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Observations on the Effect of Constitutional Interpretation on American Life*

Stanley F. Reed

Law Journals had an early beginning in America and have grown amazingly in number as their value has been recognized by bench and bar. One thinks of them now as peculiarly a product of the modern law school. Naturally in a center of legal learning where the law is an art with time for its history and theory, rather than a business, law reviews flourish. As the years go by they become increasingly useful as expositors of legal research and trends, and as aids to postgraduate legal education. They keep their readers current with present legislation and decisions. In this they follow their early prototype. When John E. Hall brought out his American Law Journal in 1808, he copyrighted the title thus:


As a matter of fact the Journal must have interested our legal-minded brethren of that time. The Aaron Burr trial by Marshall at Richmond was just in the offing, of course the cause célèbre of that period. Without hesitation the able Mr. Hall published in his first volume an article, "Treason: Observations on the law of treason in the United States, as applicable to the case of colonel Aaron Burr." Moreover, he took an unequivocal position that it was the actual use and not the preparation of a force for war against the United States that was treasonable, a position that Chief Justice Marshall had left uncertain shortly before in Ex parte Bollman and Swartwout,1 and which continued so even down to the

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*This material made up the substance of Justice Reed's keynote address at the Fifth National Conference of Law Reviews, Western Reserve University, on April 3rd, 1959.

1. 7 U.S. (4 Cranch) 75, 126 (1807).
Cramer case. Mr. Hall, however, not only made the assertion that it required something more than "preparation" for treason by levying war, as the Chief Justice later held, but explained how Colonel Burr's counsel should handle the charge. Fortunately that crusading spirit still finds expression in our law journals. It is interesting to note in the sixth volume of the Journal, 152 k, that the laws of the United States were not readily available to the bar. Mr. Hall asked Congress to make a timely printed promulgation after each session.

My impression is that editors of law journals today have strong convictions that articles in their publications should be specific in character. That is, just what a judicial opinion should be, confined to the issues necessary for a decision of the case. An article on a relatively narrow topic can be sufficiently comprehensive and up-to-date to be useful. The reviews need no longer publish selected cases.

In 1870 the Albany Law Journal was more general in its contents. Its leading article was "On the Study of Forensic Eloquence." Another was "Law and Lawyers in Literature," another, "The Moral Standing of the Legal Profession." In 1868 one journal favored its readers with this notice, names omitted:

[Mr. X] is not only an able and talented young member of the bar, but he is good and pure. He has withstood the temptations and dissipation of Washington society, and remains temperate in habit, healthy in body, and uncorrupted in mind. We hold up his virtue, his honesty, his modesty, his industry, and his close application to business, as an example to be followed by all young men who seek to make themselves distinguished at the bar, and honored by the community in which they live.

The marriage of [Mr. X] to [Miss A], daughter of [Sen. M], on the 24th of September last, is the first announced in the columns of The Legal News. We wish them both a long and happy voyage upon the sea of life.

While agreeing that exhaustive articles or notes upon narrow topics are the most useful contribution the reviews can make to the profession, as a judge I have chosen to speak myself on Constitutional Interpretation, Its Influence Upon American Life, particularly in the field of law — the governmentally enforceable rules controlling the relations of man with his fellows.

Nothing could please me more than to have the opportunity to speak on the law to such an audience as this. The scope of what one may say is quite unrestricted. One is not like a judge, sitting upon a multiple bench who must express his conclusions in terms to secure agreement or write in concurrence or dissent. Nor a trial judge who also must carefully restrict his utterances to the facts of the one case. The errors or even the expression of a general principle that may creep into one's opin-

3. Hall, Treason, 1 AM. L. J. 344, 359 (1808).
ion, without careful analysis, announced with an authority that binds lower courts, can trouble those that must attempt to follow the decisions. So you can well understand how a judge gladly accepts the privilege of expressing views on matters upon which he has reflected, and which I hope will be an interesting topic to you, even though somewhat expansive.

When one begins the study of law, it seems highly compartmentalized — contracts, descent, distribution, corporations, real property. Then one begins to perceive a unifying force, the ideal of justice between man and man. The law becomes the power that directs human relations. Its purpose is to provide the rules that enable men to live together in harmony. For us that function is guided by our Constitution.

