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GROWTH IN THE CONSTITUTION AND CONSTITUTIONAL LAW SINCE THE DECISION OF THE CASE OF WEST COAST HOTEL VS. PARRISH

HUGH EVANDER WILLIS†

With the decision of the case of West Coast Hotel vs. Parrish, there began a new period in United States constitutional history. This period resembles the constitutional period from 1910 to 1922, when Justices Holmes, Brandeis and Hughes were the dominant members of the court; and the period from the Civil War to the late eighties, when Justice Miller and Chief Justices Waite and Taney dominated the court; and to some extent, the period from 1801 to the Civil War, when the court was dominated by Chief Justice Marshall. It differs radically from the constitutional period which extended from 1922 to 1937, when Justices Butler, McReynolds, Sutherland and Van Devanter dominated the court; and the period from the late eighties to 1910, when Justices Field, Bradley, Peckham and Chief Justice Fuller dominated the court. This new period introduced remarkable changes into our Constitution and constitutional law. This is shown by the fact that more than forty prior cases of the Supreme Court were overruled by over thirty new Supreme Court cases, and by the fact that where prior cases were not overruled new cases introduced a great many new principles. These changes were so great that all sorts of things which had been unconstitutional prior to 1937 became constitutional after 1937. So great were these changes that many prominent lawyers and other prominent persons in the United States were filled with alarm and publicly proclaimed that all of our Constitution was being overthrown. The reason for this feeling was that most of the cases overruled had been cases in the prior period in which the opinions had been written either by Justice Butler, Justice

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1300 U. S. 379, 57 Sup. Ct. 578, 81 L. Ed. 703 (1937).
McReynolds, Justice Sutherland, or Justice Van Devanter. Many lawyers were well acquainted with Supreme Court decisions no further back than this time, and it is not surprising that they thought that all the constitutional law they knew was being wiped away. But when the work of the Supreme Court since 1937 is compared with the work of the Supreme Court from the beginning of United States history, it is very easy to see that there is no cause for alarm. As a matter of fact, the court in this last period did not work any more radical changes in our Constitution than did the justices in the immediately preceding period. And for some strange reason lawyers and other people were not filled with alarm at the work of Justices Butler, McReynolds, Sutherland and Van Devanter.

All that the Supreme Court has done in the last few years has been to undo the work of the Supreme Court in this prior period—to terminate the dominancy of Justices Butler, McReynolds, Sutherland and Van Devanter, and to make the dissents of Justices Holmes, Brandeis, Clark, Stone and Cardozo the doctrines of the court.

Yet the Constitution and the constitutional law which we now have are so different from the Constitution and the constitutional law which we had during the dominancy of Justices Butler, McReynolds, Sutherland and Van Devanter, that careful consideration should be given to the changes which have occurred, and the new principles and doctrines which have been established. In doing this we will divide our discussion up into topics corresponding with the great fundamental doctrines of our Constitution.

**Sovereignty**

One great doctrine of the United States Constitution is the doctrine of the sovereignty of the people as a whole. There has been no new growth in this doctrine since 1937. The problem of what is the meaning of sovereignty, and who, under the United States Constitution is sovereign, has probably been finally solved. At any rate, the Supreme Court did
not do any further work on this subject in the period we are discussing. The doctrine was almost placed in our Constitution by the Constitutional Convention in the preamble to the Constitution, but it required a great deal of work by the United States Supreme Court before it became a fundamental part of our Constitution. This work was begun by Chief Justice Jay, continued by Chief Justice Marshall, and was finally completed by Justice Holmes and his associates who defined sovereignty as the power to make laws, and the nature and scope of sovereignty, as without limitations. Since Jay and Marshall and Lincoln and the Civil War had settled the question of where sovereignty in the United States resides, i.e., in the people as a whole, the topic of sovereignty needs little, if any, further elucidation.

Amendability

What has been said about sovereignty will more or less apply to amendability. The original Constitution covered so many features of the amending power, and where the original Constitution did not cover the whole of the subject, the Supreme Court has, through the years, filled in so many of the omissions, that very little work remains to be done, and the Supreme Court did very little work on this topic in the period under discussion. However, it did render one decision, Coleman vs. Miller, in which the Supreme Court held that the question of how long a proposed amendment continues to be

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pending is a political question for Congress; and in doing so it overruled a prior case of *Dillon vs. Gloss.* This case also made the question of whether ratification and rejection are final acts a political one.

**Universal Citizenship and Suffrage**

The doctrine of universal citizenship and suffrage has been so fully worked out by the formal Fourteenth, Fifteenth and Nineteenth Amendments, and the work of the United States Supreme Court, that not very much remains to be done to this doctrine. But in this last period the Supreme Court rendered a few decisions on these topics and on the topics of privileges and immunities of the United States and state citizens. In *Perkins vs. Elg,* the court held that a child born in the United States does not lose his United States citizenship by the expatriation of his parents. In the case of *Schneiderman vs. United States,* it held that membership in a communistic party at the time of naturalization is not a ground for later cancellation of naturalization granted to a person. In the case of *Edwards vs. California,* four concurring judges held that the privilege of passing from state to state is a privilege of a United States citizen, and, while the majority of the court put its decision on another ground of commerce, it did not say that it was not also a United States privilege and immunity. In *Madden vs. Commonwealth of Kentucky,* the Supreme Court held that the privilege of carrying on business beyond the lines of a state, for example, to make a deposit of money in banks, is not a privilege of a United States citizen. This was *contra* to the case of *Colgate vs. Harvey,* decided in the prior constitutional period, and therefore, this case was overruled. The first decision, consequently, had the effect of restoring the meaning of the United States privileges and

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9320 U. S. 118, 63 Sup. Ct. 1333, 87 L. Ed. 1796 (1943).
11309 U. S. 83, 60 Sup. Ct. 406, 84 L. Ed. 590 (1940).
immunities clause to that given to it by the *Slaughterhouse Cases*\(^{12}\) in the period of Justice Miller. In this period the Supreme Court also overruled the case of *Grovey vs. Townsend*.\(^{13}\) It did this in the cases of the *United States vs. Classic*, and *Smith vs. Allwright*.\(^{14}\) *Grovey vs. Townsend* had held that the Democratic party in Texas was not an agency of the state, and, therefore, that the political party was not forbidden by the Constitution from discriminating against Negroes. The *Classic* case gave the Federal Government the power to regulate primary elections as well as regular elections; thereby overruling the *Newberry* case.\(^{15}\) The *Allwright* case made a political party an agency of the state; and, thereby, made the constitutional limitation against discrimination apply. Since the *Classic* case had already given the Federal Government power to regulate primary elections, it follows that the Federal Government has the power to prevent discrimination against Negroes by a political party.

