Volume 54 | Number 2 Article 1

1-1-1976

Court vs. Constitution: Disparate Distortions of the Indirect Limitations in the American Constitutional Framework

Frank R. Strong

COURT vs. CONSTITUTION: DISPARATE DISTORTIONS OF THE INDIRECT LIMITATIONS IN THE AMERICAN CONSTITUTIONAL FRAMEWORK

FRANK R. STRONG†

Dualism in the American scheme of constitutional limitation is one of its distinguishing characteristics. It was the consequence of convergence, in the great minds that fashioned the constitutions of the new nation, of two lines of political theory and practice, each of ancient lineage. One line looks for limitation to the manner in which government is structured; the other manifests itself in explicitly stated prohibitions on the exercise of governmental power.

The long evolution of the concept of separation of powers has been well chronicled.[1] Suffice it to observe that the Framers were, under the spell of Montesquieu, thoroughly convinced that functional fractionalization of governmental powers was essential to maintenance of limited government. The principle of federalism has roots fully as deep in antiquity,[2] and colonial experience with the intrusions of a unitary mother country made divided government seem a *sine qua non* of constitutional limitation.

James Madison realized the kinship of these principles of federalism and separation of powers. Familiar is the passage in *The Federalist* in which he observed that

> [i]n a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.[3]

---

† Cary C. Boshamer University Distinguished Professor, The University of North Carolina at Chapel Hill; Dean and Professor of Law Emeritus, The Ohio State University.

1. Friedrich, *Separation of Powers*, 13 ENCYC. SOC. SCI. 663-66 (1934).

2. Elazar, *Federalism*, 5 INT'L ENCYC. SOC. SCI. 353, 361-65 (1968); *cf.* note 4 *infra*.

3. THE FEDERALIST No. 51, at 161 (R. Fairfield ed. 1966) (J. Madison).

Time has only confirmed Madison's insight.[4] The manner in which "security arises" from these power distributions has never been more vividly explained than by Justice Louis Brandeis in his celebrated dissent in *Myers v. United States*.[5] Referring to the doctrine of separation of powers he stressed that its incorporation into the basic structure of the Constitution of 1787 was "not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."[6]

Subsequently Justice Brandeis authored the opinion in *Erie Railroad Co. v. Tompkins*,[7] destined to be for over thirty years the last Supreme Court pronouncement suggesting federalistic limitation on the powers of Congress. Although *Erie* contains for federalism no such express explanation as that in *Myers*, Mr. Justice Harlan was later to regard it as a similar assertion of the function of federally divided government.

> I have always regarded that decision as one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems. *Erie* recognized that there should not be two conflicting systems of law controlling the primary activity of citizens . . . . And it recognized that the scheme of our Constitution envisions an allocation of law-making functions between state and federal legislative processes which is undercut if the federal judiciary can make substantive law affecting state affairs beyond the bounds of congressional legislative powers in this regard.[8]

---

4. Roche, *Distribution of Powers*, 3 INT'L ENCYC. SOC. SCI. 300 (1968), treats Madison's "insight" as pragmatic rather than conceptual so far as federalism is concerned. To him Madison along with Jefferson was no friend of federalism at the time of the Convention; their embrasure of divided government sprang from a realization that a unitary form of structure would never be accepted. The author asserts that federalism did not have the conceptual acceptance enjoyed by the theory of separation of powers. *Contra*, Elazar, *supra* note 2.

5. 272 U.S. 52, 240 (1926).

6. *Id.* at 293.

7. 304 U.S. 64 (1938).

8. Hanna v. Plumer, 380 U.S. 460, 474-75 (1965) (Harlan, J., concurring). Writing more generally without reference to *Erie*, Justice Frankfurter had, in a case involving the jurisdiction of the National Labor Relations Board, invoked "the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy . . . ." San Diego Building Trades Council v. Garmon, 359 U.S. 236, 243 (1959). Quite recently, Justice Rehnquist in a preemption case drew upon this articulation of the significance of federalism. City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 643 (1973) (dissenting opinion).

Both federalism and separation of powers achieve protection of the individual from Government Unlimited as a by-product of the friction induced by articulated power allocations in the structure of government. By reason of this indirect mode of protective operation, federalism and separated powers can be visualized as devices for *indirect* limitation.

Long in evolution was a distinctly different political theory, boldly holding that crasser acts of government are legally out of bounds. Because this concept directly challenges the claims of Government Unlimited, rather than seeking to reduce its thrust through calculated diffusion of total power, the theory suggests itself as one of *direct* limitation. A leading Biblical scholar convincingly writes that origins of this theory can be found in the political practices of the Hebrews during their periods of monarchy.[9] Other scholars are convinced that the writings of Cicero reveal the concept in gestation. The theory became embryonically operational with chapter 39 of Magna Carta. Runnymede is one of the great occasions of history; after 1215 the monarchs of England might continue their acts of despotism but thenceforth those actions were in violation of the fundamental law of the realm. If at first the restrictions of chapter 39 pertained only to procedures, limitations of a substantive nature as well were to find their place there. Certainly this was true by Coke's time, to which he contributed strength and scope as a Judge of Common Pleas and later as a Member of Parliament.[10] It is familiar learning that at the end of the momentous seventeenth century, England reversed its field to embrace the theoretical omnipotence of Parliament, but that the Englishmen of the New World found the evolving theory of direct limitation a congenial concept in their struggle for freedom.[11]

When the time came to draft the fundamental law of states and nation, both the political theory of indirect limitation—separation of powers and federalism—and that of direct limitation—procedural and substantive—were fully accepted political dogma.[12] Unsurprisingly, therefore, both were from the first incorporated into American written constitutions. In retrospect, adoption of dualism in constitutional limitation may have been a mistake. As able and dispassionate a constitutional scholar as Charles McIlwain was of this opinion, further urging

9. E. TRUEBLOOD, THE PREDICAMENT OF MODERN MAN 78-79 (1944).

10. F. STRONG, AMERICAN CONSTITUTIONAL LAW 43-48 (1950).

11. One able historian writes of this as "the American consensus." C. ROSSITER, THE POLITICAL THOUGHT OF THE AMERICAN REVOLUTION 52-63 (1963).

12. The evolution and flowering of each are traced in F. STRONG, *supra* note 10, at 27-68.

that the indirect form of limitation, at least separation of powers, should have been scuttled in favor of the direct.[13] To the contrary, Judge Learned Hand, viewing the matter from the standpoint of judicial determination of constitutionality, expressed himself as favoring relegation of the judicial role to the umpiring of disputes over allocation of powers among the different divisions of government; in a word, it was only with respect to indirect limitations that courts should exercise power to pass on constitutionality.[14]

Incorporation of dual political theories of limitation into American constitutions did not carry with it the solution to the problem of effective implementation. The innovative period of design of the original state constitutions remains fascinating for the several devices conceived for that purpose. In several of *The Federalist Papers* James Madison examined those devices, only to find none to his satisfaction.[15] One approach inevitably open was that of departmental self-control; let legislature, executive, and judiciary each police responsibly the limits of its own province. "If men were angels" this would solve the problem, but the flaw lay in the absence of any mechanism for deterring inevitable encroachments of one branch upon another. Reputedly the weakest of the three segments of government, the judicial branch, even after Montesquieu had won for it a theoretical equality with legislature and executive, was not long in experiencing inroads upon it by the other two branches.

It was largely in this context that state courts and later the United States Supreme Court began to claim not only authority to perform the function of a coordinate branch in the interpretation and administration of law, but as well to appropriate the extraordinary power to function as *the* umpire of the Constitution's dual limitations. The clearest precedent for constitutional review prior to the Federal Convention was the North Carolina case of *Bayard v. Singleton*,[16] in which the new power was exercised defensively to protect the jurisdiction of the judicial division created by the North Carolina constitution. In functional effect, *Marbury v. Madison*[17] was the same: deterrence of the Con-

13. C. McILWAIN, CONSTITUTIONALISM AND THE CHANGING WORLD 244-46 (1939).

14. L. HAND, THE SPIRIT OF LIBERTY 155 (3d ed. 1960). Judge Hand's opposition was basically to constitutional review of direct substantive limitations. He may well have thought direct procedural limitations to be related to indirect limitations, as functionally they are.