In my early days, constitutional courses were not stressed. They were not popular. It seemed more important to memorize the statute on the execution of a valid will so that it would be signed by the testator in the presence of two witnesses who also signed the instrument in the testator's presence and in the presence of one another. But as one's legal experiences accumulate (or perhaps it is the growing complexities of life), it has become more important to perfect one's understanding of how our basic document underlies and controls conclusions that must be reached in the daily controversies of life. The Constitution states our conception of the limitations on the legal adjustments that may be made between our inhabitants to secure an acceptable manner of living. What Lord Wright has called "an impartial arbitrament based on the idea of right."  

Legal conclusions, whether expressed as decisions or dissertations, are not reached by formal logic. Hence the general acceptance of the Holmes' aphorism that the life of the law has not been logic but experience. If judges laid down major premises followed by minor, in syllogistic fashion, law would be as certain as mathematics. It is not. The difficulty arises from the impossibility of stating adequate major premises for syllogistic reasoning. "All employers must pay compensation at common law for damages caused by their employees in the scope of their employment." Such a premise could be easily administered, but it would be unfair. In jurisprudence, the major premise does not have that generality. The uncertain term "negligence" must be added; the fellow-servant, or the contributory negligence, or the assumption of risk rules appear. It took the Federal Tort Claims Act to make the United States liable. Because legal rules do not possess the preciseness of scientific classifications, experience — perhaps we should add, foresight — plays a major role in the development of the law. That is, a logician's indisputable conclusion is not necessary, but the determination may be in ac-

4. Lord Wright of Durky, LEGAL ESSAYS AND ADDRESSES 188 (1939).
cordance with the exceptions to the words themselves that legal judgment from experience and precedent requires. That has been a legal doctrine since Plowden.

And the Law may be resembled to a Nut, which has a Shell and a Kernel within, the Letter of the Law represents the Shell, and the Sense of it the Kernel, and as you will be no better for the Nut if you make Use only of the Shell, so you will receive no Benefit by the Law, if you rely only upon the Letter, and as the Fruit and Profit of the Nut lies in the Kernel, and not in the Shell, so the Fruit and Profit of the Law consists in the Sense more than in the Letter.5

The search for the logically consistent legal system of Austin turns more toward the effect of law — social reality.

That is not to say a judge is free to disregard precedent. None does, but changing conditions do change rules of law and the most careful judges have felt the necessity to make changes from the earliest days.6 It has sometimes been suggested that a decision or an interpretation of the Supreme Court on a constitutional question ought to become a part of the Constitution, not to be changed without an amendment. But this rule would bring a rigidity into that document which is unrealistic in view of the generality of many of its clauses. The better rule must be that stated by Chief Justice Taney in the Passenger Cases:

After such opinions, judicially delivered, I had supposed that question to be settled, so far as any question upon the construction of the Constitution ought to be regarded as closed by the decision of this court. I do not, however, object to the revision of it, and am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported.7

Courts have no techniques for gathering facts to form an ultimate judgment as to values of social policy. The record contains the facts for the litigation. The judge must decide an issue of interpretation from that record, historical observation, and legal precedents in the light of current experience. Nor should a judge undertake the establishment of a public policy through his decisions. The exercise of arbitrary powers, for example, cannot be justified because deemed necessary for good gov-

7. 48 U.S. (7 How.) 283, 470 (1849).
ernment. That was not the basis of the Japanese Curfew Case, though that decision has been subjected to that criticism, for it was based on the Court's interpretation of the war power.\(^8\) Arbitrariness must be judged in the circumstances of its alleged commitment. Nor can judges take decision off the plane of constitutional principle and put it on the plane of social welfare alone.

