating that part of their profits, which were wrung from the necessities of their employees, and will concede the better terms required by the law, and that while in individual cases, hardship may result, the restriction will enure to the benefit of the general class of employees in whose interest the law is passed, and so to that of the community at large.' Id., 261 U.S. 525, at page 563, 403, 24 A.L.R. 1238.

We think that the views thus expressed are sound and that the decision in the Adkins Case was a departure from the true application of the principles governing the regulation by the state of the relation of employer and employed.

Those principles have been reenforced by our subsequent decisions. Thus in Radice v. New York, 264 U.S. 292, we sustained the New York statute which restricted the employment of women in restaurants at night. In O'Gorman & Young v. Hartford Fire Insurance

Company, 282 U.S. 251, 72 A.L.R. 1163, which upheld an act regulating the commissions of insurance agents, we pointed to the presumption of the constitutionality of a statute dealing with a subject within the scope of the police power and to the absence of any factual foundation of record for deciding that the limits of power had been transcended. In *Nebbia v. New York*, 291 U.S. 502, 89 A.L.R. 1469, dealing [300 U.S. 379, 398] with the New York statute providing for minimum prices for milk, the general subject of the regulation of the use of private property and of the making of private contracts received an exhaustive examination, and we again declared that if such laws 'have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of our process are satisfied'; that 'with the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal'; that 'times without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.' *Id.*, 291 U.S. 502, at pages 537, 538, 516, 89 A.L.R. 1469.

With full recognition of the earnestness and vigor which characterize the prevailing opinion in the Adkins Case, we find it impossible to reconcile that ruling with these well-considered declarations. What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of

women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end? The Legislature of the state was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances. The Legislature was entitled to adopt measures to reduce the evils of the 'sweating system,' the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition. The Legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many states evidences a deep-seated conviction both as to the presence of the evil and as to the means adapted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the Legislature is entitled to its judgment.

There is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being, but casts a direct burden for



their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. It is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land. While in the instant case no factual brief has been presented, there is no reason to doubt that the state of Washington has encountered the same social problem that is present elsewhere. The community is not bound to provide what is in effect a subsidy for unconscionable employers. The [300 U.S. 379, 400] community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest. The argument that the legislation in question constitutes an arbitrary discrimination, because it does not extend to men, is unavailing. This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach. The Legislature 'is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest.' If 'the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied.' There is no 'doctrinaire requirement' that the legislation should be couched in all embracing terms. Carroll v. Greenwich Insurance Co., 199 U.S. 401, 411; Patson v. Pennsylvania, 232 U.S. 138, 144; Keokee Coke Co. v. Taylor, 234 U.S. 224, 227; Sproles

v. binford, 286 U.S. 374, 396, 588; Semler v. Oregon Board, 294 U.S. 608, 610, 611, 571. This familiar principle has repeatedly been applied to legislation which singles out women, and particular classes of women, in the exercise of the state's protective power. Miller v. Wilson, supra, 236 U.S. 373, at page 384, L.R.A. 1915F, 829; Bosley v. McLaughlin, supra, 236 U.S. 385, at pages 394, 395; Radice v. New York, supra, 264 U.S. 292, at pages 295-298, 326, 327. Their relative need in the presence of the evil, no less than the existence of the evil itself, is a matter for the legislative judgment.

Our conclusion is that the case of Adkins v. Children's Hospital, supra, should be, and it is, overruled. The judgment of the Supreme Court of the state of Washington is affirmed.

Affirmed.

Mr. Justice SUTHERLAND.

Mr. Justice VAN DEVANTER, Mr. Justice McREYNOLDS, Mr. Justice BUTLER, and I think the judgment of the court below should be reversed, [300 U.S. 379, 401] The principles and authorities relied upon to sustain the judgment were considered in Adkins v. Children's Hospital, 261 U.S. 525, 24 A.L.R. 1238, and Morehead v. New York ex rel. Tipaldo, 298 U.S. 587, 103 A.L.R. 1445, and their lack of application to cases like the one in hand was pointed out. A sufficient answer to all that is now said will be found in the opinions of the court in those cases. Nevertheless, in the circumstances, it seems well to restate our reasons and conclusions.

Under our form of government, where the written Constitution, by its own

meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it.'

The Adkins Case dealt with an Act of Congress which had passed the scrutiny both of the legislative and executive branches of the government. We recognized that [300 U.S. 379 , 405] thereby these departments had affirmed the validity of the statute, and properly declared that their determination must be given great weight, but we then concluded, after thorough consideration that their view could not be sustained. We think it not inappropriate now to add a word on that subject before coming to the question immediately under review.

The people by their Constitution created three separate, distinct, independent, and coequal departments of government. The governmental structure rests, and was intended to rest, not upon any one or upon any two, but upon all three of these fundamental pillars. It seems unnecessary to repeat, what so often has been said, that the powers of these departments are different and are to be exercised independently. The differences clearly and definitely appear in the Constitution. Each of the departments is an agent of its creator; and one department is not and cannot be the agent of another. Each is answerable to its creator for what it does, and not to another agent. The view, therefore, of the Executive and of Congress that an act is constitutional is persuasive in a high degree; but it is not controlling.

Coming, then, to a consideration of the Washington statute, it first is to be observed that it is in every substantial respect identical with the statute involved in the Adkins Case. Such

vices as existed in the latter are present in the former. And if the Adkins Case was properly decided, as we who join in this opinion think it was, it necessarily follows that the Washington statute is invalid.

In support of minimum-wage legislation, it has been urged, on the one hand, that great benefits will result in favor of underpaid labor, and, on the other hand, that the danger of such legislation is that the minimum will tend to become the maximum and thus bring down the [300 U.S. 379 , 406] earnings of the more efficient toward the level of the less-efficient employees. But with these speculations we have nothing to do. We are concerned only with the question of constitutionality.

That the clause of the Fourteenth Amendment which forbids a state to deprive any person of life, liberty, or property without due process of law includes freedom of contract is so well settled as to be no longer open to question. Nor reasonably can it be disputed that contracts of employment of labor are included in the rule. *Adair v. United States*, 208 U.S. 161, 174 , 175, 280, 13 Ann.Cas. 764; *Coppage v. Kansas*, 236 U.S. 1, 10, 14, L.R.A. 1915C, 960. In the first of these cases, Mr. Justice Harlan, speaking for the Court, said, 'The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. \* \* \* In all such particulars the employer and the employee 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.'

legislation, the power was exercised arbitrarily. On the other hand, if such legislation in respect of men was properly omitted on the ground that it would be unconstitutional, the same conclusion of unconstitutionality is inescapable in respect of similar legislative restraint in the case of women. Adkins Case, 261 U.S. 525, 553, 399, 24 A.L.R. 1238.

Finally, it may be said that a statute absolutely fixing wages in the various industries at definite sums and forbidding employers and employees from contracting for any other than those designated would probably not be thought to be constitutional. It is hard to see why the power to fix minimum wages does not connote a like power in respect of maximum wages. And yet, if both powers be exercised in such a way that the minimum and the maximum so nearly approach each other as to [300 U.S. 379, 414] become substantially the same, the right to make any contract in respect of wages will have been completely abrogated.

A more complete discussion may be found in the Adkins and Tipaldo Cases cited supra.

#### Footnotes

[ Footnote 1 ] Allgeyer v. Louisiana, 165 U.S. 578; Lochner v. New York,

198 U.S. 45, 3 Ann.Cas. 1133; Adair v. United States, 208 U.S. 167, 13 Ann.Cas. 764.

[ Footnote 2 ] Munn v. Illinois, 94 U.S. 113; Railroad Commission Cases, 116 U.S. 307, 388, 1191; Wilcox v. Consolidated Gas Co., 212 U.S. 19, 48 L.R.A.(N. S.) 1134, 15 Ann.Cas. 1034; Atkin v. Kansas, 191 U.S. 207; Mugler v. Kansas, 123 U.S. 623; Crowley v. Christensen, 137 U.S. 86; Gundling v. Chicago, 177 U.S. 183; Booth v. Illinois, 184 U.S. 425; Schmidinger v. Chicago, 226 U.S. 578; Armour & Co. v. North Dakota, 240 U.S. 510, Ann.Cas.1916D, 548; National Union Fire Insurance Co. v. Wanberg, 260 U.S. 71; Radice v. New York, 264 U.S. 292; Yeiser v. Dysart, 267 U.S. 540; Liberty Warehouse Company v. Burley Tobacco Growers' Association, 276 U.S. 71, 97, 297; Highland v. Russell Car Co., 279 U.S. 253, 261, 316; O'Gorman & Young v. Hartford Insurance Co., 282 U.S. 251, 72 A.L.R. 1163; Hardware Insurance Co. v. Glidden Co., 284 U.S. 151, 157, 70; Packer Corporation v. Utah, 285 U.S. 105, 111, 275, 79 A.L.R. 546; Stephenson v. Binford, 287 U.S. 251, 274, 188, 87 A.L.R. 721; Hartford Accident Co. v. Nelson Co., 291 U.S. 352, 360, 395; Petersen Baking Co. v. Bryan, 290 U.S. 570, 90 A.L.R. 1285; Nebbia v. New York, 291 U.S. 502, 527, 529, 511, 512, 89 A.L.R. 1469.

SUPREME COURT OF THE UNITED STATES

317 U.S. 111

Wickard v. Filburn

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE  
SOUTHERN DISTRICT OF OHIO

No. 59 Argued: May 4, 1942 --- Decided: November 9, 1942

MR. JUSTICE JACKSON delivered the opinion of the Court.

The appellee filed his complaint against the Secretary of Agriculture of the United States, three members of the County Agricultural Conservation Committee for Montgomery County, Ohio, and a member of the State Agricultural Conservation Committee for Ohio. He sought to enjoin enforcement against himself of the marketing penalty imposed by the amendment of May 26, 1941, [n1] to the Agricultural Adjustment Act of 1938, [n2] upon that part of his 1941 wheat crop which was available for marketing in excess of the marketing quota established for his farm. He also sought a declaratory judgment that the wheat marketing quota provisions of the Act, as amended and applicable to him, were unconstitutional because not sustainable [p114] under the Commerce Clause or consistent with the Due Process Clause of the Fifth Amendment.

The Secretary moved to dismiss the action against him for improper venue, but later waived his objection and filed an answer. The other appellants moved to dismiss on the ground that

they had no power of authority to enforce the wheat marketing quota provisions of the Act, and, after their motion was denied, they answered, reserving exceptions to the ruling on their motion to dismiss. [n3] The case was submitted for decision on the pleadings and upon a stipulation of facts.

The appellee for many years past has owned and operated a small farm in Montgomery County, Ohio, maintaining a herd of dairy cattle, selling milk, raising poultry, and selling poultry and eggs. It has been his practice to raise a small acreage of winter wheat, sown in the Fall and harvested in the following July; to sell a portion of the (crop) to feed part to poultry and livestock on the farm, some of which is sold; to use some in making flour for home consumption, and to keep the rest for the following seeding. The intended disposition of the crop here involved has not been expressly stated. *recolte*

In July of 1940, pursuant to the Agricultural Adjustment Act of 1938, as then amended, there were established

for the appellee's 1941 crop a wheat acreage allotment of 11.1 acres and a normal yield of 20.1 bushels of wheat an acre. He was given notice of such allotment in July of 1940, before the Fall planting of his 1941 crop of wheat, and again in July of 1941, before it was harvested. He sowed, however, 23 acres, and harvested from his 11.9 acres of excess acreage 239 bushels, which, under the terms of the Act as amended on May 26, 1941, constituted farm [p115] marketing excess, subject to a penalty of 49 cents a bushel, or \$117.11 in all. The appellee has not paid the penalty, and he has not postponed or avoided it by storing the excess under regulations of the Secretary of Agriculture, or by delivering it up to the Secretary. The Committee, therefore, refused him a marketing card, which was, under the terms of Regulations promulgated by the Secretary, necessary to protect a buyer from liability to the penalty and upon its protecting [en. [n4]

The general scheme of the Agricultural Adjustment Act of 1938 as related to wheat is to control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce. [n5] Within prescribed limits and by prescribed standards, the Secretary of Agriculture is directed to ascertain and proclaim each year a national acreage allotment for the next crop of wheat, which is then apportioned to the states and their counties, and is eventually broken up into allotments for individual farms. [n6] Loans and payments to wheat farmers are authorized in stated circumstances. [n7]

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The Act further provides that, whenever it appears that the total supply of wheat as of the beginning of

any marketing year, beginning July 1, will exceed a normal year's domestic consumption and export by more than 35 percent, the Secretary shall so proclaim not later than May 15 prior to the beginning of such marketing year, and that, during the marketing year, a compulsory national marketing quota shall be in effect with respect to the marketing [p116] of wheat. [n8] Between the issuance of the proclamation and June 10, the Secretary must, however, conduct a referendum of farmers who will be subject to the quota, to determine whether they favor or oppose it; and, if more than one-third of the farmers voting in the referendum do oppose, the Secretary must, prior to the effective date of the quota, by proclamation suspend its operation. [n9]

On May 19, 1941, the Secretary of Agriculture made a radio address to the wheat farmers of the United States in which he advocated approval of the quotas and called attention to the pendency of the amendment of May 26, 1941, which had at the time been sent by Congress to the White House, and pointed out its provision for an increase in the loans on wheat to 85 percent of parity. He made no mention of the fact that it also increased the penalty from 15 cents a bushel to one-half of the parity loan rate of about 98 cents, but stated that,

Because of the uncertain world situation, we deliberately planted several million extra acres of wheat. . . Farmers should not be penalized because they have provided insurance against shortages of food.

Pursuant to the Act, the referendum of wheat growers was held on May 31, 1941. According to the required published statement of the Secretary of

Agriculture, 81 percent of those voting favored the marketing quota, with 19 percent opposed.

The court below held, with one judge dissenting, that the speech of the Secretary invalidated the referendum, and that the amendment of May 26, 1941,

insofar as it increased the penalty for the farm marketing excess over the fifteen cents per bushel prevailing at the time of planting and subjected the entire crop to a lien for the payment thereof,

should not be applied to the appellee because, [p117] as so applied, it was retroactive, and in violation of the Fifth Amendment, and, alternatively, because the equities of the case so required. 43 F.Supp. 1017. Its Judgment permanently enjoined appellants from collecting a marketing penalty of more than 15 cents a bushel on the farm marketing excess of appellee's 1941 wheat crop, from subjecting appellee's entire 1941 crop to a lien for the payment of the penalty, and from collecting a 15-cent penalty except in accordance with the provisions of § 339 of the Act as that section stood prior to the amendment of May 26, 1941. [n10] The Secretary and his codefendants have appealed. [n11]

I

The holding of the court below that the Secretary's speech invalidated the referendum is manifest error. Read as a whole and in the context of world events that constituted his principal theme, the penalties of which he spoke were more likely those in the form of ruinously low prices resulting from the excess supply, rather than the penalties prescribed in the Act. But,

under any interpretation, the speech cannot be given the effect of invalidating the referendum. There is no evidence that any voter put upon the Secretary's words the interpretation that impressed the court below or was in any way misled. There is no showing that the speech influenced the outcome of the referendum. The record, in fact, does not show that any, and does not suggest a basis for even a guess as to how many, of the voting farmers dropped work to listen to "Wheat Farmers and the Battle for [p118] Democracy" at 11:30 in the morning of May 19th, which was a busy hour in one of the busiest of seasons. If this discourse intended reference to this legislation at all, it was, of course, a public Act, whose terms were readily available, and the speech did not purport to be an exposition of its provisions.

To hold that a speech by a Cabinet officer, which failed to meet judicial ideals of clarity, precision, and exhaustiveness, may defeat a policy embodied in an Act of Congress would invest communication between administrators and the people with perils heretofore unsuspected. Moreover, we should have to conclude that such an officer is able to do by accident what he has no power to do by design. Appellee's complaint, insofar as it is based on this speech, is frivolous, and the injunction, insofar as it rests on this ground, is unwarranted. *United States v. Rock Royal Cooperative*, 307 U.S. 533.

II

It is urged that, under the Commerce Clause of the Constitution, Article I, § 8, clause 3, Congress does not possess the power it has in this instance sought to exercise. The question would merit little

consideration, since our decision in United States v. Darby, 312 U.S. 100, [n12] sustaining the federal power to regulate production of goods for commerce, except for the fact that this Act extends federal regulation to production not intended in any part for commerce, but wholly for consumption on the farm. The Act includes a definition of "market" and its derivatives, so that, as related to wheat, in addition to its conventional meaning, it also means to dispose of

by feeding (in any [p119] form) to poultry or livestock which, or the products of which, are sold, bartered, or exchanged, or to be so disposed of. [n13]

Hence, marketing quotas not only embrace all that may be sold without penalty, but also what may be consumed on the premises. Wheat produced on excess acreage is designated as "available for marketing" as so defined, and the penalty is imposed thereon. [n14] Penalties do not depend upon whether any part of the wheat, either within or without the quota, is sold or intended to be sold. The sum of this is that the Federal Government fixes a quota including all that the farmer may harvest for sale or for his own farm needs, and declares that wheat produced on excess acreage may neither be disposed of nor used except upon payment of the penalty, or except it is stored as required by the Act or delivered to the Secretary of Agriculture.

Appellee says that this is a regulation of production and consumption of wheat. Such activities are, he urges, beyond the reach of Congressional power under the Commerce Clause, since they are local in character, and their effects upon interstate commerce are, at most, "indirect." In answer, the

Government argues that the statute regulates neither production nor consumption, but only marketing, and, in the alternative, that, if the Act does go beyond the regulation of marketing, it is sustainable as a "necessary and proper" [n15] implementation of the power of Congress over interstate commerce.

The Government's concern lest the Act be held to be a regulation of production or consumption, rather than of marketing, is attributable to a few dicta and decisions of this Court which might be understood to lay it down that activities such as "production," "manufacturing," and [p120] "mining" are strictly "local" and, except in special circumstances which are not present here, cannot be regulated under the commerce power because their effects upon interstate commerce are, as matter of law, only "indirect." [n16] Even today, when this power has been held to have great latitude, there is no decision of this Court that such activities may be regulated where no part of the product is intended for interstate commerce or intermingled with the subjects thereof. We believe that a review of the course of decision under the Commerce Clause will make plain, however, that questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as "production" and "indirect" and foreclose consideration of the actual effects of the activity in question upon interstate commerce.

At the beginning, Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded. Gibbons v. Ogden, 9 Wheat. 1, 194-195. He made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed

from political, rather than from judicial, processes. Id. at 197. [p121]

For nearly a century, however, decisions of this Court under the Commerce Clause dealt rarely with questions of what Congress might do in the exercise of its granted power under the Clause, and almost entirely with the permissibility of state activity which it was claimed discriminated against or burdened interstate commerce. During this period, there was perhaps little occasion for the affirmative exercise of the commerce power, and the influence of the Clause on American life and law was a negative one, resulting almost wholly from its operation as a restraint upon the powers of the states. In discussion and decision, the point of reference, instead of being what was "necessary and proper" to the exercise by Congress of its granted power, was often some concept of sovereignty thought to be implicit in the status of statehood. Certain activities such as "production," "manufacturing," and "mining" were occasionally said to be within the province of state governments and beyond the power of Congress under the Commerce Clause. [n17]

It was not until 1887, with the enactment of the Interstate Commerce Act, [n18] that the interstate commerce power began to exert positive influence in American law and life. This first important federal resort to the commerce power was followed in 1890 by the Sherman Anti-Trust Act [n19] and, thereafter, mainly after 1903, by many others. These statutes ushered in new phases of adjudication, which required the Court to approach the interpretation of the Commerce Clause in the light of an actual exercise by Congress of its power thereunder.

When it first dealt with this new legislation, the Court adhered to its earlier pronouncements, and allowed but [p122] little scope to the power of Congress. *United States v. Knight Co.*, 156 U.S. 1. [n20] These earlier pronouncements also played an important part in several of the five cases in which this Court later held that Acts of Congress under the Commerce Clause were in excess of its power. [n21]

Even while important opinions in this line of restrictive authority were being written, however, other cases called forth broader interpretations of the Commerce Clause destined to supersede the earlier ones, and to bring about a return to the principles first enunciated by Chief Justice Marshall in *Gibbons v. Ogden*, supra.

Not long after the decision of *United States v. Knight Co.*, supra, Mr. Justice Holmes, in sustaining the exercise of national power over intrastate activity, stated for the Court that "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." *Swift & Co. v. United States*, 196 U.S. 375, 398. It was soon demonstrated that the effects of many kinds of intrastate activity upon interstate commerce were such as to make them a proper subject of federal regulation. [n22] In some cases sustaining the exercise of federal power over intrastate matters, the term "direct" [p123] was used for the purpose of stating, rather than of reaching, a result; [n23] in others, it was treated as synonymous with "substantial" or "material"; [n24] and in others it was not used at all. [n25] Of late, its use has been abandoned in cases dealing with questions of federal power under the Commerce Clause.



specialization is consumed on the farm and grown for such purpose. Such farmers, while growing some wheat, may even find the balance of their interest on the consumer's side.

The effect of consumption of home-grown wheat on interstate commerce is due to the fact that it constitutes the most variable factor in the disappearance of the wheat crop. Consumption on the farm where grown appears to vary in an amount greater than 20 percent of average production. The total amount of wheat consumed as food varies but relatively little, and use as seed is relatively constant.

