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# SOME ASPECTS OF CONSTITUTIONALISM AND FEDERALISM\*

THOMAS REED POWELL

[An Address Delivered Before the North Carolina Bar Association on  
August 20, 1935]

*Mr. Chairman, Members and Guests of the North Carolina Bar Association:*

The charming, alluring, much appreciated and eagerly accepted invitation of your President was waiting for me at my summer home on the New York shore of Lake Champlain on the eve of July 4th upon my return from a day of motoring in my native state of Vermont. The Lake which once was a highway between the two states is now in the days of motors a barrier, but at Crown Point we cross on a bridge maintained by the two states jointly. The annual tolls are several times the amount that Vermont paid to New York in atonement for the ruthless and successful resistance of the Green Mountain Boys to sovereign powers which New York sought in vain to exercise over what had been the New Hampshire Grants. My native state would have been New Hampshire, had not the British Government transferred the territory to New York in 1764. My native state would have been New York, had not New York behaved so wantonly about prior New Hampshire grants that the grantees took it upon themselves to establish and maintain their independence.

The orthodoxy of Vermont's action is as open to question as was that of New York. If such issues are still open for consideration, one may even ask questions about what happened in Philadelphia on July 4th, 1776, little as some be-buttoned and be-pinned Sons and Daughters seem inclined to do so. To Vermont, though still without the fold of the inchoate union, the Declaration of Independence was not only a for-

\* This paper was written in a shack in the woods where library facilities were meagre. Some recent Supreme Court reports, some ancient records of Vermont history and some printed perpetrations of my own were about all that was available to make for that accuracy which is a requisite of scholarship. The form of expression was motivated by the anticipation of oral delivery rather than by the canons of a formal law-review article. In complying with the request for law-review publication it has seemed to me best to leave the text as originally written and to add retroactively in footnotes such corrections, qualifications and citations as autumnal reflection and the facilities of a law library suggest and supply. Chasing down references and citations is not in itself a thrilling chore, but the tedium is alleviated by its refreshing of the grateful recollection of a happy and stimulating week in the goodly fellowship of the glorious company on the cruise of the North Carolina Bar Association on board the good ship "Reliance" in August, 1935.

ward-looking document but a backward-looking one as well. To make the past secure and the future free, she resolved as follows:

"Whereas, the Honorable and Continental Congress did, on the 4th day of July last, declare the United Colonies in America to be free and independent of the crown of Great Britain; which declaration we most cordially acquiesce in; and whereas by the said declaration the arbitrary acts of the crown are null and void, in America, consequently the jurisdiction by said crown granted to New York government over the people of New-Hampshire Grants is totally dissolved;

"We therefore. . ."<sup>1</sup>

A lawyer who by the aid of his familiarity with *nunc pro tunc* and with trespass *ab initio* can accept Vermont's premise must naturally anticipate the conclusion that the jurisdiction of New Hampshire was thereupon retroactively restored. Not so the Vermonters. For what follows is this:

"We therefore, the inhabitants, on said tract of land, are at present without law or government, and may be truly said to be in a state of nature; consequently a right remains to the people of said grants to form a government best suited to secure their property, well being and happiness."<sup>2</sup>

This is prophetic of Calhoun, or at least of the Hartford Convention. So perhaps without offensive or undue pride, a Yankee, with or without a prefatory adjective, may point out the debt of the South to Vermont and to New England for example and for justification.

Facts are more important than theories, and the fact is that Vermont acted as an independent nation from 1777 to 1791. She fought at Ticonderoga, Hubbardton and Bennington, but she also pursued negotiations with the British commander in Montreal which resulted in staving off a British invasion during a season when the pen and tongue proved mighty though the sword was weak. Yet I would not have you think that Vermonters are characteristically strong in speech. A profusion of verbal reserve has been thought to be a trait of one of the later Green Mountain boys who attained a high place in the nation. This was not learned from Ethan Allen, nor from George Harvey or John Barrett, but it was not unknown even in early days. Several months before Vermont formally adopted her Declaration of Independence from New York, she voted to prepare the public mind to receive it. Here are the stirring tones of the resolution:

"That a Manifesto be put in the public newspapers setting forth the reasons, in easy terms, why we choose not to connect with New-York."<sup>3</sup>

<sup>1</sup> Records of the Council of Safety and Governor and Council of the State of Vermont, vol. 1, p. 51.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Id.* at 38.

Before we leave the subject of secession, mention must be made of the most successful one, of which North Carolina for a year or so was one of the victims. This was the secession of Delaware, Pennsylvania, New Jersey, Georgia, Connecticut, Massachusetts, Maryland, South Carolina, New Hampshire, Virginia and New York from the Government of the United States under the Articles of Confederation. The Articles provided that the Union should be perpetual and that no change should be made except by the vote of Congress and the ratification of the legislatures of all the thirteen states. Such cumbersome procedure did not suit the Founding Fathers. They preferred ratification by conventions, rather than by legislatures, by nine of the states rather than by thirteen. And so it came about that North Carolina and Rhode Island were left alone for a season as the only truly legal United States of America, until they too joined in our second Revolution and became a part of the new federation under the new Constitution of the United States. Facts again are more important than theories, and the Constitution has long since put off its unconstitutionality and become a recognized foundation of the government under which we live.

This brief reminder of happenings in backgrounds dear to you and me may suggest that the evolution of government does not follow the rigid process of strict law. Other examples are afforded by the creation of the State of West Virginia and by the ratification of the Fourteenth Amendment. Lawyers proficient in searching titles would need to mellow their canons of authenticity before giving a warranty deed after making an abstract of constitutional grants and conveyances. Lawyers skilled in the drafting and interpretation of deeds and wills would be hard put to it to tell the meaning of our Constitution by reading its articles and sections. They might from such reading even be unaware that there is a place to go for information about this meaning. For the Constitution does not say that it shall mean what the Supreme Court shall say that it shall mean. This was left to inference, and the great decision of *Marbury v. Madison*<sup>4</sup> makes the inference easy only by assuming that the issue of constitutionality is capable of an objective answer if made by a court and that for judges the comparison of statute and constitution is as simple as the housewife's matching of colors.

The present Chief Justice of the United States knew better when he was Governor of the State of New York. I may quote inaccurately, for I am away from my books, but in substance he said: "We are living

<sup>4</sup> 1 Cranch 137, 2 L. ed. 60 (U. S. 1803).

[Ed. Note: It is the policy of this publication to cite the volume of the official United States Reports, rather than the named reporters. However, out of deference to the author's preference for the latter form, an exception is made herein.]

under a Constitution, but the Constitution is what the judges say it is."<sup>6</sup> Again I may quote inaccurately from Bishop Hoadley who back in the early eighteenth century said something like this: "Whoso hath final power to interpret any written or spoken laws, he it is who is in truth the lawgiver, and not the person who first wrote or spoke them."<sup>7</sup> I may be inaccurate in quotation, but I am not inaccurate if I say the same things myself,—or at least not wholly inaccurate. Of course general statements like this may tend to over-emphasize one of the several or many factors in the process of judicial interpretation. That there are various factors in the judicial process is charmingly told in Mr. Justice Cardozo's lectures on the nature of that process.<sup>8</sup> The inevitable presence of several factors inevitably involves the necessity of judicial choice. When judges choose, it is the judges who choose, and neither statute nor precedent nor Constitution can do the choosing for them. Even those who choose the judges can not choose how they shall choose, as the elder Roosevelt learned from Mr. Justice Holmes.

This incident of Roosevelt's explosion at Holmes's dissent in the *Northern Securities Case* is enough to make one leery about any suggestion to pack a bench to get the kind of constitutional law one may at the moment want. Who can know well enough the hidden springs of human action and human attitude even in intimate and life-long friends to be

<sup>6</sup> The correct quotation is: "We are under a Constitution, but the Constitution is what the judges say it is, . . ." The statement was made in the course of an extemporaneous speech before the Elmira (New York) Chamber of Commerce on May 3, 1907, and was in a paragraph directed against the position that there should be judicial review of matters of administrative detail in connection with utility regulation. This paragraph reads as follows:

"I have the highest regard for the courts. My whole life has been spent in work conditioned upon respect for the courts. I reckon him one of the worst enemies of the community who will talk lightly of the dignity of the bench. We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and of our property under the Constitution. I do not want to see any direct assault upon the courts, nor do I want to see any indirect assault upon the courts. And I tell you, ladies and gentlemen, no more insidious assault could be made upon the independence and esteem of the judiciary than to burden it with these questions of administration,—questions which lie close to the public impatience, and in regard to which the people are going to insist on having administration by officers directly accountable to them." ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES (1st ed. 1908) 139-140; (2nd ed. 1916) 185-186.

