BACK TO THE CONSTITUTION

As in the Renaissance Men Began to Go behind the Gloss to the Text of the Classics, So Today We Are Having Something Like a Parallel Process in Regard to the Constitution—Or, to Vary the Comparison, Successive Layers Superimposed on the Old Master Are Being Removed, Thus Disclosing the Original—Illustrations from the Fields of Due Process of Law, Taxation and the Commerce Power*

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I

ONE of the great achievements of the Renaissance was the rediscovery of the classics. Men began to go behind the gloss to the text. I think that we are having something of a constitutional Renaissance at the present time—a rediscovery of the Constitution.

It is as if a painting which had been retouched by successive generations of artists were to have the successive layers of oils removed and the Old Master itself revealed once again. In the case of the Constitution, the result has brought conflicting responses from the critics. Some are quite astonished at the picture, its simplicity and the economy and breadth of its strokes, and they are unwilling to believe that it is really the Old Master that has been exposed to view. But there it is, the genuine article, and I for one welcome its restoration. We are really back to the Constitution.

The fact is that constitutional law had become, not the law *of* the Constitution, but the law *about* the Constitution. It grew up, case by case, into a sort of super-common-law, so that a lawyer, in arguing a constitutional case, devoted himself to analyzing and expounding and distinguishing and reconciling the language of judicial opinions, instead of grounding himself in the language and historic meaning of the Constitution itself. The body of law thereby encrusted on the Constitution has been formidable. In the case of the ordinary common law, the process of judicial law-making can be checked by the legislature if the results diverge too far from reality and the interests of society. Legislatures can, and do, replace the rule of assumption of risk and the fellow-servant doctrine with a system of workmen's compensation, and substitute for the rule of *caveat emptor* the standards of blue-sky legislation. But in the field of constitutional law, the only corrective is the process of constitutional amendment or reconsideration by the court. For this reason, if for no other, the task of constitutional decision requires the utmost self-criticism on the part of the courts. It requires also the utmost knowledge of constitutional history.

There is a story that Justice Miller of the Supreme Court observed that one of the great factors in early American law was ignorance; the judges, he said, did not know enough to do the wrong thing, so they did the right thing.[1] This holds true, I think, of early constitutional law. The judges, having only the Constitution and the debates and the Federalist to rely on, were apt to do the right thing. Their successors, with the benefit of several hundred volumes of U. S. Reports, cannot be so sure. Yet the several hundred volumes must be taken account of, and so ignorance no longer suffices for a judge.

In maintaining that we are now back to the Constitution, let me illustrate by turning to three fields of judicial review: due process of law, taxation, and the commerce power.

II

The prohibition against depriving any person of life, liberty or property without due process of law existed in the Constitution, in the Fifth Amendment, for almost a century without constituting a serious limitation on the substance of federal legislation. It was only when the Constitution ceased to be something within the memory of man that the clause began to take on a new and expansive meaning. After a similar clause was inserted in the Fourteenth Amendment it became the rallying point for those who resisted the efforts of the states to control the excesses and relieve the oppressions of a rising industrial economy. In saying this, I am only paraphrasing what the Supreme Court itself took occasion to say in 1877, just nine years after the Fourteenth Amendment was adopted. Speaking through Justice Miller, in *Davidson v. New Orleans*, 96 U. S. 97, 103-104, the Court observed, with reference to the due process clause:

> It is not a little remarkable, that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the Federa government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion. But while it has been a part of the Constitution, as a restraint upon the power of the States, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty, or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the fourteenth amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the

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1. See Pound, *The Formative Era of American Law*, p. 11.

decision against him, and of the merits of the legislation on which such a decision may be founded.

But the lawyers persisted, despite the admonition of the Court, and their efforts were finally rewarded. Beginning about 1890, it was a fortunate and relatively innocuous piece of reform legislation that was able to run the gauntlet of the due process clause. Two hundred and twenty-eight times thereafter the Supreme Court set aside state action under the Fourteenth Amendment.[2] The figures do not tell the whole story, because a single decision may have caused the death of similar legislation in many states and prevented its birth in others.