The sovereign has privileges in litigation because it is a sovereign — such as freedom from suit without consent and freedom from the necessity of producing evidence concerning affairs of state or security. But these are privileges that are opposed by the trend toward equality of rights as between the citizen and his government.\(^9\)

This reasoning requires interpretation of constitutional language somewhat as one would construe other documents or a statute. It cannot be done, as was once suggested, solely by laying the statute by the Constitution and deciding whether the former squares with the latter.\(^10\) Let us take the First Amendment of the Constitution for an example. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; . . . ." Keep in mind, too, that the principles of the First Amendment have been included in the command of the Fourteenth to the States.\(^11\) Although some expressions in the Supreme Court opinions have indicated this language means that laws are not constitutional which affect religion, speech or press, generally the decisions are to the contrary and allow legislation that directly affects religion and speech or press.\(^12\)

The Supreme Court has had continuous difficulty with the interpretation of the clause relating to the abridgment of the freedom of the "Press." There is universal agreement that an essential basis for those freedoms as guaranteed by the First Amendment is the existence of a press that is allowed to print and circulate criticism, suggestion and denunciation without censorship or punishment, limited only by the laws of libel to protect the individual and those for the proper security of

\(^8\) Hirabayashi v. United States, 320 U.S. 81, 102 (1943); Cf. Ex parte Endo, 323 U.S. 283, 300-304 (1944); Korematsu v. United States, 323 U.S. 214, 223 (1944).
the States. It is the application of the accepted doctrine to the circumstances of a charged violation of those limits that continues the difficulties. The same words may be actionable at one time and not at another.\footnote{14}

First Amendment protections are sought by great organizations as well as petty political pamphleteers. When the National Labor Relations Board ordered the Associated Press to reinstate in its employment a rewrite man, one of a group of filing editors, who received, rewrote and filed for transmission, news coming into the AP's New York office, and who was discharged for continuing as a member of the American Newspaper Guild, a labor organization, the employer pleaded and argued that to compel such re-employment abridged the freedom of the press in violation of the First Amendment.\footnote{15} The argument was that to permit a federal agency to direct employment of persons for writing was the same as to direct what they should write. It was called an "indirect limitation upon the press of the country."

Four dissenters in the Supreme Court upheld this view, saying:

If freedom of the press does not include the right to adopt and pursue a policy without governmental restriction, it is a misnomer to call it freedom. And we may as well deny at once the right of the press freely to adopt a policy and pursue it, as to concede that right and deny the liberty to exercise an uncensored judgment in respect of the employment and discharge of the agents through whom the policy is to be effectuated.\footnote{16}

The requirement, said the dissent, is imperative that "Congress shall make no law . . . abridging the freedom . . . of the press." The Court upheld the Labor Board, saying:

The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. . . .\footnote{17}

This interpretation of the First Amendment accords with a judicial attitude of searching for the inner meaning of a constitutional command rather than being satisfied with the words alone.\footnote{18}

The judicial reasoning that is necessarily required for the interpretation...
tion of the Constitution, however, is subject to an important control that is not applied to issues concerning the common law or a statute. This is the doctrine of the avoidance of constitutional determinations, not essential for the decision. If the federal constitutional question has not been raised in the pleadings or trial, it will not be passed upon on appeal. If a statute is reasonably susceptible of two interpretations, that one will be adopted which avoids a test of its constitutionality.

No duty so awesome confronts a judge as the responsibility to finally interpret the constitutionality of a statute or an occurrence about which that complaint is made. The past experience may be contradictory or obscure, and surely the future effect of a constitutional ruling is not always certain. Some clauses— for example, the Contract Clause—are not absolute so as "to be read with literal exactness." The phrase is taken from Home Building and Loan Association v. Blaisdell, a case holding constitutional a state moratorium statute that deferred, under court administration, the dispossession of a delinquent mortgagor, despite the contrary terms of a prior mortgage. Fundamental interests of the State may be affected.

If by the statement that what the Constitution means at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. That case came in early 1934 when the destructive force of the Great Depression was wrecking men's lives, debtors were desperate, and foreclosures often required police for enforcement. There were four dissents. The case cushioned disaster and gave strength to recovery.

From the beginnings of our Nation, constitutional interpretations have played a large part in our economic and political life. The working out of proper relationships between men is the permanent interest of all mankind and all nations. The United States was created to bind its sovereign States into a union with strength for defense, with opportunity for development and with the purpose of guaranteeing liberty and justice to every man. The Constitution specified the structure of our Federal Government, granted it certain powers, expressed the limits on their exercise, and forbade certain rights to the sovereign States. Therefore political and judicial interpretations of the Constitution have had large effect on our changing economy. When one compares our polity with that of contemporary states, it surely is not alone patriotic fervor.
that tells us we may be well satisfied that we did not adopt the rules of absolutism or unrestrained improvisation for the conduct of our affairs. The interpretations of our Constitution that were at their announcement of the greatest interest have covered different clauses and policies. Sometimes the decisions' effect on our society seemed small, but it may be progressive.