**Separation of Powers**

It cannot be said that the Supreme Court has finished its work on this doctrine, at least, if we expect the court to make the doctrine a coherent and scientific one. The original Constitution put this doctrine into our Constitution in spite of the fact that it did not expressly say so. About all that the original Constitution did was to establish three branches of government, name certain specific powers given to each branch, and to introduce its scheme of checks and balances. Most of the work of rationalizing this subject has been done by the Supreme Court. It has found the following characteristics of our doctrine of separation of powers: (1) three branches of government, the executive branch including the

\(^{12}\) Wall. 36, 21 L. Ed. 394 (1872).
\(^{13}\) 295 U. S. 45, 55 Sup. Ct. 622, 79 L. Ed. 1292 (1935).
\(^{15}\) Newberry v. United States, 256 U. S. 232, 41 Sup. Ct. 469, 65 L. Ed. 913 (1921).
THE CONSTITUTION GROWS

administrative branch; (2) three functions of government corresponding to the three branches of government; (3) an allocation of powers or functions to the various branches, but without any scientific allocation of legislative powers to the legislative branch, or judicial powers to the judicial branch, or executive powers to the executive branch. (The scheme of checks and balances of the original Constitution departed from any such allocation, and the Supreme Court has permitted even greater confusion of powers.); (4) a prohibition on the delegation of its powers by any one branch to another branch, or to another agent of government, or to a private individual, except in the case of local self-government; (5) a prohibition on the commingling of all of the functions of government in any one branch of government, except in the case of administrative commissions; and (6) the supremacy of the Supreme Court over the other branches of the Federal Government instead of a status of equality. The most exasperating and unscientific part of this doctrine is the confusion of powers caused by the way they have been allocated to the various branches of government. Yet if any improvement in this situation is ever to occur, it has not occurred in the period which we are now studying. Very little in the way of the change of the doctrine has occurred in this period. In the case of O'Malley v. Woodrough, the court held that an income tax upon the salary of a federal judge is not a diminution of his salary contrary to the Constitution, and to this extent enlarged the taxing power of the legislative branch. In deciding this case the Supreme Court expressly overruled the earlier case of Miles v. Graham, and impliedly overruled the case of Evans v. Gore. In spite of the rule against delegation of authority, the Supreme Court, in the case of Shields v. Utah Idaho Central Railroad Company, permitted Con-

19253 U. S. 245, 40 Sup. Ct. 550, 64 L. Ed. 887 (1920) (opinion by Justice Van Devanter).
gness to delegate to the Interstate Commerce Commission the
power to determine whether a particular electric railroad was
an interurban railroad; and in United States v. Rock Royal
Corporation, the Supreme Court permitted Congress to dele-
gate to the Secretary of Agriculture the power to determine
details of a legislative scheme. The Supreme Court, in
this period, also tended to put a limitation of self-restraint
upon its own power of judicial review.

Supremacy of the Supreme Court

When the Supreme Court established its supremacy over
the other branches of the Federal Government, it did so im-
portant a thing that it really created a new doctrine of constitu-
tional law. This doctrine is now so great that it gives the
Supreme Court supremacy, not only over the lower Federal
courts, but over the other branches of the Federal Govern-
ment, and over the branches of the state governments. Its
power over state courts is so great that state courts have
practically become inferior courts in the Federal system. In
the case of diversity of citizenship and where the amount in-
volved is in excess of $3000.00, the Supreme Court's su-
premacy relates to every possible kind of question. And in
connection with this power the Supreme Court at first built
up a Federal common law of its own, differing from the gen-
eral common law of the states in which the lower federal
courts sat. Aside from diversity cases, the United States
Supreme Court has supremacy over federal questions, but it
has this power whether the Federal question comes up in a
lower Federal court ($3000.00) or in a state court; and here
also the Supreme Court followed the practice of following its
own rule instead of any rule of the state courts. In the nine-
ties the Supreme Court extended its supremacy so as to include
not only protection to personal liberty and equality as to

20307 U. S. 533, 59 Sup. Ct. 993, 83 L. Ed. 1446 (1939). And to the
Court of Claims the power to legislate after unfavorable adjudication.
Pope v. United States, 323 U. S. 1, 65 Sup. Ct. 16, 89 L. Ed. 5 (1944).
21See cases infra under the topic of "Supremacy of the Supreme
Court."
matters of procedure and jurisdiction, but also as to matters of substance; so that it acquired the power to determine in a negative fashion what changes in social control can be established by either Congress or state legislatures.

This continued to be constitutional law in the United States in the period under consideration, except that the Supreme Court made a few slight modifications of the doctrine which has just been discussed. In the case of Erie Railroad Company v. Tompkins, the Supreme Court reversed the case of Swift v. Tyson, and in doing so, held that in diversity cases the Supreme Court will cease to make its own common law, but will hereafter apply the common law of that state in which the particular court is sitting. The Supreme Court thought that the rule of Swift v. Tyson created a great deal of uncertainty, but it is possible that the case of Erie Railroad Company v. Tompkins has created another kind of uncertainty as bad as was ever created by Swift v. Tyson. In spite of this new reversal of policy (1) the Federal courts may still decide, in diversity cases, the meaning of a state constitution or statute where there is no state decision, or state decisions conflict; (2) Federal courts may decide the state common law where there are no state decisions, or the decisions are conflicting, or the decisions of one state differ from those of another state; (3) the Federal courts may decide as to their own law in case of Federal questions; the Erie case does not apply to equity cases; (5) the rule of the Erie case does not apply to questions of the impairment of the obligations of a contract; (6) the rule of the Erie case does not apply to matters of procedure; and to some other miscellaneous matters constantly being newly discovered. The Supreme Court in this period also limited the

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22304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188 (1938).
2316 Pet. 1, 10 L. Ed. 865 (1842).
power of the Federal courts to punish for contempt to cases so near geographically as to obstruct the administration of justice and not to those casually obstructing;\textsuperscript{26} and for determining when there is a contempt the court adopted the clear and present danger test.\textsuperscript{27} In this period the Supreme Court also put a limitation of self-restraint on itself against judicial review so as to limit its power over the other branches of government. It did this first, by making some matters political questions\textsuperscript{28} and leaving the decision either to the executive or legislative branch of government, and second, by giving finality to the findings of fact of administrative commissions.\textsuperscript{29}

\textit{Dual Form of Government}

The doctrine of dual form of government was put in our Constitution by Chief Justice John Marshall and he and other justices have developed most of the principles found in this doctrine, but they used a lot of matters found in the original Constitution in connection with the powers of the various branches of the Federal Government. By the dual form of government there was created a Federal Government and the state government, each with powers of its own and each independent of the other, except as the doctrine of Federal supremacy made the Federal Government supreme over the

\textsuperscript{26}Nye v. United States, 313 U. S. 33, 61 Sup. Ct. 810, 85 L. Ed. 1172 (1941).

\textsuperscript{27}Bridges v. California, 314 U. S. 252, 62 Sup. Ct. 190, 86 L. Ed. 192 (1941).