I have taken 1890 as the beginning of the era of negation under the due process clause. The late Judge Hough, of the Second Circuit, was more specific. He dated it from the decision in *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota,*[2a] rendered on March 24 of that year.[3] In that case the Court decided that in establishing rates for railroads, the question of their reasonableness cannot be left by the legislature to a state commission, but must be subject to judicial review. Three members of the Court—Justices Bradley, Gray and Lamar—delivered a dissenting opinion, in which they charged that the decision "practically overruled" *Munn v. Illinois* and the other granger cases. "It is complained," they said (p. 465), "that the decisions of the board are final and without appeal. So are the decisions of the courts in matters within their jurisdiction. There must be a final tribunal somewhere for deciding every question in the world. Injustice may take place in all tribunals. All human institutions are imperfect—courts as well as commissions and legislatures." A majority of the Court disagreed. "It is from that decision," said Judge Hough, "that I date the flood."

There is not time to follow the flood waters in all their wanderings. I want simply to point out two important and ancient landmarks that were inundated—price-fixing and wage-fixing legislation. From these the waters have now at last receded. *Nebbia v. New York,* 291 U. S. 502; *United States v. Rock Royal Co-operative, Inc.,* decided June 5, 1938; *West Coast Hotel Co. v. Parrish,* 300 U. S. 379.

There is nothing in the Constitution which provides that there shall be no power to regulate prices or wages. Still less is there anything in the Constitution which provides that while it is a lawful function of government to regulate the hours of labor of women (*Muller v. Oregon,* 208 U. S. 412), it is not a lawful function to regulate their rate of pay (*Adkins v. Childrens Hospital,* 261 U. S. 525). Though the distinction is not to be found in the Constitution, it was deduced from "due process of law," the same provision that had already supported a distinction between an 8-hour day for miners, held to be permitted by the Constitution (*Holden v. Hardy,* 169 U. S. 366), and a 10-hour day for bakers, held to be prohibited by the Constitution (*Lochner v. New York,* 198 U. S. 45).

What constitutional principle explains these results? "Freedom of contract is . . . the general rule and restraint the exception," said the Court in the *Adkins* case (261 U. S. at 546). But the Constitution says nothing of freedom of contract, much less about a general rule and exceptions to it. If by the general rule is simply meant a statistical summary of acts of the legislatures, then what the Court has said is that unless the legislatures actually legislated a great deal, they could constitutionally legislate only a very little.

If the constitutional principle against wage-fixing and price-fixing did not come from the terms of the Constitution, perhaps it came from the historic experience of the Framers which was distilled in the due process clause. That experience is revealed in a volume which has recently come to light, known as the "Laws and Liberties of Massachusetts," published in 1648, containing the laws of the colonial legislature as of that date.[4] It is reputed to be the first comprehensive reduction into one form of a body of legislation of an English-speaking country, and it is amazingly modern, for all its quaintness. One or two items relate to our present subject. Under the heading "Bakers," appears this interesting example of price-fixing:

> It is ordered by this Court and Authoritie thereof, that henceforth every Baker shall have a distinct mark for his bread, & keep the true assizes as hereafter is expressed viz. When wheat is ordinarily sold at these severall rates hereafter mentioned the penie white loaf by averdupois weight shall weigh when wheat is by the bushell . . . at 3s o d. the white 11 onces 1 qr. . . .

And so on, with gradual decrease in the weight of the penny loaf as the price of wheat rises, until when the price of wheat is 6s. 6d. the penny white loaf need weigh only 6 ounces. The enforcement provision is also of interest:

> under the penaltie of forfeiting all such bread as shall not be of the severall assizes as is aforementioned to the use of the poor of the towne where the offence is committed.

And what did the Laws and Liberties of Massachusetts provide as to wages? There was apparently a shortage in the labor market, for the law was concerned with maximum, not minimum wages, and it allowed these to be fixed by a majority of the freemen of each town:

> It is also ordered by the Authoritie aforesaid, that the Free-men of everie town may from time to time as occasion shall require agree amongst themselves about the prizes, and rates of all workmens labours and servants wages. And everie person inhabiting in any town, whether workman laborer or servant shall be bound to the same rates which the said Freemen, or the greater part shall bind themselves unto: and whosoever shall exceed those rates so agreed shall be punished by the discretion of the Court of that Shire, according to the qualitie and measure of the offence.

There was even a provision for adjustments as between towns:

> And if any town shall have cause of complaint against the Freemen of any other town for allowing greater rates, or wages than themselves, the Quarter Court of that Shire shall from time to time set order therein.