The first of the great constitutional issues that arose was one that has continued through the years and probably will continue to the end of time — the various forms of conflict between federal and state power. An early manifestation was the adoption of the Tenth Amendment that powers not delegated to the Nation are reserved to the States or the People. In a few years differing opinions as to its meaning created the nation-wide controversy over the Alien and Sedition Laws. The Annals of Congress summarize the arguments pro and con but perhaps the strongest statements of its opponents appear in the Virginia and Kentucky Resolutions.

The cause of the Resolutions, as you will recall, was the adoption by the Congress under the Federalist leadership of the Alien and Sedition Laws of 1798. The Act concerning aliens authorized the President to deport all of them whom he should judge dangerous to our peace and safety or whom he reasonably suspected of machinations against the Government. The Sedition Act provided punishment for advising or attempting to procure insurrection against, or to impede the operation of any law of the United States. It also provided punishment for defamation of the President, the Congress or the Government. The Acts arose out of Federalist opposition to the activities in the United States of the revolutionary directory government of France in connection with its struggle with England.

While a number of the Justices on circuit upheld the validity of these laws, no case reached the Supreme Court before their repeal. Questions on constitutional grounds would undoubtedly be raised today against the validity of some provisions of these Acts, but I am referring to them solely to call attention to the chief ground of objection by the Republicans, the predecessors of the present-day Democrats.

Notwithstanding the strong feelings aroused among the Republicans (Jeffersonians) of that time by the Federalists' efforts under President Adams to prevent the spread of the egalitarian concepts of the French Revolution into this country, no objection, of course, could be made to the propriety of criminal sanctions to stop interference by threats or incitement with the operation of the Government. The objection, voiced

22. 1 Stat. 570, 596 (1798).
23. 1 Warren, Supreme Court in United States History 159, n. 1 (1926).
by Virginia and Kentucky, to the national law to protect governmental action against interference by violence or otherwise, was not that such interference should be permitted but that the Federal Government had no power to pass laws to prevent disturbances, only power to punish them after their occurrence. That attitude toward the power of the Federal Government was based on the then conviction that "the powers of the Federal Government as resulting from the compact, to which the states are parties" are limited by the plain sense and intention of the instrument constituting that compact as understood by the objectors. Madison, in his report in answer to the criticism of other States, said:

Has the federal government no power, then, to prevent as well as to punish resistance to the laws?
They have the power, which the Constitution deemed most proper, in their hands for the purpose. The Congress has power, before it happens, to pass laws for punishing it; and the executive and judiciary have power to enforce those laws when it does happen. 24

So far as the Resolutions objected to Congress authorizing punishment of seditious utterances in the Sedition Act, Section 2, these objecting States placed that upon the ground of their retention of state authority. Mr. Jefferson's draft of the Kentucky Resolution and the Resolution as introduced by Mr. Breckenridge both said, speaking of the right to criticize:

... no power over the freedom of religion, freedom of speech, or freedom of the press being delegated to the United States, by the Constitution, nor prohibited by it to the States, all lawful powers respecting the same did of right remain, and were reserved to the States or the people; that thus was manifested their determination to retain themselves the right of judging how far the licentiousness of speech and of the press may be abridged without lessening their useful freedom, and how far those abuses which cannot be separated from their use should be tolerated, rather than the use be destroyed; ... 25

The Virginia Resolution of Mr. Madison likewise embodied a strict construction of granted powers so as to exclude federal control of aliens and seditious utterances. 26

Today there are doubtless few who would assert that power to deport dangerous aliens or to punish incitements to overthrow the Government were beyond the power of Congress. Dennis v. United States; 27 Pennsylvania, 341 U.S. 494 (1951).