15. THE FEDERALIST NOS. 48-50, at 146-58 (R. Fairfield ed. 1966) (J. Madison).

16. 1 N.C. 5 (1787).

17. 5 U.S. (1 Cranch) 137 (1803).

gress from allegedly extending the Court's original jurisdiction beyond the constitutional limitation as Marshall construed article III.[18]

Concededly, Marshall used language in *Marbury* as a trial balloon to test the political climate respecting broader exercise of constitutional review. His only effective challenge came in 1825 from Justice Gibson of the Supreme Court of Pennsylvania,[19] who, twenty years later, threw in the towel in a triumph of paralogism over reasoned analysis. Rather paradoxically, the most threatening challenge to nondefensive constitutional review that occurred during this period was to Supreme Court review of state court decisions, a type of constitutional review Justice Gibson readily accepted in light of his perception of constitutional structure and of the crucial decision in *Martin v. Hunter's Lessee*.[20] It required nearly all of the nineteenth century for firm establishment of constitutional review, both vertically and horizontally, with respect to the full panoply of constitutional limitations, direct as well as indirect, on all branches of government.

Whatever the merits of dual limitations in American constitutions, or of eventual full embrace of the concept of courts as the exclusive interpreters of those constitutionalized theories of limitation, there can be no question but that the consequence is complexity compounded. And complexity easily produces possibilities of misinterpretation. The same judicial bodies are performing two quite divergent functions, those of judicial review and of constitutional review. A classic instance of confusion resulting from this is the recent Three Sisters' Bridge litigation.[21] No wonder that several of the nations that have adapted from this country the practice of constitutional review have established separate courts for the purpose.

Aside from litigation under the contract clause, until past the middle of the nineteenth century constitutional review of indirect limitations was more common than that of direct limitations. The decades after the Civil War witnessed the great rise of due process as a direct limitation on governmental regulation of economic affairs; and, with its demise in this century, that limitation has been replaced by the emer-

18. The frailties in the reasoning of Chief Justice Marshall are well exposed in Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1.

19. Eakin v. Raub, 12 S. & R. (Pa.) 330, 343-55 (1825).

20. 14 U.S. (1 Wheat.) 304 (1816).

21. Volpe v. District of Columbia Fed'n of Civic Ass'ns, 459 F.2d 1231 (D.C. Cir.), *cert. denied*, 405 U.S. 1030 (1972). This recent litigation has been used as a vehicle for explaining the difference between judicial review and constitutional review. *See* Strong, *Three Little Words and What They Didn't Seem to Mean*, 59 A.B.A.J. 29 (1973).

gence of the first amendment, due process, and equal protection as bulwarks of civil liberties. With the emphasis so shifted to direct limitations as those fully protective of the individual, appreciation of the fact that indirect limitations are designed for the very same objective has dulled. In place of their historic function in political theory, there is a growing view of them as protective of the various governmental units that are the intended product of diffusion of authority through division or separation of governmental power.[22]

Two decisions of Chief Justice Warren in his last years illustrate his difficulties with the purpose of indirect limitations. In *South Carolina v. Katzenbach*[23] he correctly rejected the claim of South Carolina (and of some of the other states as *amici curiae*) for protection under that facet of the separation doctrine specifically enunciated in the bill of attainder clauses and more generally derived from the structural separation of the judicial from the legislative function. "[C]ourts have consistently regarded the Bill of Attainder Clause of Article I and the principle of the separation of powers only as protections for individual persons and private groups, those who are peculiarly vulnerable to nonjudicial determinations of guilt."[24]

Yet in *Flast v. Cohen*,[25] two years later, he assumed a distinction in objective between direct and indirect constitutional limitations, disregarding the latter's function as affording protection of the individual against governmental intrusion upon guaranteed private right. Apply-

22. For separation of powers there is a refreshing return to the historic function of indirect limitation in recent commentary of Anthony Lewis. "In the deepest sense the safety of liberty in this country rests on respect for the separation of powers—on Congress as a balance to the growth of Presidential power." Lewis, *Only Congress Itself*, N.Y. Times, Sept. 18, 1975, at 41, col. 1. Mr. Lewis states that anyone in need of recollecting this truth should read *The Morality of Consent*, the last writing of the late Alexander Bickel, recently published posthumously by the Yale University Press. There is not wanting some continuing recognition of the original conception of federalism's function, Boehm, *Federalism*, 6 ENCYC. SOC. SCI. 169 (1931), and of the value of that function today. Address by K. Brewster, Jr. (President of Yale University), American Bar Foundation Annual Dinner, Feb. 22, 1975, in THE REPORT OF THE PRESIDENT, YALE UNIVERSITY 1974:75; A. VANDERBILT, THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE 66 (1963 ed.). Yet traditional federalism is not enjoying "revival" similar to that of separation of powers. Explanation appears to lie in the specious reasoning that there is no call for limitation on congressional power vis a vis the states because the states are all represented in the Congress. Many interests that would be protected by enforcement of a line between federal and state authority have no effective representation in Congress. It is regrettable that Professor Wechsler has lent his scholarly reputation to this superficiality. See H. WECHSLER, PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 80-81 (1961).

23. 383 U.S. 301 (1966).

24. *Id.* at 324.

25. 392 U.S. 83 (1968).

ing his two-nexus test, the Chief Justice found that Mrs. Frothingham, taxpayer-plaintiff in the precedent under reexamination in *Flast*, satisfied the first but failed the second.

> [S]he lacked standing because her constitutional attack was not based on an allegation that Congress, in enacting the Maternity Act of 1921, had breached a specific limitation upon its taxing and spending power. The taxpayer in *Frothingham* alleged essentially that Congress, by enacting the challenged statute, had exceeded the general powers delegated to it by Art. I, § 8, and that Congress had thereby invaded the legislative province reserved to the States by the Tenth Amendment . . . . In essence, Mrs. Frothingham was attempting to assert the States' interest in their legislative prerogatives and not a federal taxpayer's interest in being free of taxing and spending in contravention of specific constitutional limitations imposed upon Congress' taxing and spending power [such as the establishment clause of the first amendment]."[26]

Dissenting, Mr. Justice Harlan exposed the fallacy of attempting to restrict standing to direct limitations.[27]

> The Court's position is equally precarious if it is assumed that its premise is that the Establishment Clause is in some uncertain fashion a more "specific" limitation upon Congress' powers than are the various other constitutional commands. . . . The specificity to which the Court repeatedly refers must therefore arise, not from the provisions' language, but from something implicit in their purposes. But this Court has often emphasized that Congress' powers to spend are coterminous with the purposes for which, and methods by which, it may act, and that the various constitutional commands applicable to the central government, including those implicit both in the Tenth Amendment and in the General Welfare Clause, thus operate as limitations upon spending.[28]

The best that can be said for Chief Justice Warren is that in *Flast* he was lured into conceptual error in an effort to free the Court from the horns of a dilemma in the matter of standing for constitutional challenge. *Frothingham v. Mellon*[29] had to be relaxed, yet not to the point of swamping federal court dockets. But the problem of judicial overload must be faced head on, as by some form of provision for a National

---

26. *Id.* at 105, *discussing* Frothingham v. Mellon, 262 U.S. 447 (1923).

27. That the Warren test also operated to deny standing to challenge under due process alleged taking of property, analytically involving a direct limitation, does not mitigate the fact that the primary thrust of his test disregarded the historic function of federalism and separation of powers.

28. 392 U.S. at 127.

29. 262 U.S. 447 (1923).

Court of Appeals for relief of the Supreme Court. It cannot wisely be solved by perversion of fundamental constitutional principles.