It may be objected to this, as to ox-tail soup, that it goes too far back to find something good. Perhaps these were some of the things we tried to get rid of in the Revolution. The evidence, however, is just the other way. During the Revolution, and largely at the instigation of the Continental Congress, at least 8 of the 13 states passed laws fixing the price of almost every commodity on the market, from butter and beans to shoes and steel.[5] This was the atmosphere in which

2. The cases are listed in Frankfurter, *Mr. Justice Holmes and the Supreme Court* (1938), 97-137, and include the 1937 Term.

2a. 134 U. S. 418.

3. See Hough, *Due Process of Law—Today,* 32 Harv. L. Rev. 218, 228.

4. Reprinted in facsimile in 1929 from the original in the Henry E. Huntington Library.

5. See Note, 33 Harv. L. Rev. 838, where the statutes are cited.

the Fathers of the Constitution were brought up; this is the way they acted when left to their own devices. Is it likely, then, that when they adopted the Fifth Amendment they meant to select for outlawry that form of legislation which fixed wages or prices? And if they had no such intention, did the States which ratified the due process clause of the Fourteenth Amendment understand that they were renouncing the power?

We have finally returned to the Constitution for an answer to these questions. We have arrived, after a long and painful journey, at the point where Justice Holmes stood in his now-vindicated dissents. In the *Adkins* case he said (261 U. S. at 568):

> . . . The only objection that can be urged (against a minimum wage law for women for the District of Columbia) is found within the vague contours of the Fifth Amendment, prohibiting the depriving any person of liberty or property without due process of law. To that I turn.
>
> The earlier decisions upon the same words in the Fourteenth Amendment began within our memory and went no farther than an unpretentious assertion of the liberty to follow the ordinary callings. Later that innocuous generality was expanded into the dogma, Liberty of Contract. Contract is not specially mentioned in the text that we have to construe. It is merely an example of doing what you want to do, embodied in the word liberty. But pretty much all law consists in forbidding men to do some things that they want to do, and contract is no more exempt from law than other acts.

Before the *Adkins* case, in the case of the 10-hour law for bakers, he had stated the whole matter of judicial review under the Fourteenth Amendment with what must now seem unanswerable eloquence, though to his brethren it did not. He said (198 U. S. at 75-76):

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

Off the Bench he was more explicit. In an address in 1913 he said:[6]

> . . . When twenty years ago a vague terror went over the earth and the word socialism began to be heard, I thought and still think that fear was translated into doctrines that had no proper place in the Constitution or the common law. Judges are apt to be naif, simple-minded men, and they need something of Mephistopheles. We too need education in the obvious—to learn to transcend our own convictions and to leave room for much that we hold dear to be done away with short of revolution by the orderly change of law.

III

In the field of taxation, too, we have recently seen a return to the Constitution. There was a dramatic quality in the overruling of *Collector v. Day*, 11 Wall. 113, which had stood for almost 70 years as a precedent against the taxation of state employees by the Federal Government and of federal employees by the state governments.[7] *Collector v. Day* had a fairly long span of authority, but it was not the law of the Constitution. In the beginning was the Word, and the words of the Constitution contained nothing about the immunity of government officers or employees from the ordinary burdens of taxation by the sovereignty under which they lived and enjoyed protection.

The great case of *McCulloch v. Maryland*, 4 Wheat. 316, decided in 1819, has been resorted to in order to justify the rule of immunity. But that case presented a very different situation, one that was ruled by the Constitution itself. The tax involved in that case was directed against the Bank of the United States; it operated to discriminate against the national institution and in favor of state banks; and so by frustrating the activities of a federal instrumentality it came into collision with Article VI of the Constitution, which provides that the Constitution and laws of the United States pursuant thereto shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.[8]

Following *Collector v. Day* the Court became enmeshed in a network of decisions which attempted on the one hand to preserve the constitutional taxing power and on the other hand to preserve the judicial rule of immunity. And so a whole body of so-called constitutional law was developed which revolved around distinctions between governmental and proprietary activities of the states, distinctions between taxes "on" income from a state or the national government and taxes "measured by" such income, and distinctions between employees and independent contractors. The Court has now finally recognized that the task of fashioning this network need not have been undertaken in the first place, and that the true constitutional principle is that employees and instrumentalities of one government have not had conferred upon them an immunity from the ordinary and non-discriminatory taxes imposed by another government on those living under its laws.