26. 4 Elliot's Debates 528, 569 (2d ed. 1836); MILLER, CRISIS IN FREEDOM 168 (1951); CONTEMPORARY OPINION OF RESOLUTIONS, 5 Amer. Hist. Rev. 45, 225 (1899).
EFFECT OF CONSTITUTIONAL INTERPRETATION

sylvania v. Nelson and Shaughnessy v. Mezei were decided on the contrary assumption.

The adoption of the Tenth Amendment made it clear that the United States had only delegated powers. Since these powers came from the ratification of the Constitution by the several States, it was quite natural that they should feel that their courts had equal authority with the federal courts to determine the constitutionality of Acts under the Federal Constitution. So in the early nineteenth century, when Chief Justice Marshall's Court had before it the struggle of some States to preserve for their courts determination of the constitutionality of the use of federal power in federal matters affecting both governments, great decisions were handed down which welded the Nation into a unit for matters of national concern and preserved to the States matters essentially local in character. Calder v. Bull had adumbrated the conclusions later announced in Marbury v. Madison and Cohens v. Virginia that the Supremacy Clause made the decisions of the national courts controlling as to the meaning and application of federal law.

McCulloch v. Maryland established national power upon an effective basis when the Court announced that when the end is legitimate, all appropriate means adapted to that end may be employed. This ruling, necessary for the exercise of national sovereignty, was rest on the Necessary and Proper Clause. Upon it has been built the national banking and federal reserve system, as well as the great network of subsidiary financial agencies that made credit available to farmers, home builders, and loan associations, and protected the savings of the people.

As we look back upon that dispute now, we can realize the intensity of conviction that strengthened the Nullification Doctrine and urged the finality of state adjudication in federal constitutional issues. A national government that could not finally decide for itself such problems would have been too weak to survive. Different decisions by individual States would have effectually hamstrung all national progress.

We have just had a striking illustration of the value, yes, the necessity, of one final judicial authority on federal matters. Florida had held unconstitutional as violative of the Privileges and Immunities Clause a Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings, an Act drawn by the National Conference of Commissioners on Uniform State Laws and adopted in over forty states. The Supreme Court reversed the decision on the above-

29. 3 U.S. (3 Dall.) 386 (1798).
30. 5 U.S. (1 Cranch) 137 (1803); 19 U.S. (6 Wheat.) 264 (1821).
stated constitutional clause. This action enables States to force needed
witnesses to appear to testify in criminal cases in a foreign jurisdiction,
free from restriction of the Privileges and Immunities Clause. This is
the basic effect of the decision. Due process difficulties may arise in its
administration, such as the showing of necessity for taking a man from
Florida to California, whether the desired witness must travel in custody,
how much is he to be paid. Such are readily solvable problems when the
basic power of a State to secure necessary witnesses for prosecution is
settled.

The Fourteenth Amendment capped the unified national structure. It
made citizenship sure. While the adoption of the Fourteenth Amend-
ment did not bring all the guarantees of the Bill of Rights to the States —
for example, those of indictment by a grand jury, trial by a twelve-
man jury — it did bring to everyone in every situation that is ruled
by law those protections that are "implicit in the concept of ordered lib-
erty." The Fourteenth Amendment did not limit due process to the
guarantees of the Bill of Rights. Had it been so construed it would
have left the Constitution, without amendment, helpless to protect the
liberties of the citizen except as to the guarantees listed under the situa-
tion existing in the eighteenth century. Surely those who held such a
limited view of constitutional adaptability would have insisted that con-
struction of general phrases must be decided according to the viewpoint
of that era.

We are left, however, with problems of state-federal relationship and
constitutional power adequate to fill the time and employ the talents of
the lawyers of this coming generation. For example, the right of a State
to require testimony under a state immunity statute, notwithstanding it
might subject the witness to federal prosecution, was recently sustained.
Knapp v. Schweitzer. Their solution continues to be of the utmost im-
portance as government enters more into social betterment as well as the
maintenance of order.