<sup>7</sup> James B. Thayer in *The Origin and Scope of the American Doctrine of Constitutional Law* (1893) 7 HARV. L. REV. 129, at 132, gives the reference to a sermon by Bishop Hoadly on "The Nature of the Kingdom or Church of Christ," published in London by James Knapton in 1717, and quotes the sentence as follows: "Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the law-giver, to all intents and purposes, and not the person who first wrote or spoke of them." Mr. Thayer derived the quotation from John C. Gray, who derived it from Mr. Justice Holmes. See Gray, *Some Definitions and Questions in Jurisprudence* (1892) 6 HARV. L. REV. 21, at 33, n. 1. The two quoters differ slightly in their quotations and in their spelling of the good Bishop's name. Mr. Thayer apparently went to the original source.

<sup>8</sup> CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1925).

competent to forecast judicial behavior on varied specific issues? Who can know how long the issues of the moment will remain the issues of the nation? One may search in prospective judges for qualities of insight and power, for real gifts of reason and wisdom and statesmanship, and one may perhaps find what one is looking for, as I for one believe that President Hoover was reluctantly compelled to find in Mr. Justice Cardozo, but if one goes about with a candle or a lantern searching for a rubber stamp, the search may be rewarded by a stamp that other hands will soon find the way to press.

It is hard enough to pick a really excellent judge when the picking is confined to one at a time. Unhappily there is no established tradition or available machinery for getting the sense of the bar or of the nation on the most desirable persons to be considered for membership on the Supreme Court of the United States. In some of our states the situation is better, though the results may not be commensurate with the opportunity. So long as the American Bar Association continues its present practice in picking its presidents, I would not recommend that it be consulted about possibilities for the more important post of Supreme Court Justice. Yet something better than the sort of chance that now operates would be desirable. Only once in a while does the appointment of a Chief Justice or an Associate Justice go to one whom the gentlemen of the ring would call a "natural." Of the present bench only the Chief Justice and Mr. Justice Cardozo fall easily within that class. The other appointments depended greatly upon who was the picker at the moment. This is not to belittle the results, but only to point to an obvious fact.

It was the unrivalled distinction of Holmes that created the void that inexorably called for Cardozo. I have seen the same situation on law faculties. When a retirement has left a small hole, there is danger that the choice of a successor will content itself with a man that is about big enough to match the hole. When real distinction has been lost, there is likely to be a more determined impulse to replace it. It is well to remind ourselves that a small hole offers as big an opportunity as a large one, and that the smaller the hole the more joyous the opportunity. After we have thus reminded ourselves, we should pass the reminder on to the President and the Senators. There are some sad instances in which individual Senators have with the aid of so-called Senatorial courtesy dictated to a President the appointment of inferior federal judges who all too well live down to that designation. In such matters the local and state bar associations have a significant opportunity to play an important part. If they should develop a tradition of insisting on the highest possible calibre of men for the lowest rung of the federal judicial

ladder, we might hope for a group of trained and experienced judges in which there would be several who would stand out as "naturals" whenever there is a vacancy on the highest court of the land.

We are living under a Constitution, but the Constitution is what the judges say it is. This is always forced into the limelight when the judges are divided. There was a time in the Chief Justiceship of Mr. White when on a type of important issues the bench was divided into three equal camps. On one side were certain to be the Chief Justice and Justices Van Devanter and McReynolds. On the other side were certain to be Justices Holmes, Brandeis and Clarke. The cases were decided by the odd man of Justices McKenna, Day and Pitney. In those days I knew a little constitutional law, in the sense of what Mr. Justice Holmes calls a prophecy of what courts will do in fact. When that bench was transformed, my constitutional law evaporated for a time. Later I became competent again. On one side were Justices Van Devanter, McReynolds, Sutherland and Butler. On the opposite side were surely Justices Holmes and Brandeis and progressively surely Mr. Justice Stone. In between were Mr. Chief Justice Taft and Mr. Justice Sanford, with the Chief Justice, as he grew older, more definitely aligning himself with the four whom for convenience of later reference I may call the Stalwarts.

In the latter days of the Taft court, a determined Stalwart majority went to new lengths in curbing the governmental powers of police and of taxation. Long established and judicially sanctioned powers of taxation were brought to an end, sometimes by explicit over-ruling,<sup>8</sup> sometimes by distinctions so tenuous<sup>9</sup> that one was compelled to suspect either the capacity or the candor of the distinguishers. On issues that from a technical lawyer's standpoint differed widely, there was the same or nearly the same division in case after case.<sup>10</sup> In the realm of police power the judicial mesh was woven so tight that little that was new or far-reaching got through. By contrast with anything that had happened in any earlier comparable period, it is fair to say that the power of

<sup>8</sup> See *Farmers' Loan & Trust Co. v. Minnesota*, 280 U. S. 204, 209, 50 Sup. Ct. 98, 99, 74 L. ed. 371, 374 (1930), explicitly overruling *Blackstone v. Miller*, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. ed. 439 (1903).

<sup>9</sup> See *Macallen Co. v. Massachusetts*, 279 U. S. 620, 49 Sup. Ct. 432, 73 L. ed. 874 (1929). I have discussed these distinctions in *The Macallen Case—and Before* (1930) 8 NAT. INC. TAX MAG. 47; *The Macallen Case—and Beyond* (1930) 8 NAT. INC. TAX MAG. 91; and in *An Imaginary Judicial Opinion* (1931) 44 HARV. L. REV. 889.

<sup>10</sup> From 1925 to 1930 there were about 25 cases in which Justices Holmes, Brandeis and Stone were together in dissent, and some 12 cases in which Justices Holmes and Brandeis dissented without being joined by Mr. Justice Stone. These dissenters were joined by Mr. Chief Justice Taft and Justices Sutherland and Butler in one case each, and by Justices McReynolds and Sanford in three cases each. Mr. Justice Van Devanter stood wholly aloof.

judicial veto was tending to run rampant. This was the view of the Supreme Court Justice who from life and from books knew most about judicial history. Less than two years before his retirement, Mr. Justice Holmes told us in his dissent in *Baldwin v. Missouri*:<sup>11</sup>

"I have not yet adequately expressed the more than anxiety I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions."<sup>12</sup>

Such was the background of contemporary judicial history when at the end of his first year in office President Hoover had two places on the bench to fill. Only in the light of this background can one appreciate the unprecedented stir that the President's first two nominations caused. If the Supreme Court was to continue to exercise an uncontrolled and well-nigh unlimited political function, the political agencies of the government proposed to have a hand in choosing the persons in whom this supreme political power was to be vested. The opposition of the Senate was primarily a rebuke to the political behavior of the recent majority of the Supreme Court. In my judgment it was a thoroughly well-deserved rebuke, however unfortunately misdirected. Unhappily the effective opportunity for rebuke requires that it be directed against others than those who have created the need and demand for it. The debates in the Senate afforded an important popular education in jurisprudence. They emphasized the fact that final interpreters are law-givers. If, as one may perhaps infer from some contrasting opinions that have since been rendered, the particular victory of the Senate has turned out to be a Pyrrhic victory, this but reinforces views already expressed against putting confidence in any search for rubber stamps.

After the changes in the composition of the Court, the four Stalwarts began to find themselves more frequently in the minority. In the next succeeding term they stood together in dissent from decisions sustaining a progressive chain-store tax<sup>13</sup> and a regulation of the commissions payable to insurance agents<sup>14</sup> and a decision condemning the so-called Minnesota Gag Law.<sup>15</sup> Mr. Justice McReynolds left his cus-

<sup>11</sup> 281 U. S. 586, 50 Sup. Ct. 436, 74 L. ed. 1056 (1930).

<sup>12</sup> *Id.* at 595, 50 Sup. Ct. at 439, 74 L. ed. at 1061.

<sup>13</sup> *Indiana v. Jackson*, 283 U. S. 527, 51 Sup. Ct. 540, 75 L. ed. 1248 (1931).

<sup>14</sup> *O'Gorman v. Hartford Ins. Co.*, 282 U. S. 251, 51 Sup. Ct. 130, 75 L. ed. 324 (1931).

<sup>15</sup> *Near v. Minnesota*, 283 U. S. 697, 51 Sup. Ct. 625, 75 L. ed. 1357 (1931).



tomary companions to join in a decision<sup>16</sup> which restored the earlier rule<sup>17</sup> that exempt income may be included in the measure of a corporate excise. The subsequent trend has been toward restricting the tax exemptions of those who have relations with government<sup>18</sup> instead of expanding those exemptions as was the practice of the later Taft court. On issues of state jurisdiction to levy inheritance taxes, however, the new Chief Justice and Mr. Justice Roberts have followed the revolutionary precedents of the Taft régime.<sup>19</sup> There still keep coming year by year a fair crop of cases in which Justices Brandeis, Stone and Cardozo are opposed to their six colleagues.<sup>20</sup> When they add one to their number, it is more likely to be the Chief Justice than Mr. Justice Roberts.<sup>21</sup> The most significant instance of this is the recent decision<sup>22</sup> condemning the Railroad Retirement Act.<sup>23</sup> This is the first of the decisions to which we must turn in a consideration of the problem of national power over national affairs.