\textsuperscript{28}See \textit{supra} Amendability, etc.

states. Under this dual form of government the Federal Government and the state government have jurisdiction over the same people and within the same territory. The dual form of government does not apply to our foreign relations. In this field the states have no powers.30

**Federal Supremacy**

This doctrine was created by Chief Justice Marshall in his great decision in *McCulloch v. Maryland*. He held both that the Federal Government had many implied powers, and that it had power to tax state instrumentalities when states did not have the power to tax Federal instrumentalities; and in *Gibbons v. Ogden*,31 he held that Federal power superseded state power, after Congressional action, even though both governments had concurrent powers. In the period of Justice Miller, and Chief Justice Taney, there was substituted, in the case of *Collector v. Day*,32 for Federal supremacy, at least in tax cases, the doctrine of the equality of the states and Federal Government, and reciprocal immunity from taxation by either of the instrumentalities of the other. In the present period of United States constitutional law the doctrine of immunity established by *Collector v. Day* has been reversed so as to permit reciprocal taxation by both the states33 and the United States34 of the instrumentalities of each other. But

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30United States v. Curtiss-Wright Exp. Corp., 299 U. S. 304, 57 Sup. Ct. 216, 81 L. Ed. 255 (1936) (this case was decided a few weeks before the West Coast Hotel v. Parrish case, *supra* note 1.) Imports are immune from state taxation until they are either sold or removed from the original package, or put to the use for which they were imported. Hoover & Allison Co. v. Evatt, 65 Sup. Ct. 870 (U. S. 1945).

319 Wheat. 1, 6 L. Ed. 22 (1824). See also *Veazie Bank v. Fenno*, 8 Wall. 533, 19 L. Ed. 482 (1869).

3211 Wall. 113, 20 L. Ed. 122 (1871).


these cases did not go so far as to permit the states directly to tax the property of the Federal Government; and the Supreme Court has held that this is so, even though Congress is silent on the subject, and that in cases of prohibition by Congress the states' power of taxation of the instrumentalities of the Federal Government can be destroyed.35 These cases seem to restore the doctrine of Federal supremacy even in the case of state taxation. Recent cases have not expressly told us whether or not the Federal Government may still tax the instrumentalities of the states and perhaps the states, but the Supreme Court has recently recognized36 the doctrine of Federal supremacy in tax matters as it was set forth in the case of McCulloch v. Maryland, and Veazie Bank v. Fenno, so that it now may be assumed that the doctrine of Federal supremacy has again been restored, so far as concerns taxation by the states of the Federal Government, and the instrumentalities of the Federal Government.

In the case of United States v. Butler,37 the Supreme Court held that the Federal Government could not use a tax power, although it possessed a general taxing power, if, thereby, it invaded a state's police power, because it would be allowing Congress to give to itself a police power which had never been given to it by the Constitution. This case did not say that the Federal Government could not use its taxing power for its own police power purposes, nor did it say that the Federal Government's taxing power did not supersede the state's taxing power, nor a Federal Government's police power a state government's police power, nor a Federal Government's police power a state government's taxing power. In Carmichael v. Southern Coal and Coke Company,38 over the dissent of Justices Butler, McReynolds, Sutherland and Van

37297 U. S. 1, 56 Sup. Ct. 312, 80 L. Ed. 477 (1936).
Devanter, the Supreme Court upheld the Federal Social Security Act and the state act passed to satisfy the prerequisites of the Federal act, all on the theory that the Federal Government was simply using its taxing power, and was not exercising a police power, by coercing the states. And in *Mulford v. Smith,* the court, in an opinion written by Justice Roberts (who wrote the opinion in *United States v. Butler*), upheld the second Federal AAA on the theory that Congress was regulating marketing, not production, and, therefore, was regulating interstate commerce and, thereby, was using its police power in spite of the fact that this act was practically as sweeping as the first act. The Supreme Court, under this marketing theory, upheld congressional statutes for further regulation of agricultural products (milk, wheat). These cases, therefore, also support the doctrine of Federal supremacy.

Any doubt as to the doctrine of Federal supremacy, or the use of federal tax power for federal police power purposes, was settled by the case of *Sonzinsky v. United States* in which the Supreme Court also definitely held that the taxing power may be used for police power purposes.

*Interstate Commerce: Defined*

Chief Justice Marshall defined interstate commerce as traffic and transportation (navigation). This continued to be the definition of interstate commerce until the period of Justices Butler, McReynolds, Sutherland and Van Devanter, who tended more and more to confine commerce to transportation. These later decisions have now been overruled, and

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41 300 U. S. 506, 57 Sup. Ct. 554, 81 L. Ed. 772 (1937).
Marshall's definition of interstate commerce has been restored. The decision of Paul v. Virginia, which held that insurance was not commerce, and, therefore, could not be interstate commerce, has now also been overruled by the decision of United States v. Southeastern Underwriters Association. This decision is certainly correct, but some other modern decisions have pushed interstate commerce so far that there is a suspicion that the Supreme Court has overdone its work.

Who May Regulate?

The Supreme Court has had as much trouble in discovering who has the constitutional power to regulate and tax interstate commerce as it had in the defining of interstate commerce.

Police Power: State

During the period dominated most of the time by Chief Justice Marshall, from 1824 to 1852, the states and the Federal Government had concurrent powers to regulate interstate commerce. In this period was decided the License Cases which allowed the states to tax the importation into them of intoxicating liquors, either while the liquors were still in the original package, or after the original package was broken.

the original package doctrine as to when foreign commerce ends has now been enlarged so that it reads that such commerce lasts until (1) the original package has been broken, or (2) there has been one sale, or (3) the use for which the goods were imported has been accomplished, still to sufficiently state the rule so as to carry out the ideas of Chief Justice Marshall and Justice Black, it should be added that in any event immunity from state taxation will last only a reasonable length of time, as where goods imported are stored and nothing more is done to them. Hoover & Allison Co. v. Evatt, supra note 30.


448 Wall. 168, 19 L. Ed. 357 (1868).

45322 U. S. 532, 64 Sup. Ct. 1162, 88 L. Ed. 1440 (1944).


475 How. 504, 12 L. Ed. 256 (1847).
Of course, in such case there would be a Federal supersedure in case of any Congressional act in conflict with state legislation.

In 1851, and extending to 1894, there was ushered in a new period with reference to the powers of regulation of the Federal and state governments. In the case of Cooley v. Board of Wardens of Port of Philadelphia, the Supreme Court held that the power of the Federal Government was exclusive over all matters of interstate commerce national in scope, and left a concurrent power in the state governments only over matters of very local interest, like ferries. In this period there was decided the liquor cases of Bowman v. Chicago and Northwestern Railroad Company, and Leisy v. Hardin, in which the Supreme Court held that a state could neither forbid the importation of intoxicating liquors into the state, nor regulate the sales after they had arrived in the state. Since most of the Federal Government's power was now exclusive, and the states were not allowed to regulate interstate commerce even incidentally, the possibility of Federal supersedure was limited to the local cases, where the state still had a little concurrent power.