The maintenance by government regulation of a price for wheat undoubtedly can be accomplished as effectively by sustaining or increasing the demand as by limiting the supply. The effect of the statute before us is to restrict the amount which may be produced for market and the extent, as well, to which one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the [p128] scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial. Labor Board v. Fairblatt, 306 U.S. 601, 606 et seq.; United States v. Darby supra at 123.

to forestall  
= prevent,  
eviter

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. [n28] 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 [p129] 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. [n29]. 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.

wheat in excess of the quota for the farm on which it was produced should be subject to a penalty of 15 cents a bushel on the excess so marketed. [n33] Marketing of wheat was defined as including disposition "by feeding (in any form) to poultry or livestock which, or the products of which, are sold, bartered, or exchanged, . . ." [n34] The amendment of May 26, [p132] 1941, made before the appellee had harvested the growing crop, changed the quota and penalty provisions. The quota for each farm became the actual production of acreage planted to wheat, less the normal or the actual production, whichever was smaller, of any excess acreage. [n35] Wheat in excess of this quota, known as the "farm marketing excess" and declared by the amendment to be "regarded as available for marketing," was subjected to a penalty fixed at 50 percent of the basic loan rate for cooperators, [n36] or 49 cents, instead of the penalty of 15 cents which obtained at the time of planting. At the same time, there was authorized an increase in the amount of the loan which might be made to noncooperators such as the appellee upon wheat which "would be subject to penalty if marketed" from about 34 cents per bushel to about 59 cents. [n37] The entire crop was subjected by the amendment to a lien for the payment of the penalty.

The penalty provided by the amendment can be postponed or avoided only by storing the farm marketing excess according to regulations promulgated by the Secretary or by delivering it to him without compensation; [p133] and the penalty is incurred and becomes due on threshing. [n38] Thus, the penalty was contingent upon an act which appellee committed not before, but after, the enactment of the statute, and, had he chosen to cut his excess

and cure it or feed it as hay, or to reap and feed it with the head and straw together, no penalty would have been demanded. Such manner of consumption is not uncommon. Only when he threshed, and thereby made it a part of the bulk of wheat overhanging the market, did he become subject to penalty. He has made no effort to show that the value of his excess wheat consumed without threshing was less than it would have been had it been threshed while subject to the statutory provisions in force at the time of planting. Concurrently with the increase in the amount of the penalty, Congress authorized a substantial increase in the amount of the loan which might be made to cooperators upon stored farm marketing excess wheat. That appellee is the worse off for the aggregate of this legislation does not appear; it only appears that, if he could get all that the Government gives and do nothing that the Government asks, he would be better off than this law allows. To deny him this is not to deny him due process of law. Cf. *Mulford v. Smith*, 307 U.S. 38.

Reversed.

1. 55 Stat. 203, 7 U.S.C. (Supp. No. 1) § 1340.
2. 52 Stat. 31, as amended, 7 U.S.C. § 1281 et seq.
3. Because of the conclusion reached as to the merits, we need not consider the question whether these appellants would be proper if our decision were otherwise.
4. *Wheat* – 507, §§ 728.240, 728.248, 6 Federal Register 2695, 2699-2701.
5. § 331, 7 U.S.C. § 1331.
6. § 335, 7 U.S.C. § 1335.

## Droit constitutionnel comparé

30 hrs.,  
Master en droit

Aperçu général du droit des États-Unis d'Amérique  
- partim 4 -

### La jurisprudence de la Cour en matière de lutte contre les discriminations raciales sociales et sexuelles

- Cour suprême des États-Unis, arrêt *Plessy v. Ferguson*, 163 US 537 (1896) [extraits] <sup>1</sup>,
- Cour suprême des États-Unis, arrêt *Brown v. Board of Education of Topeka, Kansas*, 347 US 483 (1954) <sup>2</sup>,
- Cour suprême des États-Unis, arrêts *Heart of Atlanta Motel v. United States*, 379 US 241, et *Katzbach v. McClung*, 379 US 294 (1964) [extraits] <sup>3</sup>,
- Cour suprême des États-Unis, arrêt *Griswold v. Connecticut*, 381 US 479 (1965) [extraits],
- Cour suprême des États-Unis, arrêt *Loving v. Virginia*, 388 US 1 (1967) [extraits],
- Cour suprême des États-Unis, arrêt *Regents of the University of California v. Bakke*, 438 US 265 (1978) [extraits],
- Cour suprême des États-Unis, arrêt *Lawrence v. Texas*, 539 US 558 (2003) [extraits].

<sup>1</sup> La jurisprudence consacrée par cet arrêt sera abandonnée par le revirement effectué dans l'arrêt *Brown* (1954), *infra*.

<sup>2</sup> Cet arrêt est sans doute le plus célèbre que la Cour suprême ait rendu en plus de deux cents ans d'existence.

<sup>3</sup> Les deux arrêts ont été rendus le même jour.

BROWN, J., Opinion of the Court  
SUPREME COURT OF THE UNITED STATES

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163 U.S. 537

Plessy v. Ferguson

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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No. 210 Argued: April 18, 1896 --- Decided: May 18, 1896

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MR. JUSTICE BROWN, after stating the case, delivered the opinion of the court.

This case turns upon the constitutionality of an act of the General Assembly of the State of Louisiana, passed in 1890, providing for separate railway carriages for the white and colored races. Acts 1890, No. 111, p. 152.

The first section of the statute enacts

that all railway companies carrying passengers in their coaches in this State shall provide equal but separate accommodations for the white and colored races by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations: Provided, That this section shall not be construed to apply to street railroads. No person or persons, shall be admitted to occupy seats in coaches other than the ones assigned to them on account of the race they belong to.

By the second section, it was enacted

that the officers of such passenger trains shall have power and are hereby

required [p541] to assign each passenger to the coach or compartment used for the race to which such passenger belongs; any passenger insisting on going into a coach or compartment to which by race he does not belong shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison, and any officer of any railroad insisting on assigning a passenger to a coach or compartment other than the one set aside for the race to which said passenger belongs shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison; and should any passenger refuse to occupy the coach or compartment to which he or she is assigned by the officer of such railway, said officer shall have power to refuse to carry such passenger on his train, and for such refusal neither he nor the railway company which he represents shall be liable for damages in any of the courts of this State.

The third section provides penalties for the refusal or neglect of the officers, directors, conductors, and employees of railway companies to comply with

the act, with a proviso that "nothing in this act shall be construed as applying to nurses attending children of the other race." The fourth section is immaterial.

The information filed in the criminal District Court charged in substance that Plessy, being a passenger between two stations within the State of Louisiana, was assigned by officers of the company to the coach used for the race to which he belonged, but he insisted upon going into a coach used by the race to which he did not belong. Neither in the information nor plea was his particular race or color averred. The petition for the writ of prohibition averred that petitioner was seven-eighths Caucasian and one eighth African blood; that the mixture of colored blood was not discernible in him, and that he was entitled to every right, privilege and immunity secured to citizens of the United States of the white race; and that, upon such theory, he took possession of a vacant seat in a coach where passengers of the white race were accommodated, and was ordered by the conductor to vacate [p542] said coach and take a seat in another assigned to persons of the colored race, and, having refused to comply with such demand, he was forcibly ejected with the aid of a police officer, and imprisoned in the parish jail to answer a charge of having violated the above act.

The constitutionality of this act is attacked upon the ground that it conflicts both with the Thirteenth Amendment of the Constitution, abolishing slavery, and the Fourteenth Amendment, which prohibits certain restrictive legislation on the part of the States.

1. That it does not conflict with the Thirteenth Amendment, which

abolished slavery and involuntary servitude, except as a punishment for crime, is too clear for argument. Slavery implies involuntary servitude -- a state of bondage; the ownership of mankind as a chattel, or at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property and services. 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, however, in that case 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.

So, too, in the Civil Rights Cases, 109 U.S. 3, 24, it was said that the act of a mere individual, the owner of an inn, a public conveyance or place of amusement, refusing accommodations to colored people cannot be justly regarded as imposing any badge of slavery or servitude upon the applicant, but [p543] only as involving an ordinary civil injury, properly cognizable by the laws of the State and presumably subject to redress by those laws until the contrary appears. "It would be

running the slavery argument into the ground," said Mr. Justice Bradley,

to make it apply to every act of discrimination which a person may see fit to make as to the 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 theatre, or deal with in other matters of intercourse or business.

A statute which implies merely a legal distinction between the white and colored races — a distinction which is founded in the color of the two races and which must always exist so long as white men are distinguished from the other race by color -- has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude. Indeed, we do not understand that the Thirteenth Amendment is strenuously relied upon by the plaintiff in error in this connection.

2. By the Fourteenth Amendment, all persons born or naturalized in the United States and subject to the jurisdiction thereof are made citizens of the United States and of the State wherein they reside, and the States are forbidden from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, or shall deprive any person of life, liberty, or property without due process of law, or deny to any person within their jurisdiction the equal protection of the laws.

The proper construction of this amendment was first called to the attention of this court in the Slaughterhouse Cases, 16 Wall. 36, which involved, however, not a question of race, but one of exclusive privileges. The case did not call for any expression of opinion as to the exact

rights it was intended to secure to the colored race, but it 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. [p544]

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.

One of the earliest of these cases is that of Roberts v. City of Boston, 5 Cush. 19, in which the Supreme Judicial Court of Massachusetts held that the general school committee of Boston had power to make provision for the instruction of colored children in separate schools established exclusively for them, and to prohibit their attendance upon the other

schools. "The great principle," said Chief Justice Shaw, p. 206, "advanced by the learned and eloquent advocate for the plaintiff" (Mr. Charles Sumner),

is that, by the constitution and laws of Massachusetts, all persons without distinction of age or sex, birth or color, origin or condition, are equal before the law. . . . But when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment, but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security.

It was held that the powers of the committee extended to the establishment [p545] of separate schools for children of different ages, sexes and colors, and that they might also establish special schools for poor and neglected children, who have become too old to attend the primary school and yet have not acquired the rudiments of learning to enable them to enter the ordinary schools. Similar laws have been enacted by Congress under its general power of legislation over the District of Columbia, Rev.Stat.D.C. §§ 281, 282, 283, 310, 319, as well as by the legislatures of many of the States, and have been generally, if not uniformly, sustained by the courts. State v. McCann, 21 Ohio St. 198; Lehew v. Brummell, 15 S.W.Rep. 765; Ward v. Flood, 48 California 36; Bertonneau v. School Directors, 3 Woods 177; People v. Gallagher, 93 N.Y. 438; Cory v. Carter, 48 Indiana 897; Dawson v. Lee, 3 Kentucky 49.

Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the State. State v. Gibson, 36 Indiana 389.

The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theatres and railway carriages has been frequently drawn by this court. Thus, in Strauder v. West Virginia, 100 U.S. 303, it was held that a law of West Virginia limiting to white male persons, 21 years of age and citizens of the State, the right to sit upon juries was a discrimination which implied a legal inferiority in civil society, which lessened the security of the right of the colored race, and was a step toward reducing them to a condition of servility. Indeed, the right of a colored man that, in the selection of jurors to pass upon his life, liberty and property, there shall be no exclusion of his race and no discrimination against them because of color has been asserted in a number of cases. Virginia v. Rives, 100 U.S. 313; Neal v. Delaware, 103 U.S. 370; Bush v. Kentucky, 107 U.S. 110; Gibson v. Mississippi, 162 U.S. 565. So, where the laws of a particular locality or the charter of a particular railway corporation has provided that no person shall be excluded from the cars on account of [p546] color, we have held that this meant that persons of color should travel in the same car as white ones, and that the enactment was not satisfied by the company's providing cars assigned exclusively to people of color, though they were as good as those which they assigned exclusively to white persons. Railroad Company v. Brown, 17 Wall. 445.

company for failing to provide the separate accommodations, but the question considered was the constitutionality of the law. In that case, the Supreme Court of Mississippi, 66 Mississippi 662, had held that the statute applied solely to commerce within the State, and that, being the construction of the state statute by its highest court, was accepted as conclusive. "If it be a matter," said the court, p. 591,

respecting commerce wholly within a State, and not interfering with commerce between the States, then obviously there is no violation of the commerce clause of the Federal Constitution. . . . No question arises under this section as to the power of the State to separate in different compartments interstate passengers [p548] or affect in any manner the privileges and rights of such passengers. All that we can consider is whether the State has the power to require that railroad trains within her limits shall have separate accommodations for the two races; that affecting only commerce within the State is no invasion of the power given to Congress by the commerce clause.

A like course of reasoning applies to the case under consideration, since the Supreme Court of Louisiana in the case of the State ex rel. Abbott v. Hicks, Judge, et al., 44 La. Ann. 770, held that the statute in question did not apply to interstate passengers, but was confined in its application to passengers traveling exclusively within the borders of the State. The case was decided largely upon the authority of Railway Co. v. State, 66 Mississippi 662, and affirmed by this court in 133 U.S. 587. In the present case, no question of interference with interstate commerce can possibly arise, since the East Louisiana Railway appears to

have been purely a local line, with both its termini within the State of Louisiana. Similar statutes for the separation of the to races upon public conveyances were held to be constitutional in West Chester &c. Railroad v. Miles, 55 Penn. St. 209; Day v. Owen, 5 Michigan 520; Chicago &c. Railway v. Williams, 5 Illinois 185; Chesapeake &c. Railroad v. Wells, 85 Tennessee 613; Memphis &c. Railroad v. Benson, 85 Tennessee 627; The Sue, 22 Fed. Rep. 83; Logwood v. Memphis &c. Railroad, 23 Fed. Rep. 318; McGuinn v. Forbes, 37 Fed. Rep. 639; People v. King, 18 N.E. Rep. 245; Houck v. South Pac. Railway, 38 Fed. Rep. 226; Heard v. Georgia Railroad Co., 3 Int. Com. Com'n 111; S.C., 1 Ibid. 428.

While we think the enforced separation of the races, as applied to the internal commerce of the State, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws within the meaning of the Fourteenth Amendment, we are not prepared to say that the conductor, in assigning passengers to the coaches according to their race, does not act at his peril, or that the provision of the second section of the act that denies to the passenger compensation [p549] in damages for a refusal to receive him into the coach in which he properly belongs is a valid exercise of the legislative power. Indeed, we understand it to be conceded by the State's Attorney that such part of the act as exempts from liability the railway company and its officers is unconstitutional. The power to assign to a particular coach obviously implies the power to determine to which race the passenger belongs, as well as the power to determine who, under the laws of the particular State, is to be deemed a white and who a colored



person. This question, though indicated in the brief of the plaintiff in error, does not properly arise upon the record in this case, since the only issue made is as to the unconstitutionality of the act so far as it requires the railway to provide separate accommodations and the conductor to assign passengers according to their race.

It is claimed by the plaintiff in error that, in any mixed community, the reputation of belonging to the dominant race, in this instance the white race, is property in the same sense that a right of action or of inheritance is property. Conceding this to be so for the purposes of this case, we are unable to see how this statute deprives him of, or in any way affects his right to, such property. If he be a white man and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so-called property. Upon the other hand, if he be a colored man and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man.

In this connection, it is also suggested by the learned counsel for the plaintiff in error that the same argument that will justify the state legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street and white people upon the other, or requiring white men's houses to be painted white and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side [p550] of the street is as good as the other, or that a house

or vehicle of one color is as good as one of another color. The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class.

Thus, in *Yick Wo v. Hopkins*, 118 U.S. 356, it was held by this court that a municipal ordinance of the city of San Francisco to regulate the carrying on of public laundries within the limits of the municipality violated the provisions of the Constitution of the United States if it conferred upon the municipal authorities arbitrary power, at their own will and without regard to discretion, in the legal sense of the term, to give or withhold consent as to persons or places without regard to the competency of the persons applying or the propriety of the places selected for the carrying on of the business. It was held to be a covert attempt on the part of the municipality to make an arbitrary and unjust discrimination against the Chinese race. While this was the case of a municipal ordinance, a like principle has been held to apply to acts of a state legislature passed in the exercise of the police power. *Railroad Company v. Husen*, 95 U.S. 465; *Louisville & Nashville Railroad v. Kentucky*, 161 U.S. 677, and cases cited on p. 700; *Duggett v. Hudson*, 43 Ohio St. 548; *Capen v. Foster*, 12 Pick. 48; *State ex rel. Wood v. Baker*, 38 Wisconsin 71; *Monroe v. Collins*, 17 Ohio St. 66; *Hulseman v. Rems*, 41 Penn. St. 396; *Orman v. Riley*, 1 California 48.

So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and, with respect to this, there must necessarily be a large discretion on the part of the

legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances [p551] is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

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. As was said by the Court of Appeals of New York in *People v. Gallagher*, 93 N. Y. 438, 448,

this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized, and performed all of the functions respecting social advantages with which it is endowed.

Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly [p552] or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.

It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different States, some holding that any visible admixture of black blood stamps the person as belonging to the colored race (*State v. Chaver*, 5 Jones [N.C.] 1, p. 11); others that it depends upon the preponderance of blood (*Gray v. State*, 4 Ohio 354; *Monroe v. Collins*, 17 Ohio St. 665); and still others that the predominance of white blood must only be in the proportion of three-fourths. (*People v. Dean*, 4 Michigan 406; *Jones v. Commonwealth*, 80 Virginia

538). But these are questions to be determined under the laws of each State, and are not properly put in issue in this case. Under the allegations of his petition, it may undoubtedly become a question of importance whether, under the laws of Louisiana, the petitioner belongs to the white or colored race.

The judgment of the court below is, therefore,

Affirmed.

HARLAN, J., Dissenting Opinion

SUPREME COURT OF THE UNITED STATES

163 U.S. 537

Plessy v. Ferguson

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA

No. 210 Argued: April 18, 1896 --- Decided: May 18, 1896

TRÈS CÉLÈBRE OPINION DISSIDENTE!

MR. JUSTICE HARLAN, dissenting.

By the Louisiana statute the validity of which is here involved, all railway companies (other than street railroad companies) carrying passengers in that State are required to have separate but equal accommodations for white and colored persons

by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations.

Under this statute, no colored person is permitted to occupy a seat in a coach assigned to white persons, nor any white person to occupy a seat in a coach assigned to colored persons. The managers of the railroad are not allowed to exercise any discretion in the premises, but are required to assign each passenger to some coach or compartment set apart for the exclusive use of his race. If a

passenger insists upon going into a coach or compartment not set apart for persons of his race, [p553] he is subject to be fined or to be imprisoned in the parish jail. Penalties are prescribed for the refusal or neglect of the officers, directors, conductors and employees of railroad companies to comply with the provisions of the act.

Only "nurses attending children of the other race " are excepted from the operation of the statute. No exception is made of colored attendants traveling with adults. A white man is not permitted to have his colored servant with him in the same coach, even if his condition of health requires the constant, personal assistance of such servant. If a colored maid insists upon riding in the same coach with a white woman whom she has been employed to serve, and who may need her personal attention while traveling, she is subject to be fined or imprisoned for such an exhibition of zeal in the discharge of duty.

While there may be in Louisiana persons of different races who are not

citizens of the United States, the words in the act "white and colored races" necessarily include all citizens of the United States of both races residing in that State. So that we have before us a state enactment that compels, under penalties, the separation of the two races in railroad passenger coaches, and makes it a crime for a citizen of either race to enter a coach that has been assigned to citizens of the other race.

Thus, the State regulates the use of a public highway by citizens of the United States solely upon the basis of race.

However apparent the injustice of such legislation may be, we have only to consider whether it is consistent with the Constitution of the United States.

That a railroad is a public highway, and that the corporation which owns or operates it is in the exercise of public functions, is not, at this day, to be disputed. Mr. Justice Nelson, speaking for this court in *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344, 382, said that a common carrier was in the exercise

of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned.

Mr. Justice Strong, delivering the judgment of [p554] this court in *Olcott v. The Supervisors*, 16 Wall. 678, 694, said:

That railroads, though constructed by private corporations and owned by them; are public highways has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have had

any existence. Very early the question arose whether a State's right of eminent domain could be exercised by a private corporation created for the purpose of constructing a railroad. Clearly it could not unless taking land for such a purpose by such an agency is taking land for public use. The right of eminent domain nowhere justifies taking property for a private use. Yet it is a doctrine universally accepted that a state legislature may authorize a private corporation to take land for the construction of such a road, making compensation to the owner. What else does this doctrine mean if not that building a railroad, though it be built by a private corporation, is an act done for a public use.

So, in *Township of Pine Grove v. Talcott*, 19 Wall. 666, 676: "Though the corporation [a railroad company] was private, its work was public, as much so as if it were to be constructed by the State." So, in *Inhabitants of Worcester v. Western Railroad Corporation*, 4 Met. 564:

The establishment of that great thoroughfare is regarded as a public work, established by public authority, intended for the public use and benefit, the use of which is secured to the whole community, and constitutes, therefore, like a canal, turnpike or highway, a public easement. It is true that the real and personal property necessary to the establishment and management of the railroad is vested in the corporation, but it is in trust for the public.

In respect of civil rights common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. Every true man has pride of race, and, under

appropriate circumstances, when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper. But I deny that any legislative body or judicial tribunal may have regard to the [p555] race of citizens when the civil rights of those citizens are involved. Indeed, such legislation as that here in question is inconsistent not only with that equality of rights which pertains to citizenship, National and State, but with the personal liberty enjoyed by everyone within the United States.

The Thirteenth Amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude. It decreed universal civil freedom in this country. This court has so adjudged. But that amendment having been found inadequate to the protection of the rights of those who had been in slavery, it was followed by the Fourteenth Amendment, which added greatly to the dignity and glory of American citizenship and to the security of personal liberty by declaring that

all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside,

and that

no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; 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.