Here the majority opinion was written by Mr. Justice Roberts, the Mr. Justice Roberts who wrote the opinion sustaining the New York statute regulating the price of milk<sup>24</sup> and who joined with four col-

<sup>16</sup> *Educational Films Co. v. Ward*, 282 U. S. 379, 51 Sup. Ct. 170, 75 L. ed. 400 (1931).

<sup>17</sup> *Flint v. Stone Tracy Co.*, 220 U. S. 107, 31 Sup. Ct. 342, 55 L. ed. 389 (1911).

<sup>18</sup> See *Fox Film Corp. v. Doyal*, 286 U. S. 123, 52 Sup. Ct. 546, 76 L. ed. 1010 (1932); *Willcuts v. Bunn*, 282 U. S. 216, 51 Sup. Ct. 125, 75 L. ed. 304 (1931); *Alward v. Johnson*, 282 U. S. 509, 51 Sup. Ct. 273, 75 L. ed. 496 (1931); *Denman v. Slayton*, 282 U. S. 514, 51 Sup. Ct. 269, 75 L. ed. 500 (1931); *Burnet v. Jergins Trust*, 288 U. S. 508, 53 Sup. Ct. 439, 77 L. ed. 925 (1933); and *Indian Ter. I. Oil Co. v. Bd. of Equalization*, 288 U. S. 325, 53 Sup. Ct. 388, 77 L. ed. 812 (1933).

<sup>19</sup> See *Farmers' Loan & Trust Co. v. Minnesota*, 280 U. S. 204, 50 Sup. Ct. 98, 74 L. ed. 371 (1930); *Baldwin v. Missouri*, 281 U. S. 586, 50 Sup. Ct. 436, 74 L. ed. 1056 (1930); and *First National Bank v. Maine*, 284 U. S. 312, 52 Sup. Ct. 174, 76 L. ed. 313 (1932).

<sup>20</sup> There were six instances during the last term of court and four during the term before.

<sup>21</sup> I doubt if the statement in the text can be supported statistically, and the instances are so few that a count would not be significant. The statement was made in the light or the shadow of the *Railway Pension Case*, note 22 *infra*. The only other important instance in which the Chief Justice was to the left and Mr. Justice Roberts to the right is the dissent from decisions denying naturalization to persons of limited readiness to bear arms. *United States v. Macintosh*, 283 U. S. 605, 51 Sup. Ct. 570, 75 L. ed. 1302 (1931); *United States v. Bland*, 283 U. S. 636, 51 Sup. Ct. 569, 75 L. ed. 1319 (1931). These cases were decided while Mr. Justice Holmes was on the bench, so that it is a mere assumption, though a fairly safe one, that Mr. Justice Cardozo would have dissented.

Against these cases there are a few in which Mr. Justice Roberts was with the justices to the left and Mr. Chief Justice Hughes was with those to the right. Persons should not carelessly make statements like the one in the text now confessed to be questionable.

<sup>22</sup> *Railroad Retirement Board v. Alton R. R. Co.*, 295 U. S. 330, 55 Sup. Ct. 758, 79 L. ed. — (1935).

<sup>23</sup> 48 STAT. 1283, 45 U. S. C. A. §§201-14 (Supp. 1934).

<sup>24</sup> *Nebbia v. New York*, 291 U. S. 502, 54 Sup. Ct. 505, 78 L. ed. 940 (1934).

leagues to sustain the Minnesota Mortgage Moratorium Law<sup>25</sup> and the action of the national government in calling in gold certificates<sup>26</sup> and in abolishing the gold clause in private contracts.<sup>27</sup> He also joined in the curious and as yet ununderstandable decision<sup>28</sup> to the effect that holders of liberty bonds were not damaged by the mere fact that they were paid in paper backed by a standard dollar of lesser gold content than that specified in the bond, which specification the government had wrongfully and therefore unsuccessfully sought to alter, but which though unaltered by the legislature somehow seemed to get altered by the Court. This interesting phenomenon or non-phenomenon of "Now you see it, now you don't" is aside from our immediate interest, but it affords insight into the process of constitutional interpretation and does not militate against the conclusion that the enterprise is one in which the views of Supreme Court justices play a part.

Clear as is this conclusion to any one with a modicum of intelligence, it is a conclusion that majority opinions are prone to deny or to conceal. Thus in the *Railway Pension Case*,<sup>29</sup> Mr. Justice Roberts, after outlining the provisions of the Railway Retirement Act, goes on to say:

"Our duty, like that of the court below, is fairly to construe the powers of Congress, and to ascertain whether or not the enactment falls within them, uninfluenced by predilection for or against the policy disclosed in the legislation. The fact that the compulsory scheme is novel is, of course, no evidence of unconstitutionality. Even should we consider the Act unwise and prejudicial to both public and private interest, if it be fairly within delegated power, our obligation is to sustain it. On the other hand, though we should think the measure embodies a valuable social plan and be in entire sympathy with its purpose and intended results, if its provisions go beyond the boundaries of constitutional power we must so declare."<sup>30</sup>

Behold these nine automatons, with minds swept free of every human frailty and every human preference, with no interest in the income of carriers or the well-being of those whose hands are on the throttle and whose eyes are on the track, with no notions of public policy, behold them reading the Constitution with some mechanical instruments of vision and of understanding and finding there between the lines or beneath the words of 1787 and 1789 the answers to the questions of 1935!

<sup>25</sup> Home Bldg. & Loan Ass'n. v. Blaisdell, 290 U. S. 398, 54 Sup. Ct. 231, 78 L. ed. 413 (1934).

<sup>26</sup> Nortz v. United States, 294 U. S. 317, 55 Sup. Ct. 428, 79 L. ed. — (1935).

<sup>27</sup> Norman v. Baltimore & Ohio R. R. Co., 294 U. S. 240, 55 Sup. Ct. 407, 79 L. ed. — (1935).

<sup>28</sup> Perry v. United States, 294 U. S. 330, 55 Sup. Ct. 432, 79 L. ed. — (1935). On the intricacies and the unsatisfactory reasoning of the opinion in this case see, Hart, *The Gold Clause in United States Bonds* (1935) 48 HARV. L. REV. 1057.

<sup>29</sup> Railroad Retirement Board v. Alton R. R. Co., note 22 *supra*.

<sup>30</sup> 295 U. S. at 346, 55 Sup. Ct. at 761, 79 L. ed. at —.

The conception is classic. The Delphic oracle has no monopoly of hokum.

The words of 1789 were those of the Fifth Amendment with its requirement of due process of law. Mr. Justice Roberts tells how to find their meaning when he says in a footnote:

"When the question is whether the legislative action transcends the limits of due process guaranteed by the Fifth Amendment, decision is guided by the principle that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the end sought to be attained."<sup>31</sup>

"Decision shall be guided by the principle"—this smacks of the animism of ideas and the inertness of the passive but receptive wearers of the robe. But—"unreasonable, arbitrary or capricious"—can this by any stretch of credulity be thought to exclude "predilection for or against the policy disclosed by the legislation"? The so-called principle has no other measuring rod than the rod of fallible, human judgment. The principle does not decide the case nor write the opinion. The decision and the opinion are the products of fallible human judgment. Judicial professions to the contrary, however commendable because of their apparent self-abnegation and modesty, are intentionally or unintentionally but a mask of power; and he who is deceived thereby is not wise.

The Railroad Retirement Act had various provisions. All of the Justices agreed that some of them were so unreasonable, arbitrary or capricious as to be subject to condemnation as wanting in due process of law. On other provisions there was disagreement. Had the case ended here, we should not at the moment be concerned with it. It did not stop here, for the majority went on to declare that no compulsory pension act for employees of interstate carriers would be a regulation of interstate commerce. This means that, no matter how reasonable and perfect a compulsory pension plan, the only power to impose one on interstate carriers is the power of the several states. For such a conclusion it is difficult to have a high degree of respect. It would be far easier to respect the contrary conclusion that the application to interstate carriers of a compulsory pension plan is so serious and extensive a regulation of interstate commerce that the power to impose it resides only in Congress and not in the states. The only rational basis for the judgment of the majority is an aversion to any legislative compulsion to pay pensions. For such an aversion, the appropriate constitutional capsule is a judicial pronouncement of the denial of due process of law.