In 1894, in the case of Plumley v. Commonwealth of Massachusetts, the Supreme Court held that even where the Federal Government's power over interstate commerce was exclusive, the states still might exercise a general police power, if it only incidentally affected interstate commerce; i.e., where the primary purpose of the state legislation was to protect some social interest of the people of the state, and the interference with regulation of interstate commerce was very little, the Supreme Court would allow the states to exercise their police power, if it thought the social interest to be protected thereby was more important than any social interest to be protected by Federal regulation. After this decision, of

4812 How. 299, 13 L. Ed. 996 (1851).
49125 U. S. 465, 8 Sup. Ct. 689, 31 L. Ed. 700 (1888).
50135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128 (1890).
51155 U. S. 461, 15 Sup. Ct. 154, 39 L. Ed. 223 (1894).
course, the states could exclude intoxicating liquors, or their sale in the state; under their general police power, for the protection of the health of the people of the state, if shipped into the state: and they could regulate shipments of liquor through the states so far as necessary to protect them against the use of liquor therein, but, of course, they could not prohibit through shipments. However, in the case of Edwards v. State of California, the court held that a state could not exclude a citizen of another state simply on the grounds that he was a pauper, because in such case there was not sufficient social interest for the state's police power. Of course, now Federal supersedure will apply, not only in case of local matters, where the state's police power is concurrent, but also where the Federal Government's power of regulation is exclusive but the states are allowed to exercise their general police power.

Before this third stage in the development of the powers of the states and the Federal Government there were various attempts to get away from the holdings of Bowman v. Chicago and Northwestern and Leisy v. Hardin. After a great deal of pressure from the dry states, Congress passed the Wilson act to permit states to regulate the sale of intoxicating liquors after they arrived in the state, and the Webb-Kenyon act prohibiting the shipment of intoxicating liquors in interstate commerce into dry states. The Wilson act was upheld in the case of In re Rahrer, but the court would not give any satisfactory rationale for its decision. Of course, the only possible rationale was that given later in the case of Plumley v. Commonwealth of Massachusetts. The Supreme Court upheld the Webb-Kenyon act in the case of the Clark Distilling Company v. Western Maryland Railroad Company. The rationale for this decision was, of course, that Congress had exer-

53Supra note 10.
cised its own police power, which included the power of prohibition, even though it meant the exercise of a general police power instead of its police power to regulate interstate commerce. Later, Congress passed the Hawes-Cooper act, and the Ashurst-Summers act, to do for prison made goods exactly what it did in the Wilson act and the Webb-Kenyon act for intoxicating liquors; and the Supreme Court upheld both these prison made goods acts in the cases of *Whitfield v. State of Ohio*[^58] and *Kentucky Whip and Collar Company v. Illinois Central Railroad Company*[^57] for the same reasons given in the liquor cases.

In the first child labor case of *Hammer v. Dagenhart*,[^55] the Supreme Court refused to allow Congress to prohibit the shipment in interstate commerce of goods manufactured by child labor. This case was decided long after *Plumley v. Commonwealth of Massachusetts* and was contra, not only to the case of *Clark Distilling Company v. Western Maryland Railroad Company* and *Kentucky Whip and Collar Company v. Illinois Central Railroad Company* and other cases like the lottery cases, stolen goods cases, and white slave cases, but the Supreme Court followed a very narrow and mistaken view of the Federal Government's power over interstate commerce. The Supreme Court has now realized its mistake and in the case of *United States v. F. W. Darby Lumber Company*[^59] has expressly overruled *Hammer v. Dagenhart*, and thereby established the federal commerce power on a broad basis.

In the case of *Di Santo v. Commonwealth of Pennsylvania*,[^60] the Supreme Court held that a state could not exact a license of one, not even an employee of a railway company or a steamship company, for selling, in the state, steamship tickets.

[^60]: U. S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101 (1918). The Supreme Court has held that the Fair Labor Standards Act did not prohibit child labor by the Western Union. Western Union Telegraph Co. v. Lenroot, 323 U. S. 490, 65 Sup. Ct. 335, 89 L. Ed. 289 (1945).
[^61]: U. S. 34, 47 Sup. Ct. 267, 71 L. Ed. 524 (1927).
Neither the majority nor the dissenting judges emphasized the fact that this was an attempt on the part of the state to regulate foreign commerce. Justice Butler, writing for the majority, declared the regulation unconstitutional because it was a direct regulation of foreign commerce. In the later case of *United States v. Curtiss-Wright Company* the Supreme Court held that so far as concerns foreign commerce there is no dual form of government, (quaere, inspection power) and, therefore, that the states could not regulate foreign commerce in any way under its general police power. After both of these decisions the Supreme Court in the case of *State of California v. Thompson* overruled the case of *Di Santo v. Pennsylvania*. However, it did not do this on the ground that a state had a general police power which it might exercise even against foreign commerce, for the court did not overrule the *Curtiss-Wright* case, but it put its decision on the ground that a case of interstate commerce was involved. This places a little doubt on the *Curtiss-Wright* decision, but probably the best conclusion to come to is that the *Curtiss-Wright* case is still law. Yet in the very recent case of *State of Georgia v. Pennsylvania Railroad Company* the Supreme Court allowed a state, as parens patriae, to sue a number of railways for injunctive relief against a conspiracy in violation of the Sherman Anti-Trust Act, because it injured the economy of the state, and the Interstate Commerce Commission did not have jurisdiction, although Chief Justice Stone, for the dissenters, thought that only the Federal Government is parens patriae in such cases.

**Police Power: Federal**

All the time during which the Supreme Court was developing the law as to the states' power to regulate interstate commerce, Congress, of course, always had a specific police power to regulate interstate commerce; and under this power it

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61 Supra note 30.


63 65 Sup. Ct. 716 (U. S. 1945).
could have (1) regulated the persons and instrumentalities engaged in interstate commerce, (2) regulated goods engaged in interstate commerce, (3) prevented obstructions and interference with interstate commerce, (4) regulated intrastate commerce when so interblended with interstate commerce that both had to be regulated by one regulation, (5) fostered and encouraged interstate commerce. Whether the states' power was concurrent, as prior to 1851, or the states had no incidental police power, as between 1851 and 1894, or incidental police power, as after 1894, the Federal Government's specific police power would have remained the same if it had wanted to exercise it. As a matter of fact, up until the eighties, the Federal Government did not enter this field of regulation. But after the Supreme Court had held that the Federal Government's power of regulation was exclusive, and the states could not incidentally regulate under their general police power, the demand for Federal regulation was so great that Congress had to take action; and the first form that its regulation took was the Interstate Commerce Act and the establishment of the Interstate Commerce Commission in 1887. Since that time all sorts of statutes have been passed under its power to regulate interstate commerce and it has exercised its power in all of the respects cataloged above. In connection therewith, it has even gone so far as to exercise a general police power implied from its express specific police power, as in the lottery cases, white slave cases, and child goods cases. The Supreme Court has held that the Mann Act applies to transportation wholly within the District of Columbia. In the case of the Carolene Products Company v. United States, this general police power was extended to protection against fraud. The development which had been going on since the eighties has continued since 1937, and attention will be further called to a few of the cases decided in this period.