A further major source of complexity arising from the dualistic structure of American constitutions derives from the fact that direct and indirect constitutional limitations do not necessarily have the same thrust in terms of the extent of protection afforded the individual. In consequence, under the modern practice of full-blown constitutional review there are four possible outcomes in constitutional litigation. Whether governmental action is that of the legislature, the executive, or the judiciary, it may be constitutional by indirect limitation but unconstitutional by direct; it may be constitutional by direct limitation yet unconstitutional by indirect; it may be unconstitutional under both; or it may be constitutional under both. The necessary corollary of dualism is that challenged acts of government must twice run the constitutional gauntlet before their judicial validation is complete. A review of landmark decisions of the Court from Marshall's time to 1966 illustrates these patterns and discloses the easy possibilities for indiscrimination.[30]

Of four decisions handed down by the United States Supreme Court on May 27, 1975, two reveal among the Justices judicial mismanagement of dualism in their role as exclusive interpreter of the federal Constitution. It is harsh, yet justifiable, to observe that this now bald claim to exclusivity in constitutional interpretation ought to be accompanied by a most thorough understanding of the instrument with respect to which the claim is made.

Take first *Fry v. United States*,[31] in which seven members of the Court sustained, in application to an Ohio law effecting a 10.6 percent increase in wages and salaries of all state employees, the Federal Economic Stabilization Act of 1970.[32] Writing the opinion for the Court, Mr. Justice Marshall had no difficulty reaching the conclusion of constitutionality under the commerce clause. To him *Wickard v. Filburn*[33] and *Heart of Atlanta Motel, Inc. v. United States*[34] were sufficient precedent for a finding of effect on commerce among the states. Substantial increases for 65,000 employees of the State of Ohio, along with

30. *See* Strong, *Judicial Review: A Tri-Dimensional Concept of Administrative-Constitutional Law*, 69 W. VA. L. REV. 111 (1967).

31. 421 U.S. 542 (1975).

32. 12 U.S.C. § 1904 (1970). The maximum allowed by the Pay Board under the Act was seven percent.

33. 317 U.S. 111 (1942).

34. 379 U.S. 241 (1964).

the possibility of "similar numbers" from forty-nine other jurisdictions, "could inject millions of dollars of purchasing power into the economy and might exert pressure on other segments of the work force to demand comparable increases."[35] There was the federalistic problem that major state functions were involved. But the Court held that "this argument is foreclosed by our decision in *Maryland v. Wirtz*," relied upon by the lower court, "where we held that the Fair Labor Standards Act could constitutionally be applied to schools and hospitals run by a State."[36] The Economic Stabilization Act is, we are told, less intrusive than the earlier FLSA extension, which, we are doubly assured, "was quite limited in application." Yet despite the asserted modicum of intrusion, "[i]t seems inescapable that the effectiveness of federal action would have been drastically impaired if wage increases to this sizeable group of employees were left outside the reach of these emergency federal wage controls."[37]

A crumb is thrown to petitioners in a footnote, in response to their reliance upon the tenth amendment as a limitation on the commerce power. Despite reduction of that amendment to the status of a mere truism in *United States v. Darby*,[38] the Court now concedes that "it is not without significance."[39] Note, however, the thrust of the recognition: "The [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."[40] Here, however, it is the Court's judgment that "the wage restriction regulations constituted no such drastic invasion of state sovereignty."[41] The clear concern is for the state as a polity, not for a division of governmental powers in the interest of indirect protection for individual rights. An analog in the separation of powers context would be concern for the judicial power per se, not concern for the independence of the judiciary as guarantor of the vitality of judicial review for the indirect shielding of individual rights.

From the commentator's viewpoint, it is disappointing that Mr. Justice Douglas found it improper to reach the merits, because in his view, termination of the congressional act shortly after grant of certio-

35. 421 U.S. at 547.
36. *Id.* at 548, *citing* Maryland v. Wirtz, 392 U.S. 183 (1968).
37. *Id.*
38. 312 U.S. 100 (1941).
39. 421 U.S. at 547 n.7.
40. *Id.*
41. *Id.* at 547-48 n.7.

rari called for dismissal of the writ as improvidently granted. Disappointment springs from the fact not only that Justice Douglas had dissented in *Maryland v. Wirtz*,[42] but that he had also refused to accede to Court sustainment of congressional impingement upon traditional state domain in *New York v. United States*,[43] where he was joined by Mr. Justice Black, and in *United States v. Oregon*,[44] where the two Justices parted company.[45] The thread running through these dissents[46] is that of concern for preservation of the fiscal interests of the states, in the face of federal envelopment through the commerce, taxing, and spending powers. The threat was least in *Oregon*, more apparent in *New York*, and deadly serious in *Maryland*. *United States v. California*,[47] relied upon by the *Fry* majority along with *Maryland v. Wirtz*, was decided before Justice Douglas came to the Court. However, he had no disagreement with that decision; no overwhelming danger to state fiscal policy lay in federal statutory penalties imposed upon state-owned railroads for violation of the federal Safety Appliance Act.[48]

---

42. 392 U.S. at 205 (Douglas, J., dissenting).

43. 326 U.S. 572, 590 (1946) (Douglas & Black, JJ., dissenting) (federal excise tax on mineral waters of Saratoga Springs, bottled and sold by a public corporation of the State of New York).

44. 366 U.S. 643 (1961) (conflicting federal and state claims to personal property of a veteran dying intestate and without heirs in a Veterans' Administration hospital).

45. In two decisions following hard on *New York v. United States*, Mr. Justice Douglas had dissented technically on grounds of statutory interpretation. Involved was the extension of maximum price regulations of World War II to sales of state-owned tangible personalty. Dissenting from Court sustainment of such extension, he would have avoided a construction that carried "substantial intrusions on the sovereignty of the States." But citation of his dissent in *New York* following his observation that for him there were presented "serious constitutional questions" is evidence that his concerns were at the constitutional level. Hulbert v. Twin Falls County, 327 U.S. 103, 106 (1946); Case v. Bowles, 327 U.S. 92, 103 (1946).

46. That Mr. Justice Douglas failed to dissent in Oklahoma v. United States Civil Service Commission, 330 U.S. 127 (1947), is not easy to reconcile, *cf.* Linde, *Justice Douglas on Freedom in the Welfare State*, 39 WASH. L. REV. 4, 19-31 (1964). Its implications for federal intrusion upon state sovereignty seem serious. An explanation may lie in the fact that the Justice's concern at the moment lay elsewhere. *Oklahoma* was argued and decided together with United Public Workers of America v. Mitchell, 330 U.S. 75 (1947), wherein Mr. Justice Douglas was at vigorous odds with the majority validation of the Hatch Act in its application to federal employees. *Id.* at 115, 120-26 (Douglas, J., dissenting in part). Yet he did not join the Black-Rutledge dissent based upon the constitutional proposition that political sterilization of all federal employees violated the first amendment. Rather he found basis for conflict resolution in a distinction between administrative employees and industrial employees, the latter of whom should have the "constitutional freedom to pursue conventional political activities." Linde, *supra*, at 34. The Justice makes no reference to *Oklahoma* in his dissent in Maryland v. Wirtz, 392 U.S. at 201-05.

47. 297 U.S. 175 (1936).

48. 45 U.S.C. § 6 (1970).

But the application of the federal Fair Labor Standards Act[49] to employees of state schools and hospitals, litigated in *Maryland v. Wirtz*, was another matter. "If all this can be done then the National Government could devour the essentials of state sovereignty, though that sovereignty is attested by the Tenth Amendment. . . . In this case the State as a sovereign power is being seriously tampered with, potentially crippled."[50]

Although the wage and salary levels set by federal administrative action under the Economic Stabilization Act would, if enforced, have foiled a major pay hike for nearly 65,000 employees of the State of Ohio, it is not clear that Mr. Justice Douglas would have dissented in *Fry*. There is not present the kind of threat to state fiscal policy that lurked in the earlier cases. But a threat to state fiscal policy greater than any in those cases is posed by the major extension of the Fair Labor Standards Act, through amendment in 1974, to all state and local employees not falling within two exceptions: non-civil service personnel and elective officers and their assistants in positions at policymaking levels.[51] *National League of Cities v. Dunlop*,[52] in which this major extension of federal domain beyond that encountered in *Maryland v. Wirtz* is contested by a battery of state attorneys general, was argued at the last term but was subsequently set down for reargument at the current term.[53] Had Mr. Justice Douglas been able to continue on the Court, there is good reason to believe a judgment of invalidity on his part would have resulted.[54]

Two features are clear. One is that in Justice Douglas' mind there was no inconsistency between his position in the cases discussed and his consistent support of the extension of congressional authority, culminating in his writing the controlling opinion in *Perez v. United States*,[55] when private interests challenged federal legislation on the ground that it violated the division of power between the nation

49. 29 U.S.C. § 201-19 (1970).