The Supreme Court reports contain many cases in which the commerce clause has been invoked as a basis for decisions influenced or

<sup>31</sup> *Id.* at 347-48, 55 Sup. Ct. at 762, 79 L. ed. at —.

dictated by judgments about the wisdom of the particular statute involved. Decisions on the scope of state power over or affecting interstate commerce could hardly be put into a rational pattern that excluded the element of a comparison of the merits of freedom and restraint. While the theory is that denial of state power is affirmation of exclusive national power, the fact often is that immunity from state power means practical immunity from national power as well.<sup>32</sup> This can hardly be obscured by the pretty metaphysic that Congress by its silence about matters requiring uniformity of regulation has declared that they shall be free from regulation. Notably in the field of taxation does Congress fail to rush in where the states are forbidden to tread.<sup>33</sup> Judicially conferred freedom from a particular state regulation thus often has the practical consequence of freedom from any similar national regulation. More obvious still is the practical fact that judicially conferred freedom from national regulation may have the consequence of freedom from all regulation.

This is all regrettably abstract and general and is likely to be comprehensible only to lawyers who by the nature of their calling inevitably think in generals and in principles. For members of the bar who are not lawyers, I should be more specific and concrete. It is inconceivable that the states by separate action could establish a uniform, nation-wide pension plan for the migratory employees of interstate carriers. In so far as the plan was less than nation-wide, its spottiness might influence the conduct of carriers to the detriment of the states with pension plans. This in turn would influence those states to modify or abandon their plans. Such practical considerations afford a sufficient reason why questions of pay and pensions like questions of rates of interstate carriers<sup>34</sup> should be answered by Congress rather than by the states. It is

<sup>32</sup> See, for example, *Di Santo v. Pennsylvania*, 273 U. S. 34, 47 Sup. Ct. 267, 71 L. ed. 524 (1927), which held unconstitutional under the commerce clause a Pennsylvania statute requiring a license fee from persons, other than railroad or steamship corporations, who sell or take orders for steamship tickets, and requiring further a bond conditioned on due accounting for all moneys received. As the minority pointed out, there were such agents who sold steamship tickets to the impecunious and uneducated on the instalment plan and who had been found to be guilty of practices from which their customers needed protection. It is hardly conceivable that Congress will provide national regulation to take care of many minor matters like this.

<sup>33</sup> This is not true as to taxes on imports from foreign countries, but I know of no instances in which Congress has imposed special taxes on interstate transportation and interstate sales to put on those enterprises burdens comparable to those from which they are relieved by decisions denying state power to tax. Without such compensatory burdens, local enterprise, which the state must tax because of the need for revenue, may be at a competitive disadvantage as compared with interstate enterprise. This situation is one of increasing importance with the spread of state sales taxes.

<sup>34</sup> See *Houston, East & West Texas Railway Co. v. United States* (The Shreveport Rate Case), 234 U. S. 342, 34 Sup. Ct. 833, 58 L. ed. 1341 (1914); Railroad

difficult to escape the conclusion that the real underlying reason why the majority of the Court held that pay and pensions of employees of interstate carriers are not within the commerce power of Congress is that this majority believes that such matters should be left to private bargaining and not arranged by legislatures at all. This, if not the purpose of the decision, is pretty clearly destined to be the result.

There is nothing novel in this suggestion that issues of state versus national regulation are often issues of some regulation or none. There is nothing surprising in the fact that we all like national regulation that we like, and hate national regulation that we hate. If I were not a guest, I should confess that once upon an arid time in contrasting the attitudes in certain localities toward national regulation of child labor and national regulation of intoxicating liquor I wrote that the sacred slogan of states' rights is easily forgotten when employers wish their laborers sober but unctuously invoked when they wish them young. Massachusetts believes in a protective tariff, but not on raw materials. Many who have howled against governmental regulation of industry have had no fault to find with tariffs and subsidies. We talk in generals, but we care about specifics. We can choose among competing generals to find shelter for our preferred specifics. We believe in liberty but not in license. Law should be stable, but it must not stand still. We must follow logic, but not to a dryly logical extreme. The world is a world of particulars, and whenever we talk in generals we are likely to say more than we really mean.

We may talk at large about the necessity of a national power adequate to national needs or we may cry clarion calls to safeguard and preserve unimpaired the reserved autonomy of the states, but we can hardly think in such broad slogans. We cannot in wisdom make a single question out of many different questions. From 1824 until 1851<sup>85</sup> Marshall and his successors fumbled with the question whether the power of Congress over commerce is exclusive or concurrent and then arrived at the wise conclusion that it is partly one and partly the other.

*Commission of Wisconsin v. Chicago, B. & Q. R. Co.*, 257 U. S. 563, 42 Sup. Ct. 232, 66 L. ed. 371 (1922); *New York v. United States*, 257 U. S. 591, 42 Sup. Ct. 239, 66 L. ed. 385 (1922); and *Lancaster v. McCarty*, 267 U. S. 427, 45 Sup. Ct. 342, 69 L. ed. 696 (1925).

<sup>85</sup> See the uncertainties and diversities of opinion among many justices in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23 (U. S. 1824); *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678 (U. S. 1827); *Wilson v. Black Bird Creek Marsh Co.*, 2 Pet. 245, 7 L. ed. 412 (U. S. 1829); *Mayor, etc., of New York v. Miln*, 11 Pet. 102, 9 L. ed. 648 (U. S. 1837); *Groves v. Slaughter*, 15 Pet. 449, 10 L. ed. 800 (U. S. 1841); *License Cases*, 5 How. 504, 12 L. ed. 256 (U. S. 1847); *The Passenger Cases*, 7 How. 283, 12 L. ed. 702 (U. S. 1848); and *Cooley v. Board of Port Wardens*, 12 How. 299, 13 L. ed. 996 (U. S. 1851). In this last case, the opinion of Mr. Justice Curtis announced a formula broad enough to permit all the diversities of judgment of his predecessors and successors.

Ever since, year by year, the Court has been drawing the line, as it must keep on drawing it, so long as states and nation continue to have their partly independent orbits. No black-letter law can sum up the cases unless it says that the states may regulate interstate commerce some but not too much. The judicial formulas do not greatly help. What is "national in character" and what is "local"? What "imperatively demands uniformity" and what "permits of diversity"? What "regulates" and what "merely incidentally affects"? What interferences are "direct" and what are "indirect"? The answer comes not from the categories but only from multitudinous cases.

Not long after his accession to the bench, Mr. Justice Stone pointed out the meaninglessness of the formula on which the majority was content to rest a decision<sup>36</sup> that Pennsylvania may not regulate brokers who sell steamship tickets on the instalment plan. He concurred in the dissent of Mr. Justice Brandeis, but added in part:

"In this case the traditional test of the limit of state action by inquiring whether the interference with commerce is direct or indirect seems to me too mechanical, too uncertain in its application, and too remote from actualities, to be of value. In thus making use of the expressions, 'direct' and 'indirect interference' with commerce, we are doing little more than using labels to describe a result rather than any trustworthy formula by which it may be reached.

"It is difficult to say that such permitted interferences as those enumerated in Mr. Justice Brandeis' opinion are less direct than the interference prohibited here. But it seems clear that those interferences not deemed forbidden are to be sustained, not because the effect on commerce is nominally indirect, but because a consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual effect on the flow of commerce, lead to the conclusion that the regulation concerns interests peculiarly local and does not infringe the national interest in maintaining the freedom of commerce across state lines."<sup>37</sup>

Instead of a single mechanical formula, there are various practical factors to be taken account of in order to reach a practical judgment as to whether on the whole it is wiser to permit the states to do what Congress might do so long as Congress has not done it or wiser to leave persons free to do what they please until Congress pleases to tell them what to do or not to do.

No one who gets law from judicial behavior rather than from judicial remarks can have any doubt that Mr. Justice Stone points to the actual process and results of decision. Florida may keep its green

<sup>36</sup> *Di Santo v. Pennsylvania*, 273 U. S. 34, 47 Sup. Ct. 267, 71 L. ed. 524 (1927).

<sup>37</sup> *Id.* at 43, 47 Sup. Ct. at 271, 71 L. ed. at 530.

lemons,<sup>38</sup> but West Virginia may not keep its natural gas.<sup>39</sup> Connecticut may keep its wild game,<sup>40</sup> and New Jersey its water from running streams,<sup>41</sup> but Mississippi may not require the shucks of shrimps to be removed before the shrimps go to market.<sup>42</sup> Once upon a time a state might demand a license of an interstate ferry that wished to leave its shore,<sup>43</sup> but now such power is denied.<sup>44</sup> States may require interstate trains to stop at county seats<sup>45</sup> but it is not enough that the same sized village has a poultry experiment station.<sup>46</sup> The law of state power over interstate commerce is a welter of particulars. A license may be required of one who puts up lightning rods ordered from without the state<sup>47</sup> but not of one who assembles ice-making machinery.<sup>48</sup> The distinctions are not silly but sensible. The Supreme Court usually behaves much better than it talks. One reason why it talks so badly is that the Justices are prone to pretend that the case is being decided by their predecessors rather than by themselves and that it is not they that speak but the Constitution that speaketh in them.

All these many things that the states may do to interstate commerce are things that Congress may prevent the states from doing. The notion that the spheres of state and of national power over commerce are independent and distinct was exploded by Marshall in 1824 and 1829.<sup>49</sup>

<sup>38</sup> *Sligh v. Kirkwood*, 237 U. S. 52, 35 Sup. Ct. 501, 59 L. ed. 835 (1915).