In *Williams v. Jacksonville Terminal Company*, the Supreme Court held that "red caps" are engaged in interstate commerce, and, therefore, can be regulated, as persons engaged in interstate commerce. In the case of *Wickard v. Filburn*, the court held that Congress could regulate the amount of wheat to be grown under its power to foster and encourage interstate commerce. In *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, the court held that the National Labor Relations Board may order the reinstatement and back pay for employees discharged by a cannery shipping 38 per cent. of its products in interstate commerce on the theory of preventing obstructions to interstate commerce. In *Apex Hosiery Company v. Leader*, the court held that the restraint on the movement of goods in interstate commerce resulting from a sit-down strike to influence labor demands for a closed shop, by compelling a shut-down of the employer's factory, is not the kind of a restraint of trade or commerce at which the Sherman Anti-Trust Act is aimed, because the court held that the conduct must restrain commercial competition. This case overruled the case of *United Mine Workers of America v. Coronado Coal Company*. The *Apex* case restored the decision in the case of *Appalachian Coals Incorporated v. United States*, which had probably been overruled by the case of *United States v. Socony-Vacuum Oil Company*.

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69310 U. S. 469, 60 Sup. Ct. 982, 84 L. Ed. 1311 (1940).
70259 U. S. 344, 42 Sup. Ct. 570, 66 L. Ed. 975 (1922).
Taxation: State

Probably before 1885, the states had a power of taxation of interstate commerce concurrent with the Federal Government's specific police power over it. About this time the Supreme Court held that a state could not directly tax interstate commerce, but on this date in the case of Brown v. Houston,\textsuperscript{73} it held that a state may exercise its general taxing power if it only incidentally affects interstate commerce. Since that time many other forms of taxation by the state have been permitted if they only incidentally affect interstate commerce; thus, Coe v. Town of Errol\textsuperscript{74} held that a state could tax goods, although already articles of interstate commerce, if they were at rest in that state, just as Brown v. Houston held that a state could tax after transportation was over and they had come to rest in a state, even though interstate commerce was not, as yet, over. State of Minnesota v. Blasius\textsuperscript{75} held that a state could tax goods while they are at rest in the state after some transportation is over, but more transportation is to continue. A state may also levy non-discriminatory property taxes on the property of a person engaged in interstate commerce, after property has a situs within the state.\textsuperscript{76} And the state of domicile of the owner may levy a tax on the intangibles of an interstate owner,\textsuperscript{77} and under the unit rule if tangibles have no fixed situs, a state through which they move may tax a proportional part of them (and also intangibles in the same proportion).\textsuperscript{78} A state may also levy license taxes for the privilege of doing intrastate business even

\textsuperscript{73}114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257 (1885). \textit{Cf.} state taxation of imports, Hoover & Allison Co. v. Evatt, \textit{supra} note 42.

\textsuperscript{74}116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715 (1886).

\textsuperscript{75}290 U. S. 1, 54 Sup. Ct. 34, 78 L. Ed. 131 (1933).

\textsuperscript{76}Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158 (1885).

\textsuperscript{77}Virginia v. Imperial Coal Sales Co., 293 U. S. 15, 55 Sup. Ct. 12, 79 L. Ed. 171 (1934).

\textsuperscript{78}Pullman Palace Car Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613 (1891).
though by an interstate company, and even though it measures it in a way that it could not levy the tax;\textsuperscript{79} a fee for the use of state highways and other property;\textsuperscript{80} a gross receipts tax in lieu of property taxes;\textsuperscript{81} a net income tax on a domestic corporation on all its income and on a foreign corporation on income derived from the state;\textsuperscript{82} a use tax\textsuperscript{83} and a sales tax by a buyer state after transportation into that state; but a sales tax can not be levied by the seller state on goods shipped into any other state before transportation.\textsuperscript{84} The decisions since 1937 have only continued the trend which we find before 1937. It is interesting to note that the proper rationale of the subject of state taxation is the same as the rationale of the states' police power over interstate commerce since 1894.

Of course, the Federal Government under its general taxing power could tax interstate commerce and the privilege of engaging in interstate commerce, but to-date it has not undertaken these forms of taxation.

\textit{Elections}

There has always been some question as to the extent of the powers of the Federal Government and the states over Federal elections. The states have generally thought that they had most of the power (a) because they may prescribe the times, places and manner for holding elections for senators and representatives, (b) because the electors in each state for both representatives and senators must have the qualifica-

\textsuperscript{79}Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 58 Sup. Ct. 546, 82 L. Ed. 823 (1938).
\textsuperscript{81}United States Express Co. v. State of Minnesota, 223 U. S. 335, 32 Sup. Ct. 211, 56 L. Ed. 459 (1912).
\textsuperscript{82}United States Glue Co. v. Town of Oak Creek, 247 U. S. 321, 38 Sup. Ct. 499, 62 L. Ed. 1135 (1918).
\textsuperscript{84}McGoldrick v. Burwind-White Coal Mining Co., 309 U. S. 33, 60 Sup. Ct. 388, 84 L. Ed. 565 (1940).
tions requisite for electors of the most numerous branch of
the state legislature, (c) because of their power to provide
for the election of electors for the president and for vice-
president, and (d) because until recently the Federal Gov-
ernment has been held to have no power over primary elec-
tions. But the original Constitution gives Congress the power
to appoint the time and manner of holding elections, and the
Supreme Court now has extended the power of Congress to
primary elections,96 overruling the case of Newberry v. United
States.97 Congress, consequently, has a very wide power over
elections. It can legislate to prevent corruption therein, and
is the sole judge of the qualifications of its own members; but
it is questionable whether or not it has the power to make
the poll tax illegal. It has been contended that this poll tax
is a tax and not a qualification for voting, and that voting
of a United States citizen can not be taxed; but voting is not
a privilege of a United States citizen, and even if a poll tax
is a tax, it is a qualification for voting because it has been so
treated throughout United States history. It has also been
contended that Congress would have the power to abolish the
poll tax under its power to provide for the manner of voting
since there has been a lot of corruption in the administration
of the poll tax, through politicians’ paying the tax for those
they wanted to vote; but it is a little doubtful whether or
not this power of Congress would override a specific grant
of power over qualifications of voters to the states.

It has now been held98 that political parties are agencies of
the state so that the states may be held liable for any action
by the political parties which are in violation of guarantees
in the Constitution.

Bankruptcy

The Supreme Court held the first Frazier-Lemke Act un-
constitutional because of the violation of due process of law.99

97Supra note 15.
854, 79 L. Ed. 1593 (1939).
The second Frazier-Lemke Act, contrary to the first, provided for public sale; that the mortgagee should retain his lien and privilege to bid; and that the farmer who retains possession must pay rental, but that the act shall apply though the farmer has only a right of redemption, or conditional sale contract, or is only the equitable owner. The Supreme Court upheld the constitutionality of this second act in the case of *Wright v. Vinton Branch of Mountain Trust Bank.*

This clause applies to state, not Federal acts, and to both state and Federal judgments, (Federal judgments in state courts, and state in Federal) but it does not apply to Federal judgments in Federal courts; but to be entitled to full faith and credit, a judgment (civil, common law, equity, and declaratory) must first be *res judicata* and second, meet the requirements of due process of law (a) as to jurisdiction, (b) as to procedure, and (c) as to substance. In the past it has been held that for jurisdiction for divorce a state must be the domicile of both parties, or the last matrimonial domicile, or there must be personal service on the defendant, or he must appear, or the plaintiff must acquire a separate domicile, (either because of consent of the other spouse or because of his or her misconduct). *Haddock v. Haddock* has now been overruled by *Williams v. State of North Carolina* in which it was held that separate (*bona fide*) domicile of one spouse alone is enough.