50. Maryland v. Wirtz, 392 U.S. 183, 205 (1968) (Douglas, J., dissenting).

51. Act of Apr. 8, 1974, Pub. L. No. 93-259, § 6(a)(2), 88 Stat. 58, *amending* 29 U.S.C. § 203(e) (1970) (codified at 29 U.S.C.A. § 203(e)(2) (Supp. 1975)).

52. 421 U.S. 907 (1975).

53. 421 U.S. 986 (1975). The clerks office advises that, at the earliest, reargument will take place in late February of 1976.

54. Mr. Justice Stewart, having joined in the Douglas dissent in *Maryland v. Wirtz*, might be expected to find invalidity in the latest extension of the coverage of the Fair Labor Standards Act even though he did not dissent in *Fry*. Having dissented in *Fry*, Mr. Justice Rehnquist would presumably be of like mind. But with Mr. Justice Douglas gone, a judicial halt to federal jeopardizing of state fiscal integrity is an unlikely possibility.

55. 402 U.S. 146 (1971) (federal law forbidding extortionate credit transactions, applied to a loan shark in a transaction taking place wholly within one state).

and the states. The second point of clarity is that increasingly Justice Douglas conceived the issue in the *Fry* type of case as one of intergovernmental immunities rather than of the reach of federal taxing and regulatory policy via the operation of the necessary and proper clause upon a specifically granted federal power. In this conception it is the rights of the state per se that are considered; there is no accommodation for the original view of federalism as a device of indirect limitation operating for the benefit of the individual.

Mr. Justice Rehnquist did dissent in *Fry*, believing that the case under review possessed the same "dangers to our federal system" that he, like Mr. Justice Douglas, found in *Maryland v. Wirtz*. "The Tenth Amendment, the Court's opinion in this case insists, does have meaning; but the critical question is how much meaning is left to it and the basic constitutional principles which it illumines."[56] Yet in line of reasoning the Rehnquist analysis is remarkably like that of Justice Douglas, whose *Maryland* dissent he cites. He finds the same fundamental distinction between invocation of the commerce clause by private interests and by the state. "[A]n individual who attacks an Act of Congress on the ground that it is not within congressional authority under the Commerce Clause asserts only a claim of lack of legislative power," an assertion "ordinarily very difficult to sustain."[57]

> But an individual who attacks an Act of Congress, justified under the Commerce Clause, on the ground it infringes his rights under, say, the First or Fifth Amendment, is asserting an affirmative constitutional defense of his own, one which can limit the exercise of power which is otherwise expressly delegated to Congress. . . .
>
> In this case, as well as in *Wirtz* and *United States v. California*, the State is not simply asserting an absence of congressional legislative authority, but rather is asserting an affirmative constitutional right, inherent in its capacity as a State, to be free from such congressionally asserted authority.[58]

Absent is the traditional conception of federalism as dividing the spheres of national and state authority to effectuate the limitation of power that would thereby flow derivatively for the benefit of the individual. It is now a matter of the states' defense of their own political integrity. And, to demonstrate the difference, Mr. Justice Rehnquist employs a contrast between the weakness of the individual's constitutional claim under the commerce clause, a species of indirect limitation,

56. 421 U.S. at 550.
57. *Id.* at 552-53.
58. *Id.* at 553.

and its strength under the affirmative first or fifth amendments, each expressive of the direct form of delimitation. Indirect limitation as a mechanism for restriction of the power of government is left a kind of derelict on the backwaters of constitutional theory and practice.

Justice Rehnquist's analysis in *Fry* inevitably leads him to perceive the relevancy of the Court decisions on intergovernmental immunities, with two paragraphs then given to *New York v. United States* as a leading decision on intergovernmental tax immunity. Examining that case brought the conclusion that "six members of the Court, as it was then constituted, thought that the principles of federalism reflected in the Tenth Amendment to the Constitution did not stop with merely prohibiting Congress from discriminating between States and other taxable entities in the exercise of the taxing power."[59] As was so with Mr. Justice Douglas, the emphasis is on protection of the state, not the individual, an emphasis Justice Rehnquist buttresses by resort to *Hans v. Louisiana*[60] "for the principle that the States as such were regarded by the Framers of the Constitution as partaking of many attributes of sovereignty quite apart from the provisions of the Tenth Amendment."[61] It is significant that the editors of two of the major constitutional law casebooks, in their revised editions for 1975, are disposed to locate *Fry* and its antecedents in their respective chapters on intergovernmental immunities.[62]

Less than three weeks after *Fry* came down, a unanimous Court reaffirmed the removal of one plank of the American constitutional framework as erected by the Framers. In the considerable debate that had arisen as to whether minimum fee schedules of local bar associations constituted a violation of the Sherman Act, attention was directed largely to the continued viability of the supposed exemption for professional associations; the question of the constitutional reach of the Act was either disregarded or given short shrift.[63] Predictably, *Goldfarb*

59. *Id.* at 556.

60. 134 U.S. 1 (1889).

61. 421 U.S. at 556.

62. G. GUNTHER, CONSTITUTIONAL LAW 125-26, 386-87 (9th ed. 1975); W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW 487-504 (4th ed. 1975).

63. Two commentators who do give attention to the question reach ridiculous lengths in their assertions as to the scope of congressional power under the commerce clause. Branca, *Bar Association Fee Schedules and Suggested Alternatives: Reflections on a Sherman Exemption That Doesn't Exist*, 3 U.C.L.A.-ALAS. L. REV. 207, 224-25 (1974) ("The practice of commercial law involves and affects such clients as corporations, manufacturers, retailers and distributors who do business and have contacts and connections with many states. . . . Further, if legal activities were not involved in, and did not affect, commerce in more than one state, there would not be problems in the

v. Virginia State Bar[64] quickly put the commerce issue out of contention. Technically, it brought within federal compass only minimum attorney fees for title examination. The primary constitutional prop was the concept of stream of commerce, first formulated in *Swift & Co. v. United States*,[65] raised to full decisional level in *Stafford v. Wallace*,[66] and occasionally invoked thereafter.[67] Title examination being, in the Court's view, commercially necessary in real estate transactions, it followed that "a title examination is an integral part of an interstate transaction"[68] where mortgage money flows across state lines. "The fact that there was no showing that home buyers were discouraged by the challenged activities does not mean that interstate commerce was not affected. Otherwise, the magnitude of the effect would control, and our cases have shown that, once an effect is shown, no specific magnitude need be proved."[69] This statement contains a classic non sequitur. It is quite correct that the Court's cases hold that once some effect is demonstrated the magnitude is immaterial.[70] But here the Chief Justice has just stated for the Court that there has been shown no effect on interstate commerce. By the old arithmetic, anyway, multiplication of any magnitude by zero still yields a product of zero.

The potential reach of *Goldfarb* far exceeds its technical holding. Should the mortgage money come in some instances from intrastate sources, the Court's response can be that title examination is nonetheless within federal policy control because such examinations are of a class with those in which the flow of funds is interstate. Citation of *Perez v. United States*[71] will readily dispatch any constitutional contention on that score. The *Goldfarb* opinion assures that "[o]f course, there may be legal services that involve interstate commerce in other

area of conflict of laws."); Comment, *The Wisconsin Minimum Fee Schedule: A Problem of Antitrust*, 1968 WIS. L. REV. 1236, 1245-47 ("The use of the mails in giving advice, billing clients, referring clients and subscribing to legal periodicals are activities clearly in interstate commerce.").

64. 421 U.S. 773 (1975).

65. 196 U.S. 375, 398-99 (1905).

66. 258 U.S. 495 (1922).

67. The concept was a thread in the reasoning of Mr. Justice Rutledge for the Court in Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 (1948); it was the basis of the Court's reasoning in United States v. Yellow Cab Co., 332 U.S. 218 (1947). Both cases are cited in *Goldfarb*, as is *Swift*.