<sup>39</sup> *Pennsylvania v. West Virginia*, 262 U. S. 553, 43 Sup. Ct. 658, 67 L. ed. 1117 (1923). Neither may Oklahoma. See *West v. Kansas Gas Co.*, 221 U. S. 229, 31 Sup. Ct. 564, 55 L. ed. 716 (1911).

<sup>40</sup> *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. ed. 793 (1896). So may Louisiana. See *Lacoste v. Department of Conservation*, 263 U. S. 544, 44 Sup. Ct. 186, 68 L. ed. 437 (1924).

<sup>41</sup> *Hudson Water Co. v. McCarter*, 209 U. S. 349, 28 Sup. Ct. 529, 52 L. ed. 828 (1908).

<sup>42</sup> *Foster Fountain Packing Co. v. Haydel*, 278 U. S. 1, 49 Sup. Ct. 1, 73 L. ed. 147 (1928). The text is in error in saying "Mississippi." It should have said "Louisiana." It was the custom to catch the shrimp in Louisiana and take them over to Mississippi to be prepared for market. Louisiana wished to have the processing done within her borders. Mr. Justice McReynolds, in dissenting, thought that, as she might retain the shrimp for home consumption, she might keep them long enough to give some employment to her people. His eight colleagues disagreed.

<sup>43</sup> *Conway v. Taylor's Executor*, 1 Black 603, 17 L. ed. 191 (U. S. 1862).

<sup>44</sup> *Mayor of Vidalia v. McNeely*, 274 U. S. 676, 47 Sup. Ct. 758, 71 L. ed. 1292 (1927).

<sup>45</sup> *Gladson v. Minnesota*, 166 U. S. 427, 17 Sup. Ct. 627, 41 L. ed. 1064 (1897).

<sup>46</sup> *St. Louis-S. F. R. Co. v. Public Service Commission*, 261 U. S. 369, 43 Sup. Ct. 380, 67 L. ed. 701 (1923).

<sup>47</sup> *Browning v. Waycross*, 233 U. S. 16, 34 Sup. Ct. 578, 58 L. ed. 828 (1914).

<sup>48</sup> *York Mfg. Co. v. Colley*, 247 U. S. 21, 38 Sup. Ct. 430, 62 L. ed. 963 (1918).

<sup>49</sup> Compare *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23 (U. S. 1824), with *Wilson v. Black Bird Creek Marsh Co.*, 2 Pet. 245, 7 L. ed. 412 (U. S. 1829). Doubtless "exploded" is much too strong a word to use in the text. Marshall, however, clearly recognized that there are many things that states may do until Congress enters upon the same field.

States could regulate bridges over navigable streams<sup>50</sup> until Congress took the matter in hand.<sup>51</sup> States could require posting of interstate rates and adherence to posted rates<sup>52</sup> until Congress took the subject over.<sup>53</sup> State tort law applied to injuries to employees while engaged in interstate commerce<sup>54</sup> until we had the federal Employer's Liability Law.<sup>55</sup> Failure to deliver interstate messages and shipments of goods was subject to appropriate state law<sup>56</sup> until Congress acted.<sup>57</sup> Where

<sup>50</sup> *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96 (U. S. 1866).

<sup>51</sup> See *Union Bridge Co. v. United States*, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. ed. 523 (1906).

<sup>52</sup> *Chicago & N. W. R. R. Co. v. Fuller*, 17 Wall. 560, 21 L. ed. 710 (U. S. 1873).

<sup>53</sup> *Gulf, C. & S. F. R. Co. v. Hefley & Lewis*, 158 U. S. 98, 15 Sup. Ct. 802, 39 L. ed. 910 (1895).

<sup>54</sup> I can recall no cases in which the contrary was contended. Had attorneys thought there were any objections that could be premised on the commerce clause, they would have been likely to urge them in some of the following cases: *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. ed. 107 (1888); *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 8 Sup. Ct. 1176, 32 L. ed. 109 (1888); *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. ed. 772 (1893); *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209, 15 Sup. Ct. 585, 39 L. ed. 695 (1895); *Tullis v. Lake Erie & W. R. Co.*, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. ed. 192 (1899); *Minnesota Iron Co. v. Kline*, 199 U. S. 593, 26 Sup. Ct. 159, 50 L. ed. 322 (1905). When after the Employers' Liability Act there was denial of the application of state law, the reason was exclusively that Congress had taken the matter over. *St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 702, 33 Sup. Ct. 703, 57 L. ed. 1031 (1913); *New York Central Railroad v. Winfield*, 244 U. S. 147, 37 Sup. Ct. 546, 61 L. ed. 1045 (1917); *Erie Railroad Co. v. Winfield*, 244 U. S. 170, 37 Sup. Ct. 556, 61 L. ed. 1057 (1917). It would have been unthinkable that such injuries in the course of interstate commerce should be subject to no law at all, and the only federal law available was one derived from those general principles that federal courts may discover for themselves in matters of general jurisprudence as a guide to their action in cases properly within their jurisdiction. To avoid any such vacuum as would at one time have resulted from the inapplicability of state law to discrimination in charges for interstate service, Mr. Justice Brewer by invoking some questionable jurisprudence reached a wise result in *Western Union Telegraph Co. v. Call Publishing Co.*, 181 U. S. 92, 21 Sup. Ct. 561, 45 L. ed. 765 (1901).

<sup>55</sup> See *Second Employers' Liability Cases*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. ed. 327 (1912).

<sup>56</sup> There was always the question as to what is the appropriate state law in order to avoid the extraterritorial application of state statutes. On state regulation of interstate telegraph messages, see among many cases the following: *Western Union Telegraph Co. v. Commercial Milling Co.*, 218 U. S. 406, 31 Sup. Ct. 59, 54 L. ed. 1088 (1910); *Western Union Telegraph Co. v. Crovo*, 220 U. S. 364, 31 Sup. Ct. 399, 55 L. ed. 498 (1911); and *Western Union Telegraph Co. v. Brown*, 234 U. S. 542, 34 Sup. Ct. 955, 58 L. ed. 1457 (1914). For corresponding cases on state regulation of liability for non-delivery of freight, see *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. ed. 688 (1898); *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. ed. 268 (1903); and *Missouri, K. & T. R. Co. v. Harris*, 234 U. S. 412, 34 Sup. Ct. 790, 58 L. ed. 1377 (1914). This last case allowed a state court to apply a state statute to award an attorney's fee in an action under the Carmack Amendment.

<sup>57</sup> *Postal Telegraph Co. v. Warren-Goodwin Lumber Co.*, 251 U. S. 27, 40 Sup. Ct. 69 L. ed. 118 (1919); *Western Union Telegraph Co. v. Boegli*, 251 U. S. 315, 40 Sup. Ct. 167, 64 L. ed. 281 (1920); *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. ed. 314 (1913). The first two cases involve telegraph messages. Congress had said nothing about non-delivery of messages or liability



states were not allowed by the Court to regulate,<sup>58</sup> Congress might permit them to do so.<sup>59</sup> Intoxicating liquor has mellowed the stiffness of constitutional law. Always in between the exclusive bailiwicks of state power and of national power there has been a large common because of vicinage. The law is not only a mosaic; it is also a kaleidoscope. Any notion that in that hot Philadelphia summer of 1787 the Fathers froze forever a rigid framework of government is wide of the mark.

Very early Hamilton with Marshall's sanction pushed national power beyond what Jefferson and Madison thought were the boundaries nominated in the bond. Jefferson and Madison in their days of power yielded constitutional doubts to practical exigencies. Be it remembered that the words of the commerce clause and of the Tenth Amendment fix no limit to national power. They merely assert that there is a limit. The necessary and proper clause allows any expansion that judges think is justified. The adjectives themselves point to circumstances as a guide to judgment. Judgment must depend upon some combination of views of necessity and desirability and some general notion of what is too great and too sudden a stretch of ancient anticipations to be sanctioned without taking the sense of that composite legal sovereign that wields the formal amending power.

Thus we conclude our introduction and come at last to the *Schechter Case*<sup>60</sup> with its unanimous judgment that Congress itself could not indulge in any such sweeping control of local matters as was attempted by the Codes under the National Industrial Recovery Act.<sup>61</sup> I am not disposed to criticise the result of the decision. Indeed I am rather precluded from doing so by what I wrote about the *Railway Pension Case* shortly before the *Schechter* decision came down. In a paper read at

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therefor. It had merely provided that the companies might vary their rates as to repeated and unrepeatable messages. This, said the Court, indicated a purpose to subject interstate telegraph companies to a uniform national rule, and to exclude the possibility of applying varying state laws. Thus the state-imposed penalties failed because state law could no longer apply. For the proper rule of damages, the Supreme Court looked to those principles of general jurisprudence which it can discover when necessary. Some would say that this means that the suit was settled according to federal common law, but this analysis may be not yet wholly orthodox. The third case, *supra*, involved the shipment of goods, and a state statute was held to be inapplicable because of the Carmack Amendment to the Hepburn Act of 1906. Here also the Supreme Court had to discover for itself the rule of liability, since Congress had not thought about it.