These two amendments, if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship. Finally, and to the end that no citizen should be denied, on account of his race, the privilege of participating in the political control of his country, it as declared by the Fifteenth Amendment that

the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude.

These notable additions to the fundamental law were welcomed by the friends of liberty throughout the world. They removed the race line from our governmental systems. They had, as this court has said, a common purpose, namely to secure

to a race recently emancipated, a race that through [p556] many generations have been held in slavery, all the civil rights that the superior race enjoy.

They declared, in legal effect, this court has further said,

that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color.

We also said:

The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race -- the right to exemption from unfriendly legislation against them distinctively as colored -- exemption from legal discriminations, implying inferiority in civil society, Lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.

It was, consequently, adjudged that a state law that excluded citizens of the colored race from juries, because of their race and however well qualified in other respects to discharge the duties of jurymen, was repugnant to the Fourteenth Amendment. *Strauder v. West Virginia*, 100 U.S. 303, 306, 307; *Virginia v. Rives*, 100 U.S. 313; *Ex parte Virginia*, 100 U.S. 339; *Neal v. Delaware*, 103 U.S. 370, 386; *Bush v. Kentucky*, 107 U.S. 110, 116. At the present term, referring to the previous adjudications, this court declared that

underlying all of those decisions is the principle that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government or the States against any citizen because of his race. All citizens are equal before the law.

*Gibson v. Mississippi*, 162 U.S. 565.

The decisions referred to show the scope of the recent amendments of the Constitution. They also show that it is not within the power of a State to prohibit colored citizens, because of their race, from participating as jurors in the administration of justice.

It as said in argument that the statute of Louisiana does [p557] not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Everyone knows that the statute in question had its origin in the purpose not so much to exclude white persons from railroad cars occupied by blacks as to exclude colored people from coaches occupied by or assigned to white persons. Railroad corporations of Louisiana did not make discrimination among whites in the matter of accommodation for travelers. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary. The fundamental objection, therefore, to the statute is that it interferes with the personal freedom of citizens. "Personal liberty," it has been well said,

consists in the power of locomotion, of changing situation, or removing one's person to whatsoever places one's own inclination may direct, without imprisonment or restraint unless by due course of law.

1 Bl.Com. \*134. If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so, and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each.

It is one thing for railroad carriers to furnish, or to be required by law to furnish, equal accommodations for all whom they are under a legal duty to carry. It is quite another thing for government to forbid citizens of the white and black races from traveling in

the same public conveyance, and to punish officers of railroad companies for permitting persons of the two races to occupy the same passenger coach. If a State can prescribe, as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street and black citizens to keep on the other? Why may it not, upon like grounds, punish whites and blacks who ride together in streetcars or in open vehicles on a public road [p558] or street? Why may it not require sheriffs to assign whites to one side of a courtroom and blacks to the other? And why may it not also prohibit the commingling of the two races in the galleries of legislative halls or in public assemblages convened for the consideration of the political questions of the day? Further, if this statute of Louisiana is consistent with the personal liberty of citizens, why may not the State require the separation in railroad coaches of native and naturalized citizens of the United States, or of Protestants and Roman Catholics?

The answer given at the argument to these questions was that regulations of the kind they suggest would be unreasonable and could not, therefore, stand before the law. Is it meant that the determination of questions of legislative power depends upon the inquiry whether the statute whose validity is questioned is, in the judgment of the courts, a reasonable one, taking all the circumstances into consideration? A statute may be unreasonable merely because a sound public policy forbade its enactment. But I do not understand that the courts have anything to do with the policy or expediency of legislation. A statute

may be valid and yet, upon grounds of public policy, may well be characterized as unreasonable. Mr. Sedgwick correctly states the rule when he says that, the legislative intention being clearly ascertained,

the courts have no other duty to perform than to execute the legislative will, without any regard to their views as to the wisdom or justice of the particular enactment.

Stat. & Const. Constr. 324. There is a dangerous tendency in these latter days to enlarge the functions of the courts by means of judicial interference with the will of the people as expressed by the legislature. Our institutions have the distinguishing characteristic that the three departments of government are coordinate and separate. Each must keep within the limits defined by the Constitution. And the courts best discharge their duty by executing the will of the lawmaking power, constitutionally expressed, leaving the results of legislation to be dealt with by the people through their representatives. Statutes must always have a reasonable construction. Sometimes they are to be construed strictly; sometimes liberally, in order to carry out the legislative [p559] will. But however construed, the intent of the legislature is to be respected, if the particular statute in question is valid, although the courts, looking at the public interests, may conceive the statute to be both unreasonable and impolitic. If the power exists to enact a statute, that ends the matter so far as the courts are concerned. The adjudged cases in which statutes have been held to be void because unreasonable are those in which the means employed by the legislature were not at all germane to the end to which the legislature was competent.



The white race deems itself to be the dominant race in this country. And so it is in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

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. It was adjudged in that case that the descendants of Africans who were imported into this country and sold as slaves were not included nor intended to be included under the word "citizens" in the Constitution, and could not claim any of the rights and privileges which that instrument provided for and secured to citizens of the United States; that, at the time of the adoption of the Constitution, they were

considered as a subordinate and inferior class of beings, who had been subjugated by the dominant [p560]

race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them.

19 How. 393, 404. The recent amendments of the Constitution, it was supposed, had eradicated these principles from our institutions. But it seems that we have yet, in some of the States, a dominant race -- a superior class of citizens, which assumes to regulate the enjoyment of civil rights, common to all citizens, upon the basis of race. The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution, by one of which the blacks of this country were made citizens of the United States and of the States in which they respectively reside, and whose privileges and immunities, as citizens, the States are forbidden to abridge. Sixty millions of whites are in no danger from the presence here of eight millions of blacks. The destinies of the two races in this country are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches

occupied by white citizens. That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.

The sure guarantee of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, National and State, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States, without regard to race. State enactments regulating the enjoyment of civil rights upon the basis of race, and cunningly devised to defeat legitimate results of the [p561] war under the pretence of recognizing equality of rights, can have no other result than to render permanent peace impossible and to keep alive a conflict of races the continuance of which must do harm to all concerned. This question is not met by the suggestion that social equality cannot exist between the white and black races in this country. That argument, if it can be properly regarded as one, is scarcely worthy of consideration, for social equality no more exists between two races when traveling in a passenger coach or a public highway than when members of the same races sit by each other in a street car or in the jury box, or stand or sit with each other in a political assembly, or when they use in common the streets of a city or town, or when they are in the same room for the purpose of having their names placed on the registry of voters, or when they approach the ballot box in order to exercise the high privilege of voting.

There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But, by the

statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana, many of whom, perhaps, risked their lives for the preservation of the Union, who are entitled, by law, to participate in the political control of the State and nation, who are not excluded by law or by reason of their race, from public stations of any kind, and who have all the legal rights that belong to white citizens, are yet declared to be criminals, liable to imprisonment, if they ride in a public coach occupied by citizens of the white race. It is scarcely just to say that a colored citizen should not object to occupying a public coach assigned to his own race. He does not object, nor, perhaps, would he object to separate coaches for his race if his rights under the law were recognized. But he objecting, and ought never to cease objecting, to the proposition that citizens of the white and black race can be adjudged criminals because they sit, or claim the right to sit, in the same public coach on a public highway. [p562]

The arbitrary separation of citizens on the basis of race while they are on a public highway is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds.

If evils will result from the commingling of the two races upon public highways established for the benefit of all, they will be infinitely less than those that will surely come from state legislation regulating the enjoyment of civil rights upon the basis of race. We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the

law which, practically, puts the brand of servitude and degradation upon a large class of our fellow citizens, our equals before the law. The thin disguise of "equal" accommodations for passengers in railroad coaches will not mislead anyone, nor atone for the wrong this day done.

The result of the whole matter is that while this court has frequently adjudged, and at the present term has recognized the doctrine, that a State cannot, consistently with the Constitution of the United States, prevent white and black citizens, having the required qualifications for jury service, from sitting in the same jury box, it is now solemnly held that a State may prohibit white and black citizens from sitting in the same passenger coach on a public highway, or may require that they be separated by a "partition," when in the same passenger coach. May it not now be reasonably expected that astute men of the dominant race, who affect to be disturbed at the possibility that the integrity of the white race may be corrupted, or that its supremacy will be imperiled, by contact on public highways with black people, will endeavor to procure statutes requiring white and black jurors to be separated in the jury box by a "partition," and that, upon retiring from the courtroom to consult as to their verdict, such partition, if it be a moveable one, shall be taken to their consultation room and set up in such way as to prevent black jurors from coming too close to their brother jurors of the white race. If the "partition" used in the courtroom happens to be stationary, provision could be made for screens with openings through [p563] which jurors of the two races could confer as to their verdict without coming into personal contact with each other. I cannot see but that, according to the

principles this day announced, such state legislation, although conceived in hostility to, and enacted for the purpose of humiliating, citizens of the United States of a particular race, would be held to be consistent with the Constitution.

I do not deem it necessary to review the decisions of state courts to which reference was made in argument. Some, and the most important, of them are wholly inapplicable because rendered prior to the adoption of the last amendments of the Constitution, when colored people had very few rights which the dominant race felt obliged to respect. Others were made at a time when public opinion in many localities was dominated by the institution of slavery, when it would not have been safe to do justice to the black man, and when, so far as the rights of blacks were concerned, race prejudice was, practically, the supreme law of the land. Those decisions cannot be guides in the era introduced by the recent amendments of the supreme law, which established universal civil freedom, gave citizenship to all born or naturalized in the United States and residing here, obliterated the race line from our systems of governments, National and State, and placed our free institutions upon the broad and sure foundation of the equality of all men before the law.

I am of opinion that the statute of Louisiana is inconsistent with the personal liberty of citizens, white and black, in that State, and hostile to both the spirit and letter of the Constitution of the United States. If laws of like character should be enacted in the several States of the Union, the effect would be in the highest degree mischievous. Slavery, as an institution tolerated by law would, it is true, have disappeared from our country, but

there would remain a power in the States, by sinister legislation, to interfere with the full enjoyment of the blessings of freedom to regulate civil rights, common to all citizens, upon the basis of race, and to place in a condition of legal inferiority a large body of American citizens now constituting a part of the political community called the [1864] People of the United States, for whom and by whom, through representatives, our government is administered. Such a system is inconsistent with the guarantee given by the Constitution to each State of a republican form of government, and may be stricken down by Congressional action, or by the courts in the discharge of their solemn duty to maintain the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding.

For the reasons stated, I am constrained to withhold my assent from the opinion and judgment of the majority.

MR. JUSTICE BREWER did not hear the argument or participate in the decision of this case.

WARREN, C.J., Opinion of the Court  
SUPREME COURT OF THE UNITED STATES

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347 U.S. 483

Brown v. Board of Education of Topeka

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF  
KANSAS

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No. 1. Argued: Argued December 9, 1952 Reargued December 8, 1953 ---  
Decided: Decided May 17, 1954

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[p\*486] MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion. [n1][p487]

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, [p488] they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called "separate but equal" doctrine announced by this Court in Plessy v. Ferguson, 163 U.S. 537. Under that doctrine, equality of treatment is

accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction. [n2] Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court. [n3][p489]

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then-existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some

light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history with respect to segregated schools is the status of public education at that time. [n4] In the South, the movement toward free common schools, supported [p490] by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences, as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states, and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that

there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. [n5] The doctrine of [p491] "separate but equal" did not make its appearance in this Court until 1896 in the case of Plessy v. Ferguson, supra, involving not education but transportation. [n6] American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the "separate but equal" doctrine in the field of public education. [n7] In *Cumming v. County Board of Education*, 175 U.S. 528, and *Gong Lum v. Rice*, 275 U.S. 78, the validity of the doctrine itself was not challenged. [n8] In more recent cases, all on the graduate school [p492] level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337; *Sipuel v. Oklahoma*, 332 U.S. 631; *Sweatt v. Painter*, 339 U.S. 629; *McLaurin v. Oklahoma State Regents*, 339 U.S. 637. In none of these cases was it necessary to reexamine the doctrine to grant relief to the Negro plaintiff. And in *Sweatt v. Painter*, supra, the Court expressly reserved decision on the question whether *Plessy v. Ferguson* should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here, unlike *Sweatt v. Painter*, there are findings below that the Negro 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. [n9] 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.

In approaching this problem, we cannot turn the clock back to 1868, when the Amendment was adopted, or even to 1896, when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout [p493] the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical

facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In Sweatt v. Painter, supra, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In McLaurin v. Oklahoma State Regents, supra, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: ". . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." [p\*494] Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs: Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits

they would receive in a racial[ly] integrated school system. [n10] Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority. [n11] Any language [p495] in Plessy v. Ferguson contrary to this finding is rejected.

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. [n12]

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question -- the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term [n13] The Attorney General [p496] of the United States is again invited to

participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as amici curiae upon request to do so by September 15, 1954, and submission of briefs by October 1, 1954. [n14]

It is so ordered.

*A.B.: Pas d'opinion  
dissidente!*

\* Together with No. 2, Briggs et al. v. Elliott et al., on appeal from the United States District Court for the Eastern District of South Carolina, argued December 9-10, 1952, reargued December 7-8, 1953; No. 4, Davis et al. v. County School Board of Prince Edward County, Virginia, et al., on appeal from the United States District Court for the Eastern District of Virginia, argued December 10, 1952, reargued December 7-8, 1953, and No. 10, Gebhart et al. v. Belton et al., on certiorari to the Supreme Court of Delaware, argued December 11, 1952, reargued December 9, 1953.

1. In the Kansas case, Brown v. Board of Education, the plaintiffs are Negro children of elementary school age residing in Topeka. They brought this action in the United States District Court for the District of Kansas to enjoin enforcement of a Kansas statute which permits, but does not require, cities of more than 15,000 population to maintain separate school facilities for Negro and white students. Kan.Gen.Stat. § 72-1724 (1949). Pursuant to that authority, the Topeka Board of Education elected to establish segregated elementary schools. Other public schools in the community, however, are operated on a nonsegregated basis. The three-judge District Court, convened under 28 U.S.C. §§ 2281 and 2284, found that segregation in public education has a detrimental effect upon Negro children, but denied relief on the ground that the



CLARK, J., Opinion of the Court  
SUPREME COURT OF THE UNITED STATES

379 U.S. 241

Heart of Atlanta Motel, Inc. v. United States

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF GEORGIA

No. 515 Argued: October 5, 1964 --- Decided: December 14, 1964

MR. JUSTICE CLARK delivered the opinion of the Court.

This is a declaratory judgment action, 28 U.S.C. § 2201 and § 2202 (1958 ed.), attacking the constitutionality of Title II of the Civil Rights Act of 1964, 78 Stat. [p243] 241, 243. [n1] In addition to declaratory relief, the complaint sought an injunction restraining the enforcement of the Act and damages against appellees based on allegedly resulting injury in the event compliance was required. Appellees counterclaimed for enforcement under § 206(a) of the Act and asked for a three-judge district court under § 206(b). A three-judge court, empaneled under § 206(b) as well as 28 U.S.C. § 2282 (1958 ed.), sustained the validity of the Act and issued a permanent injunction on appellees' counterclaim restraining appellant from continuing to violate the Act which remains in effect on order of MR. JUSTICE BLACK, 85 S.Ct. 1. We affirm the judgment.

1. *The Factual Background and Contentions of the Parties.*

The case comes here on admissions and stipulated facts. Appellant owns and operates the Heart of Atlanta Motel, which has 216 rooms available

to transient guests. The motel is located on Courtland Street, two blocks from downtown Peachtree Street. It is readily accessible to interstate highways 75 and 85 and state highways 23 and 41. Appellant solicits patronage from outside the State of Georgia through various national advertising media, including magazines of national circulation; it maintains over 50 billboards and highway signs within the State, soliciting patronage for the motel; it accepts convention trade from outside Georgia and approximately 75% of its registered guests are from out of State. Prior to passage of the Act, the motel had followed a practice of refusing to rent rooms to Negroes, and it alleged that it intended to continue to do so. In an effort to perpetuate that policy, this suit was filed.

The appellant contends that Congress, in passing this Act, exceeded its power to regulate commerce under Art. I, [p244] § 8, cl. 3, of the Constitution of the United States; that the Act violates the Fifth Amendment because appellant is deprived of the right to choose its customers and operate its business as it wishes, resulting in a taking of its liberty and property without due process of law and a taking of its

property without just compensation; and, finally, that, by requiring appellant to rent available rooms to Negroes against its will, Congress is subjecting it to involuntary servitude in contravention of the Thirteenth Amendment.

The appellees counter that the unavailability to Negroes of adequate accommodations interferes significantly with interstate travel, and that Congress, under the Commerce Clause, has power to remove such obstructions and restraints; that the Fifth Amendment does not forbid reasonable regulation, and that consequential damage does not constitute a "taking" within the meaning of that amendment; that the Thirteenth Amendment claim fails because it is entirely frivolous to say that an amendment directed to the abolition of human bondage and the removal of widespread disabilities associated with slavery places discrimination in public accommodations beyond the reach of both federal and state law.

At the trial, the appellant offered no evidence, submitting the case on the pleadings, admissions and stipulation of facts; however, appellees proved the refusal of the motel to accept Negro transients after the passage of the Act. The District Court sustained the constitutionality of the sections of the Act under attack (§§ 201(a), (b)(1) and (c)(1)) and issued a permanent injunction on the counterclaim of the appellees. It restrained the appellant from "[r]efusing to accept Negroes as guests in the motel by reason of their race or color" and from

[m]aking any distinction whatever upon the basis of race or color in the availability of the goods, services, facilities, [p245] privileges, advantages or accommodations offered or made

available to the guests of the motel, or to the general public, within or upon any of the premises of the Heart of Atlanta Motel, Inc.

## 2. *The History of the Act.*

Congress first evidenced its interest in civil rights legislation in the Civil Rights or Enforcement Act of April 9, 1866. [n2] There followed four Acts, [n3] with a fifth, the Civil Rights Act of March 1, 1875, [n4] culminating the series. In 1883, this Court struck down the public accommodations sections of the 1875 Act in the *Civil Rights Cases*, 100 U.S.

3. No major legislation in this field had been enacted by Congress for 82 years when the Civil Rights Act of 1957 [n5] became law. It was followed by the Civil Rights Act of 1960. [n6] Three years later, on June 19, 1963, the late President Kennedy called for civil rights legislation in a message to Congress to which he attached a proposed bill. Its stated purpose was

to promote the general welfare by eliminating discrimination based on race, color, religion, or national origin in . . . public accommodations through the exercise by Congress of the powers conferred upon it . . . to enforce the provisions of the fourteenth and fifteenth amendments to regulate commerce among the several States, and to make laws necessary and proper to execute the powers conferred upon it by the Constitution.

H.R.Doc. No. 124, 88th Cong., 1st Sess., at 14. [p246] Bills were introduced in each House of the Congress, embodying the President's suggestion, one in the Senate being S. 1732 [n7] and one in the House H.R. 7152. However, it was not until July 2, 1964, upon the recommendation of President Johnson, that the Civil Rights Act of 1964, here under attack, was finally passed.

After extended hearings, each of these bills was favorably reported to its respective house, H.R. 7152 on November 20, 1963, H.R. Rep. No. 914, 88th Cong., 1st Sess., and S. 1732 on February 10, 1964, S. Rep. No. 872, 88th Cong., 2d Sess. Although each bill originally incorporated extensive findings of fact, these were eliminated from the bills as they were reported. The House passed its bill in January, 1964, and sent it to the Senate. Through a bipartisan coalition of Senators Humphrey and Dirksen, together with other Senators, a substitute was worked out in informal conferences. This substitute was adopted by the Senate and sent to the House, where it was adopted without change. This expedited procedure prevented the usual report on the substitute bill in the Senate as well as a Conference Committee report ordinarily filed in such matters. Our only frame of reference as to the legislative history of the Act is, therefore, the hearings, reports and debates on the respective bills in each house.

The Act as finally adopted was most comprehensive, undertaking to prevent, through peaceful and voluntary settlement, discrimination in voting as well as in places of accommodation and public facilities, federally secured programs, and in employment. Since Title II is the only portion under attack here, we confine our consideration to those public accommodation provisions. [p247]

3. Title II of the Act. *Civil Rights Act 1964*

This Title is divided into seven sections, beginning with § 201(a), which provides that:

All persons shall be entitled to the full and equal enjoyment of the goods,

services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

There are listed in § 201(b) four classes of business establishments, each of which "serves the public" and "is a place of public accommodation" within the meaning of § 201(a) "if its operations affect commerce, or if discrimination or segregation by it is supported by State action." The covered establishments are:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria . . . [not here involved];

(3) any motion picture house . . . [not here involved];

(4) any establishment . . . which is physically located within the premises of any establishment otherwise covered by this subsection, or . . . within the premises of which is physically located any such covered establishment . . . [not here involved].

Section 201(c) defines the phrase "affect commerce" as applied to the above establishments. It first declares that "any inn, hotel, motel, or other establishment which provides lodging to transient guests" affects commerce *per se*. Restaurants, cafeterias, etc., in class two affect [p248] commerce only if they serve or offer to serve interstate

travelers or if a substantial portion of the food which they serve or products which they sell have "moved in commerce." Motion picture houses and other places listed in class three affect commerce if they customarily present films, performances, etc., "which move in commerce." And the establishments listed in class four affect commerce if they are within, or include within their own premises, an establishment "the operations of which affect commerce." Private clubs are excepted under certain conditions. See § 201(e).