68. 421 U.S. at 784.

69. *Id.* at 785.

70. *E.g.*, United States v. McKesson & Ribbins, Inc., 351 U.S. 305 (1956). The proposition dates from the early decisions on the reach of the Wagner and the Fair Labor Standard Acts. On its facts, Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946), is most striking.

71. 402 U.S. 146 (1971).

fashions" than by becoming "an integral part of an interstate transaction."[72] The "channel of commerce" doctrine could be drawn upon in instances where the factual pattern of legal practice discloses repetitive use of interstate commerce.[73] Also readily at hand, with many a citation supporting its use, is the Keynesian-type economic reasoning by which there is no private activity, no matter how "local," that does not in some fashion affect interstate commerce.[74] Even price fixing by two bootblacks in Podunk could be put an end to were Congress disposed to remove such a threat to the competitive ideal imbedded in the Sherman Act. True, the last cited language from the Court's opinion continues with the observation that "[t]here may be legal services that have no nexus with interstate commerce and thus are beyond the reach of the Sherman Act,"[75] but no one should be taken in by this proffered reassurance. At the constitutional level, there is nothing left of federalism as a mechanism for indirect constitutional limitation of federal power in the interest of individual protections. The states will be lucky if as polities they are themselves saved from complete federal overrun of their fiscal independence. And if they are, they will, rather paradoxically, owe major thanks to their staunch defense by none other than Mr. Justice Douglas.

Goldfarb does not disturb the doctrine of *Parker v. Brown*,[76] which establishes an exemption from the Sherman Act where state action is found. At the same time, however, the decision of the High Court does not augur well for the federalistic foundation on which rests the *Parker* doctrine. The integrated Virginia State Bar, through which the state supreme court regulates the practice of law in Virginia, had condoned minimum fee schedules and implemented its position by issuance of ethical opinions providing that "any lawyer, whether or not a member of his county bar association, may be disciplined for '*habitually* charg[ing] less than the suggested minimum fee schedule adopted by his local Bar Association.' "[77] But to the Court the state bar's warning

72. 421 U.S. at 785.

73. American Power & Light Co. v. SEC, 329 U.S. 90 (1946); North American Co. v. SEC, 327 U.S. 686 (1946).

74. *E.g.*, Wickard v. Filburn, 317 U.S. 111 (1942); Wisconsin R.R. Comm'n v. Chicago, B. & Q.R.R., 257 U.S. 563 (1922). A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), in which the Court unanimously rejected the theory of "buying power" interdependence between local activity and interstate commerce, has been overruled *sub silentio* by Katzenbach v. McClung, 379 U.S. 294 (1964).

75. 421 U.S. at 785.

76. 317 U.S. 341 (1943).

77. 421 U.S. at 782, *quoting* Virginia State Bar Comm. on Legal Ethics, Opinion No. 170, May 28, 1971.

that disciplinary action might result from habitual disregard of county bar minimum fees signalled joinder in a "private anticompetitive activity" rather than projection of affirmative state policy. "It is not enough that, as the County Bar put it, anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign."[78] From this it is apparent that in the antitrust context "state action" possesses none of the elasticity familiar in its constitutional setting.

Lower federal court decisions shortly antedating the Court's ruling in *Goldfarb* disclose that *Parker* was being read restrictively. In the companion case to *Goldfarb, United States v. Oregon State Bar*,[79] initiated by the Justice Department's Antitrust Division, Oregon statute law made the Oregon State Bar a public corporation, and an instrumentality of the judicial department of the state government. Nevertheless, in the view of the federal district court even this close relationship was insufficient to give the bar antitrust immunity on its motion for summary disposition.

> There is no Oregon statute specifically authorizing the promulgation of an attorneys' fees schedule; nor, of course, is there a federal statute explicitly recognizing or implicitly authorizing the formulation of such fee schedules. In addition, the fee schedules published and distributed by the defendant were neither debated in public hearings nor approved by a disinterested state commission. In short, there is not the substantial state direction and involvement required to meet the legislative mandate requirements and to elevate these Oregon State Bar activities to the plateau of "state action" immunity.[80]

The *Oregon State Bar* opinion relied largely on two courts of appeals decisions, one from the First Circuit,[81] the other from the Ninth.[82] The former disposed on summary judgment of a private action by one manufacturer of "pipeless" swimming pools against another, alleging violations of the Sherman[83] and Clayton Acts.[84] The type of pool involved was one purchased for the most part by public bodies through

78. *Id.* at 791.
79. 385 F. Supp. 507 (D. Ore. 1974).
80. *Id.* at 511.
81. George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir. 1970).
82. New Mexico v. American Petrofina, Inc., 501 F.2d 363 (9th Cir. 1974).
83. Act of July 2, 1890, ch. 647, § 1, 26 Stat. 209 (codified at 15 U.S.C. §§ 1-7 (1970)).
84. Act of Oct. 15, 1914, ch. 323, § 1, 38 Stat. 730 (codified in scattered sections of 15, 29 U.S.C.).

competitive bidding. Alleged antitrust violations lay in attempts to influence architects and engineers retained by the public bodies for design and construction. Defendant conceded all allegations, but claimed antitrust exemption under *Parker* and a related doctrine. In a reversal of the trial court, summary judgment was denied the defendant.

> Our reading of *Parker* convinces us that valid government action confers antitrust immunity only when government determines that competition is not the *summum bonum* in a particular field and deliberately attempts to provide an alternate form of public regulation.
>
> In terms of such deliberate governmental occupation of a field normally left to the free winds of competition, this case falls at the opposite end of the spectrum from *Parker*.[85]

The decision in the Ninth Circuit came in a suit by the State of New Mexico asserting antitrust violations by six suppliers of asphalt. Defendants counterclaimed, alleging a conspiracy on the part of the state and some of its subdivisions as consumers of asphalt, to fix prices and eliminate competition. Affirming dismissal of the counterclaim, the court of appeals rejected defendants' claim that the state is immune only in the circumstances specified in the passage just quoted from the First Circuit's opinion:

> Since the suit here is directly against the state, there can be no such question [as to the source of the conduct], and the [First Circuit's] analysis is inapplicable. The "legislative mandate" test is useful, indeed possibly necessary, when there is doubt if the defendant or the regulatory scheme is really an instrument of the state. But when there is no doubt that the defendant is the state, the "legislative mandate" analysis is unnecessary.[86]

Antitrust immunity can thus be had where the state is affirmatively implicated. But that this condition is hard to come by is further evidenced by the last pre-*Goldfarb* lower court decisions. The United

85. 424 F.2d at 30.

86. 501 F.2d at 370 (footnote omitted). While *Whitten* was distinguished, the reasoning of Hecht v. Pro-Football, Inc., 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972), was disapproved. Hecht and others had brought a Sherman Act suit alleging violation in a restrictive covenant of a lease executed by the District of Columbia Armory Board in favor of the Washington Redskins. The covenant forbade use of the Robert F. Kennedy Stadium by any other professional football team. Defendant had successfully contended that the Armory Board was an instrumentality of the District of Columbia, making its action governmental in character. Reversing, the appellate court disagreed with the "facile conclusion" that governmental participation resolves the issue of Sherman Act applicability. *Id.* at 935. With the implication that states are always immune from antitrust liability, the Ninth Circuit in turn disagreed. "We can do no more than say that . . . we disagree with the implication of *Hecht* that a state may sometimes be liable." 501 F.2d at 371.

States was successful in an antitrust proceeding against the National Society of Professional Engineers,[87] whose code of ethics, as promulgated by its board of directors in 1964, decreed that a member "shall not solicit or submit engineering proposals on the basis of competitive bidding."[88] Defense predicated upon the *Parker* doctrine was of no avail.