When disorder is state-wide or insurrectionary in character, the Gov-
ernor may take charge and call out troops, as he did in Moyer v. Pea-
body, arrest the leaders, and hold them not for punishment but by way
of precaution. As was there said, he may be called upon to justify such

35. Palko v. Connecticut, 302 U.S. 319, 325 (1937); Adamson v. California, 332
use of the executive power and this was actually done in *Sterling v. Con-
stantin.*39 There an interlocutory injunction restrained the Governor of
Texas and its national guard from enforcing orders to close certain oil
wells in face of a federal injunction allowing the flow. In 1932 the
Supreme Court, unanimously, Chief Justice Hughes writing the opinion,
upheld the authority of the injunction in the face of the contention that
the power of the Governor was supreme. He said:

> If this extreme position could be deemed to be well taken, it is mani-
> fest that the fiat of a state Governor, and not the Constitution of the
> United States, would be the supreme law of the land; that the restrictions
> of the Federal Constitution upon the exercise of state power would be but
> impotent phrases, the futility of which the State may at any time disclose
> by the simple process of transferring powers of legislation to the Governor
> to be exercised by him, beyond control, upon his assertion of necessity.
> Under our system of government, such a conclusion is obviously untenable.
> There is no such avenue of escape from the paramount authority of the
> Federal Constitution. When there is a substantial showing that the exer-
> cition of state power has overridden private rights secured by that Consti-
> tution, the subject is necessarily one for judicial inquiry in an appropriate
> proceeding directed against the individuals charged with the transgres-
> sion.40

This has recently been reaffirmed in *Cooper v. Aaron.*41 Without such
federal authority the United States would be only a Common Market, not
a Nation.

Grave constitutional issues may arise in the most unexpected places.
A few years ago the Supreme Court was called upon to review a con-
viction for refusing to allow a garbage inspector without a search warrant
to enter a house for routine examination at a reasonable hour and after
complaint. The court of appeals reversed the conviction on the ground
of unlawful search and seizure. The difficulties the case raised are im-
portant. Under the accepted rule of not passing upon constitutional is-
ues except by necessity, the question was not answered by the Court.
However, this seemingly trivial municipal regulation really has a deep
appeal to many who feel that to permit such entrance for sanitation pur-
poses infringes the citizen's right to privacy, although admitting the de-
sirability of governmental oversight of sanitary matters. A similar ques-
tion is pending now before the Supreme Court.42

With the adoption of the last of the War Amendments, the Fifteenth,
on the right to vote, the Nation turned from the major questions con-
cerning national *vis-a-vis* state sovereignty to the problems arising from

40. Id. at 397-398.
42. See District of Columbia v. Little, 339 U.S. 1 (1950); Frank v. Maryland,
359 U.S. 360 (1959). [Case decided subsequent to Mr. Justice Reed's address.
Entry without warrant upheld. ed.]
the growing industrialism, burgeoning corporations, conflicting govern-
mental regulations. Principles of private rights were combatted by dis-
contents with the world as it was; new social responsibilities pressed for
solution.

A determination that had far-reaching results soon came down —
Santa Clara County, California v. Southern Pacific Railroad— deciding
that the word "person" in Section I of the Fourteenth Amendment in-
cluded corporations under equal protection. The Santa Clara case was
the determinate decision in the California series of important railroad tax
cases passing through the courts to determine the legality of state railroad
assessments and classification. The ruling on the point was short:

Mr. Chief Justice Waite said: The Court does not wish to hear argu-
ment on the question whether the provision in the Fourteenth Amend-
ment to the Constitution, which forbids a State to deny to any person with-
in its jurisdiction the equal protection of the laws, applies to these corpo-
rations. We are all of the opinion that it does.

It occurred after lengthy discussion in the brief for defendant and the
ruling in the Railroad Tax Cases by Justice Field. He there said:

A similar provision is found in nearly all of the state constitutions;
and everywhere, and at all times, and in all courts, it has been held, either
by tacit assent or express adjudication, to extend, so far as their property
is concerned, to corporations. And this has been because the property of
a corporation is in fact the property of the corporators.

Counsel for Santa Clara County conceded that "of course, corporations
are persons, and, of course, they are protected by the Fourteenth Amend-
ment." In 1889 the ruling was held to cover not only equal protection
but also due process. With the Santa Clara decision the Fourteenth
Amendment was established and has been maintained against vigorous
criticism as a shield of equal justice for all, for the stockholder and
homeowner alike.