Section 201(d) declares that "discrimination or segregation" is supported by state action when carried on under color of any law, statute, ordinance, regulation or any custom or usage required or enforced by officials of the State or any of its subdivisions.

In addition, § 202 affirmatively declares that all persons

shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.

Finally, § 203 prohibits the withholding or denial, etc., of any right or privilege secured by § 201 and § 202 or the intimidation, threatening or coercion of any person with the purpose of interfering with any such right or the punishing, etc., of any person for exercising or attempting to exercise any such right.

The remaining sections of the Title are remedial ones for violations of any of the previous sections. Remedies are

limited to civil actions for preventive relief. The Attorney General may bring suit where he has

reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to [p249] the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described.

...

§ 206(a).

A person aggrieved may bring suit, in which the Attorney General may be permitted to intervene. Thirty days' written notice before filing any such action must be given to the appropriate authorities of a State or subdivision the law of which prohibits the act complained of and which has established an authority which may grant relief therefrom. § 204(c). In States where such condition does not exist, the court, after a case is filed, may refer it to the Community Relations Service, which is established under Title X of the Act. § 204(d). This Title establishes such service in the Department of Commerce, provides for a Director to be appointed by the President with the advice and consent of the Senate, and grants it certain powers, including the power to hold hearings, with reference to matters coming to its attention by reference from the court or between communities and persons involved in disputes arising under the Act.

4. *Application of Title II to Heart of Atlanta Motel.*

It is admitted that the operation of the motel brings it within the provisions of § 201(a) of the Act, and that appellant refused to provide lodging for transient Negroes because of their race or color.

and that it intends to continue that policy unless restrained.

The sole question posed is, therefore, the constitutionality of the Civil Rights Act of 1964 as applied to these facts. The legislative history of the Act indicates that Congress based the Act on § 5 and the Equal Protection Clause of the Fourteenth Amendment, as well as its power to regulate interstate commerce under Art. I, § 8, cl. 3, of the Constitution. [p250]

The Senate Commerce Committee made it quite clear that the fundamental object of Title II was to vindicate "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." At the same time, however, it noted that such an objective has been and could be readily achieved "by congressional action based on the commerce power of the Constitution." S.Rep. No. 872, *supra*, at 16-17. Our study of the legislative record, made in the light of prior cases, has brought us to the conclusion that Congress possessed ample power in this regard, and we have therefore not considered the other grounds relied upon. This is not to say that the remaining authority upon which it acted was not adequate, a question upon which we do not pass, but merely that, since the commerce power is sufficient for our decision here, we have considered it alone. Nor is § 201(d) or § 202, having to do with state action, involved here. and we do not pass upon either of those sections. 5. *The Civil Rights Cases, 109 U.S. (1883), and their Application.*

In light of our ground for decision, it might be well at the outset to discuss the *Civil Rights Cases, supra*, which declared provisions of the Civil Rights Act of 1875 unconstitutional. 18 Stat.

335, 336. We think that decision inapposite and without precedential value in determining the constitutionality of the present Act. Unlike Title II of the present legislation, the 1875 Act broadly proscribed discrimination in "inns, public conveyances on land or water, theaters, and other places of public amusement," without limiting the categories of affected businesses to those impinging upon interstate commerce. In contrast, the applicability of Title II is carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and people, [p251] except where state action is involved. Further, the fact that certain kinds of businesses may not in 1875 have been sufficiently involved in interstate commerce to warrant bringing them within the ambit of the commerce power is not necessarily dispositive of the same question today. Our populace had not reached its present mobility, nor were facilities, goods and services circulating as readily in interstate commerce as they are today. Although the principles which we apply today are those first formulated by Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1 (1824), the conditions of transportation and commerce have changed dramatically, and we must apply those principles to the present state of commerce. The sheer increase in volume of interstate traffic alone would give discriminatory practices which inhibit travel a far larger impact upon the Nation's commerce than such practices had on the economy of another day. Finally, there is language in the Civil Rights Cases which indicates that the Court did not fully consider whether the 1875 Act could be sustained as an exercise of the commerce power. Though the Court observed that

no one will contend that the power to pass it was contained in the Constitution before the adoption of the last three amendments [Thirteenth, Fourteenth, and Fifteenth],

the Court went on specifically to note that the Act was not "conceived" in terms of the commerce power, and expressly pointed out:

Of course, these remarks [as to lack of congressional power] do not apply to those cases in which Congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such power to the States, as in the regulation of commerce with foreign nations, among the several States, and with the Indian tribes. . . . In these cases, Congress has [p252] power to pass laws for regulating the subjects specified in every detail, and the conduct and transactions of individuals in respect thereof.

At 18. Since the commerce power was not relied on by the Government and was without support in the record, it is understandable that the Court narrowed its inquiry and excluded the Commerce Clause as a possible source of power. In any event, it is clear that such a limitation renders the opinion devoid of authority for the proposition that the Commerce Clause gives no power to Congress to regulate discriminatory practices now found substantially to affect interstate commerce. We therefore conclude that the *Civil Rights Cases* have no relevance to the basis of decision here, where the Act explicitly relies upon the commerce power and where the record is filled with testimony of obstructions and restraints resulting from the discriminations found to be existing.

We now pass to that phase of the case.

#### 6. *The Basis of Congressional Action.*

While the Act, as adopted, carried no congressional findings, the record of its passage through each house is replete with evidence of the burdens that discrimination by race or color places upon interstate commerce. See Hearings before Senate Committee on Commerce on S. 1732, 88th Cong., 1st Sess.; S.Rep. No. 872, *supra*; Hearings before Senate Committee on the Judiciary on S. 1731, 88th Cong., 1st Sess.; Hearings before House Subcommittee No. 5 of the Committee on the Judiciary on miscellaneous proposals regarding Civil Rights, 88th Cong., 1st Sess., ser. 4; H.R.Rep. No. 914, *supra*. This testimony included the fact that our people have become increasingly mobile, with millions of people of all races traveling from State to State; that Negroes in particular have been the subject of discrimination in transient accommodations, having to travel great distances [p253] to secure the same; that often they have been unable to obtain accommodations, and have had to call upon friends to put them up overnight, S.Rep. No. 872, *supra*, at 14-22, and that these conditions had become so acute as to require the listing of available lodging for Negroes in a special guidebook, which was itself "dramatic testimony to the difficulties" Negroes encounter in travel. Senate Commerce Committee Hearings, *supra*, at 692-694. These exclusionary practices were found to be nationwide, the Under Secretary of Commerce testifying that there is "no question that this discrimination in the North still exists to a large degree" and in the West and Midwest as well. *Id.* at 735, 744. This testimony indicated a qualitative, as well as quantitative, effect on interstate travel by Negroes. The former was the obvious

impairment of the Negro traveler's pleasure and convenience that resulted when he continually was uncertain of finding lodging. As for the latter, there was evidence that this uncertainty stemming from racial discrimination had the effect of discouraging travel on the part of a substantial portion of the Negro community. *Id.* at 744. This was the

conclusion not only of the Under Secretary of Commerce, but also of the Administrator of the Federal Aviation Agency, who wrote the Chairman of the Senate Commerce Committee that it was his

belief that air commerce is adversely affected by the denial to a substantial segment of the traveling public of adequate and desegregated public accommodations.

*Id.* at 12-13. We shall not burden this opinion with further details, since the voluminous testimony presents overwhelming evidence that discrimination by hotels and motels impedes interstate travel.

#### 7. The Power of Congress Over Interstate Travel.

The power of Congress to deal with these obstructions depends on the meaning of the Commerce Clause. Its meaning was first enunciated 140 years ago by the great [p254] Chief Justice John Marshall in *Gibbons v. Ogden*, 9 Wheat. 1 (1824), in these words:

The subject to be regulated is commerce, and . . . to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities . . . , but it is something more: it is intercourse . . . between

nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. [At 189-190.]

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To what commerce does this power extend? The constitution informs us, to commerce "with foreign nations, and among the several States, and with the Indian tribes."

It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse. . . . No sort of trade can be carried on . . . to which this power does not extend. [At 193-194.]

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The subject to which the power is next applied is to commerce "among the several States." The word "among" means intermingled. . . .

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. . . [I]t may very properly be restricted to that commerce which concerns more States than one. . . . The genius and character of the whole government seem to be that its action is to be applied to all the . . . internal concerns [of the Nation] which affect the States generally, but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary [p255] to interfere for the purpose of executing some of the general powers of the government. [At 194-195.]

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We are now arrived at the inquiry -- What is this power?

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution. . . . If, as has always been understood, the sovereignty of Congress . . . is plenary as to those objects [specified in the Constitution], the power over commerce . . . is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments. [At 196-197.]

In short, the determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is "commerce which concerns more States than one" and has a real and substantial relation to the national interest. Let us now turn to this facet of the problem.

That the "intercourse" of which the Chief Justice spoke included the movement of persons through more [p256] States than one was settled as early as 1849, in the *Passenger Cases*, 7 How. 283, where Mr. Justice McLean stated: "That the transportation of passengers is a part of commerce is not now an open question." At 401. Again, in 1913, Mr.

Justice McKenna, speaking for the Court, said:

Commerce among the States, we have said, consists of intercourse and traffic between their citizens, and includes the transportation of persons and property.

*Hoke v. United States*, 227 U.S. 308, 320. And only four years later, in 1917, in *Caminetti v. United States*, 242 U.S. 470, Mr. Justice Day held for the Court:

The transportation of passengers in interstate commerce, it has long been settled, is within the regulatory power of Congress, under the commerce clause of the Constitution, and the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.

At 491. Nor does it make any difference whether the transportation is commercial in character. *Id.* at 484-486. In *Morgan v. Virginia*, 328 U.S. 373 (1946), Mr. Justice Reed observed as to the modern movement of persons among the States:

The recent changes in transportation brought about by the coming of automobiles [do] not seem of great significance in the problem. People of all races travel today more extensively than in 1878, when this Court first passed upon state regulation of racial segregation in commerce. [It but] emphasizes the soundness of this Court's early conclusion in *Hall v. DeCuir*, 95 U.S. 485.

At 383.

The same interest in protecting interstate commerce which led Congress to deal with segregation in



interstate [p257] carriers and the white slave traffic has prompted it to extend the exercise of its power to gambling, *Lottery Case*, 188 U.S. 321 (1903); to criminal enterprises, *Brooks v. United States*, 267 U.S. 432 (1925); to deceptive practices in the sale of products, *Federal Trade Comm'n v. Mandel Bros., Inc.*, 359 U.S. 385 (1959); to fraudulent security transactions, *Securities & Exchange Comm'n v. Ralston Purina Co.*, 346 U.S. 119 (1953); to misbranding of drugs, *Weeks v. United States*, 245 U.S. 618 (1918); to wages and hours, *United States v. Darby*, 312 U.S. 100 (1941); to members of labor unions, *Labor Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); to crop control, *Wickard v. Filburn*, 317 U.S. 111 (1942); to discrimination against shippers, *United States v. Baltimore & Ohio R. Co.*, 333 U.S. 169 (1948); to the protection of small business from injurious price-cutting, *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954); to resale price maintenance, *Hudson Distributors, Inc. v. Eli Lilly & Co.*, 377 U.S. 386 (1964), *Schwegmann v. Calvert Distillers Corp.*, 341 U.S. 384 (1951); to professional football, *Radovich v. National Football League*, 352 U.S. 445 (1957), and to racial discrimination by owners and managers of terminal restaurants, *Boynnton v. Virginia*, 364 U.S. 454 (1960).

That Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid. In framing Title II of this Act, Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact

appropriate legislation, and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong. [p258]

It is said that the operation of the motel here is of a purely local character. But, assuming this to be true, "[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States v. Women's Sportswear Mfrs. Assn.*, 336 U.S. 460, 464 (1949). See *Labor Board v. Jones & Laughlin Steel Corp.*, *supra*. As Chief Justice Stone put it in *United States v. Darby*, *supra*:

The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. See *McCulloch v. Maryland*, 4 Wheat. 316, 421.

At 118. Thus, the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce. One need only examine the evidence which we have discussed above to see that Congress may -- as it has -- prohibit racial discrimination by motels serving travelers, however "local" their operations may appear.

*Central Eureka Mining Co.* 357 U.S. 155 (1958).

We find no merit in the remainder of appellant's contentions, including that of "involuntary servitude." As we have seen, 32 States prohibit racial discrimination in public accommodations. These laws but codify the common law innkeeper rule, which long predated the **Thirteenth Amendment**. It is difficult to believe that the Amendment was intended to abrogate this principle. Indeed, the opinion of the Court in the Civil Rights Cases is to the contrary as we have seen, it having noted with approval the laws of "all the States" prohibiting discrimination. We could not say that the requirements of the Act in this regard are in any way "akin to African slavery." *Butler v. Perry*, 240 U.S. 328, 332 (1916).

We therefore conclude that the action of the Congress in the adoption of the Act as applied here to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause of the Constitution, as interpreted by this Court for 140 years. It may be argued that Congress could have pursued other methods to eliminate the obstructions it found in interstate commerce caused by racial discrimination. But this is a matter of policy that rests entirely with the Congress, not with the courts. How obstructions in commerce [p262] may be removed -- what means are to be employed -- is within the sound and exclusive discretion of the Congress. It is subject only to one caveat -- that the means chosen by it must be reasonably adapted to the end permitted by the Constitution. We cannot say that its choice here was not so adapted. The Constitution requires no more.

Affirmed.

## APPENDIX TO OPINION OF THE COURT

### TITLE II-- INJUNCTIVE RELIEF AGAINST DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION

SEC. 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station; [p263]

(3) any motion picture house, theater, concert hall, sports arena, stadium or

SUPREME COURT OF THE UNITED STATES

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379 U.S. 294

Katzenbach v. McClung

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF ALABAMA

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No. 543 Argued: October 5, 1964 --- Decided: December 14, 1964

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MR. JUSTICE CLARK delivered the opinion of the Court.

This case was argued with No. 515, Heart of Atlanta Motel v. United States, decided this date, ante, p. 241, in which we upheld the constitutional validity of Title II of the Civil Rights Act of 1964 against an attack by hotels, motels, and like establishments. This complaint for injunctive relief against appellants attacks the constitutionality of the Act as applied to a restaurant. The case was heard by a three-judge United States District Court and an injunction was issued restraining appellants from enforcing the Act against the restaurant. 233 F.Supp. 815. On direct appeal, 28 U.S.C. §§ 1252-1253 (1958 ed.), we noted probable jurisdiction. 379 U.S. 802. We now reverse the judgment.

1. The Motion to Dismiss

The appellants moved in the District Court to dismiss the complaint for want of equity jurisdiction and that claim is pressed here. The grounds are that the Act authorizes only preventive relief; that there has been no threat of enforcement against the appellees and that they have alleged no irreparable injury. It is true that ordinarily equity will not interfere in such cases. However, we may and do consider this complaint

as an application for a declaratory judgment under 28 U.S.C. §§ 2201 and 2202 (1958 ed.). In this case, of course, direct appeal to this Court would still lie under 28 U.S.C. § 1252 (1958 [p296] ed.). But even though Rule 57 of the Federal Rules of Civil Procedure permits declaratory relief although another adequate remedy exists, it should not be granted where a special statutory proceeding has been provided. See Notes on Rule 57 of Advisory Committee on Rules, 28 U.S.C.App. 5178 (1958 ed.). Title II provides for such a statutory proceeding for the determination of rights and duties arising thereunder, §§ 204-207, and courts should, therefore, ordinarily refrain from exercising their jurisdiction in such cases.

The present case, however, is in a unique position. The interference with governmental action has occurred and the constitutional question is before us in the companion case of Heart of Atlanta Motel as well as in this case. It is important that a decision on the constitutionality of the Act as applied in these cases be announced as quickly as possible. For these reasons, we have concluded, with the above caveat, that the denial of discretionary declaratory relief is not required here.

## 2. The Facts

Ollie's Barbecue is a family owned restaurant in Birmingham, Alabama, specializing in barbecued meats and homemade pies, with a seating capacity of 220 customers. It is located on a state highway 11 blocks from an interstate one and a somewhat greater distance from railroad and bus stations. The restaurant caters to a family and white-collar trade with a take-out service for Negroes. It employs 36 persons, two-thirds of whom are Negroes.

In the 12 months preceding the passage of the Act, the restaurant purchased locally approximately \$150,000 worth of food, \$69,683 or 46% of which was meat that it bought from a local supplier who had procured it from outside the State. The District Court expressly found that a substantial portion of the food served in the restaurant [p297] had moved in interstate commerce. The restaurant has refused to serve Negroes in its dining accommodations since its original opening in 1927, and, since July 2, 1964, it has been operating in violation of the Act. The court below concluded that, if it were required to serve Negroes, it would lose a substantial amount of business.

On the merits, the District Court held that the Act could not be applied under the Fourteenth Amendment because it was conceded that the State of Alabama was not involved in the refusal of the restaurant to serve Negroes. It was also admitted that the Thirteenth Amendment was authority neither for validating nor for invalidating the Act. As to the Commerce Clause, the court found that it was

an express grant of power to Congress to regulate interstate commerce, which consists of the movement of persons, goods or information from one state to another,

and it found that the clause was also a grant of power

to regulate intrastate activities, but only to the extent that action on its part is necessary or appropriate to the effective execution of its expressly granted power to regulate interstate commerce.

There must be, it said, a close and substantial relation between local activities and interstate commerce which requires control of the former in the protection of the latter. The court concluded, however, that the Congress, rather than finding facts sufficient to meet this rule, had legislated a conclusive presumption that a restaurant affects interstate commerce if it serves or offers to serve interstate travelers or if a substantial portion of the food which it serves has moved in commerce. This, the court held, it could not do, because there was no demonstrable connection between food purchased in interstate commerce and sold in a restaurant and the conclusion of Congress that discrimination in the restaurant would affect that commerce. [p298]

The basic holding in Heart of Atlanta Motel answers many of the contentions made by the appellees. [n1] There, we outlined the overall purpose and operational plan of Title II, and found it a valid exercise of the power to regulate interstate commerce insofar as it requires hotels and motels to serve transients without regard to their race or color. In this case, we consider its application to restaurants which

depressant effect on general business conditions in the respective communities. See, e.g. Senate Commerce Committee Hearings at 623-630, 695-700, 1384-1385.

Moreover, there was an impressive array of testimony that discrimination in restaurants had a direct and highly restrictive effect upon interstate travel by Negroes. This resulted, it was said, because discriminatory practices prevent Negroes from buying prepared food served on the premises while on a trip, except in isolated and unkempt restaurants and under most unsatisfactory and often unpleasant conditions. This obviously discourages travel and obstructs interstate commerce, for one can hardly travel without eating. Likewise, it was said that discrimination deterred professional as well as skilled people from moving into areas where such practices occurred, and thereby caused industry to be reluctant to establish there. S.Rep. No. 872, supra, at 18-19.

We believe that this testimony afforded ample basis for the conclusion that established restaurants in such areas sold less interstate goods because of the discrimination, that interstate travel was obstructed directly by it, that business in general suffered, and that many new businesses refrained from establishing there as a result of it. Hence, the District Court was in error in concluding that there was no connection between discrimination and the movement of interstate commerce. The court's conclusion that such a connection is outside "common experience" flies in the face of stubborn fact.

It goes without saying that, viewed in isolation, the volume of food purchased by Ollie's Barbecue from sources

supplied from out of state was insignificant when [p301] compared with the total foodstuffs moving in commerce. But, as our late Brother Jackson said for the Court in Wickard v. Filburn, 317 U.S. 111 (1942):

That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.

At 127-128.

We noted in Heart of Atlanta Motel that a number of witnesses attested to the fact that racial discrimination was not merely a state or regional problem, but was one of nationwide scope. Against this background, we must conclude that, while the focus of the legislation was on the individual restaurant's relation to interstate commerce, Congress appropriately considered the importance of that connection with the knowledge that the discrimination was but

representative of many others throughout the country, the total incidence of which, if left unchecked, may well become far-reaching in its harm to commerce.

Polish Alliance v. Labor Board, 322 U.S. 643, 648 (1944).

With this situation spreading as the record shows, Congress was not required to await the total dislocation of commerce. As was said in Consolidated Edison Co. v. Labor Board, 305 U.S. 197 (1938):

But it cannot be maintained that the exertion of federal power must await the disruption of that commerce.

Congress was entitled to provide reasonable preventive measures and that was the object of the National Labor Relations Act.

At 222.

#### 5. The Power of Congress to Regulate Local Activities

Article I, § 8, cl. 3, confers upon Congress the power "[t]o regulate Commerce . . . among the several States" and Clause 18 of the same Article grants it the power [p302] "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers. . . ." This grant, as we have pointed out in *Heart of Atlanta Motel*,

extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce.

*United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942). Much is said about a restaurant business being local, but,

even if appellee's activity be local, and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce. . . .

*Wickard v. Filburn*, *supra*, at 125. The activities that are beyond the reach of Congress are

those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose

of executing some of the general powers of the government.

*Gibbons v. Ogden*, 9 Wheat. 1, 195 (1824). This rule is as good today as it was when Chief Justice Marshall laid it down almost a century and a half ago.

This Court has held time and again that this power extends to activities of retail establishments, including restaurants, which directly or indirectly burden or obstruct interstate commerce. We have detailed the cases in *Heart of Atlanta Motel*, and will not repeat them here.

Nor are the cases holding that interstate commerce ends when goods come to rest in the State of destination apposite here. That line of cases has been applied with reference to state taxation or regulation, but not in the field of federal regulation.