<sup>58</sup> *Bowman v. Chicago & N. W. Ry. Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 31 L. ed. 700 (1888); *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. ed. 128 (1890).

<sup>59</sup> *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. ed. 572 (1891), sustaining the Wilson Act, and *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U. S. 311, 37 Sup. Ct. 180, 61 L. ed. 326 (1917), sustaining the Webb-Kenyon Act.

<sup>60</sup> *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 496, 55 Sup. Ct. 837, 79 L. ed. — (1935).

<sup>61</sup> 48 STAT. 195, 196 (1933), 15 U. S. C. A. §703 (Supp. 1934).

Philadelphia to neighbors of Mr. Justice Roberts,<sup>62</sup> I referred to the dissenting view of Mr. Chief Justice Hughes and Justices Brandeis, Stone and Cardozo and concluded by saying:

"It is the attitude of men who for many years have been widely acclaimed. In voting, their strength is as the strength of four. In power of thought and in quality of wisdom, it is not so limited. I should think that any man of intelligence and large capacity would be proud to be numbered among them."<sup>63</sup>

This rather pleased me at the moment as a gentle way of chiding Mr. Justice Roberts in his own home town, and I did not anticipate how soon I might be hoist by my own petard. I regretfully conclude that there was wisdom in what I said and that therefore it must be granted that the unanimity of the judgment in the *Schechter Case* commands, if it does not compel, respect.

The decision on its particular facts was in some respects a narrow one. The Schechters acted only after interstate commerce was over and their sales were wholly local. The effect of their local practices on the previous interstate commerce in chickens or on future interstate commerce in chickens was not demonstrably great. Their violation of the code provisions as to wages and hours operated on interstate commerce through reduction of price and reduction of the purchasing power of their employees and of those whom they might have employed had their employees worked fewer hours per week. Promotion of interstate commerce by increase of the price of commodities is far from certain in its operation. If interstate commerce was promoted by increasing the buying power of the Schechter Shochtim, it would be promoted equally by increasing the buying power of any or every one else. To the buying power argument, there pretty clearly is no stopping place. Moreover, you do not necessarily increase total buying power by increasing the buying power of some. All the economics of the buying power argument is disputable, quite possibly too disputable to have one view accepted by a court as a sufficient reason for turning us all at once into a well-nigh unitary rather than a federal system of government.

The suddenness and expansiveness of the national regulation of hours and wages and trade practices in numerous types of business were very different from the creep-mouse, crawl-mouse way in which Congress had previously dealt with special local matters that affect interstate commerce. From cases sanctioning previous Congressional control over intrinsically local commerce it was easy enough to spin a verbal chain of reasoning that would condone the wide reach of the Recovery

<sup>62</sup> *The Constitution and Social Security* (1935) 181 ANNALS 149.

<sup>63</sup> *Id.* at 158.

Act. I know how easy it was, because in an early moment of enthusiasm I spun such a chain myself.<sup>64</sup> I knew from the beginning there must be a stopping point somewhere, and the barbers and cleaners and dyers seemed rather remote. Clearly the *Schechter Case* was a much weaker one for the government than the *Belcher Case*<sup>65</sup> would have been. If the government wished to delay the judicial test until it could put its worst foot forward, it succeeded admirably. If it wished to delay the judicial test until rosy hopes had somewhat faltered and faded, it succeeded also. The *Schechter Case* has left hardly a ripple as compared with what would have been an enormous splash had the Supreme Court clipped the eagle's wings when it first began to scream.

While we are compelled to concur in the judgment of a unanimous court, we do not have to entertain unqualified admiration for the opinion of the Chief Justice in support of the decision. As technical lawyers we may regret that he did not confine himself closely to the precise case before him. Indeed, as really technical lawyers, we may regret that the court went into the commerce question at all, since the Recovery Act had already been killed by the opinion on the point of delegation. Hereafter, no member of the court can rightly criticize a majority for deciding great constitutional issues when the decision is not necessary for the disposition of the case at bar. The Chief Justice has weakened his own lament in the *Railway Pension Case*<sup>66</sup> that the majority there indulged in the superfluous. Judicial professions and judicial practice are not in universal accord. Whatever the Constitution may command as to the absence of national power over local commerce, it does not command the Supreme Court to condemn a hypothetical Act of Congress in addi-

<sup>64</sup> *The Scope of the Commerce Power*, in *ESSAYS ON THE LAW AND PRACTICE OF GOVERNMENTAL ADMINISTRATION* (a volume in honor of Frank Johnson Goodnow) (1935) 197.

<sup>65</sup> *United States v. Belcher*. I have not been able to find the report of this case decided in the District Court for the Northern District of Alabama on October 31, 1934. In the preliminary print of the official advance sheets of the Supreme Court Reports, Vol. 204, No. 1, at page viii at the end of the pamphlet is the statement: "April 1, 1935. No. 628. *United States v. Belcher*. . . Motion of appellant to dismiss the appeal and that mandate issue forthwith granted." In the brief for the defendants in the *Schechter Case*, there is at page 84 a list of 17 cases in lower courts in which the Recovery Act was declared unconstitutional, none of which had reached the Supreme Court for hearing. It was stated that, "although many opportunities have been afforded the Government to have the validity of the Recovery Act determined in this Court, it has yet to bring a case thereon to argument in this Court, and private individuals have been unable to do so either because the Administration has not seen fit to enforce orders of its various Boards or because of the Government's failure to effect review of adverse court decisions." The *Belcher Case* and a number of others involved manufacturers who ship their products across state lines.

<sup>66</sup> Note 29 *supra*. 295 U. S. at 375, 55 Sup. Ct. at 773, 79 L. ed. at —.

tion to the one involved in the case. Such conduct gives no comfort to the orthodox who dislike the terms "judicial government" and "judicial veto."

In the Circuit Court of Appeals it was necessary for the majority to declare themselves on the commerce question, for the decision there was unanimous that there had been no undue delegation of legislative power and no violation of the standards of due process.<sup>67</sup> This unanimity suggests that the Constitution did not inexorably condemn the scope of choice left by Congress to the President. On the commerce question the Circuit Judges were unanimous, too, in sanctioning national power over the selling practices of the Schechters. On this point, also, the constitutional command cannot be inexorable. Judge Manton would have sustained the indictment with respect to wages and hours. For himself and Judge Chase, Judge Learned Hand differed. He approached the problem as one of human judgment, as a question of more or less, when he declared:

"In an industrial society bound together by means of transport and communication as rapid and certain as ours, it is idle to seek for any transaction, however apparently isolated, which may not have an effect elsewhere; such a society is an elastic medium which transmits all tremors throughout its territory; the only question is of their size."<sup>68</sup>

And similarly, after reviewing cases sanctioning national power, he added:

"It would be, I think, disingenuous to pretend that the ratio decidendi of such decisions is susceptible of statement in general principles. That no doubt might give a show of necessity to the conclusion, but it would be insincere and illusory, and appears formidable only in case the conclusion is surreptitiously introduced during the reasoning. The truth really is that where the border shall be fixed is a question of degree, dependent upon the consequences in each case."<sup>69</sup>

Degree and consequence do not themselves decide cases. They merely afford data for consideration by human beings who decide cases. In the Supreme Court, however, the Chief Justice was more acute than Judge Hand and was able to sum up the precedents in a formula. The cases, he finds, establish that Congress may regulate intrastate transactions that affect interstate commerce directly but may not regulate those intrastate transactions that affect interstate commerce only indirectly. Otherwise Congress might regulate substantially all intrastate transac-

<sup>67</sup> *United States v. A. L. A. Schechter Poultry Corp.*, 76 F (2d) 617 (C. C. A. 2d, 1935).

<sup>68</sup> *Id.* at 624.

<sup>69</sup> *Id.* at 625.

tions and there would be an end of state autonomy. All that remained to reach a decision was the minor premise. This was found in the assertion that the practices of the Schechters affected interstate commerce only indirectly. The Q. E. D. was thus practically automatic. We are left to discover for ourselves why and wherein the Schechters affected interstate commerce only indirectly and whether others differently situated would affect that commerce directly or indirectly. We are told that "the precise line can be drawn only as individual cases arise, but the distinction is clear in principle."<sup>70</sup> Clear in principle but not enlightening with respect to application.