IV

My final example relates to the power of Congress to regulate commerce among the several states. It has now been made clear that this power to regulate is a power to limit as well as to increase the quantity of commerce in a particular commodity, that the commodities regulated may be those which are wholesome

6. *Law and the Court*, in Collected Legal Papers, pp. 291, 295.

7. *Graves v. O'Keefe*, United States Supreme Court, decided March 27, 1939.

8. The decisions intervening between *McCulloch v. Maryland* and *Collector v. Day* were all supported by the constiutional principle of federal supremacy. *Osborn v. United States Bank*, 9 Wheat. 738; *Weston v. City Council of Charleston*, 2 Pet. 449; *Dobbins v. Commissioners of Erie County*, 16 Pet. 435.

as well as those which are noxious, and that the constitutional power in Article I, Section 8, Clause 18, to make all laws which shall be necessary and proper for carrying into execution the powers granted to the Federal Government, applies to the commerce power as well as to others. This has been made clear particularly in the cases involving agricultural legislation,[9] though it is recognized also in the litigation involved in the National Labor Relations Act.[10]

Prior to these decisions a heavy gloss had been laid over the constitutional provisions. An attempt by Congress to prohibit the shipment of products of child labor in interstate commerce was held not to be a regulation of interstate commerce, though a law of Congress prohibiting the interstate shipment of lottery tickets was accepted as a regulation of commerce. And in the decision dealing with the first Guffey Coal Act the prevailing opinion had announced that whether the regulation of labor practices in the bituminous coal industry was, as Congress thought it was, necessary and proper for the regulation of interstate commerce in coal, could not be made to turn on the actual magnitude of the effect of the practices upon interstate commerce, but must turn on the number of steps by which the mining process was removed from the shipment.[11]

It is true that the Constitution says nothing of agriculture or of the mining of coal, or of labor disputes in industry. This was the attitude taken by a district judge not long ago on the argument of a case involving an agricultural marketing agreement. "I find nothing in the Constitution," said the judge, "concerning a Secretary of Agriculture." Of course the short answer to the judge might have been that neither could one find in the Constitution any reference to the power of a federal court to declare an Act of Congress unconstitutional. In the latter case the power has been found to exist by virtue of the historic meaning of "the judicial power" conferred upon the federal courts by Article III. In the case of the regulation of matters which affect interstate commerce, the power is even more explicitly conferred, in the necessary and proper clause. The power to enact legislation necessary and proper to carry out the specific powers is not, as is sometimes said, an implied power. It is as much an express power as the others. It is simply broader and more general in its terms.

In making the point that we have returned to the Constitution it is not part of my present thesis to support the legislative wisdom of what has been sustained. That would be a subject more appropriate for discussion before a political or a lay audience. I have attempted to confine myself to the Constitution, and so to follow the high example of the decisions which I have commended.

But it is wholly proper, I think, to emphasize the fact that the powers of government conferred by the Framers were meant to be construed and applied in no parochial or petty sense; they were meant to be applied with courage and vision, for, as Marshall reminded his contemporaries in speaking of the "necessary and proper" clause, it is a Constitution "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."[12] In his great opinion in *Gibbons v. Ogden,* 9 Wheat. 1, 220, Marshall again warned of the danger that the powers granted by the Constitution might be eroded away by petty or scholastic interpretation. He said:

> Powerful and ingenious minds, taking, as postulates, that the powers expressly granted to the government of the Union, are to be contracted, by construction, into the narrowest possible compass, and that the original powers of the states are retained, if any possible construction will retain them, may, by a course of well-digested, but refined and metaphysical reasoning, founded on these premises, explain away the constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use. . . .

V

I have tried to suggest that the spirit in which the Constitution has recently been applied is more truly the spirit of the Framers than was that which prevailed during the period of judicial negation from about 1890 down to an all-too-recent time. Perhaps nowhere is the spirit of the Framers better reflected than in the opinion of the Court announced on May 15 of this year in the much argued case of *United States and the Secretary of Agriculture v. Morgan.* In that case it was contended by the appellees, who were the operators of market agencies at the Kansas City stockyards, that a procedural error on the part of the Secretary of Agriculture in the conduct of a hearing rendered the Secretary's rate order not only void but irremediably void, so that the market agencies were conclusively entitled to the charges which had been paid into court pending review of the order. The court looked at the problem in a different way. The Court pointed out that the purpose of the statutory plan of regulation was to assure just rates and charges, and that the Court should not make itself an instrument of injustice by refusing an opportunity to the Secretary to reconsider the rate order in a properly conducted proceeding. In speaking of the relationship which ought to exist between administrative agencies and the courts, the opinion of Mr. Justice Stone declared:

> . . . Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim. . .