The appellees contend that Congress has arbitrarily created a conclusive presumption that all restaurants [p303] meeting the criteria set out in the Act "affect commerce." Stated another way, they object to the omission of a provision for a case-by-case determination -- judicial or administrative -- that racial discrimination in a particular restaurant affects commerce.

But Congress' action in framing this Act was not unprecedented. In *United States v. Darby*, 312 U.S. 100 (1941), this Court held constitutional the Fair Labor Standards Act of 1938. [n2] There, Congress determined that the payment of substandard wages to employees engaged in the production of goods for commerce, while not itself commerce, so inhibited it as to be subject to federal regulation. The appellees in that case argued, as do the appellees here, that the Act was

invalid because it included no provision for an independent inquiry regarding the effect on commerce of substandard wages in a particular business. (Brief for appellees, pp. 76-77, United States v. Darby, 312 U.S. 100.) But the Court rejected the argument, observing that:

[S]ometimes Congress itself has said that a particular activity affects the commerce, as it did in the present Act, the Safety Appliance Act, and the Railway Labor Act. In passing on the validity of legislation of the class last mentioned the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power.

At 120-121.

Here, as there, Congress has determined for itself that refusals of service to Negroes have imposed burdens both upon the interstate flow of food and upon the movement of products generally. Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators, in [p304] light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end. The only remaining question -- one answered in the affirmative by the court below -- is whether the particular restaurant either serves or offers to serve interstate travelers or serves food a substantial portion of which has moved in interstate commerce.

The appellees urge that Congress, in passing the Fair Labor Standards Act and the National Labor Relations Act, [n3] made specific findings which were embodied in those statutes. Here, of

course, Congress has included no formal findings. But their absence is not fatal to the validity of the statute, see United States v. Carolene Products Co., 304 U.S. 144, 152 (1938), for the evidence presented at the hearings fully indicated the nature and effect of the burdens on commerce which Congress meant to alleviate.

Confronted as we are with the facts laid before Congress, we must conclude that it had a rational basis for finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce. Insofar as the sections of the Act here relevant are concerned, §§ 201(b)(2) and (c), Congress prohibited discrimination only in those establishments having a close tie to interstate commerce, i.e., those, like the McClungs', serving food that has come from out of the State. We think, in so doing, that Congress acted well within its power to protect and foster commerce in extending the coverage of Title II only to those restaurants offering to serve interstate travelers or serving food, a substantial portion of which has moved in interstate commerce.

The absence of direct evidence connecting discriminatory restaurant service with the flow of interstate food, [p305] a factor on which the appellees place much reliance, is not, given the evidence as to the effect of such practices on other aspects of commerce, a crucial matter.

The power of Congress in this field is broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere. The Civil Rights Act of 1964, as here applied, we

! find to be plainly appropriate in the resolution of what the Congress found to be a national commercial problem of the first magnitude. We find it in no violation of any express limitations of the Constitution and we therefore declare it valid.

The judgment is therefore

Reversed.

[For concurring opinion of MR. JUSTICE BLACK, see ante, p. 268.]

[For concurring opinion of MR. JUSTICE Douglas, see ante, p. 279.]

[For concurring opinion of MR. JUSTICE GOLDBERG, see ante, p. 291.]

1. That decision disposes of the challenges that the appellees base on the Fifth, Ninth, Tenth, and Thirteenth Amendments, and on the Civil Rights Case, 109 U.S. 3 (1883).

2. 52 Stat. 1060, 29 U.S.C. § 201 et seq. (1958 ed.).

3. 49 Stat. 449, as amended, 29 U.S.C. § 151 et seq. (1958 ed.).



DOUGLAS, J., Opinion of the Court  
SUPREME COURT OF THE UNITED STATES

381 U.S. 479

Griswold v. Connecticut

APPEAL FROM THE SUPREME COURT OF ERRORS OF  
CONNECTICUT

No. 496 Argued: March 29-30, 1965 — Decided: June 7, 1965

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Appellant Griswold is Executive Director of the Planned Parenthood League of Connecticut. Appellant Buxton is a licensed physician and a professor at the Yale Medical School who served as Medical Director for the League at its Center in New Haven -- a center open and operating from November 1 to November 10, 1961, when appellants were arrested.

They gave information, instruction, and medical advice to married persons as to the means of preventing conception. They examined the wife and prescribed the best contraceptive device or material for her use. Fees were usually charged, although some couples were serviced free.

The statutes whose constitutionality is involved in this appeal are §§ 53-32 and 54-196 of the General Statutes of Connecticut (1958 rev.). The former provides:

Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor

more than one year or be both fined and imprisoned.

Section 54-196 provides:

Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.

The appellants were found guilty as accessories and fined \$100 each, against the claim that the accessory statute, as so applied, violated the Fourteenth Amendment. The Appellate Division of the Circuit Court affirmed. The Supreme Court of Errors affirmed that judgment. 151 Conn. 544, 200 A.2d 479. We noted probable jurisdiction. 379 U.S. 926. [p481]

We think that appellants have standing to raise the constitutional rights of the married people with whom they had a professional relationship. *Tilston v. Ullman*, 318 U.S. 44, is different, for there the plaintiff seeking to represent others asked for a declaratory judgment. In that situation, we thought that the requirements of standing should be strict, lest the standards of

"case or controversy" in Article III of the Constitution become blurred. Here, those doubts are removed by reason of a criminal conviction for serving married couples in violation of an aiding-and-abetting statute. Certainly the accessory should have standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be, a crime.

This case is more akin to *Truax v. Raich*, 239 U.S. 33, where an employee was permitted to assert the rights of his employer; to *Pierce v. Society of Sisters*, 268 U.S. 510, where the owners of private schools were entitled to assert the rights of potential pupils and their parents, and to *Barrows v. Jackson*, 346 U.S. 249, where a white defendant, party to a racially restrictive covenant, who was being sued for damages by the covenantors because she had conveyed her property to Negroes, was allowed to raise the issue that enforcement of the covenant violated the rights of prospective Negro purchasers to equal protection, although no Negro was a party to the suit. And see *Meyer v. Nebraska*, 262 U.S. 390; *Adler v. Board of Education*, 342 U.S. 485; *NAACP v. Alabama*, 357 U.S. 449; *NAACP v. Button*, 371 U.S. 415. The rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them.

Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments [p482] suggest that *Lochner v. New York*, 198 U.S. 45, should be our guide. But we decline that invitation, as we did in *West Coast Hotel Co. v. Parrish*, 300

U.S. 379; *Olsen v. Nebraska*, 313 U.S. 236; *Lincoln Union v. Northwestern Co.*, 335 U.S. 525; *Williamson v. Lee Optical Co.*, 348 U.S. 483; *Giboney v. Empire Storage Co.*, 336 U.S. 490. We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice -- whether public or private or parochial -- is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

By *Pierce v. Society of Sisters*, *supra*, the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By *Meyer v. Nebraska*, *supra*, the same dignity is given the right to study the German language in a private school. In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read (*Martin v. Struthers*, 319 U.S. 141, 143) and freedom of inquiry, freedom of thought, and freedom to teach (see *Wieman v. Updegraff*, 344 U.S. 183, 195) -- indeed, the freedom of the entire university community. *Sweezy v. New Hampshire*, 354 U.S. 234, 249-250, 261-263; *Barenblatt v. United States*, 360 U.S. 109, 112;

*Baggett v. Bullitt*, 377 U.S. 360, 369. Without [p483] those peripheral rights, the specific rights would be less secure. And so we reaffirm the principle of the *Pierce* and the *Meyer* cases.

In *NAACP v. Alabama*, 357 U.S. 449, 462 we protected the "freedom to associate and privacy in one's associations." noting that freedom of association was a peripheral First Amendment right. Disclosure of membership lists of a constitutionally valid association, we held, was invalid

as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association.

*Ibid.* In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion. In like context, we have protected forms of "association" that are not political in the customary sense, but pertain to the social, legal, and economic benefit of the members. *NAACP v. Button*, 371 U.S. 415, 430-431. In *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, we held it not permissible to bar a lawyer from practice because he had once been a member of the Communist Party. The man's "association with that Party" was not shown to be "anything more than a political faith in a political party" (*id.* at 244), and was not action of a kind proving bad moral character. *Id.* at 245-246.

Those cases involved more than the "right of assembly" -- a right that extends to all, irrespective of their race or ideology. *De Jonge v. Oregon*, 299 U.S. 353. The right of "association," like the right of belief (*Board of Education v. Barnette*, 319 U.S. 624), is more than the right to attend a

meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion, and, while it is not expressly included in the First Amendment, its existence is necessary in making the express guarantees fully meaningful. [p484]

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. See *Poe v. Ullman*, 367 U.S. 497, 516-522 (dissenting opinion). Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment, in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner, is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment, in its Self-Incrimination Clause, enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Fourth and Fifth Amendments were described in *Boyd v. United States*, 116 U.S. 616, 630, as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life." [\*] We recently referred [p485] in *Mapp v.*

Ohio, 367 U.S. 643, 656, to the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully reserved to the people." See Beane, The Constitutional Right to Privacy, 1962 Sup.Ct.Rev. 212; Griswold, The Right to be Let Alone, 55 Nw.U.L.Rev. 216 (1960).

We have had many controversies over these penumbral rights of "privacy and repose." See, e.g., *Breard v. Alexandria*, 341 U.S. 622, 626, 644; *Public Utilities Comm'n v. Pollak*, 343 U.S. 451; *Monroe v. Pape*, 365 U.S. 167; *Lanza v. New York*, 370 U.S. 139; *Frank v. Maryland*, 359 U.S. 360; *Skinner v. Oklahoma*, 316 U.S. 535, 541. These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives, rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a

governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.

NAACP v. Alabama, 377 U.S. 288, 307. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The [p486] very idea is repulsive to the notions of

privacy surrounding the marriage relationship.

We deal with a right of privacy older than the Bill of Rights -- older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Reversed.

\* The Court said in full about this right of privacy:

The principles laid down in this opinion [by Lord Camden in *Entick v. Carrington*, 19 How.St.Tr. 1029] affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence -- it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence

SUPREME COURT OF THE UNITED STATES

388 U.S. 1

Loving v. Virginia

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

No. 395 Argued: April 10, 1967 --- Decided: June 12, 1967

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This case presents a constitutional question never addressed by this Court: whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. [n1] For reasons which seem to us to reflect the central meaning of those constitutional commands, we conclude that these statutes cannot stand consistently with the Fourteenth Amendment.

In June, 1958, two residents of Virginia, Mildred Jeter, a Negro woman, and Richard Loving, a white man, were married in the District of Columbia pursuant to its laws. Shortly after their marriage, the Lovings returned to Virginia and established their marital abode in Caroline County. At the October Term, 1958, of the Circuit Court [p3] of Caroline County, a grand jury issued an indictment charging the Lovings with violating Virginia's ban on interracial marriages. On January 6, 1959, the Lovings pleaded guilty to the charge, and were sentenced to one year in jail; however, the trial judge suspended the sentence for a period of 25 years on the

condition that the Lovings leave the State and not return to Virginia together for 25 years. He stated in an opinion that:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And, but for the interference with his arrangement, there would be no cause for such marriage. The fact that he separated the races shows that he did not intend for the races to mix.

After their convictions, the Lovings took up residence in the District of Columbia. On November 6, 1963, they filed a motion in the state trial court to vacate the judgment and set aside the sentence on the ground that the statutes which they had violated were repugnant to the Fourteenth Amendment. The motion, not having been decided by October 28, 1964, the Lovings instituted a class action in the United States District Court for the Eastern District of Virginia requesting that a three-judge court be convened to declare the Virginia anti-miscegenation statutes unconstitutional and to enjoin state officials from enforcing their convictions. On January 22, 1965, the state trial judge denied the motion to vacate the sentences, and the Lovings perfected an appeal to the Supreme

Court of Appeals of Virginia. On February 11, 1965, the three-judge District Court continued the case to allow the Lovings to present their constitutional claims to the highest state court.

The Supreme Court of Appeals upheld the constitutionality of the anti-miscegenation statutes and, after [p4] modifying the sentence, affirmed the convictions. [n2] The Lovings appealed this decision, and we noted probable jurisdiction on December 12, 1966, 385 U.S. 986.

The two statutes under which appellants were convicted and sentenced are part of a comprehensive statutory scheme aimed at prohibiting and punishing interracial marriages. The Lovings were convicted of violating § 258 of the Virginia Code:

Leaving State to evade law. -- If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage.

Section 259, which defines the penalty for miscegenation, provides:

Punishment for marriage. -- If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years.

Other central provisions in the Virginia statutory scheme are § 20-57, which automatically voids all marriages between "a white person and a colored person" without any judicial proceeding, [n3] and §§ 20-54 and 1-14 which, [p5] respectively, define "white persons" and "colored persons and Indians" for purposes of the statutory prohibitions. [n4] The Lovings have never disputed in the course of this litigation that Mrs. Loving is a "colored person" or that Mr. Loving is a "white person" within the meanings given those terms by the Virginia statutes. [p6]

Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications. [n5] Penalties for miscegenation arose as an incident to slavery, and have been common in Virginia since the colonial period. [n6] The present statutory scheme dates from the adoption of the Racial Integrity Act of 1924, passed during the period of extreme nativism which followed the end of the First World War. The central features of this Act, and current Virginia law, are the absolute prohibition of a "white person" marrying other than another "white person," [n7] a prohibition against issuing marriage licenses until the issuing official is satisfied that [p7] the applicants' statements as to their race are correct, [n8] certificates of "racial composition" to be kept by both local and state registrars, [n9] and the carrying forward of earlier prohibitions against racial intermarriage. [n10]

I

In upholding the constitutionality of these provisions in the decision below, the Supreme Court of Appeals of Virginia referred to its 1965 decision in *Naim v. Naim*, 197 Va. 80, 87 S.E.2d

749, as stating the reasons supporting the validity of these laws. In *Naim*, the state court concluded that the State's legitimate purposes were "to preserve the racial integrity of its citizens," and to prevent "the corruption of blood," "a mongrel breed of citizens," and "the obliteration of racial pride," obviously an endorsement of the doctrine of White Supremacy. *Id.* at 90, 87 S.E.2d at 756. The court also reasoned that marriage has traditionally been subject to state regulation without federal intervention, and, consequently, the regulation of marriage should be left to exclusive state control by the Tenth Amendment.

While the state court is no doubt correct in asserting that marriage is a social relation subject to the State's police power, *Maynard v. Hill*, 125 U.S. 190 (1888), the State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. Nor could it do so in light of *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Skinner v. Oklahoma*, 316 U.S. 535 (1942). Instead, the State argues that the meaning of the Equal Protection Clause, as illuminated by the statements of the Framers, is only that state penal laws containing an interracial element [p8] as part of the definition of the offense must apply equally to whites and Negroes in the sense that members of each race are punished to the same degree. Thus, the State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based upon race. The second argument advanced by the State assumes the validity of its equal application theory. The argument

is that, if the Equal Protection Clause does not outlaw miscegenation statutes because of their reliance on racial classifications, the question of constitutionality would thus become whether there was any rational basis for a State to treat interracial marriages differently from other marriages. On this question, the State argues, the scientific evidence is substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages.

Because we reject the notion that the mere "equal application" of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations, we do not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose. The mere fact of equal application does not mean that our analysis of these statutes should follow the approach we have taken in cases involving no racial discrimination where the Equal Protection Clause has been arrayed against a statute discriminating between the kinds of advertising which may be displayed on trucks in *New York City, Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949), or an exemption in Ohio's ad valorem tax for merchandise owned by a nonresident in a storage warehouse, *Allied Stores of Ohio, [p9] Inc. v. Bowers*, 358 U.S. 522 (1959). In these cases, involving distinctions not drawn according to race, the Court has merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures. In the case at bar, however, we deal with statutes containing racial

classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.

The State argues that statements in the Thirty-ninth Congress about the time of the passage of the Fourteenth Amendment indicate that the Framers did not intend the Amendment to make unconstitutional state miscegenation laws. Many of the statements alluded to by the State concern the debates over the Freedmen's Bureau Bill, which President Johnson vetoed, and the Civil Rights Act of 1866, 14 Stat. 27, enacted over his veto. While these statements have some relevance to the intention of Congress in submitting the Fourteenth Amendment, it must be understood that they pertained to the passage of specific statutes, and not to the broader, organic purpose of a constitutional amendment. As for the various statements directly concerning the Fourteenth Amendment, we have said in connection with a related problem that, although these historical sources "cast some light" they are not sufficient to resolve the problem;

[a]t best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments, and wished them to have the most limited effect.

Brown v. Board of Education, 347 U.S. 483, 489 (1954). See also Strauder [p10] v. West Virginia, 100 U.S. 303, 310 (1880). We have rejected the proposition that the debates in the

Thirty-ninth Congress or in the state legislatures which ratified the Fourteenth Amendment supported the theory advanced by the State, that the requirement of equal protection of the laws is satisfied by penal laws defining offenses based on racial classifications so long as white and Negro participants in the offense were similarly punished. *McLaughlin v. Florida*, 379 U.S. 184 (1964).

The State finds support for its "equal application" theory in the decision of the Court in *Pace v. Alabama*, 106 U.S. 583 (1883). In that case, the Court upheld a conviction under an Alabama statute forbidding adultery or fornication between a white person and a Negro which imposed a greater penalty than that of a statute proscribing similar conduct by members of the same race. The Court reasoned that the statute could not be said to discriminate against Negroes because the punishment for each participant in the offense was the same. However, as recently as the 1964 Term, in rejecting the reasoning of that case, we stated "*Pace* represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court." *McLaughlin v. Florida*, *supra*, at 188. As we there demonstrated, the Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States. *Slaughter-House Cases*, 16 Wall. 36, 71 (1873); *Strauder v. West Virginia*, 100 U.S. 303, 307-308 (1880); *Ex parte Virginia*, 100 U.S. 339, 334-335 (1880); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Burton*



v. Wilmington Parking Authority, 365 U.S. 715 (1961). [p11]

There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. Over the years, this Court has consistently repudiated "[d]istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality." Hirabayashi v. United States, 320 U.S. 81, 100 (1943). At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," Korematsu v. United States, 323 U.S. 214, 216 (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. Indeed, two members of this Court have already stated that they

cannot conceive of a valid legislative purpose . . . which makes the color of a person's skin the test of whether his conduct is a criminal offense.

McLaughlin v. Florida, supra, at 198 (STEWART, J., joined by DOUGLAS, J., concurring).

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to

maintain White Supremacy. [n11] We have consistently denied [p12] the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.

II

These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). See also Maynard v. Hill, 125 U.S. 190 (1888). To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual, and cannot be infringed by the State.

These convictions must be reversed.

It is so ordered. [p13]

1. Section 1 of the Fourteenth Amendment provides:

POWELL, J., Judgment of the Court  
SUPREME COURT OF THE UNITED STATES

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438 U.S. 265

Regents of the University of California v. Bakke

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No. 7811 Argued: October 12, 1977 --- Decided: June 28, 1978

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MR. JUSTICE POWELL announced the judgment of the Court.

This case presents a challenge to the special admissions program of the petitioner, the Medical School of the University of California at Davis, which is designed to assure the admission [p270] of a specified number of students from certain minority groups.

The Superior Court of California sustained respondent's challenge, holding that petitioner's program violated the California Constitution, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., and the Equal Protection Clause of the Fourteenth Amendment. The court enjoined petitioner from considering respondent's race or the race of any other applicant in making admissions decisions. It refused, however, to order respondent's admission to the Medical School, holding that he had not carried his burden of proving that he would have been admitted but for the constitutional and statutory violations. The Supreme Court of California affirmed those portions of the trial court's judgment declaring the special admissions program unlawful and enjoining petitioner from considering the race of any applicant. [\*] [p271] It modified that portion of the judgment denying respondent's requested injunction and directed the trial court to order his admission.

For the reasons stated in the following opinion, I believe that so much of the judgment of the California court as holds petitioner's special admissions program unlawful and directs that respondent be admitted to the Medical School must be affirmed. For the reasons expressed in a separate opinion, my Brothers THE CHIEF JUSTICE, MR. JUSTICE STEWART, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS concur in this judgment. [p272]

I also conclude, for the reasons stated in the following opinion, that the portion of the court's judgment enjoining petitioner from according any consideration to race in its admissions process must be reversed. For reasons expressed in separate opinions, my Brothers MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN concur in this judgment.

Affirmed in part and reversed in part.  
1 [\*\*]

The Medical School of the University of California at Davis opened in 1968 with an entering class of 50 students. In 1971, the size of the entering class

was increased to 100 students, a level at which it remains. No admissions program for disadvantaged or minority students existed when the school opened, and the first class contained three Asians but no blacks, no Mexican-Americans, and no American Indians. Over the next two years, the faculty devised a special admissions program to increase the representation of "disadvantaged" students in each Medical School class. [n1] The special program consisted of [p273] a separate admissions system operating in coordination with the regular admissions process.

Under the regular admissions procedure, a candidate could submit his application to the Medical School beginning in July of the year preceding the academic year for which admission was sought. Record 149. Because of the large number of applications, [n2] the admissions committee screened each one to select candidates for further consideration. Candidates whose overall undergraduate-grade point averages fell below 2.5 on a scale of 4.0 were summarily rejected. Id. at 63. About [p274] one out of six applicants was invited for a personal interview. Ibid. Following the interviews, each candidate was rated on a scale of 1 to 100 by his interviewers and four other members of the admissions committee. The rating embraced the interviewers' summaries, the candidate's overall grade point average, grade point average in science courses, scores on the Medical College Admissions Test (MCAT), letters of recommendation, extracurricular activities, and other biographical data. Id. at 62. The ratings were added together to arrive at each candidate's "benchmark" score. Since five committee members rated each candidate in 1973, a perfect score was 500; in 1974, six members rated each

candidate, so that a perfect score was 600. The full committee then reviewed the file and scores of each applicant and made offers of admission on a "rolling" basis. [n3] The chairman was responsible for placing names on the waiting list. They were not placed in strict numerical order; instead, the chairman had discretion to include persons with "special skills." Id. at 63-64.