By insisting that the arguments of the government could not be accepted without sanctioning a completely centralized system, the decision was made easy and inevitable. The opinion has more of the flavor of umpiring a debate than of analyzing a problem. It says about as little as possible beyond affirming that there remains to the states under the Constitution a reserved sphere of autonomy over local production and distribution, notwithstanding economic crises and notwithstanding economic advantages or disadvantages of a centralized system. To say that the opinion is rationally inadequate is not to say that it is without wisdom. Had it analyzed rather than asserted, it would itself be more open to analysis and would more clearly reveal the nature of the judgment exercised. Paradoxically enough, had the opinion been narrower, it might have been broader. Specific and concrete differentiation and reasoning might cover more cases that are likely to arise than does a broad assertion that Congress may not order the whole of local commerce. By closing only the big door to the cat, the opinion may leave open many little doors for the kittens.

It is not easy to tell just what small doors are closed. The decision itself of course settles that local merchants are not subject to Congressional regulation of prices and practices and wages. The opinion precludes general national labor regulation if the only argument in support is that states cannot have high labor standards if their local and extra-state markets are subject to competition from states with low labor standards. It does not preclude national labor regulations of enterprises that compete with each other in interstate commerce, leaving those free who confine themselves to local commerce. Though the opinion does not preclude such more restricted national regulation, it lends no comfort to it. Part of the opinion talks about "all the processes of production and distribution that enter into cost"<sup>71</sup> without indicating that it is

<sup>70</sup> 295 U. S. at 546, 55 Sup. Ct. at 850, 79 L. ed. at —.

<sup>71</sup> *Id.* at 549, 55 Sup. Ct. at 851, 79 L. ed. at —.

confining itself to production not followed by interstate commerce. Coal mining, for example, is a prelude to interstate commerce, whereas the Schechter chicken-killing and selling enterprise was a postlude. Would the difference make a difference? The opinion does not say. The Chief Justice certainly could have told us had he wished us to know. Here is a door, and not a very small one, that is still not officially closed.

The most that is left to Congress by the decision is a power to set up compulsory standards of fair competition for producers and manufacturers who make interstate sales. I say "standards of fair competition," because that is the phrase that is going around. What one should say is "standards of fair non-competition." What national manufacturers are after is to prevent methods of competition that glut the market and that enable low-cost producers or producers content with small profits to capture the market or most of it for themselves. What labor leaders are after is to compel all competitors to maintain a standard scale of wages so that no competitor or group of competitors who can get labor at low wages can depress the wage scale generally. National manufacturers to a considerable degree seem ready to accept standardized wages as the price of securing standardized modes and scales of production and distribution. Not that this desire is universal among them. It is stronger with those who cannot get cheap labor than with those who can. It is stronger with northern textile mills than with southern. In some other enterprises, it is stronger with the strong than with the weak, stronger with the big than with the little.

The Sherman Act,<sup>72</sup> the Clayton Act<sup>73</sup> and the Trade Commission Act<sup>74</sup> prevent the strong and the big in various ways from taking advantage of their power and size. This is irksome generally and particularly when in time of depression bigness is at a disadvantage because of its inevitable overhead and relative inflexibility. Then the big look at the little and like to call them chisellers. The shirt manufacturer who can get stitchers at two dollars a week and get mail orders and ship by parcel post is a boon to his particular customers. It is not so certain that he is a boon to the nation. His two-dollar stitchers are not good customers for the shoemakers. Beyond the individual manufacturers and their individual employees there are the other producers and the other workers. In these days of large-scale industry the recipients of interest and dividends cannot by their purchases keep the factories going. It is the pay envelopes of the masses that make possible the pay envelopes of

<sup>72</sup> 26 STAT. 209 (1890), 15 U. S. C. A. §1 (1927).

<sup>73</sup> 38 STAT. 730 (1914), 15 U. S. C. A. §12 (1927).

<sup>74</sup> 38 STAT. 717 (1914), 15 U. S. C. A. §41 (1927).

the masses. It is these pay envelopes that make possible the payment of interest and dividends on bonds and stocks. There are reasons why industrialists generally must desire the general wide distribution of good wages. There are reasons why we all must desire well-being and comfort for all if we know how to get it without too much sacrifice of other things we desire more and think we can get.

Some such mixture of individualistic and collectivistic hopes lay back of the National Recovery Act. How far they came to fruition under the codes and their administration is a matter of dispute. The dispute will not be settled by the contemporary competing rhetoric and it can hardly be settled by statistics until we are able to get statistics of what would have happened if what did happen hadn't happened and something else had. Fortunately or unfortunately there is no supreme bench of economic theorists to give us decisions that make the authoritative economic law as a supreme bench of judges can give decisions that make the constitutional law that is the law because they themselves embody the law. The constitutional law is that we cannot without change of the Constitution have any such large-scale planning of industry as was attempted. All that remains possible at the moment is some smaller-scale planning that at most can extend to the industries that sell their products across state lines. Even as to this there are grave doubts whether the Supreme Court would so read the Constitution as to find therein the requisite national power.

In weighing the outlook for the future, one must of course not bank too heavily upon the approach of a single opinion. It may be that we should have had a very different opinion in the *Schechter Case* had the Chief Justice assigned the task of writing it to one of his colleagues rather than to himself. The tone of much of our contemporary constitutional law may be more an individual than a collective one, due to the fact that the Chief Justice assumes the burden of being the spokesman in most of the major cases. There are judges to right of him and judges to left of him who may volley and thunder and reason why in ways somewhat different from his. Yet when the issue is one between regulation and freedom we know how the judges to right of him are likely to volley and thunder, so that if he seems to be inclined against regulation we can be pretty confident that the contemporary court will be in favor of freedom.

The cases which would most nearly sanction national power over processes of production for extra-state markets are those which applied

the Sherman Act to a strike in a mine<sup>75</sup> and to a corner in cotton.<sup>76</sup> These cases were not so pertinent to the Schechter situation. There is a possible indication in the opinion of the Chief Justice that he regards the Sherman Act cases as no precedent for legislation that curbs competition rather than compels it. He says that "our growth and development have called for wide use of the commerce power of the federal government in its control over the expanded activities of interstate commerce and in protecting that commerce from burdens, interferences, and conspiracies to restrain and monopolize it."<sup>77</sup> If people outside of commerce interfere with commerce, burden it, or restrain it, they can be dealt with by Congress. It does not follow that Congress may compel people outside of commerce to act together to regularize commerce rather than to act separately in order to leave commerce free. It is always precarious to assume a negative pregnant in a statement of what can be done, but we can still be quite certain that legislation forbidding competition will have a harder time with a court than legislation commanding it.

In addition to the commerce question and interwoven with it is the due-process question. The due-process issue was not considered in the *Schechter Case*. The Poultry Code had been killed twice and it could not be revived or given further needful repose by extracting the mystery of the Fifth Amendment. This Amendment, however, must be satisfied by any legislation otherwise within Congressional power. So we have to face the question whether regulation of hours and wages normally obnoxious to the judicial canons of due process<sup>78</sup> can find sufficient sav-

<sup>75</sup> *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295, 45 Sup. Ct. 551, 69 L. ed. 963 (1925). This is known familiarly as the *Second Coronado Case*, in contradistinction to the *First Coronado Case*, which is *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344, 42 Sup. Ct. 570, 66 L. ed. 975 (1922), which was the first appeal in the same action. On the first appeal the Supreme Court reversed a judgment against striking defendants, on the ground that there was no evidence of an intent to affect interstate commerce. On the second trial new evidence was offered to meet the deficiencies pointed out by the Supreme Court. The trial court, on the strength of the prior decision, directed a verdict for the defendants. On appeal, this was reversed by the Supreme Court's ruling that there was enough evidence of the requisite intent to send the case to the jury. The new evidence on the second trial was largely confined to reports that speakers at meetings, in exhorting the strikers to keep up the fight, pointed out that loss of the union scale in their mine would result in loss of the scale in competing mines in other states and thereby affect adversely the workers' interests over a wide area. This was of course a patent economic fact, but the hortatory mention of it at a rally seems a slim ground for spelling out an intent to affect interstate commerce, when the quarrel in origin and in immediate aim was confined to the particular mine.

<sup>76</sup> *United States v. Patten*, 226 U. S. 525, 33 Sup. Ct. 141, 57 L. ed. 333 (1913).

<sup>77</sup> 295 U. S. at 549, 55 Sup. Ct. at 851, 79 L. ed. at —.

<sup>78</sup> The following statement in the brief for the Schechters may be accepted as a fair statement of the law of the past, though an inadequate presentation of the



ing grace in the fact that it is imposed as part of a plan for creating fair non-competition. It does not seem fanciful to hazard the surmise that such a justification must have behind it a much greater strength of public opinion than any now prevailing before it will become congenial to a majority of the Justices of the Supreme Court of the United States. Without provisions as to wages and hours of labor, no codes of fair non-competition are likely to be politically possible or economically wise. On the whole, the outlook for restricting the *Schechter Case* to its own particular facts is far from bright.