So far as concerns the division of powers between the states and the Federal Government there was no continuous...
general judicial trend prior to the period under discussion and there has been no trend in this period. 93

Fundamentals of Democracy

The fundamentals of democracy are (1) self-rule, (2) equality, (3) liberty, (4) common good. All of these values of democracy are fully protected by various provisions in our United States Constitution. Self-rule is protected by the sovereignty of the people, by the power of amendment, by universal citizenship and suffrage, by the power of social control, by the jury system, by the subjection of the military to the civil authority, by freedom of contract, and by judicial review. Practically all of these matters have already been considered. Equality is protected by the equality clause, the commerce clause, the interstate privileges and immunities clause, the due process clause and judicial review. Liberty is protected by the contract clause, by the writ of *habeas corpus*, by the limitations on taxation, by the due process clause, by our dual form of government, by the separation of powers and by judicial review. The common good is protected to some extent (*eg. pence*) directly by the Constitution but mostly indirectly by the police powers, powers of taxation, and the powers of eminent domain of both the states and the Federal Government, by the constitutional limitations on liberty, and by judicial review. The last three fundamentals of democracy remain to be considered. The fundamental of the common good is more or less opposed to equality and liberty. It is impossible to have complete equality and complete liberty and also protect the common good. The protection of the common good involves a great deal of delimitation of personal liberty. Hence, these three fundamentals involve the task of balancing equality and liberty against the common

93 Herb v. Pitcairn, 65 Sup. Ct. 459 (U. S. 1945). The Supreme Court has very recently, not only repeated that a state may tax discriminatorily a foreign corporation not engaged in interstate commerce, but has treated a foreign insurance company as that kind of a corporation in spite of the Southeastern Underwriters case. Lincoln National Life Ins. Co. v. Read, 65 Sup. Ct. 1220 (U. S. 1945).
good so as to give something of all. Since it is impossible to have all of all, and it would be unwise to have none of any of them, the only course remaining is to find out just how much equality and liberty are good for a good society and just how much social control is necessary for the common good. The Supreme Court has done most of this work.

Equality

Under the United States Constitution the guarantee of equality means a guarantee against discrimination, or a guarantee of equality of opportunity. It does not guarantee identity of treatment. This means that the government must in this respect treat all equally. It also means that the government has the power by social control to equalize the opportunities of all. This kind of treatment is guaranteed as against the states by the equality clause and the interstate privilege and immunities clause and the commerce clause, and against the Federal Government by the due process clause. This protection extends to Negroes, aliens, and even corporations if they are engaged in interstate commerce. As against any or all of these the states and the Federal Government have the power of classifying for the police power, for taxation, and for eminent domain. But they do not have the power to pass class legislation.

All of these principles were, of course, developed prior to 1937 and it looks very much as though the protection of equality is so satisfactory that very little more work needs to be done on the protection of this fundamental of democracy. But in the case of State of Missouri v. Canada,94 the

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94305 U. S. 337, 59 Sup. Ct. 232, 83 L. Ed. 208 (1936). The Supreme Court has more recently held that the executive and legislative branches did not intend any discrimination in the west coast exclusion order or Railway Labor Act. (Dissent, that they could not.) Ex parte Mitsuye Endo, 323 U. S. 83, 65 Sup. Ct. 208, 89 L. Ed. 219 (1944). The Court has also held that the Clayton Act, even as amended by the Robinson-Patman Act, protects against discrimination caused either by longer options, or lower prices, or longer periods for deliveries. Corn Products Refining Co. v. Federal Trade Commission, 65 Sup. Ct. 961 (U. S. 1945); Federal Trade Commission v. A. E. Staley Manufacturing Co., 65 Sup. Ct. 971 (U. S. 1945).
Supreme Court, Chief Justice Hughes writing the opinion, gave a very interesting application of the protection of the equal laws clause, in holding that the state of Missouri had violated this clause in failing to give legal education to negroes when it afforded such education to white residents, in spite of the fact that it had provided for the payment of tuition for negroes outside the state. The court held that the duty to refrain from discrimination could be performed only within the state's own jurisdiction.

**Liberty**

Through interpreting the guarantees of the original Bill of Rights and of due process of law, the Supreme Court has gradually drawn the line between personal liberty and social control so as, for example, to make the United States Constitution guarantee (1) absolute freedom of thought, (2) absolute freedom of expression except for slander and libel, sedition, *etcetera*, and (3) freedom of action where it does not interfere with the coordinate freedom of action of fellow human beings, or with other more important social interests.

Since 1937, the Supreme Court has done considerable work in the way of really drawing the line between personal liberty and social control, so as sometimes to protect more personal liberty, and at other times to allow more social control. In the period of Justice Miller the Supreme Court held in the *Slaughterhouse Cases*, Supra note 12, that the United States privileges and immunities clause protected the personal liberty of citizens of the United States only in respect to a few matters involving their relation to the national government. This case was overruled in the period of Justices Butler, McReynolds, Sutherland, and Van Devanter, by the case of *Colgate v. Harvey*, Supra note 12, which made the United States privileges and immunities clause cover all the fundamental rights, powers, privileges and immunities of the Bill of Rights and of the common law. This put a very important limitation upon the power of social con-
control by the states. The later case of Breedlove v. Suttles,\textsuperscript{97} apparently went back to the Slaughterhouse Cases, but it did not expressly overrule the case of Colgate v. Harvey. In the case of Hague v. the Committee for Industrial Organization,\textsuperscript{98} the justices of the Supreme Court again refused to follow Colgate v. Harvey, only three of the justices holding that a United States privilege and immunity was involved in the privilege of peaceable assemblage. But this case also did not overrule Colgate v. Harvey. However, in the case of Madden v. Kentucky,\textsuperscript{99} the court finally expressly overruled Colgate v. Harvey, and thereby protected personal liberty less, but allowed more opportunity of social control.