The special admissions program operated with a separate committee, a majority of whom were members of minority groups. Id. at 163. On the 1973 application form, candidates were asked to indicate whether they wished to be considered as "economically and/or educationally disadvantaged" applicants; on the 1974 form the question was whether they wished to be considered as members of a "minority group," which the Medical School apparently viewed as "Blacks," "Chicanos," "Asians," and "American Indians." Id. at 65-66, 146, 197, 203-205, 216-218. If these questions were answered affirmatively, the application was forwarded to the special admissions committee. No formal definition of "disadvantaged" [p275] was ever produced, id. at 163-164, but the chairman of the special committee screened each application to see whether it reflected economic or educational deprivation. [n4] Having passed this initial hurdle, the applications then were rated by the special committee in a fashion similar to that used by the general admissions committee, except that special candidates did not have to meet the 2.5 grade point average cutoff applied to regular applicants. About one-fifth of the total number of special applicants were invited for interviews in 1973 and 1974. [n5] Following each interview, the special committee assigned each special applicant a benchmark score.

The special committee then presented its top choices to the general admissions committee. The latter did not rate or compare the special candidates against the general applicants, id. at 388, but could reject recommended special candidates for failure to meet course requirements or other specific deficiencies. Id. at 171-172. The special committee continued to recommend special applicants until a number prescribed by faculty vote were admitted. While the overall class size was still 50, the prescribed number was 8; in 1973 and 1974, when the class size had doubled to 100, the prescribed number of special admissions also doubled, to 16. Id. at 164, 166.

From the year of the increase in class size -- 1971 -- through 1974, the special program resulted in the admission of 21 black students, 30 Mexican-Americans, and 12 Asians, for a total of 63 minority students. Over the same period, the regular admissions program produced 1 black, 6 Mexican-Americans, [p276] and 37 Asians, for a total of 44 minority students. [n6] Although disadvantaged whites applied to the special program in large numbers, see n. 5, supra, none received an offer of admission through that process. Indeed, in 1974, at least, the special committee explicitly considered only "disadvantaged" special applicants who were members of one of the designated minority groups. Record 171.

Allan Bakke is a white male who applied to the Davis Medical School in both 1973 and 1974. In both years, Bakke's application was considered under the general admissions program, and he received an interview. His 1973 interview was with Dr. Theodore C. West, who considered Bakke "a very desirable applicant to [the] medical

school." Id. at 225. Despite a strong benchmark score of 468 out of 500, Bakke was rejected. His application had come late in the year, and no applicants in the general admissions process with scores below 470 were accepted after Bakke's application was completed. Id. at 69. There were four special admissions slots unfilled at that time, however, for which Bakke was not considered. Id. at 70. After his 1973 rejection, Bakke wrote to Dr. George H. Lowrey, Associate Dean and Chairman of the Admissions Committee, protesting that the special admissions program operated as a racial and ethnic quota. Id. at 259. [p277]

Bakke's 1974 application was completed early in the year. Id. at 70. His student interviewer gave him an overall rating of 94, finding him "friendly, well tempered, conscientious and delightful to speak with." Id. at 229. His faculty interviewer was, by coincidence, the same Dr. Lowrey to whom he had written in protest of the special admissions program. Dr. Lowrey found Bakke "rather limited in his approach" to the problems of the medical profession, and found disturbing Bakke's "very definite opinions which were based more on his personal viewpoints than upon a study of the total problem." Id. at 226. Dr. Lowrey gave Bakke the lowest of his six ratings, an 86; his total was 549 out of 600. Id. at 230. Again, Bakke's application was rejected. In neither year did the chairman of the admissions committee, Dr. Lowrey, exercise his discretion to place Bakke on the waiting list. Id. at 64. In both years, applicants were admitted under the special program with grade point averages, MCT scores, and benchmark scores significantly lower than Bakke's. [n7]

After the second rejection, Bakke filed the instant suit in the Superior Court of California. [n8] He sought mandatory, injunctive, and declaratory relief compelling his admission to the Medical School. He alleged that the Medical School's special admissions program operated to exclude him from the [p278] school on the basis of his race, in violation of his rights under the Equal Protection Clause of the Fourteenth Amendment, [n9] Art. I, § 21, of the California Constitution, [n10] and § 601 of Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000d. [n11] The University cross-complained for a declaration that its special admissions program was lawful. The trial [p279] court found that the special program operated as a racial quota because minority applicants in the special program were rated only against one another, Record 388, and 16 places in the class of 100 were reserved for them. Id. at 295-296. Declaring that the University could not take race into account in making admissions decisions, the trial court held the challenged program violative of the Federal Constitution, the State Constitution, and Title VI. The court refused to order Bakke's admission, however, holding that he had failed to carry his burden of proving that he would have been admitted but for the existence of the special program.

Bakke appealed from the portion of the trial court judgment denying him admission, and the University appealed from the decision that its special admissions program was unlawful and the order enjoining it from considering race in the processing of applications. The Supreme Court of California transferred the case directly from the trial court, "because of the importance of the issues involved." 18 Cal.3d 34, 39, 553 P.2d 1152, 1156 (1976). The California court accepted

the findings of the trial court with respect to the University's program. [n12] Because the special admissions program involved a racial classification, the Supreme Court held itself bound to apply strict scrutiny. Id. at 49, 553 P.2d at 1162-1163. It then turned to the goals of the University presented as justifying the special program. Although the court agreed that the goals of integrating the medical profession and increasing the number of physicians willing to serve members of minority groups were compelling state interests, id. at 53, 553 P.2d at 1165, it concluded that the special admissions program was not the least intrusive means of achieving those goals. Without passing on the state constitutional or federal statutory grounds cited in the trial court's judgment, the California court held [p280] that the Equal Protection Clause of the Fourteenth Amendment required that

no applicant may be rejected because of his race, in favor of another who is less qualified, as measured by standards applied without regard to race.

Id. at 55, 553 P.2d at 1166.

Turning to Bakke's appeal, the court ruled that, since Bakke had established that the University had discriminated against him on the basis of his race, the burden of proof shifted to the University to demonstrate that he would not have been admitted even in the absence of the special admissions program. [n13] Id. at 63-64, 553 P.2d at 1172. The court analogized Bakke's situation to that of a plaintiff under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-17 (1970 ed., Supp. V), see, e.g., Franks v. Bowman Transportation Co., 424 U.S. 747, 772 (1976). 18 Cal.3d at 64, 553 P.2d at

1172. On this basis, the court initially ordered a remand for the purpose of determining whether, under the newly allocated burden of proof, Bakke would have been admitted to either the 1973 or the 1974 entering class in the absence of the special admissions program. App. A to Application for Stay 4. In its petition for rehearing below, however, the University conceded its inability to carry that burden. App. B to Application for Stay A19-A20. [n14] The [p281] California court thereupon amended its opinion to direct that the trial court enter judgment ordering Bakke's admission to the Medical School. 18 Cal.3d at 64, 553. P.2d at 1172. That order was stayed pending review in this Court. 429 U.S. 953 (1976). We granted certiorari to consider the important constitutional issue. 429 U.S. 1090 (1977).

II

In this Court, the parties neither briefed nor argued the applicability of Title VI of the Civil Rights Act of 1964. Rather, as had the California court, they focused exclusively upon the validity of the special admissions program under the Equal Protection Clause. Because it was possible, however, that a decision on Title VI might obviate resort to constitutional interpretation, see *Ashwander v. TVA*, 297 U.S. 288, 346-348 (1936) (concurring opinion), we requested supplementary briefing on the statutory issue, 434 U.S. 900 (1977).

A

At the outset, we face the question whether a right of action for private parties exists under Title VI. Respondent argues that there is a private right of action, invoking the test set forth in *Cort v. Ash*, 422 U.S. 66, 78 (1975). He contends [p282] that the

statute creates a federal right in his favor, that legislative history reveals an intent to permit private actions, [n15] that such actions would further the remedial purposes of the statute, and that enforcement of federal rights under the Civil Rights Act generally is not relegated to the States. In addition, he cites several lower court decisions which have recognized or assumed the existence of a private right of action. [n16] Petitioner denies the existence of a private right of action, arguing that the sole function of § 601, see n. 11, supra, was to establish a predicate for administrative action under § 602, 78 Stat. 252, 42 U.S.C. § 2000d-1. [n17] In its view, administrative curtailment of federal funds under that section was the only sanction to be imposed upon recipients that [p283] violated § 601. Petitioner also points out that Title VI contains no explicit grant of a private right of action, in contrast to Titles II, III, IV, and VII, of the same statute, 42 U.S.C. §§ 2000a-3(a), 2000b-2, 2000c-8, and 2000e-5(f) (1970 ed. and Supp. V). [n18]

We find it unnecessary to resolve this question in the instant case. The question of respondent's right to bring an action under Title VI was neither argued nor decided in either of the courts below, and this Court has been hesitant to review questions not addressed below. *McGoldrick v. Companie Generale Transatlantique*, 309 U.S. 430, 434-435 (1940). See also *Massachusetts v. Westcott*, 431 U.S. 322 (1977); *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). Cf. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). We therefore do not address this difficult issue. Similarly, we need not pass [p284] upon petitioner's claim that private plaintiffs under Title VI must exhaust administrative remedies. We assume, only for the purposes of this case, that

benefits now accorded only white students in programs of higher education financed by Federal funds. It would, in short, assure the existing right to equal treatment in the enjoyment of Federal funds. It would not destroy any rights of private property or freedom of association.

110 Cong. Rec. 1519 (1964) (emphasis added). Other sponsors shared Representative Celler's view that Title VI embodied constitutional principles. [n21]

In the Senate, Senator Humphrey declared that the purpose of Title VI was "to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation." Id. at 6544. Senator Ribicoff agreed that Title VI embraced the constitutional standard:

Basically, there is a constitutional restriction against discrimination in the use of federal funds; and title VI simply spells out the procedure to be used in enforcing that restriction.

Id. at 13333. Other Senators expressed similar views. [n22]

Further evidence of the incorporation of a constitutional standard into Title VI appears in the repeated refusals of the legislation's supporters precisely to define the term "discrimination." Opponents sharply criticized this failure, [n23] but proponents of the bill merely replied that the meaning of [p287] "discrimination" would be made clear by reference to the Constitution or other existing law. For example, Senator Humphrey noted the relevance of the Constitution:

As I have said, the bill has a simple purpose. That purpose is to give fellow citizens -- Negroes -- the same rights

and opportunities that white people take for granted. This is no more than what was preached by the prophets, and by Christ Himself. It is no more than what our Constitution guarantees.

Id. at 6553. [n24]

In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.

III

A

Petitioner does not deny that decisions based on race or ethnic origin by faculties and administrations of state universities are reviewable under the Fourteenth Amendment. See, e.g., *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950). For his part, respondent does not argue that all racial or ethnic classifications are per se invalid. See, e.g., *Mirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944); *Lee v. Washington*, 390 U.S. 333, 334 (1968) (Black, Harlan, and STEWART, J., concurring); *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977). The parties do disagree as to the level of judicial scrutiny to be applied to the special admissions program. Petitioner argues that the court below erred in applying strict scrutiny, as this inexact term has been [p288] applied in our cases. That level of review, petitioner asserts, should be reserved for classifications that disadvantage "discrete and insular minorities." See *United States v. Carolene Products Co.*, 304 U.S. 144,

152 n. 4 (1938). Respondent, on the other hand, contends that the California court correctly rejected the notion that the degree of Judicial scrutiny accorded a particular racial or ethnic classification hinges upon membership in a discrete and insular minority and duly recognized that the "rights established [by the Fourteenth Amendment] are personal rights." Shelley v. Kraemer, 334 U.S. 1, 22 (1948).

En route to this crucial battle over the scope of judicial review, [n25] the parties fight a sharp preliminary action over the proper characterization of the special admissions program. Petitioner prefers to view it as establishing a "goal" of minority representation in the Medical School. Respondent, echoing the courts below, labels it a racial quota. [n26] [p289]

This semantic distinction is beside the point: the special admissions program is undeniably a classification based on race and ethnic background. To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants. Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status. [n27]

The guarantees of the Fourteenth Amendment extend to all persons. Its language is explicit: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." It is settled beyond question that the

rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual.

The rights established are personal rights,

Shelley v. Kraemer, supra at 22. Accord, Missouri ex rel. Gaines v. Canada, supra at 351; McCabe v. Atchison, T. & S.F. R. Co., 235 U.S. 151, 161-162 (1914). The guarantee of equal protection cannot mean one thing when applied to one individual and something else when [p290] applied to a person of another color. If both are not accorded the same protection, then it is not equal.

Nevertheless, petitioner argues that the court below erred in applying strict scrutiny to the special admissions program because white males, such as respondent, are not a "discrete and insular minority" requiring extraordinary protection from the majoritarian political process. Carolene Products Co., supra at 152-153, n. 4. This rationale, however, has never been invoked in our decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny. Nor has this Court held that discreteness and insularity constitute necessary preconditions to a holding that a particular classification is invidious. [n28] See, e.g., Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942); Carrington v. Rash, 380 U.S. 89, 997 (1965). These characteristics may be relevant in deciding whether or not to add new types of classifications to the list of "suspect" categories or whether a particular classification survives close examination. See, e.g., Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (age); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (wealth); Graham v. Richardson, 403 U.S. 365, 372 (1971) (aliens). Racial and ethnic classifications, however, are subject to stringent examination without regard to



these additional characteristics. We declared as much in the first cases explicitly to recognize racial distinctions as suspect:

Distinctions between citizens solely because of their ancestry are, by their very nature, odious to a free people [p291] whose institutions are founded upon the doctrine of equality.

Hirabayashi, 320 U.S. at 100.

[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.

Korematsu, 323 U.S. at 216. The Court has never questioned the validity of those pronouncements. Racial and ethnic distinctions of any sort are inherently suspect, and thus call for the most exacting judicial examination.

B

This perception of racial and ethnic distinctions is rooted in our Nation's constitutional and demographic history. The Court's initial view of the Fourteenth Amendment was that its "one pervading purpose" was

the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised dominion over him.

Slaughter-House Cases, 16 Wall. 36, 71 (1873). The Equal Protection Clause, however, was "[v]irtually strangled in infancy by post-civil-war judicial reactionism." [n29] It was relegated to decades of relative

desuetude while the Due Process Clause of the Fourteenth Amendment, after a short germinal period, flourished as a cornerstone in the Court's defense of property and liberty of contract. See, e.g., *Mugler v. Kansas*, 123 U.S. 623, 661 (1887); *Alley v. Louisiana*, 165 U.S. 578 (1897); *Lochner v. New York*, 198 U.S. 45 (1905). In that cause, the Fourteenth Amendment's "one pervading purpose" was displaced. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896). It was only as the era of substantive due process came to a close, see, e.g., *Nebbia v. New York*, 291 U.S. 502 (1934); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), that the Equal Protection Clause began to attain a genuine measure of vitality, see, e.g., *United States v. Carolene Products*, 304 U.S. 144 (1938); *Skinner v. Oklahoma ex rel. Williamson*, *supra*.

By that time, it was no longer possible to peg the guarantees of the Fourteenth Amendment to the struggle for equality of one racial minority. During the dormancy of the Equal Protection Clause, the United States had become a Nation of minorities. [n30] Each had to struggle [n31] -- and, to some extent, struggles still [n32] -- to overcome the prejudices not of a monolithic majority, but of a "majority" composed of various minority groups of whom it was said -- perhaps unfairly, in many cases -- that a shared characteristic was a willingness to disadvantage other groups. [n33] As the Nation filled with the stock of many lands, the reach of the Clause was gradually extended to all ethnic groups seeking protection from official discrimination. See *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880) (Celtic Irishmen) (*dictum*); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (Chinese); *Truax v. Raich*, 239 U.S.

33, 41 (1915) (Austrian resident aliens); Korematsu, supra, (Japanese); Hernandez v. Texas, 347 U.S. 475 (1954) (Mexican-Americans). The guarantees of equal protection, said the Court in [p293] Yick Wo,

are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.

118 U.S. at 369.

Although many of the Framers of the Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the white "majority," Slaughter-House Cases, supra, the Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude. As this Court recently remarked in interpreting the 1866 Civil Rights Act to extend to claims of racial discrimination against white persons,

the 39th Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves.

McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 296 (1976). And that legislation was specifically broadened in 1870 to ensure that "all persons," not merely "citizens," would enjoy equal rights under the law. See Runyon v. McCrary, 427 U.S. 160, 192-202 (1976) (WHITE, J., dissenting). Indeed, it is not unlikely that, among the Framers, were many who would have applauded a reading of the Equal

Protection Clause that states a principle of universal application and is responsive to the racial, ethnic, and cultural diversity of the Nation. See, e.g., Cong. Globe, 39th Cong., 1st Sess., 1056 (1866) (remarks of Rep. Niblack); id. at 2891-2892 (remarks of Sen. Conness); id. 40th Cong., 2d Sess., 883 (1868) (remarks of Sen. Howe) (Fourteenth Amendment "protect[s] classes from class legislation"). See also Bickel, The Original Understanding and the Segregation Decision, 69 Harv.L.Rev. 1, 60-63 (1955).

Over the past 30 years, this Court has embarked upon the crucial mission of interpreting the Equal Protection Clause with the view of assuring to all persons "the protection of [p294] equal laws," Yick Wo, supra at 369, in a Nation confronting a legacy of slavery and racial discrimination. See, e.g., Shelley v. Kraemer, 334 U.S. 1 (1948); Brown v. Board of Education, 347 U.S. 483 (1954); Hills v. Gautreaux, 425 U.S. 284 (1976). Because the landmark decisions in this area arose in response to the continued exclusion of Negroes from the mainstream of American society, they could be characterized as involving discrimination by the "majority" white race against the Negro minority. But they need not be read as depending upon that characterization for their results. It suffices to say that,

[o]ver the years, this Court has consistently repudiated "[d]istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality."

Loving v. Virginia, 388 U.S. 1, 11 (1967), quoting Hirabayashi, 320 U.S. at 100.

Petitioner urges us to adopt for the first time a more restrictive view of the Equal Protection Clause, and hold that discrimination against members of the white "majority" cannot be suspect if its purpose can be characterized as "benign." [n34] [p295] The clock of our liberties, however, cannot be turned back to 1868. Brown v. Board of Education, supra at 492; accord, Loving v. Virginia supra at 9. It is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others. [n35]

The Fourteenth Amendment is not directed solely against discrimination due to a "two-class theory" -- that is, bad upon differences between "white" and Negro.

Hernandez, 347 U.S. at 478.

Once the artificial line of a "two-class theory" of the Fourteenth Amendment is put aside, the difficulties-entailed in varying the level of judicial review according to a perceived "preferred" status of a particular racial or ethnic minority are intractable. The concepts of "majority" and "minority" necessarily reflect temporary arrangements and political judgments. As observed above, the white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance [p296] of distinctions drawn in terms of race and nationality, for then the only "majority" left would be a new minority of white Anglo-Saxon Protestants. There is no principled basis for deciding which groups would merit

"heightened judicial solicitude" and which would not. [n36] Courts would be asked to evaluate the extent of the prejudice and consequent [p297] harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary. The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence -- even if they otherwise were politically feasible and socially desirable. [n37] [p298]

Moreover, there are serious problems of justice connected with the idea of preference itself. First, it may not always be clear that a so-called preference is, in fact, benign. Courts may be asked to validate burdens imposed upon individual members of a particular group in order to advance the group's general interest. See United Jewish Organizations v. Carey, 430 U.S. at 172-173 (BRENNAN, J., concurring in part). Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups. Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth. See DeFunis v. Odegaard, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting). Third, there is a measure of inequity in

forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making.

By hitching the meaning of the Equal Protection Clause to these transitory considerations, we would be holding, as a constitutional principle, that judicial scrutiny of classifications touching on racial and ethnic background may vary with the ebb and flow of political forces. Disparate constitutional tolerance of such classifications well may serve to exacerbate [p299] racial and ethnic antagonisms, rather than alleviate them. United Jewish Organizations, supra at 173-174 (BRENNAN, J., concurring in part). Also, the mutability of a constitutional principle, based upon shifting political and social judgments, undermines the chances for consistent application of the Constitution from one generation to the next, a critical feature of its coherent interpretation. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 650-651 (1895) (White, J., dissenting). In expounding the Constitution, the Court's role is to discern

principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and place.

A. Cox, *The Role of the Supreme Court in American Government* 114 (1976).

If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a

particular group, then constitutional standards may be applied consistently. Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, *Korematsu v. United States*, 323 U.S. 214 (1944), but the standard of justification will remain constant. This is as it should be, since those political judgments are the product of rough compromise struck by contending groups within the democratic process. [n38] When they touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest. The Constitution guarantees that right to every person regardless of his background. *Shelley v. Kraemer*, 334 U.S. at 22; *Missouri ex rel. Gaines v. Canada*, 305 U.S. at 351. [p300]

C

Petitioner contends that, on several occasions, this Court has approved preferential classifications without applying the most exacting scrutiny. Most of the cases upon which petitioner relies are drawn from three areas: school desegregation, employment discrimination, and sex discrimination. Each of the cases cited presented a situation materially different from the facts of this case.