Unfortunately this has not always been the spirit with which judges viewed the work of administrative bodies. Quite another point of view, for example, was taken by Mr. Justice Brewer in speaking to the Bar Association of the State of New York in 1893, shortly after the establishment of the Interstate Commerce Commission. He referred to

> "the demand for arbitrators to settle all disputes between employer and employees, for commissions to fix all tariffs for common carriers. The argument is that judges are not adapted by their education and training to settle such matters as these; that they lack acquaintance with affairs and

9. *Mulford v. Smith,* United States Supreme Court, decided April 17, 1939, sustaining the Agricultural Adjustment Act of 1938 as applied to marketing quotas for tobacco; *United States v. Rock Royal Co-operative, Inc.,* and *H. P. Hood & Sons, Inc. v. United States,* United States Supreme Court, decided June 5, 1939; sustaining the Agricultural Marketing Agreement Act of 1937; *Currin v. Wallace,* United States Supreme Court, decided January 30, 1939, sustaining the Tobacco Inspection Act of 1935.

10. *National Labor Relations Board v. Jones & Laughlin Steel Corp.* 301 U. S. 1; *Santa Cruz Packing Co. v. National Labor Relations Board,* 303 U. S. 453; *Consolidated Edison Co. of New York v. National Labor Relations Board,* United States Supreme Court, decided December 5, 1938; *National Labor Relations Board v. Fainblatt,* United States Supreme Court, decided April 17, 1939.

11. *Carter v. Carter Coal Co.,* 298 U. S. 238, 307-308.

12. *McCulloch v. Maryland,* 4 Wheat. 316, 415.

are tied to precedents; that the procedure in the courts is too slow and that no action could be had therein until long after the need of action has passed."

Justice Brewer acknowledged some force in this argument for administrative tribunals; he conceded that "proceedings in the law courts do not anticipate the flight of time." "But the great body of judges," he went on,

"are as well versed in the affairs of life as any, and they who unravel all the mysteries of accounting between partners, settle the business of the largest corporations and extract all the truth from the mass of scholastic verbiage that falls from the lips of expert witnesses in patent cases, will have no difficulty in determining what is right and wrong between employer and employees, and whether proposed rates of freight and fare are reasonable as between the public and the owners; while as for speed, is there any thing quicker than a writ of injunction?"[13]

I venture to assert that this eulogy of government by injunction and this hostility to the work of another agency of government is not the spirit of the Constitution or the Framers or the judges of the early period of our constitutional development. It is the opinion of Mr. Justice Stone, with its warning against regarding another agency of government as "an alien intruder," that captures the spirit of the Founders. Let me fortify the point with a final judicial quotation:

. . . The idea is Utopian, that government can exist without leaving the exercise of discretion somewhere. Public security against the abuse of such discretion must rest on responsibility, and stated appeals to public approbation. Where all power is derived from the people, and public functionaries, at short intervals, deposit it at the feet of the people, to be resumed again, only at their will, individual fears may be alarmed by the monsters of imagination, but individual liberty can be in little danger. No one is so visionary as to dispute the assertion, that the sole end and aim of all our institutions is the safety and happiness of the citizen. But the relation between the action and the end, is not always so direct and palpable as to strike the eye of every observer. The science of government is the most abstruse of all sciences; if, indeed, that can be called a science, which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment.[14]

It is worth remembering that the sentiments there expressed were not those of a modern revolutionist in constitutional law. They were the sentiments of Justice William Johnson of the Supreme Court, expressed in 1821. When we let ourselves be guided by this tolerant and far-seeing view of the art of government, we are not departing from the Constitution; we are returning to it.

13. "The Nation's Safeguard," an address delivered January 17, 1893, printed in the Report of the New York State Bar Association, 1893, pp. 37, 42-43.

14. *Anderson v. Dunn*, 6 Wheat. 204, 226.