> The instant Complaint charges defendant with illegal restraint of trade on a nationwide basis. It does not attack the action of any state official or agency. Unlike the situation in *Parker*, the challenged activity of NSPE and its members was a private conspiracy in restraint of trade and not conducted pursuant to the command of any state legislature. There is no evidence of any state enforcement machinery, present in *Parker*, which suggests that when the 16 states decided to prohibit competitive bidding they also intended to establish an alternate form of public regulatory control. Defendant's activities are plainly interstate in nature, unencumbered by the regulations of individual states. The exploration of *Parker* urged by defendant is both [*sic*] unfounded in logic as well as in law. The doctrine of state immunity enunciated by the Court in *Parker* simply has no applicability to a code of ethics which has been formulated outside the command and supervision of a state agency.[89]

Yet, only a few weeks later, architects won immunity under *Parker* in *Bank Building & Equipment Corp. v. National Council of Architectural Registration Boards*,[90] a decision of the same federal court. Unavailability of the opinion at time of writing forces reliance upon an unofficial capsulation.

> The decision to dismiss Sherman Act charges centered upon the court's conclusions that the architectural boards of West Virginia, North Carolina, Georgia, Ohio, Oregon, and Texas "are each regulatory agencies of their respective states exercising the police power of their respective states in licensing persons to practice the profession of architecture . . ." and the Sherman Act does not apply to action by a state . . . pursuant to its police power exercised through a regulatory agency of the State.[91]

Subsequently, on the other hand, a trial court of Ohio, one of the six states referred to in *Bank Building*, reached the opposite conclusion; against the Architects Society of Ohio a consent judgment was entered

87. United States v. National Soc'y of Professional Eng'rs, 389 F. Supp. 1193 (D.D.C. 1974), *vacated and remanded*, 422 U.S. 1031 (1975).

88. *Id.* at 1195 n.1.

89. *Id.* at 1201.

90. Civil Act. No. 74-896 (D.D.C. Jan. 13, 1975), *excerpted in* 701 BNA ANTITRUST & TRADE REG. REP. A-12.

91. *Id.*

expressly forbidding fee schedules and enjoining the Society from limiting an architect's independent determination of his fees.[92] In current litigation are challenges to price fixing by anesthesiologists,[93] physicians,[94] and public utilities.[95] Inasmuch as the rates charged by the public utility in the last-named suit were set independently by the public service commissions of two states, state action would appear clear, but the other two cases again present the question of when the licensing of professional groups implicates the state sufficiently to bring such groups under the *Parker* umbrella.

To the resulting uncertainty concerning the present scope of the *Parker* doctrine has been added the recent action of the Supreme Court in *National Society of Professional Engineers v. United States*,[96] vacating the judgment and remanding "for further consideration in the light of *Goldfarb v. Virginia State Bar*."[97] This action is puzzling on its face because of the seeming consistency between the district court's reasoning in *Professional Engineers* and that of the Supreme Court itself in *Goldfarb*. Explanation may lie in a *Goldfarb* footnote, wherein the Court perceived for antitrust relevancy a distinction between a business and a profession. "It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas."[98] This observation is suggestive that while the Court rejects full exemption of learned professions from the Sherman Act, associations with a "public service aspect" are not subject to the rule for business associations, that price fixing is per se illegal, but only to a rule of reason. The district court in *Professional Engineers* had declared it "undisputed that price fixing is a *per se* unreasonable restraint of trade under the Sherman Act,"[99] rendering irrelevant the reasonableness of the ethical proscription against competitive bidding for en-

92. Ohio v. Architects Soc'y, 75 CV 04-1693 (Franklin County C.P., Apr. 25, 1975), *excerpted in* 712 BNA ANTITRUST & TRADE REG. REP. A-27.

93. United States v. American Soc'y of Anesthesiologists, No. 75-4640 (S.D.N.Y., filed Sept. 22, 1975), *excerpted in* 732 BNA ANTITRUST & TRADE REG. REP. A-16 to -17.

94. Ohio v. Ohio Medical Indem., No. C-2-75-473 (S.D. Ohio, filed July 9, 1975), *excerpted in* 724 BNA ANTITRUST & TRADE REG. REP. A-8 to -9.

95. City of Mishawaka v. Indiana & Mich. Elec. Co., Civil Act. No. S 74-72 (N.D. Ind., juris. noted May 1, 1975), *excerpted in* 714 BNA ANTITRUST & TRADE REG. REP. A-7.

96. 422 U.S. 1031 (1975).

97. *Id.*

98. 421 U.S. at 788 n.17.

99. United States v. National Soc'y of Professional Eng'rs, 389 F. Supp. 1193, 1199 (D.D.C. 1974).

gineering services. Accordingly, that court did not consider testimony amassed in the record by counsel for NSPE—evidence quite convincing that, when the nature of the functions of architect and professional engineer is understood, a requirement of competitive bidding in that context would be a distinct disservice to the public interest.[100] Inasmuch as such evidence would have to be considered in the judicial application of a rule of reason, the Supreme Court's vacation and remand is explainable on this hypothesis.

Among professional associations, there may well be gradations in the degree to which price fixing can be reconciled with true public interest. Professor Paul Verkuil puts the matter well:

> A capricious use of the antitrust laws by federal agencies or the judiciary bears grave implications, making some recognition of *Parker's* applicability indispensable to orderly federal-state relations. Yet recognition must also be accorded the values the antitrust laws seek to foster. When the challenged regulation is predicated upon dubious economic principles, a major bulwark of the *Parker* doctrine is absent and its applicability is thereby rendered suspect. The need to reconcile competing considerations in such cases argues for an individual inquiry, focusing upon the state's total commitment to the regulation, to determine whether *Parker* should act in an exemptive capacity.[101]

By way of illustration, it is distinctly possible to make a stronger case for elimination of competitive bidding among architects and professional engineers than can be made for the retention of minimum fee schedules for practicing lawyers. For the latter type of competitive restraint, the Supreme Court in *Goldfarb* showed little tolerance. "On this record respondents' activities constitute a classic illustration of price fixing,"[102] for which in the Court's mind there exists no justifying considerations in the mode by which legal services are delivered. With architects and professional engineers, on the contrary, there is in congressional legislation a source of justification for their anticompetitive stance. A 1972 amendment to the Federal Property and Administrative Services Act codifies long-standing practice in employing negotiation procedures rather than competitive bidding as established policy in procurement of architectural and engineering services for federal projects.[103]

100. Brief for Defendant on remand, at 7-9, 15-20, National Soc'y of Professional Eng'rs, Civil No. 2412-72 (filed Oct. 15, 1975).

101. Verkuil, *State Action, Due Process and Antitrust: Reflections on Parker v. Brown*, 75 COLUM. L. REV. 328 (1975).

102. 421 U.S. at 783.

103. 40 U.S.C. §§ 541-44 (Supp. 1972). Note especially section 542.

This distinction in judgment between professions does not alone provide the predicate for a differing result under a rule-of-reason approach. The existence of the Congressional Act, unnoted by the district court in its opinion in *Professional Engineers*, suggests an independent basis for explanation of the vacation and remand in that case. Alternatively, the Court, in remanding *Professional Engineers*, may have felt a judicial determination necessary to decide whether the congressional enactment put that situation on all fours with *Parker*, where California and congressional policy were in unison in substituting for free market forces governmental programs of production control.[104] Immunity ought to be present at least where federal-state policies are in tandem. Commentators' views can and do understandably vary. Thus Professor Phillip Areeda would allow state regulatory programs to be overturned by antitrust law absent affirmative federal policy favoring them, as was the fact in *Parker* itself.[105] On the other hand, Professor Paul Verkuil, persuaded that "important arguments can be made for the [*Parker*] doctrine's viability,"[106] would require that Congress specifically legislate beyond the Sherman Act before state regulatory programs can be subordinated.[107] Professors Posner and Slater take intermediate positions that call for the weighing of competing considerations in various patterns of clash between adherence to and departure from antitrust policy.[108] Whatever the judgment at this point, since *Parker* is a product of statutory interpretation there remains the threat of complete annihilation of federalistic values through extension of congressional power on the constitutional level. *Wirtz* and *Fry* are already on the books, with the impending likelihood, in *Dunlop*, of validation of further projection of federal supremacy. Nor will there likely be any more protection for state regulatory policy than for state fiscal independence, should Congress see fit further to move in on state polity.