The school desegregation cases are inapposite. Each involved remedies for clearly determined constitutional violations. E.g., *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *McDaniel v. Barresi*, 402 U.S. 39 (1971); *Green v. County School Board*, 391 U.S. 430 (1968). Racial classifications thus were designed as remedies for the vindication of constitutional entitlement.

the University engaged in a discriminatory practice requiring remedial efforts. Moreover, the operation of petitioner's special admissions program is quite different from the remedial measures approved in those cases. It prefers the designated minority groups at the expense of other individuals who are totally foreclosed from competition for the 16 special admissions seats in every Medical School class. Because of that foreclosure, some individuals are excluded from enjoyment of a state-provided benefit -- admission to the Medical School -- they otherwise would receive. When a classification denies an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background, it must be regarded as suspect. E.g., *McLaurin v. Oklahoma State Regents*, 339 U.S. at 641-642.

#### IV

We have held that, in

order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary . . . to the accomplishment" of its purpose or the safeguarding of its interest.

In re Griffiths, 413 U.S. 717, 721-722 (1973) (footnotes omitted); *Loving v. Virginia*, 388 U.S. at 11; *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964). The special admissions [p306] program purports to serve the purposes of: (i) "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession," Brief for Petitioner 32; (ii) countering the effects of societal discrimination; [n43] (iii) increasing the number of physicians who will practice

in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body. It is necessary to decide which, if any, of these purposes is substantial enough to support the use of a suspect classification. [p307]

#### A

If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial, but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids. E.g., *Loving v. Virginia*, supra at 11; *McLaughlin v. Florida*, supra at 198; *Brown v. Board of Education*, 347 U.S. 483 (1954).

#### B

The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination. The line of school desegregation cases, commencing with *Brown*, attests to the importance of this state goal and the commitment of the judiciary to affirm all lawful means toward its attainment. In the school cases, the States were required by court order to redress the wrongs worked by specific instances of racial discrimination. That goal was far more focused than the remedying of the effects of "societal discrimination," an amorphous concept of injury that may be ageless in its reach into the past.

We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of

other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. See, e.g., Teamsters v. United States, 431 U.S. 324, 367-376 (1977); United Jewish Organizations, 430 U.S. at 155-156; South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966). After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case, the [p308] extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined. Also, the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit. Without such findings of constitutional or statutory violations, [n44] it cannot be [p309] said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm.

Petitioner does not purport to have made, and is in no position to make, such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality. For reasons similar to those stated in Part III of this opinion, isolated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria. [n45] Cf. Hampton v. Mow Sun Wong, 426 U.S. 88 (1976); n. 41, supra. Before relying upon these sorts of findings in establishing a racial classification, a governmental body must have the authority and capability

to establish, in the record, that the classification is responsive to identified discrimination. See, e.g., Califano v. Webster, 430 U.S. at 316-321; Califano [p310] v. Goldfarb, 430 U.S. at 212-217. Lacking this capability, petitioner has not carried its burden of justification on this issue.

Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of "societal discrimination" does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved. Cf. Pasadena Cty Board of Education v. Spangler, 427 U.S. 424 (1976).

C

Petitioner identifies, as another purpose of its program, improving the delivery of health care services to communities currently underserved. It may be assumed that, in some situations, a State's interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification. But there is virtually no evidence in the record indicating that petitioner's special admissions program is either needed or geared to promote that goal. [n46] The court below addressed this failure of proof:

The University concedes it cannot assure that minority doctors who

entered under the program, all of whom expressed an "interest" in practicing in a disadvantaged community, will actually do so. It may be correct to assume that some of them will carry out this intention, and that it is more likely they will practice in minority [p311] communities than the average white doctor. (See Sandalow, Racial Preferences in Higher Education: Political Responsibility and the Judicial Role (1975) 42 U.Chi.L.Rev. 653, 688.) Nevertheless, there are more precise and reliable ways to identify applicants who are genuinely interested in the medical problems of minorities than by race. An applicant of whatever race who has demonstrated his concern for disadvantaged minorities in the past and who declares that practice in such a community is his primary professional goal would be more likely to contribute to alleviation of the medical shortage than one who is chosen entirely on the basis of race and disadvantage. In short, there is no empirical data to demonstrate that any one race is more selflessly socially oriented or by contrast that another is more selfishly acquisitive.

18 Cal.3d at 56, 553 P.2d at 1167.

Petitioner simply has not carried its burden of demonstrating that it must prefer members of particular ethnic groups over all other individuals in order to promote better health care delivery to deprived citizens. Indeed, petitioner has not shown that its preferential classification is likely to have any significant effect on the problem. [n47].

D

The fourth goal asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally

permissible [p312] goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. Mr. Justice Frankfurter summarized the "four essential freedoms" that constitute academic freedom:

"It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university -- to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."

Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (concurring in result).

Our national commitment to the safeguarding of these freedoms within university communities was emphasized in Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967):

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us, and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment. . . . The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection." United States v. Associated Press, 52 F.Supp. 362, 372.

The atmosphere of "speculation, experiment and creation" -- so essential to the quality of higher education -- is widely believed to be promoted by a diverse student body. [n48] As the Court [p313] noted in Keyishian, it is not too much to say that the "nation's future depends upon leaders trained through wide exposure" to the ideas and mores of students as diverse as this Nation of many peoples.

Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas," petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.

It may be argued that there is greater force to these views at the undergraduate level than in a medical school, where the training is centered primarily on professional competency. But even at the graduate level, our tradition and experience lend support to the view that the contribution of diversity is substantial. In Sweatt v. Painter, 339 U.S. at 634, the [p314] Court made a similar point with specific reference to legal education:

The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students, and no one who has practiced law, would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.

Physicians serve a heterogeneous population. An otherwise qualified

medical student with a particular background -- whether it be ethnic, geographic, culturally advantaged or disadvantaged -- may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity. [n49]

Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body. Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded. Respondent urges -- and the courts below have held -- that petitioner's dual admissions program is a racial classification that impermissibly infringes his rights under the Fourteenth Amendment. As the interest of diversity is compelling in the context of a university's admissions program, the question remains whether the [p315] program's racial classification is necessary to promote this interest. In re Griffiths, 413 U.S. at 721-722.

V

A

It may be assumed that the reservation of a specified number of seats in each class for individuals from the preferred ethnic groups would contribute to the attainment of considerable ethnic diversity in the student body. But petitioner's argument that this is the only effective means of serving the interest of diversity is seriously flawed. In a most fundamental sense, the argument misconceives the nature of the state interest that would justify



consideration of race or ethnic background. It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics, of which racial or ethnic origin is but a single, though important, element. Petitioner's special admissions program, focused solely on ethnic diversity, would hinder, rather than further, attainment of genuine diversity. [n50]

Nor would the state interest in genuine diversity be served by expanding petitioner's two-track system into a multi-track program with a prescribed number of seats set aside for each identifiable category of applicants. Indeed, it is inconceivable that a university would thus pursue the logic of petitioner's two-track program to the illogical end of insulating each category of applicants with certain desired qualifications from competition with all other applicants. [p316]

The experience of other university admissions programs, which take race into account in achieving the educational diversity valued by the First Amendment, demonstrates that the assignment of a fixed number of places to a minority group is not a necessary means toward that end. An illuminating example is found in the Harvard College program:

In recent years, Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also

blacks and Chicanos and other minority students. . . .

In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are "admissible" and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. . . . [See Appendix hereto.]

In Harvard College admissions, the Committee has not set target quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. . . . But that awareness [of the necessity of including more than a token number of black students] does not mean that the Committee sets a minimum number of blacks or of people from west of the Mississippi who are to be admitted. It means only that, in choosing among thousands of applicants who are not only "admissible" academically but have other strong qualities, the Committee, with a number of criteria in mind, pays some attention to distribution among many [p317] types and categories of students.

App. to Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, as Amici Curiae 2-3.

In such an admissions program, [n51] race or ethnic background may be

deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. Indeed, the weight attributed to a [p318] particular quality may vary from year to year depending upon the "mix" both of the student body and the applicants for the incoming class.

This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been

weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment. [n52]

It has been suggested that an admissions program which considers race only as one factor is simply a subtle and more sophisticated -- but no less effective -- means of according racial preference than the Davis program. A facial intent to discriminate, however, is evident in petitioner's preference program, and not denied in this case. No such facial infirmity exists in an admissions program where race or ethnic background is simply one element -- to be weighed fairly against other elements -- in the selection process. "A boundary line," as Mr. Justice Frankfurter remarked in another connection, "is none the worse for being narrow." McLeod v. Dilworth, 322 U.S. 327, 329 (1944). And a court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system. In short, good faith [p319] would be presumed in the absence of a showing to the contrary in the manner permitted by our cases. See, e.g., Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976); Swain v. Alabama, 380 U.S. 202 (1965). [n53]

B

In summary, it is evident that the Davis special admissions program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No

matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. At the same time, the preferred [p320] applicants have the opportunity to compete for every seat in the class.

The fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment. Shelley v. Kraemer, 334 U.S. at 22. Such rights are not absolute. But when a State's distribution of benefits or imposition of burdens hinges on ancestry or the color of a person's skin, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest. Petitioner has failed to carry this burden. For this reason, that portion of the California court's judgment holding petitioner's special admissions program invalid under the Fourteenth Amendment must be affirmed.

C

In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.

VI

With respect to respondent's entitlement to an injunction directing his admission to the Medical School, petitioner has conceded that it could not carry its burden of proving that, but for the existence of its unlawful special admissions program, respondent still would not have been admitted. Hence, respondent is entitled to the injunction, and that portion of the judgment must be affirmed. [n54] [p321]

APPENDIX TO OPINION OF POWELL, J.

Harvard College Admissions Program [n55]

For the past 30 years, Harvard College has received each year applications for admission that greatly exceed the number of places in the freshman class. The number of applicants who are deemed to be not "qualified" is comparatively small. The vast majority of applicants demonstrate through test scores, high school records and teachers' recommendations that they have the academic ability to do adequate work at Harvard, and perhaps to do it with distinction. Faced with the dilemma of choosing among a large number of "qualified" candidates, the Committee on Admissions could use the single criterion of scholarly excellence and attempt to determine who among the candidates were likely to perform best academically. But for the past 30 years, the Committee on Admissions has never adopted this approach. The belief has been that, if scholarly excellence were the sole or even predominant criterion, Harvard College would lose a great deal of its vitality and intellectual excellence, and that the quality of the educational [p322] experience offered to all students would suffer. Final Report of W. J. Bender, Chairman of the Admission and Scholarship Committee and Dean of Admissions and Financial

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 02—102

(539 U.S. 558 (2003))

JOHN GEDDES LAWRENCE and TYRON GARNER,  
PETITIONERS v. TEXAS

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF  
TEXAS, FOURTEENTH DISTRICT

[June 26, 2003]

Justice Kennedy delivered the opinion of the Court.

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.

The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.

In Houston, Texas, officers of the Harris County Police Department were dispatched to a private residence in response to a reported weapons

disturbance. They entered an apartment where one of the petitioners, John Geddes Lawrence, resided. The right of the police to enter does not seem to have been questioned. The officers observed Lawrence and another man, Tyron Garner, engaging in a sexual act. The two petitioners were arrested, held in custody over night, and charged and convicted before a Justice of the Peace.

The complaints described their crime as "deviate sexual intercourse, namely anal sex, with a member of the same sex (man)." App. to Pet. for Cert. 127a, 139a. The applicable state law is Tex. Penal Code Ann. §21.06(a) (2003). It provides: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." The statute defines "[d]eviate sexual intercourse" as follows:

"(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or

"(B) the penetration of the genitals or the anus of another person with an object." §21.01(1).

The petitioners exercised their right to a trial de novo in Harris County Criminal Court. They challenged the statute as a violation of the Equal Protection Clause of the Fourteenth Amendment and of a like provision of the Texas Constitution. Tex. Const., Art. 1, §3a. Those contentions were rejected. The petitioners, having entered a plea of nolo contendere, were each fined \$200 and assessed court costs of \$141.25. App. to Pet. for Cert. 107a—110a.

The Court of Appeals for the Texas Fourteenth District considered the petitioners' federal constitutional arguments under both the Equal Protection and Due Process Clauses of the Fourteenth Amendment. After hearing the case en banc the court, in a divided opinion, rejected the constitutional arguments and affirmed the convictions. 41 S. W. 3d 349 (Tex. App. 2001). The majority opinion indicates that the Court of Appeals considered our decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), to be controlling on the federal due process aspect of the case. *Bowers* then being authoritative, this was proper.

We granted certiorari, 537 U.S. 1044 (2002), to consider three questions:

"1. Whether Petitioners' criminal convictions under the Texas "Homosexual Conduct" law—which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples—violate the Fourteenth Amendment guarantee of equal protection of laws?

"2. Whether Petitioners' criminal convictions for adult consensual sexual

intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment?

"3. Whether *Bowers v. Hardwick*, 478 U.S. 186 (1986), should be overruled?"  
Pet. for Cert. i.

The petitioners were adults at the time of the alleged offense. Their conduct was in private and consensual.

II

We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution. For this inquiry we deem it necessary to reconsider the Court's holding in *Bowers*.

There are broad statements of the substantive reach of liberty under the Due Process Clause in earlier cases, including *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923); but the most pertinent beginning point is our decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

In *Griswold* the Court invalidated a state law prohibiting the use of drugs or devices of contraception and counseling or aiding and abetting the use of contraceptives. The Court described the protected interest as a right to privacy and placed emphasis on the marriage relation and the protected space of the marital bedroom. *Id.*, at 485.

After *Griswold* it was established that the right to make certain decisions

regarding sexual conduct extends beyond the marital relationship. In Eisenstadt v. Baird, 405 U.S. 438 (1972), the Court invalidated a law prohibiting the distribution of contraceptives to unmarried persons. The case was decided under the Equal Protection Clause, *id.*, at 454; but with respect to unmarried persons, the Court went on to state the fundamental proposition that the law impaired the exercise of their personal rights, *ibid.* It quoted from the statement of the Court of Appeals finding the law to be in conflict with fundamental human rights, and it followed with this statement of its own:

"It is true that in Griswold the right of privacy in question inhered in the marital relationship... if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.*, at 453.

Roe v. Wade  
= Celebration!

The opinions in Griswold and Eisenstadt were part of the background for the decision in Roe v. Wade, 410 U.S. 113 (1973). As is well known, the case involved a challenge to the Texas law prohibiting abortions, but the laws of other States were affected as well. Although the Court held the woman's rights were not absolute, her right to elect an abortion did have real and substantial protection as an exercise of her liberty under the Due Process Clause. The Court cited cases that protect spatial freedom and cases that go well beyond it. Roe recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive

dimension of fundamental significance in defining the rights of the person.

In Carey v. Population Services Int'l, 431 U.S. 678 (1977), the Court confronted a New York law forbidding sale or distribution of contraceptive devices to persons under 16 years of age. Although there was no single opinion for the Court, the law was invalidated. Both Eisenstadt and Carey, as well as the holding and rationale in Roe, confirmed that the reasoning of Griswold could not be confined to the protection of rights of married adults. This was the state of the law with respect to some of the most relevant cases when the Court considered Bowers v. Hardwick.

The facts in Bowers had some similarities to the instant case. A police officer, whose right to enter seems not to have been in question, observed Hardwick, in his own bedroom, engaging in intimate sexual conduct with another adult male. The conduct was in violation of a Georgia statute making it a criminal offense to engage in sodomy. One difference between the two cases is that the Georgia statute prohibited the conduct whether or not the participants were of the same sex, while the Texas statute, as we have seen, applies only to participants of the same sex. Hardwick was not prosecuted, but he brought an action in federal court to declare the state statute invalid. He alleged he was a practicing homosexual and that the criminal prohibition violated rights guaranteed to him by the Constitution. The Court, in an opinion by Justice White, sustained the Georgia law. Chief Justice Burger and Justice Powell joined the opinion of the Court and filed separate, concurring opinions. Four Justices dissented. 478 U.S., at 199 (opinion of Blackmun, J., joined by Brennan, Marshall, and

Stevens, JJ.); *id.*, at 214 (opinion of Stevens, J., joined by Brennan and Marshall, JJ.).

The Court began its substantive discussion in *Bowers* as follows: "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time." *Id.*, at 190. That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression

in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

Having misapprehended the claim of liberty there presented to it and thus stating the claim to be whether there is a fundamental right to engage in consensual sodomy, the *Bowers* Court said: "Proscriptions against that conduct have ancient roots." *Id.*, at 192. In academic writings, and in many of the scholarly amicus briefs filed to assist the Court in this case, there are fundamental criticisms of the historical premises relied upon by the majority and concurring opinions in *Bowers*. Brief for Cato Institute as Amicus Curiae 16—17; Brief for American Civil Liberties Union et al. as Amici Curiae 15—21; Brief for Professors of History et al. as Amici Curiae 3—10. We need not enter this debate in the attempt to reach a definitive historical judgment, but the following considerations counsel against adopting the definitive conclusions upon which *Bowers* placed such reliance.

At the outset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter. Beginning in colonial times there were prohibitions of sodomy derived from the English criminal laws passed in the first instance by the Reformation Parliament of 1533. The English prohibition was understood to include relations between men and women as well as relations between men and men. See, e.g., *King v. Wiseman*, 92 Eng. Rep. 774, 775 (K. B. 1718) (interpreting "mankind" in Act of 1533 as including women and girls). Nineteenth-century commentators similarly read American sodomy,

The policy of punishing consenting adults for private acts was not much discussed in the early legal literature. We can infer that one reason for this was the very private nature of the conduct. Despite the absence of prosecutions, there may have been periods in which there was public criticism of homosexuals as such and an insistence that the criminal laws be enforced to discourage their practices. But far from possessing "ancient roots," *Bowers*, 478 U.S., at 192, American laws targeting same-sex couples did not develop until the last third of the 20th century. The reported decisions concerning the prosecution of consensual, homosexual sodomy between adults for the years 1880—1995 are not always clear in the details, but a significant number involved conduct in a public place. See Brief for American Civil Liberties Union et al. as Amici Curiae 14—15, and n. 18.

It was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so. See 1977 Ark. Gen. Acts no. 828; 1983 Kan. Sess. Laws p. 652; 1974 Ky. Acts p. 847; 1977 Mo. Laws p. 687; 1973 Mont. Laws p. 1339; 1977 Nev. Stats. p. 1632; 1989 Tenn. Pub. Acts ch. 591; 1973 Tex. Gen. Laws ch. 399; see also *Post v. State*, 715 P.2d 1105 (Okla. Crim. App. 1986) (sodomy law invalidated as applied to different-sex couples). Post *Bowers* even some of these States did not adhere to the policy of suppressing homosexual conduct. Over the course of the last decades, States with same-sex prohibitions have moved toward abolishing them. See, e.g., *Jegley v. Picado*, 349 Ark. 600, 80 S. W. 3d 332 (2002); *Gryczan v. State*, 283 Mont. 433, 942 P.2d 112 (1997); *Campbell v. Sundquist*, 926 S. W. 2d 250 (Tenn.

App. 1996); *Commonwealth v. Wasson*, 842 S. W. 2d 487 (Ky. 1992); see also 1993 Nev. Stats. p. 518 (repealing Nev. Rev. Stat. §201.193).

In summary, the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.

It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992).

Chief Justice Burger joined the opinion for the Court in *Bowers* and further explained his views as follows: "Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards." 478 U.S., at 196. As with Justice White's



assumptions about history, scholarship casts some doubt on the sweeping nature of the statement by Chief Justice Burger as it pertains to private homosexual conduct between consenting adults. See, e.g., Eskridge, Hardwick and Historiography, 1999 U. Ill. L. Rev. 631, 656. In all events we think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring).

This emerging recognition should have been apparent when Bowers was decided. In 1955 the American Law Institute promulgated the Model Penal Code and made clear that it did not recommend or provide for "criminal penalties for consensual sexual relations conducted in private." ALI, Model Penal Code §213.2, Comment 2, p. 372 (1980). It justified its decision on three grounds: (1) The prohibitions undermined respect for the law by penalizing conduct many people engaged in; (2) the statutes regulated private conduct not harmful to others; and (3) the laws were arbitrarily enforced and thus invited the danger of blackmail. ALI, Model Penal Code, Commentary 277—280 (Tent. Draft No. 4, 1955). In 1961 Illinois changed its laws to conform to the Model Penal Code. Other States soon followed. Brief for Cato Institute as Amicus Curiae 15—16.

In Bowers the Court referred to the fact that before 1961 all 50 States had outlawed sodomy, and that at the time

of the Court's decision 24 States and the District of Columbia had sodomy laws. 478 U.S., at 192—193. Justice Powell pointed out that these prohibitions often were being ignored, however. Georgia, for instance, had not sought to enforce its law for decades. Id., at 197—198, n. 2 ("The history of nonenforcement suggests the moribund character today of laws criminalizing this type of private, consensual conduct").

The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction. A committee advising the British Parliament recommended in 1957 repeal of laws punishing homosexual conduct. The Wolfenden Report: Report of the Committee on Homosexual Offences and Prostitution (1963). Parliament enacted the substance of those recommendations 10 years later. Sexual Offences Act 1967, §1.