Of course the major basis of the *Schechter Case* would not be available as a sufficient reason for condemning Congressional regulation of an enterprise that ships its products across state lines. It could not be said that the sanction of such an exertion of national authority would "destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several states' and the internal concerns of a state."<sup>79</sup> Yet it will still be open to the Court to assert that the conditions of production prior to the shipment affect the shipment only indirectly. The majority which could so narrowly define "regulation of interstate commerce" in the *Railway Pension Case*<sup>80</sup> could readily

new justifications that might be adduced in favor of the wages and hours prescriptions of the Codes:

"It can not be denied that, if the past decisions of this Court still mean what they say, not even Congress (much less its delegates) has constitutional authority to fix minimum wages for purely private businesses, even when the declared purpose is protection of health and morals, and even when the regulation is restricted to women and children and to a field in which Congress has the unquestioned power of control. *Adkins v. Children's Hospital*, 261 U. S. 525. It can not be denied that the decisions of this Court with respect to maximum hours of labor go no further than to say that a legislature may restrict the hours of labor in limited situations to 8, 9 or 10 hours, and that the constitutionality of this restriction is definitely predicated solely upon a health relationship.

"The Recovery Act throws overboard all these 'old fashioned' limitations; it does not even restrict minimum wages to women or children; it does not restrict them to particular industrial applications; it takes no account of the health or morals factors. In its administration it is common knowledge that this bold attempt to dictate has spread out into every conceivable trade, industry, business or occupation, whether interstate or intrastate, even to barber shops and clothes pressing establishments. In the case of maximum hours of labor not the slightest attempt has been made in the statute, or in its administration, to relate the fixing of maximum hours to individual health. No consideration has been paid to the question whether or not the public has any real interest in the businesses, trades, occupations or industries regulated. The regimentation has been all pervasive and all inclusive, and liberty of contract has been utterly ignored.

"It must be admitted that even in the case of public utilities having monopolistic privileges, such as the railroads, the electric and gas companies, etc., any power to fix minimum wages has been recognized only once by this Court, and then only as a purely temporary measure to tide over a special and limited situation. *Wilson v. New*, 243 U. S. 332. It is now proposed to discard all limitations under the theory of a general emergency, and to relate the fixing merely to the vague concept of 'public welfare' (295 U. S. at 502-503).

<sup>79</sup> 295 U. S. at 550, 55 Sup. at 852, 79 L. ed. at —.

<sup>80</sup> Note 22 *supra*.

declare that Congress must keep hands off the process of production. It could readily so restrict the National Labor Relations Act<sup>81</sup> that it would achieve little or nothing of its purpose. That Act defines "affecting interstate commerce" as "in commerce, or burdening or obstructing commerce or the free flow of commerce,"<sup>82</sup> and thus invokes the authority of the precedents sanctioning the application of the Sherman Act to labor controversies, but the Court could say that those cases are authority only where there is a proven intent to affect interstate commerce, and thus again turn a canon of statutory interpretation into a restriction on constitutional power.

Unlike the National Recovery Act, the National Labor Relations Act deals with situations with which the states may deal as effectively if they will. So however did the Sherman Act when it was applied to a strike in a mine. A particular state may of course think that it has a self-interest in not encouraging collective bargaining. It may hope to make itself a Mecca for industrial enterprise, as states without inheritance taxes have sought to be Meccas for millionaires *morituri*. Whether the self interest is that of the state or of selected individuals is another question. Obviously one big reason for the movement to secure national regulation of labor relations is that it is easier to convince one legislature than forty-eight. The concern is not dominantly commercial even though there is the element of equalizing one factor of competition among producers for the national market. Much more dominantly commercial is a plan to regularize production and distribution of the fruits of the earth like coal and oil. Here individual states are well nigh helpless to do separately what pretty clearly needs to be done. They may cooperate by reciprocal legislation or by interstate compacts, but the possibility of this is not incontrovertibly a sufficient reason for finding no need for direct national action.

However much the Supreme Court may allow Congress to regulate natural resources or production for extra-state markets, the ban of the *Schechter Case* prevents any thoroughgoing ventures into a planned national economy. As a consequence, there is destined to be wide public discussion of whether we want to amend the Constitution in order to endow Congress with wider powers than the Supreme Court has accorded to it. The slogan "Back to the Constitution" is not enlightening, and the slogan "A National Power Adequate to National Needs" is not particularly informing. The issues underlying the conflict between the two slogans are not ones in which lawyers as lawyers have any especial expert competence. Not being competent, I may therefore emulate

<sup>81</sup> 29 U. S. C. A. §151 (1935). Public—No. 198—74th Congress.

<sup>82</sup> *Id.* §2, par. 7, 29 U. S. C. A. §152 (7) (1935).

others similarly situated and discuss the subject freely. Of course as a constitutional lawyer, I can say that Congress would not be compelled to exercise wide powers even though such powers are accorded to it. Had the National Recovery Act been held constitutional, Congress might have repealed it and left matters where they were before and where the Supreme Court has now put them. Whether Congress should have power and whether Congress should use power are two different questions.

Architecturally we have an antiquated frame of government when we lack nation-wide power to deal with nation-wide conditions that can not be dealt with effectively by the several states. It is abundantly clear that the states could not do much to revive agriculture and industry. If it were clear that the nation by national regulation could do a lot to revive and maintain agriculture and industry, it would then be clear that the nation ought to have the power to do it. An objection to the possession of national power for national planning must come down to a confidence in *laissez faire* as the only worth-while national physician or else be founded upon so confirmed a lack of confidence in the capacity of prospective national legislators and executives and administrators that their ministrations are more to be feared than the disease. I am neither a prophet nor the son of a prophet and I do not know that congressional and presidential incompetence are so certain that I would unqualifiedly put my trust in other gods or in none. I am not an economist and I do not know that the only way to right things is to leave them alone. As an observer I have a suspicion that some things should be tinkered with and some should be left alone. As an observer I suspect also that tinkering in response to political pressure is not certain to be the best sort of tinkering.

Though not an economist, I can sometimes tell the difference between hard and sensible thinking and hot air. One of the economists in whom I have most confidence believes that the better way out of the depth of a depression is by rapid change in production, and that rapid change is more fostered by low wages and prices than by high wages and prices.<sup>83</sup>

<sup>83</sup> See Slichter, *The Government as an Economic Manager* (June, 1935) 16 PROC. ACAD. POL. SCI., No. 3, p. 119; and *Implications of the Shorter Hour Movement* (January, 1934) 15 *id.*, No. 4, p. 63. Mr. Slichter's views gain weight from the fact that his human interest in the welfare of labor does not inspire him to chase will o' the wisps or to focus on what may seem immediate gains to the neglect of an adequate appraisal of underlying factors of a more permanent character. Needless to say, also, he is not one of those simple minded persons who pin their hope of economic heaven on letting so-called Nature take its course.

For a different attitude toward wages, see DICKINSON, *HOLD FAST THE MIDDLE WAY*, Chapter V. Mr. Dickinson believes that the conceded general disadvantages from low wages may at times be so great that for a period, to a degree, in various enterprises, it is important to use the legislative power to lift wages higher than free bargaining would put them. Short-run considerations may sometimes be so vital that we should make some compromise between them and long-run consid-

This is not likely to be the goal of political pressure. Yet political pressure may work in various ways its follies to perform, and we can hardly withhold political power because there must be political pressure behind its exercise. The absence of political power is not the absence of all power. Economic pressure may work as unwisely as political pressure. Legislatures are not certain to be foolish and certainly are not certain to be more foolish than many others. For many years there has been enough sporadic economic folly from majorities of the Supreme Court of the United States to make us not too confident about perpetuating our present verbal partition of power between the states and the nation, when these wide-open words permit such judicial majorities to use their conscious or unconscious economic notions to stop national efforts to make things better than they otherwise might be. We have had two years of now forbidden national action, and God still reigns and the Government at Washington still lives.

Unless the majority of the Supreme Court behaves with extraordinary recalcitrancy in the next few years, I do not anticipate much headway to any movement to amend the Constitution in the direction of a more consolidated government. On the whole it may be well to be patient and not bite off more than we can chew. While much nonsense is talked about bureaucracy, there certainly is a limit to what an administrative organization can handle competently. Those of us who recall when dry days were not so dry would not be surprised to learn that not all the violations of the codes got into the courts. Uniformity of law does not necessarily mean uniformity of conduct. The government of the nation has still enough on hand to keep it busy for years to come. It may, indeed, before long if not already be grateful for the loss of the load that the Court has lifted from its back. With lessened functions, it may perform better the functions that remain. These functions are more confined to special problems which may be not beyond the possibility of wise and effective grasp. Out of the experience born of the national administration of what is surely destined to be under national care, we may hope for wisdom in deciding whether to make ourselves more of a nation than the Supreme Court is able to discover that we have become.

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erations. I do not know to what extent Mr. Slichter would agree or disagree with Mr. Dickinson.