In the case of Lovell v. City of Griffin,\textsuperscript{100} the court extended the boundaries of personal liberty under due process of law to include the circulation and publication of leaflets, as well as newspapers and periodicals, as freedom of speech and the press; and in Thornhill v. State of Alabama\textsuperscript{101} and Carpenters and Joiners Union of America, Local No. 213 v. Ritter's Cafe\textsuperscript{102} the court held that freedom of speech included peaceful picketing, if it takes place at a place where there is a labor dispute; and in Thomas v. Collins,\textsuperscript{103} that it protects a Union organizer against licensing if he merely makes a speech at a mass meeting, and in Republic Aviation Corporation v. National Labor Relations Board\textsuperscript{104} that it gives an employee the privilege to organize on his own time though in his employer's factory. Yet in the case of Jones v. City of Opelika,\textsuperscript{105} the court at first held that freedom of religion does not include

\textsuperscript{97}302 U. S. 277, 58 Sup. Ct. 205, 82 L. Ed. 252 (1937).
\textsuperscript{98}307 U. S. 496, 59 Sup. Ct. 954, 83 L. Ed. 1423 (1939).
\textsuperscript{99}Supra note 11.
\textsuperscript{100}303 U. S. 444, 58 Sup. Ct. 666, 82 L. Ed. 949 (1938).
\textsuperscript{101}310 U. S. 88, 60 Sup. Ct. 736, 84 L. Ed. 1093 (1940), repudiating Gitlow v. State of New York, 268 U. S. 652, 45 Sup. Ct. 625, 69 L. Ed. 1138 (1925). The clear and present danger test was extended to contempt in Bridges v. California, supra note 27.
\textsuperscript{103}323 U. S. 516, 66 Sup. Ct. 315, 89 L. Ed. 340 (1945).
\textsuperscript{104}454 U. S. 88, 60 Sup. Ct. 736, 84 L. Ed. 1093 (1945). The clear and present danger test was extended to contempt in Bridges v. California, supra note 27.
\textsuperscript{105}316 U. S. 584, 62 Sup. Ct. 1231, 86 L. Ed. 1691 (1942).
the privilege of selling religious books and pamphlets without a license; and in *Minersville School District v. Gobitis*,\(^{106}\) that it did not include the privilege to refrain from saluting the United States flag; but in the case of *Murdock v. Commonwealth of Pennsylvania*,\(^{107}\) the court overruled the *Opelika* case; and in *Taylor v. State of Mississippi*,\(^{108}\) and *West Virginia State Board of Education v. Barnette*,\(^{109}\) the Supreme Court overruled the *Gobitis* case so as again to enlarge the boundaries of the freedom of religion, and to make it unconstitutional to interfere therewith by the means upheld in those cases. The protection of personal liberty was narrowed a little by the case of *Betts v. Brady*,\(^{110}\) which decided that the right to counsel guaranteed by the Constitution does not require the state to furnish counsel, but merely allows the accused to be represented by his own counsel. Yet in the case of *Williams v. Kaiser*,\(^{111}\) the Supreme Court, without reference to *Betts v. Brady*, held that due process requires the appointment of counsel in a capital offense if the accused is unable to employ counsel, even without a request. But *United States v. White*,\(^{112}\) held that the protection against self-crimination is personal, and not available to protect a labor union. In the very recent case of *Cramer v. United States*,\(^{113}\) the Supreme Court protected personal liberty against punishment for treason by holding that no missing facts can be supplied by the testimony of the accused, but all facts must be proved by the testimony of the two witnesses to the overt act claimed to be treasonable.

The Common Good

The last fundamental of democracy is the common good.

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\(^{106}\) U. S. 586, 60 Sup. Ct. 1010, 84 L. Ed. 1375 (1940).

\(^{107}\) U. S. 105, 63 Sup. Ct. 870, 87 L. Ed. 1292 (1943).

\(^{108}\) U. S. 583, 63 Sup. Ct. 1200, 87 L. Ed. 1628 (1943).

\(^{109}\) U. S. 624, 63 Sup. Ct. 1178, 87 L. Ed. 1628 (1943).


\(^{112}\) U. S. 694, 64 Sup. Ct. 1248, 88 L. Ed. 1542 (1944).

\(^{113}\) U. S. 918 (U. S. 1945).
The only political way to protect the common good, except directly by the Constitution itself, is through the police power, the power of taxation, and the power of eminent domain; but even then in order to protect the common good, as it ought to be, the scope of the police power, and taxation, and eminent domain, must be what it ought to be. If too much protection is given to personal liberty and equality, not enough can be given to the common good. We never could have protected the common good so as to make it anything worthwhile if the Supreme Court had not put important limitations on all the guarantees placed in the Constitution for the protection of personal liberty and equality. If the guarantees in the original Bill of Rights, and any additions to it, had not been given a reasonable interpretation but had been made absolute guarantees, there would have been so much personal liberty that the common good would largely have been destroyed. But the Supreme Court has found a way of reading in a rule of reasonableness from the common law, so as to qualify all of the provisions in the Bill of Rights.\[1\]

Thus, for example, it has made the guarantees of freedom of speech and the press and religious liberty guarantee only absolute freedom of thought, qualified freedom of expression, and much less freedom of action. At first, the Supreme Court, because of the work of

\[1\]The very recent case of In Re Summers, 65 Sup. Ct. 1307 (U.S. 1945) seemed to go too far in this direction. The Court (Justices Black, Douglas, Murphy and Rutledge dissenting) said that there was no violation of due process of law where the State of Illinois required an oath to bear arms as a condition to being admitted to the practice of law, and upheld denial of admission to a conscientious objector otherwise highly qualified. This was a limitation of personal liberty, or at least of equality even if the state was granting a privilege, unless there was a proper exercise of the police power. Perhaps there was a sufficient social interest in good lawyers, but it is impossible to see any relation between the means and the end to be accomplished. The majority relied upon the naturalization cases. But it is hard to see any relevant analogy, and even if it was possible to do so, the correctness of these decisions is very dubious. In addition, a state, in delimiting personal liberty, or equality, has the burden of showing a proper exercise of the police power, both in showing a paramount social interest and in showing some substantial relation between the means used and the end to be accomplished.
Chief Justice Marshall, made the contract clause guarantee too much personal liberty to corporations, in their charters, by permitting the granting away of police power, taxation, and eminent domain; but this has now all been changed by making the charters of all corporations subject to these sovereign powers, with the little exception of the power of taxation. Under Justice Field and his associates, and Justice Butler and his associates, too much protection was given to personal liberty and equality under the due process clause by making various forms of personal liberty, like freedom of contract, more important than any other social interests. But this now has also been changed so as to give more weight to other social interests and thereby to increase the scope of the police power.