In striking contrast to the Court's deflation of federalism as an indirect limitation, illustrated by *Fry*, is its distention of separation of powers in *Eastland v. United States Servicemen's Fund*,[109] decided the

104. Parker v. Brown, 317 U.S. 341, 367-68 (1943).
105. P. AREEDA, ANTITRUST ANALYSIS 57-58 (1967).
106. Verkuil, *supra* note 101, at 343.
107. *Id.*
108. Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U.L. REV. 693 (1974); Slater, *Antitrust and Government Action: A Formula for Narrowing Parker v. Brown*, 69 NW. U.L. REV. 71 (1974).
109. 421 U.S. 491 (1975).

same day. USSF had sought to enjoin the implementation of a subpoena duces tecum issued on behalf of the Senate Subcommittee on Internal Security to a bank in possession of the records of the organization. As chairman of the subcommittee, Senator Eastland had signed the subpoena. Named as defendants, along with the chairman, were eight other senators of the subcommittee, the committee's chief counsel, and the bank. USSF's claim was that the records in question were the equivalent of confidential membership lists, that the consequence of disclosure would be the loss of much of the organization's financial support through fewer contributions from private individuals, and that the "sole purpose" of the subpoena was to "harass, chill, punish and deter" USSF and its members in the exercise of their first amendment rights.[110]

A divided court of appeals reversed the district court dismissal,[111] finding the constitutional claim at one with that sustained in *NAACP v. Alabama*[112] and *Bates v. Little Rock*.[113] Even the dissenting judge saw the pertinency of the first amendment claim, but, employing as guidelines *Watkins v. United States*[114] and *Barenblatt v. United States*,[115] struck the balance in favor of the investigative role of Congress.[116] Again came reversal: "We conclude that the actions of the Senate Subcommittee, the individual Senators, and the Chief Counsel are protected by the Speech or Debate Clause of the Constitution, Art. I, § 6, cl. 1, and are therefore immune from judicial interference. We reverse."[117]

The opinion of the Court, by the Chief Justice, early identifies the speech or debate clause as a specific articulation of the concept of separation of powers; "our cases make it clear that the 'central role' of the Clause is to 'prevent intimidation of legislators by the Executive and accountability before a hostile judiciary . . . .' "[118] Having established this constitutional proposition, the opinion proceeds to determine the reach of the clause, concluding from earlier decisions and further

110. *Id.* at 495.
111. 488 F.2d 1252, 1271 (D.C. Cir. 1973).
112. 357 U.S. 449 (1958).
113. 361 U.S. 516 (1960).
114. 354 U.S. 178 (1957).
115. 360 U.S. 109 (1959).
116. 488 F.2d at 1280-82 (MacKinnon, J., dissenting).
117. 421 U.S. at 501.
118. *Id.* at 502, *quoting* Gravel v. United States, 408 U.S. 606, 617 (1972). The bill of attainder clauses are another specialized facet of separation of powers, as Chief Justice Warren asserted in South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966), and in United States v. Brown, 381 U.S. 437, 442 (1965).

examination that it is absolute in nature. There need be no quarrel with a broad construction of the speech or debate clause, but that determination resolves only the constitutional issue of indirect limitation. Remaining is the issue that USSF raised in its pleadings and which all members of the court of appeals faced: whether the subpoena can be squared with the direct limitation of the first amendment. This the Court completely fails to appreciate. "That approach, however, ignores the absolute nature of the speech or debate protection . . . ."[119] The Court's reasoning is utterly at variance with the dualism imbedded in the American Constitution, and the year is 1975!

The decision was not unanimous; there was a concurrence and a dissent. Mr. Justice Marshall, Justices Brennan and Stewart in accord, concurred with the majority view so far as the separation of powers aspect was concerned, and joined in the judgment because in the posture of this case he could see no way by which the first amendment issue could be raised in the face of the "immunity" of the defendants. Yet he cautioned that

> I do not read the Court to suggest, however, nor could I agree, that the constitutionality of a congressional subpoena is always shielded from more searching judicial inquiry. For, as the very cases on which the Court relies demonstrate, the protection of the Speech and [*sic*] Debate Clause is personal. It extends to Members and their counsel acting in a legislative capacity; it does not preclude judicial review of their decisions in an appropriate case, whether they take the form of legislation or a subpoena.[120]

Subsequent paragraphs of the Marshall concurrence make it clear that he had in mind the direct limitations of the Bill of Rights, particularly "the First Amendment freedoms of speech, press, religion, or political belief."[121] The difficulty was that

> This case does not present the questions of what would be the proper procedure, and who might be the proper parties defendant, in an effort to get before a court a constitutional challenge to a subpoena *duces tecum* issued to a third party. As respondent's counsel conceded at oral argument, this case is at an end if the Senate petitioners are upheld in their claim of immunity, as they must be.[122]

At least the concurrers sensed the fundamental weakness in the reasoning of the majority, and yet, by confounding procedure and substance they too failed to grasp the implications of American constitu-

119. 421 U.S. at 509.
120. *Id.* at 515.
121. *Id.* at 516, *quoting* Watkins v. United States, 354 U.S. 178, 188 (1957).
122. 421 U.S. at 517-18 (footnotes omitted).

tional dualism. The absolute nature of the speech or debate clause buttresses only legislative freedom of deliberation and investigation from executive and judicial intrusion as a matter of the separation of three supposedly coordinate branches of government. To construe the clause as immunizing Congress procedurally from constitutional review under direct limitations is fallacious. Analogous would be a determination that a congressional act that is federalistically constitutional forecloses consideration of its validity under the Bill of Rights, the due process clause, or any other constitutional provision of the direct type.[123]

The lone dissenter in *USSF* was Mr. Justice Douglas. His opinion consists of one paragraph, opening with the statement that "[t]he basic issues in this case were canvassed by me in Tenney v. Brandhove, 341 U.S. 367 . . . (dissenting opinion), and by the Court in Dombrowski v. Eastland, 387 U.S. 82 . . . in an opinion which I joined."[124] The first of these cited cases was an action for damages under federal civil rights legislation for alleged denial of constitutional rights.[125] In a contest for the office of mayor of San Francisco, plaintiff Brandhove had supported a candidate whom his opponent had charged was a Communist. For his efforts to challenge this smear, Brandhove was summoned before a committee of the California legislature, officially entitled the Senate Fact-Finding Committee on Un-American Activities. He refused to testify, was prosecuted for contempt, but won release when the jury failed to return a verdict. In his action against members of the committee, Brandhove claimed that the hearing was not for a legislative purpose, but was to silence and deter him contrary to his rights of free speech, due process, equal protection, and to his privileges and immunities.[126]

Brandhove lost in the Supreme Court because that tribunal concluded that the defendants were acting within the sphere of legitimate legislative activity—activity that the Court could not believe Congress intended to include under civil rights legislation protective of constitutional guarantees, in view of the long struggle in England and the United States to achieve recognition of speech or debate immunity for

123. Wickard v. Filburn, 317 U.S. 111 (1942), provides an excellent illustration of Court realization that the challenged congressional act must be tested against both article I, section 8 and fifth amendment due process.

124. 421 U.S. at 518.

125. Tenney v. Brandhove, 341 U.S. 367 (1951). The provisions upon which reliance was placed are now codified at 42 U.S.C. §§ 1983, 1985(3) (1970).

126. 341 U.S. at 371.

legislators.[127] Although Justice Douglas agreed with "the opinion of the Court as a statement of general principles governing liability of legislative committees and members of the legislatures,"[128] he could not agree on their complete freedom from external control.