Of even more importance, almost five years before Bowers was decided the European Court of Human Rights considered a case with parallels to Bowers and to today's case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. Dudgeon v. United Kingdom, 45 Eur. Ct. H. R. (1981) ¶52. Authoritative in all countries that are members of the Council of Europe (21

nations then, 45 nations now), the decision is at odds with the premise in Bowers that the claim put forward was insubstantial in our Western civilization.

In our own constitutional system the deficiencies in Bowers became even more apparent in the years following its announcement. The 25 States with laws prohibiting the relevant conduct referenced in the Bowers decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private. The State of Texas admitted in 1994 that as of that date it had not prosecuted anyone under those circumstances. *State v. Morales*, 869 S. W. 2d 941, 943.

Two principal cases decided after Bowers cast its holding into even more doubt. In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The Casey decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Id.*, at 851. In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows:

" These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. 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." *Ibid.*

Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in Bowers would deny them this right.

The second post-Bowers case of principal relevance is *Romer v. Evans*, 517 U.S. 620 (1996). There the Court struck down class-based legislation directed at homosexuals as a violation of the Equal Protection Clause. *Romer* invalidated an amendment to Colorado's constitution which named as a solitary class persons who were homosexuals, lesbians, or bisexual either by "orientation, conduct, practices or relationships," *id.*, at 624 (internal quotation marks omitted), and deprived them of protection under state antidiscrimination laws. We concluded that the provision was "born of animosity toward the class of persons affected" and further that it had no rational relation to a legitimate governmental purpose. *Id.*, at 634.

As an alternative argument in this case, counsel for the petitioners and some amici contend that *Romer* provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument, but we conclude the instant case requires us to address whether Bowers itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.

The stigma this criminal statute imposes, moreover, is not trivial. The offense, to be sure, is but a class C misdemeanor, a minor offense in the Texas legal system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged. The petitioners will bear on their record the history of their criminal convictions. Just this Term we rejected various challenges to state laws requiring the registration of sex offenders. *Smith v. Doe*, 538 U.S. \_\_\_ (2003); *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1 (2003). We are advised that if Texas convicted an adult for private, consensual homosexual conduct under the statute here in question the convicted person would come within the registration laws of a least four States were he or she to be subject to their jurisdiction. *Pet. for Cert.* 13, and n. 12 (citing Idaho Code §§18—8301 to 18—8326 (Cum. Supp. 2002); La. Code Crim. Proc. Ann., §§15:540—15:549 (West 2003); Miss.

Code Ann. §§45—33—21 to 45—33—57 (Lexis 2003); S. C. Code Ann. §§23—3—400 to 23—3—490 (West 2002)). This underscores the consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition. Furthermore, the Texas criminal conviction carries with it the other collateral consequences always following a conviction, such as notations on job application forms, to mention but one example.

The foundations of *Bowers* have sustained serious erosion from our recent decisions in *Casey* and *Romer*. When our precedent has been thus weakened, criticism from other sources is of greater significance. In the United States criticism of *Bowers* has been substantial and continuing, disapproving of its reasoning in all respects, not just as to its historical assumptions. See, e.g., C. Fried, *Order and Law: Arguing the Reagan Revolution—A Firsthand Account* 81—84 (1991); R. Posner, *Sex and Reason* 341—350 (1992). The courts of five different States have declined to follow it in interpreting provisions in their own state constitutions parallel to the Due Process Clause of the Fourteenth Amendment, see *Jegley v. Picado*, 349 Ark. 600, 80 S. W. 3d 332 (2002); *Powell v. State*, 270 Ga. 327, 510 S. E. 2d 18, 24 (1998); *Gryczan v. State*, 283 Mont. 433, 942 P.2d 112 (1997); *Campbell v. Sundquist*, 926 S. W. 2d 250 (Tenn. App. 1996); *Commonwealth v. Wasson*, 842 S. W. 2d 487 (Ky. 1992).

To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own

decision in Dudgeon v. United Kingdom. See P. G. & J. H. v. United Kingdom, App. No. 00044787/98, ¶156 (Eur. Ct. H. R., Sept. 25, 2001); Modinos v. Cyprus, 259 Eur. Ct. H. R. (1993); Norris v. Ireland, 142 Eur. Ct. H. R. (1988). Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. See Brief for Mary Robinson et al. as Amici Curiae 11–12. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.

The doctrine of stare decisis is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command. Payne v. Tennessee, 501 U.S. 808, 828 (1991) (“Stare decisis is not an inexorable command; rather, it ‘is a principle of policy and not a mechanical formula of adherence to the latest decision’”) (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940))). In Casey we noted that when a Court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course. 505 U.S., at 855–856; see also id., at 844 (“Liberty finds no refuge in a jurisprudence of doubt”). The holding in Bowers, however, has not induced detrimental reliance comparable to some instances where recognized individual rights are involved. Indeed, there has been no individual or societal reliance on Bowers of the sort that could counsel against overturning its holding once there are compelling

reasons to do so. Bowers itself causes uncertainty, for the precedents before and after its issuance contradict its central holding.

The rationale of Bowers does not withstand careful analysis. In his dissenting opinion in Bowers Justice Stevens came to these conclusions:

“Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of “liberty” protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.” 478 U.S., at 216 (footnotes and citations omitted).

Justice Stevens’ analysis, in our view, should have been controlling in Bowers and should control here.

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.

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that

homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. 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. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." Casey, supra, at 847. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

The judgment of the Court of Appeals for the Texas Fourteenth District is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

O'Connor, J., concurring in judgment

SUPREME COURT OF THE UNITED STATES

No. 02—102

JOHN GEDDES LAWRENCE and TYRON GARNER,  
PETITIONERS v. TEXAS

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF  
TEXAS, FOURTEENTH DISTRICT

[June 26, 2003]

Justice O'Connor, concurring in the judgment.

The Court today overrules *Bowers v. Hardwick*, 478 U.S. 186 (1986). I joined *Bowers*, and do not join the Court in overruling it. Nevertheless, I agree with the Court that Texas' statute banning same-sex sodomy is unconstitutional. See Tex. Penal Code Ann. §21.06 (2003). Rather than relying on the substantive component

of the Fourteenth Amendment's Due Process Clause, as the Court does, I base my conclusion on the Fourteenth Amendment's Equal Protection Clause.

The Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike."

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF  
TEXAS, FOURTEENTH DISTRICT

[June 26, 2003]

Justice Scalia, with whom The Chief Justice and Justice Thomas join,  
dissenting.

"Liberty finds no refuge in a jurisprudence of doubt." Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 844 (1992). That was the Court's sententious response, barely more than a decade ago, to those seeking to overrule Roe v. Wade, 410 U.S. 113 (1973). The Court's response today, to those who have engaged in a 17-year crusade to overrule Bowers v. Hardwick, 478 U.S. 186 (1986), is very different. The need for stability and certainty presents no barrier.

Most of the rest of today's opinion has no relevance to its actual holding—that the Texas statute "furthers no legitimate state interest which can justify" its application to petitioners under rational-basis review. Ante, at 18 (overruling Bowers to the extent it sustained Georgia's anti-sodomy statute under the rational-basis test). Though there is discussion of "fundamental proposition[s]," ante, at 4, and "fundamental decisions," ibid. nowhere does the Court's opinion declare that homosexual sodomy is a "fundamental right" under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy were a "fundamental right." Thus, while overruling the outcome of Bowers, the Court leaves strangely untouched its central legal conclusion: "[R]espondent would have us announce ... a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do." 478 U.S., at 191.

Instead the Court simply describes petitioners' conduct as "an exercise of their liberty"—which it undoubtedly is—and proceeds to apply an unheard-of form of rational-basis review that will have far-reaching implications beyond this case. Ante, at 3.

I

I begin with the Court's surprising readiness to reconsider a decision rendered a mere 17 years ago in Bowers v. Hardwick. I do not myself believe in rigid adherence to stare decisis in constitutional cases; but I do believe that we should be consistent rather than manipulative in invoking the doctrine. Today's opinions in support of reversal do not bother to distinguish—or indeed, even bother to mention—the paean to stare decisis coauthored by three Members of today's majority in Planned Parenthood v. Casey. There, when stare decisis meant preservation of judicially invented abortion rights, the widespread criticism of Roe was strong reason to reaffirm it:

"Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in Roe[,] ... its decision has a dimension that the resolution of the normal case does not carry... [T]o overrule under fire in the absence of the most compelling reason ... would subvert the Court's legitimacy beyond any serious question." 505 U.S., at 866–867.

measure up to professional expectations regarding judicial opinions"); Posner, *Judicial Opinion Writing*, 62 U. Chi. L. Rev. 1421, 1434 (1995) (describing the opinion in *Roe* as an "embarrassing performanc[e]").

(3) That leaves, to distinguish the rock-solid, unamendable disposition of *Roe* from the readily overrullable *Bowers*, only the third factor. "[T]here has been," the Court says, "no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding ... ." *Ante*, at 16. It seems to me that the "societal reliance" on the principles confirmed in *Bowers* and discarded today has been overwhelming. Countless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is "immoral and unacceptable" constitutes a rational basis for regulation. See, e.g., *Williams v. Pryor*, 240 F.3d 944, 949 (CA11 2001) (citing *Bowers* in upholding Alabama's prohibition on the sale of sex toys on the ground that "[t]he crafting and safeguarding of public morality ... indisputably is a legitimate government interest under rational basis scrutiny"); *Milner v. Apfel*, 148 F.3d 812, 814 (CA7 1998) (citing *Bowers* for the proposition that "[l]egislatures are permitted to legislate with regard to morality ... rather than confined to preventing demonstrable harms"); *Holmes v. California Army National Guard* 124 F.3d 1126, 1136 (CA9 1997) (relying on *Bowers* in upholding the federal statute and regulations banning from military service those who engage in homosexual conduct); *Owens v. State*, 352 Md. 663, 683, 724 A.2d 43, 53 (1999) (relying on *Bowers* in holding that "a person has no constitutional right to engage in sexual intercourse,

at least outside of marriage"); *Sherman v. Henry*, 928 S. W. 2d 464, 469—473 (Tex. 1996) (relying on *Bowers* in rejecting a claimed constitutional right to commit adultery). We ourselves relied extensively on *Bowers* when we concluded, in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991), that Indiana's public indecency statute furthered "a substantial government interest in protecting order and morality," *ibid.*, (plurality opinion); see also *id.*, at 575 (Scalia, J., concurring in judgment). State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding. See *ante*, at 11 (noting "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex" (emphasis added)). The impossibility of distinguishing homosexuality from other traditional "morals" offenses is precisely why *Bowers* rejected the rational-basis challenge. "The law," it said, "is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." 478 U.S., at 196.2

What a massive disruption of the current social order, therefore, the overruling of *Bowers* entails. Not so the overruling of *Roe*, which would simply have restored the regime that existed for centuries before 1973, in which the permissibility of and restrictions upon abortion were determined legislatively State-by-State. Casey, however, chose

to base its stare decisis determination on a different "sort" of reliance. "[P]eople," it said, "have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail." 505 U.S., at 356. This falsely assumes that the consequence of overruling Roe would have been to make abortion unlawful. It would not; it would merely have permitted the States to do so. Many States would unquestionably have declined to prohibit abortion, and others would not have prohibited it within six months (after which the most significant reliance interests would have expired). Even for persons in States other than these, the choice would not have been between abortion and childbirth, but between abortion nearby and abortion in a neighboring State.

To tell the truth, it does not surprise me, and should surprise no one, that the Court has chosen today to revise the standards of stare decisis set forth in Casey. It has thereby exposed Casey's extraordinary deference to precedent for the result-oriented expedient that it is.

## II

Having decided that it need not adhere to stare decisis, the Court still must establish that Bowers was wrongly decided and that the Texas statute, as applied to petitioners, is unconstitutional.

Texas Penal Code Ann. §21.06(a) (2003) undoubtedly imposes constraints on liberty. So do laws prohibiting prostitution, recreational use of heroin, and, for that matter, working more than 60 hours per week in a bakery. But there is no right to

"liberty" under the Due Process Clause, though today's opinion repeatedly makes that claim. Ante, at 6 ("The liberty protected by the Constitution allows homosexual persons the right to make this choice"); ante, at 13 ("These matters ... are central to the liberty protected by the Fourteenth Amendment"); ante, at 17 ("Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government"). The Fourteenth Amendment expressly allows States to deprive their citizens of "liberty," so long as "due process of law" is provided:

"No state shall ... deprive any person of life, liberty, or property, without due process of law." Amdt. 14 (emphasis added).

Our opinions applying the doctrine known as "substantive due process" hold that the Due Process Clause prohibits States from infringing fundamental liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest. *Washington v. Glucksberg*, 521 U.S., at 721. We have held repeatedly, in cases the Court today does not overrule, that only fundamental rights qualify for this so-called "heightened scrutiny" protection—that is, rights which are "deeply rooted in this Nation's history and tradition," *ibid.* See *Reno v. Flores*, 507 U.S. 292, 303 (1993) (fundamental liberty interests must be "so rooted in the traditions and conscience of our people as to be ranked as fundamental" (internal quotation marks and citations omitted)); *United States v. Salerno*, 481 U.S. 739, 751 (1987) (same). See also *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) ("[W]e have insisted not merely that the interest denominated as a 'liberty' be



countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since "this Court ... should not impose foreign moods, fads, or fashions on Americans." *Foster v. Florida*, 537 U.S. 990, n. (2002) (Thomas, J., concurring in denial of certiorari).

#### IV

I turn now to the ground on which the Court squarely rests its holding: the contention that there is no rational basis for the law here under attack. This proposition is so out of accord with our jurisprudence—indeed, with the jurisprudence of any society we know—that it requires little discussion.

The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are "immoral and unacceptable," Bowers, supra, at 196—the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. Bowers held that this was a legitimate state interest. The Court today reaches the opposite conclusion. The Texas statute, it says, "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual," ante, at 18 (emphasis added). The Court embraces instead Justice Stevens' declaration in his Bowers dissent, that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice," ante, at 17. This effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest, none of the above-

mentioned laws can survive rational-basis review.

#### V

Finally, I turn to petitioners' equal-protection challenge, which no Member of the Court save Justice O'Connor, ante, at 1 (opinion concurring in judgment), embraces: On its face §21.06(a) applies equally to all persons. Men and women, heterosexuals and homosexuals, are all subject to its prohibition of deviate sexual intercourse with someone of the same sex. To be sure, §21.06 does distinguish between the sexes insofar as concerns the partner with whom the sexual acts are performed: men can violate the law only with other men, and women only with other women. But this cannot itself be a denial of equal protection, since it is precisely the same distinction regarding partner that is drawn in state laws prohibiting marriage with someone of the same sex while permitting marriage with someone of the opposite sex.

The objection is made, however, that the antimiscegenation laws invalidated in *Loving v. Virginia*, 388 U.S. 1, 8 (1967), similarly were applicable to whites and blacks alike, and only distinguished between the races insofar as the partner was concerned. In *Loving*, however, we correctly applied heightened scrutiny, rather than the usual rational-basis review, because the Virginia statute was "designed to maintain White Supremacy." *Id.*, at 6, 11. A racially discriminatory purpose is always sufficient to subject a law to strict scrutiny, even a facially neutral law that makes no mention of race. See *Washington v. Davis*, 426 U.S. 229, 241—242 (1976). No purpose to discriminate against men or women as a class can be gleaned from the Texas

law, so rational-basis review applies. That review is readily satisfied here by the same rational basis that satisfied it in *Bowers*—society's belief that certain forms of sexual behavior are "immoral and unacceptable," 478 U.S., at 196. This is the same justification that supports many other laws regulating sexual behavior that make a distinction based upon the identity of the partner—for example, laws against adultery, fornication, and adult incest, and laws refusing to recognize homosexual marriage.

Justice O'Connor argues that the discrimination in this law which must be justified is not its discrimination with regard to the sex of the partner but its discrimination with regard to the sexual proclivity of the principal actor.

"While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class." Ante, at 5.

Of course the same could be said of any law. A law against public nudity targets "the conduct that is closely correlated with being a nudist," and hence "is targeted at more than conduct"; it is "directed toward nudists as a class." But be that as it may. Even if the Texas law does deny equal protection to "homosexuals as a class," that denial still does not need to be justified by anything more than a rational-basis, which our cases show is satisfied by the enforcement of traditional notions of sexual morality.

Justice O'Connor simply decrees application of "a more searching form of rational basis review" to the Texas statute. Ante, at 2. The cases she cites

do not recognize such a standard, and reach their conclusions only after finding, as required by conventional rational-basis analysis, that no conceivable legitimate state interest supports the classification at issue. See *Romer v. Evans*, 517 U.S., at 635; *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448—450 (1985); *Department of Agriculture v. Moreno*, 413 U.S. 528, 534—538 (1973). Nor does Justice O'Connor explain precisely what her "more searching form" of rational-basis review consists of. It must at least mean, however, that laws exhibiting "a ... desire to harm a politically unpopular group," ante, at 2, are invalid even though there may be a conceivable rational basis to support them.

This reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples. Justice O'Connor seeks to preserve them by the conclusory statement that "preserving the traditional institution of marriage" is a legitimate state interest. Ante, at 7. But "preserving the traditional institution of marriage" is just a kinder way of describing the State's moral disapproval of same-sex couples. Texas's interest in §21.06 could be recast in similarly euphemistic terms: "preserving the traditional sexual mores of our society." In the jurisprudence Justice O'Connor has seemingly created, judges can validate laws by characterizing them as "preserving the traditions of society" (good); or invalidate them by characterizing them as "expressing moral disapproval" (bad).

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Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual

agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. I noted in an earlier opinion the fact that the American Association of Law Schools (to which any reputable law school must seek to belong) excludes from membership any school that refuses to ban from its job-interview facilities a law firm (no matter how small) that does not wish to hire as a prospective partner a person who openly engages in homosexual conduct. See Romer, supra, at 653.

One of the most revealing statements in today's opinion is the Court's grim warning that the criminalization of homosexual conduct is "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." Ante, at 14. It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as "discrimination" which it is the function of our judgments to deter. So imbued is the Court with the law profession's anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously "mainstream"; that in most States what the Court calls "discrimination" against those who engage in homosexual acts is perfectly legal; that proposals to ban

such "discrimination" under Title VII have repeatedly been rejected by Congress, see Employment Non-Discrimination Act of 1994, S. 2238, 103d Cong., 2d Sess. (1994); Civil Rights Amendments, H. R. 5452, 94th Cong., 1st Sess. (1975); that in some cases such "discrimination" is mandated by federal statute, see 10 U.S.C. § 654(b)(1) (mandating discharge from the armed forces of any service member who engages in or intends to engage in homosexual acts); and that in some cases such "discrimination" is a constitutional right, see Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. Social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best. That homosexuals have achieved some success in that enterprise is attested to by the fact that Texas is one of the few remaining States that criminalize private, consensual homosexual acts. But persuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else. I would no more require a State to criminalize homosexual acts—or, for that matter, display any moral disapprobation of them—than I would forbid it to do so. What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new "constitutional right" by a Court that is impatient of democratic change. It is indeed true that "later generations can see that laws once thought necessary and proper in fact serve only to oppress," ante, at 18; and

when that happens, later generations can repeal those laws. But it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best.

One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion. The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts—and may legislate accordingly. The Court today pretends that it possesses a similar freedom of action, so that that we need not fear judicial imposition of homosexual marriage, as has recently occurred in Canada (in a decision that the Canadian Government has chosen not to appeal). See Halpern v. Toronto, 2003 WL 34950 (Ontario Ct. App.); Cohen, Dozens in Canada Follow Gay Couple's Lead, Washington Post, June 12, 2003, p. A25. At the end of its opinion—after having laid waste the foundations of our rational-basis jurisprudence—the Court says that the present case “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” Ante, at 17. Do not believe it. More illuminating than this bald, unreasoned disclaimer is the progression of thought displayed by an earlier passage in the Court's opinion, which notes the constitutional protections afforded to “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,” and then declares that “[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons

do.” Ante, at 13 (emphasis added). Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is “no legitimate state interest” for purposes of proscribing that conduct, ante, at 18; and if, as the Court coos (casting aside all pretense of neutrality), “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring,” ante, at 6; what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising “[t]he liberty protected by the Constitution,” *ibid.*? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry. This case “does not involve” the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortably assures us, this is so.

The matters appropriate for this Court's resolution are only three: Texas's prohibition of sodomy neither infringes a “fundamental right” (which the Court does not dispute), nor is unsupported by a rational relation to what the Constitution considers a legitimate state interest, nor denies the equal protection of the laws. I dissent.

#### Notes

1. This last-cited critic of Bowers actually writes: “[Bowers] is correct nevertheless that the right to engage in homosexual acts is not deeply rooted

JOHN GEDDES LAWRENCE and TYRON GARNER,  
PETITIONERS v. TEXAS

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF  
TEXAS, FOURTEENTH DISTRICT

[June 26, 2003]

Justice Thomas, dissenting.

I join Justice Scalia's dissenting opinion. I write separately to note that the law before the Court today "is ... uncommonly silly." Griswold v. Connecticut, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting). If I were a member of the Texas Legislature, I would vote to repeal it. Punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources.

Notwithstanding this, I recognize that as a member of this Court I am not empowered to help petitioners and others similarly situated. My duty, rather, is to "decide cases 'agreeably to the Constitution and laws of the United States.'" Id., at 530. And, just like Justice Stewart, I "can find [neither in the Bill of Rights nor any other part of the Constitution a] general right of privacy," ibid., or as the Court terms it today, the "liberty of the person both in its spatial and more transcendent dimensions," ante, at 1.