Since 1937, while a few forms of personal liberty and equality have been protected more than they ever had been protected before, the general trend in Supreme Court decisions has been in the direction of limiting personal liberty and increasing those sovereign powers of the government which would protect the common good. One of the chief ways whereby this has been accomplished has been by enlarging the scope of the police power of the states. In the case of *West-Coast Hotel Company v. Parrish*, *supra*, the Supreme Court upheld a state minimum wage law and in doing so overruled the decision of *Adkins v. Children’s Hospital of District of Columbia*, which had declared a federal minimum wage law unconstitutional; and *Morehead v. State of New York*, which had declared a state minimum wage law unconstitutional. In *Olsen v. State of Nebraska*, the Supreme Court enlarged the category of public utilities, and thereby the police power of the states, so as to allow them to regulate the compensation which may be collected by private employment agencies from applicants; and overruled the case of *Ribnik v.*

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116298 U. S. 587, 56 Sup. Ct. 918, 80 L. Ed. 1347 (1936).
McBride;\textsuperscript{118} and in the case of Federal Power Commission v. 
Hope Natural Gas Company,\textsuperscript{119} the Supreme Court enlarged 
the scope of the states' police power by permitting the regu-
lation of the rates of public utilities according to the prudent-
investment-rate-base theory, and thereby put to sleep the an-
cient case of Smyth v. Ames.\textsuperscript{120} In the same way the Supreme 
Court has enlarged the police power of the Federal Govern-
ment by permitting it to exclude from interstate commerce 
goods manufactured by child labor, in the case of United 
States v. F. W. Darby Lumber Company;\textsuperscript{121} by upholding the 
second Frazier-Lemke Act, in the case of Wright v. Vinton 
Branch of Mountain Trust Bank;\textsuperscript{122} by enlarging the scope of 
interstate commerce and the power of the Federal Govern-
ment to prevent obstructions thereto and to foster and en-
courage interstate commerce, in the case of National Labor 
Relations Board v. Jones and Laughlin Steel Corporation\textsuperscript{123} 
and Associated Press v. National Labor Relations Board,\textsuperscript{124} 
which impliedly overruled a number of cases like Carter v. 
Carter Coal Company;\textsuperscript{125} and by making the insurance busi-
ness interstate commerce in the case of United States v. South-
eastern Underwriters Association,\textsuperscript{126} which overruled the case 
of Paul v. Virginia.\textsuperscript{127}

The power of the states to legislate for the common good

\textsuperscript{118} 277 U. S. 350, 48 Sup. Ct. 545, 72 L. Ed. 913 (1928).
\textsuperscript{119} 220 U. S. 591, 64 Sup. Ct. 281, 88 L. Ed. 333 (1943).
\textsuperscript{120} 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819 (1898). More re-
cently it has shown even more liberality in approving other factors for 
the determination of the rate base. Market Street Ry. Co. v. Railroad 
Commission, 65 Sup. Ct. 770 (U. S. 1945); Panhandle Eastern Pipe 
Line Co. v. Federal Power Commission, 65 Sup. Ct. 821 (U. S. 1945); 
829 (U. S. 1945); Colorado-Wyoming Gas Co. v. Federal Power Com-
misson, 65 Sup. Ct. 850 (U. S. 1945).
\textsuperscript{121} Supra note 59.
\textsuperscript{122} Supra note 90.
\textsuperscript{123} Supra note 43.
\textsuperscript{124} Supra note 43.
\textsuperscript{125} Supra note 42.
\textsuperscript{126} Supra note 45.
\textsuperscript{127} Supra note 44. See also Bowles v. Willingham, 321 U. S. 503, 64 
Sup. Ct. 641, 88 L. Ed. 892 (1944).
has further been increased by enlarging their tax power so as to permit multiple taxation, in the case of *Curry v. Mccanless*,\(^{128}\) which overruled the *First National Bank of Boston v. State of Maine*;\(^ {129}\) and by permitting the states greater powers of taxation of interstate commerce by a sales tax, in the case of *McGoldrick v. Burwind-White Coal Mining Company*;\(^ {130}\) and by a use tax in the case of *Henneford v. Silas Mason Company*.\(^ {131}\) The Federal Government's power of taxation has been increased specifically by permitting it to levy an income tax upon the salaries of federal judges in the case of *O'Malley v. Woodrough*,\(^ {132}\) which case overruled the cases of *Evans v. Gore*\(^ {133}\) and *Miles v. Graham*;\(^ {134}\) and generally by giving a liberal interpretation to its power over estate, gift and income taxes.\(^ {135}\) The Supreme Court has also enlarged the power of social control of the Federal Government by limiting the power of judicial review of the findings of administrative tribunals in such cases as *Elmhurst Cemetery Company of Joliet v. Commissioner of Internal Revenue*;\(^ {136}\) *Federal Power Commission v. Pacific Power and Light Company*;\(^ {137}\) *Sunshine Anthracite Coal Company v. Adkins*;\(^ {138}\) and *Dobson v. Commissioner of Internal Revenue*.\(^ {139}\) In the case of *United States v. General Motors Corporation*,\(^ {140}\) the Supreme Court in upholding the Federal Government's power of

\(^{129}\)284 U. S. 312, 52 Sup. Ct. 174, 76 L. Ed. 313 (1932).
\(^{130}\)Supra note 84.
\(^{131}\)Supra note 83.
\(^{132}\)Supra note 16.
\(^{133}\)Supra note 18.
\(^{134}\)Supra note 17.
\(^{136}\)Supra note 29.
\(^{137}\)Supra note 29.
\(^{138}\)Supra note 29.
\(^{139}\)Supra note 29.
\(^{140}\)323 U. S. 373, 65 Sup. Ct. 357, 89 L. Ed. 379 (1945).
eminent domain defined "property" in terms of rights, and "taken" in terms of damage. Yet in United States v. Willow River Power Company,\textsuperscript{141} and United States v. Commodore Park,\textsuperscript{142} the Court made it clear that it was not extending the meaning of damage to include that caused by the police power, but only to that caused by a taking by eminent domain.

By way of summary, it may be said that the present Supreme Court agrees on the constitutionality of what may be called the New Deal program. In doing so it did not follow President Roosevelt, but followed the position of former great justices of the Supreme Court: Holmes, Brandeis, Stone, Hughes, Cardozo and Miller. All of the present justices are inclined to uphold social legislation and to give a liberal interpretation of federal powers, especially in connection with the power to regulate interstate commerce, so as to make federal power include the whole of our national economy. On other questions which have been coming before the court the justices of the Supreme Court seem to split into three different groups. Justices Black, Douglas, Murphy and Rutledge may be classed as the most liberal members of the court; and Justice Frankfurter as the most conservative member of the court; while Chief Justice Stone and Justices Jackson and Reed may be classed as occupying a position midway between the other groups. But, however the court may split according to this classification, it has been able to find a majority of all of the justices for the opinion that the Supreme Court should follow a rule of judicial self-restraint in setting aside legislation, or in reviewing the findings of administrative commissions, or in passing upon state laws; for the protection of equality and freedom of speech and religious liberty; and for more state and more federal social control of our economic system, both through the police power and the power of taxation. The Federal Government has been allowed to exercise these powers in the field of primary elections, the

\textsuperscript{141}Sup. Ct. 803 (U. S. 1945).
\textsuperscript{142}Sup. Ct. 761 (U. S. 1945).
delegation of legislative power, the exercise of a general police power in connection with interstate commerce, in its control of foreign commerce, and its taxation for federal police power purposes. The states have been able to exercise these powers in connection with the exclusion of intoxicating liquors, goods manufactured by children, in granting divorces, the regulation of public utilities and in their taxation of goods shipped in interstate commerce. Hence, whatever else may be said of the present Supreme Court, it will have to be said that it is making our Constitution protect democracy and its fundamentals of liberty, equality and the common good.