> We are dealing here with a right protected by the Constitution—the right of free speech. The charge seems strained and difficult to sustain; but it is that a legislative committee brought the weight of its authority down on respondent for exercising his right of free speech. Reprisal for speaking is as much an abridgment as a prior restraint. If a committee departs so far from its domain to deprive a citizen of a right protected by the Constitution, I can think of no reason why it should be immune.[129]

Dombrowski v. Eastland[130] was a per curiam opinion responsive to a suit for damages by Dombrowski and others against the chairman and counsel of the Internal Security Subcommittee of the Judiciary Committee of the United States Senate. Plaintiffs' claim was that a conspiracy between the defendants and certain Louisiana state officials had resulted in violation of their fourth amendment rights. The claim was quickly dispatched. As for the complaint against Senator Eastland, it "must be dismissed" on the basis of "the doctrine of legislative immunity [which has its roots] . . . in the Speech or Debate Clause of the Constitution."[131] Because the doctrine, although applicable to officers or employees of legislative bodies, was said to be less absolute as to them, remand was directed with respect to the disposition of the case against the committee counsel.[132]

Citation of these two cases by Justice Douglas in *USSF* seems odd; they do not well ventilate the basic issues, if those issues concern the relevancy of direct limitation for speech or debate adjudication. He did not even dissent in *Dombrowski*, and while he did in *Tenney*, the posture of the litigation presented only tangentially the pertinence of direct constitutional limitation in cases of defendant reliance on speech or debate immunity. One wonders why the Justice did not invoke the line of decisions beginning with *Kilbourn v. Thompson*[133] that constitutes the backbone of speech or debate clause doctrine.

Kilbourn itself can be passed over quickly for present purposes. Although in jailing Kilbourn for his refusal to testify the House was

127. *Id.* at 379.
128. *Id.* at 381.
129. *Id.* at 382.
130. 387 U.S. 82 (1967).
131. *Id.* at 84-85.
132. *Id.* at 85.
133. 103 U.S. 168 (1881).

found to have acted in excess of its powers, the members of the House committee were held protected by the speech or debate clause; only against the sergeant-at-arms was any redress sanctioned, and that by way of judgment against him in Kilbourn's action for false imprisonment.[134] The year was 1881; any succor by way of direct limitations in this context remained for the future. By the time *United States v. Johnson*[135] was in litigation, direct limitations providing protection for civil liberties were in full bloom. However, a criminal action against a former congressman for violation of the federal conflict-of-interest statute, and for conspiracy to defraud the United States, hardly offered an appropriate occasion for contemplation of such constitutional limitations as a restriction on congressional authority under the speech or debate clause. Mr. Justice Douglas joined in a dissent of three, but on a point not relevant to "the basic issues" of *USSF*.[136]

New developments came with the 1970's. *United States v. Brewster*[137] presented the question of the constitutionality of the federal antibribery law as applied to a former United States senator. The issue was the scope of the speech or debate clause. The majority held the statute constitutional.[138] Again, Justice Douglas joined in a three-way dissent that found the clause of such breadth as to render the statute invalid. In the dissenting opinion, written by Mr. Justice Brennan, there is, however, a beginning recognition of a direct form of limitation on legislative independence as regards a chamber's own members. "It is doubtful, for example, that the Congress could punish a Member for the mere expression of unpopular views otherwise protected by the First Amendment."[139]

Decided contemporaneously with *Brewster* was *Gravel v. United*

134. *Id.* at 205.
135. 383 U.S. 169 (1966).
136. *Id.* at 186-87.
137. 408 U.S. 501 (1972).
138. *Id.* at 528-29.
139. *Id.* at 544, *citing* Bond v. Floyd, 385 U.S. 116 (1966). The quoted sentence is immediately followed by one asserting that the two Houses of Congress in disciplining the conduct of members are not free from "restraints imposed by or found in the implications of the Constitution," *citing* Barry v. United States *ex rel.* Cunningham, 279 U.S. 579, 614 (1929), *quoted in* Powell v. McCormack, 395 U.S. 486, 519 n.40 (1969). It is not clear to what constitutional restraints the *Barry* Court had reference, but certainly not to article I, section 5 which was there treated as nonjusticiable. A footnote in *Powell* is an unpersuasive effort to distinguish *Barry*. See 395 U.S. at 519 n.40. The *Powell* reversal on justiciability forced the Court to face the bearing of the speech or debate clause on the situation then before it. But the factual pattern in *Powell* did not necessitate judicial consideration of the pertinency of direct limitations. For this reason the *Powell* decision, important as it is in other contexts, does not require further attention in the present analysis.

States.[140] Senator Gravel had first leaked the existence of the Pentagon Papers by reading a summary of them to his subcommittee on Public Buildings and Grounds of the Senate Public Works Committee; he had then introduced the Papers in their entirety into the public record, and allegedly had subsequently made arrangements with the Beacon Press for publication of the Papers.[141] The issue in *Gravel* was whether information-gathering is within the scope of speech or debate clause immunity for members of the Congress and their aides. The majority of the Court refused to read the clause to cover the Senator's actions with respect to the Papers, although it did conclude that aides are immunized to the same extent as members.[142] Mr. Justice Douglas' dissent discloses the increasing interrelation in his mind between direct and indirect limitation, although the two have not yet come into full correlation as dual principles of constitutional limitation of governmental power.

> I would construe the Speech or Debate Clause to insulate Senator Gravel and his aides from inquiry concerning the Pentagon Papers, and Beacon Press from inquiry concerning publication of them, for that publication was but another way of informing the public as to what had gone on in the privacy of the Executive Branch concerning the conception and pursuit of the so-called "war" in Vietnam. Alternatively, I would hold that Beacon Press is protected by the First Amendment from prosecution or investigations for publishing or undertaking to publish the Pentagon Papers.[143]

From direct and indirect limitations as alternative bases in constitutional interpretation, Justice Douglas moves in *Doe v. McMillan*[144] to a realization of their dualistic character. The fact pattern is much like that of *USSF*; there is a threat to the confidentiality of disciplinary data on named students in the printing and distribution of a House report, resulting from a select subcommittee study of District of Columbia schools. The complaint takes the form of a class action brought by parents for themselves and their children for compensatory and injunctive relief; the defense is the immunity given by the speech or debate clause.[145] The Court majority rejected plaintiffs' assertion that inclusion in the report of specific conduct on the part of identified children "was actionable because unnecessary and irrelevant to any legislative

140. 408 U.S. 606 (1972).
141. *Id.* at 609-10.
142. *Id.* at 622.
143. *Id.* at 633.
144. 412 U.S. 306 (1973).
145. *Id.* at 309-10.

purpose."[146] On the other hand, the protective mantle of the clause did not extend to public distribution of the material despite assertions of the dissenters that such coverage was essential to the informing function of Congress.[147]

Joined by Justices Brennan and Marshall, Mr. Justice Douglas was in agreement with the dissenting view concerning the scope of the speech or debate clause, yet he concurred because "[*v*]*iolations of the commands of the First Amendment are not within the scope of a legitimate legislative purpose.*"[148] Thus attesting that governmental action must pass muster under both indirect and direct limitations, the Justice goes on to observe that:

> Unless we are to put blinders on our Congressmen and isolate them from their constituents, the informing function must be entitled to the same protection of the Speech or Debate Clause as those activities which relate directly and necessarily to the immediate function of legislating. . . . In my view the question to which we should direct our attention is whether the House Report infringes upon the constitutional rights of petitioners and therefore is subject to scrutiny by the federal courts.[149]

The Douglas concurrence in *Doe*, crowning as it did his growing appreciation of the dualism in the American constitutional framework, would seem to have been the precedential statement he would have cited as identifying the "basic issues" in *Eastland v. United States Servicemen's Fund.* But whatever the explanation for his turning to *Tenney* and *Dombrowski* for a point of departure,[150] the Justice was on the right track in dissenting. As he put it:

> Under our federal regime that delegates, by the Constitution and Acts of Congress, awesome powers to individuals [in positions of official authority], that power may not be used to deprive people of their First Amendment or other constitutional rights. . . . [N]o regime of law that can rightfully claim that name may make trustees of these vast powers immune from actions brought by people who have been wronged by official action.[151]

---

146. *Id.* at 312.

147. *Id.* at 317.

148. *Id.* at 328 (emphasis in original). Note is to be taken as well of the Justice's earlier assertion: "Acts done in violation of the Fourth Amendment—like assaults with fists or clubs or guns—are outside the protective ambit of the Speech or Debate Clause; *certainly violations of the Fourth Amendment are not within the scope of a legitimate legislative* purpose," *id.* at 327 (emphasis in original).

149. *Id.* at 328.

150. See text following note 132 *supra.*

151. 421 U.S. at 518. From the context it is clear that the "individuals" to whom Justice Douglas refers are those holding public office.