Between the Santa Clara case and the Great Depression, the history of
the struggle for regulation of industry through the Sherman and Clayton
Acts, the Interstate Commerce and similar enactments, seems today, con-

43. 118 U.S. 394 (1886).
44. Id. at 396.
45. Sanderson, Brief for the County of Santa Clara, No. 464, 1885 Term, p. 28;
Brief for the County of San Bernadino, No. 619, 1885 Term, p. 69.
47. Brief for plaintiff, No. 464, 1885 Term, p. 29.
49. See Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77 (1938); Wheeling
stitutionally speaking, rather uneventful. There was no effective, sustained dissent from the view that legislative bodies can regulate the taxes or operation of public utilities. The litigation over the way and by whom this should be accomplished was voluminous. Administrative law developed as a field of law in itself. The income tax decision created a difficulty that required a constitutional amendment. So with the agitation of liquor with the conflict between the wets and the drys. The railroads had constitutional litigation with States over the responsibility for the elimination of dangerous grade crossings and the apportionment of interstate earnings for state taxation. The problems as to the constitutionality of workmen's compensation were of general interest, but speaking broadly except for cases involving taxation, liquor, and unions, no great interest was generated. The present has adjusted itself to the outcome of the controversies of the pre-depression days.

Attention should be called, however, to the Supreme Court's determination in that period that the Federal Commerce Clause permitted regulation of acts that affected commerce, as well as that commerce itself. This laid foundations for elaborate structures of national economic and social policy. This determination was made in the Shreveport case, 1913, where the Court's opinion by the then Mr. Justice Hughes upheld I. C. C. power over intrastate railroad rates. He said:

While these decisions sustaining the Federal power relate to measures adopted in the interest of the safety of persons and property, they illustrate the principle that Congress in the exercise of its paramount power may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce. This is not to say that Congress possesses the authority to regulate the internal commerce of a State, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled.

Thus, in 1913, there was the genesis of the theory of federal legislative power over local activities affecting commerce "among the States." The recognition that federal power over commerce when exercised could control more than the actual incident of transportation was a weighty factor in enabling the Nation to adjust to the economic problems arising from the depression of the thirties. The National Labor Relations Act, the Securities and Exchange Act, and the Wage and Hour Act used "power over matters affecting commerce" as the constitutional basis for their enactment. They were upheld. A narrower interpretation of the Commerce Clause might well have required a constitutional amendment to accomplish the economic readjustments that enabled the United States to

pass through the change from a conception of government as a police-
man to maintain order to the idea of it as a public spirited enterprise to
aid in those matters that the States cannot adequately accomplish for
themselves.

One of the first cases to bring a new concept of constitutional inter-
pretation into the law was *Adkins v. Children's Hospital*,\(^5\) albeit in the
dissent of Chief Justice Taft. The case involved a statute fixing mini-
imum wages for women and children in the District of Columbia. It was
held unconstitutional as a denial of due process through a denial of the
liberty to make a contract. The beneficiaries of the legislation thus were
guaranteed a freedom to work for the least amount they were willing to
accept although below the "minimum requirement of health and right
living."\(^6\) There appeared what was called a "Brandeis Brief," one that
used economic facts as well as legal precedents to convince the Court.

It was fourteen years later in March, 1937, before that constitutional
decision was overruled in *West Coast Hotel Co. v. Parrish*,\(^3\) Mr. Chief
Justice Hughes writing on the ground that liberty of contract can be im-
paired under the Due Process Clause if reasonable and if adopted in the
interests of the community.

Other Federal Acts intended to aid economic recovery were found
constitutional under other grants of power. For example, the 1935 Social
Security Act gained approval for its taxation features under the provision
of Article I, Section 8, of the Constitution, authorizing excise taxes, and for
federal contributions under the authority of the Federal Government to
provide for the general welfare.\(^4\) Fortunately an earlier decision, de-
claring unconstitutional the Agricultural Adjustment Act, had decided
that expenditure under the General Welfare Clause "for public purposes
is not limited by the direct grants of legislative power found in the Con-
stitution."\(^5\)

The resources of the Constitution for legislation are multiform. After
the A. A. A. of 1933 was declared unconstitutional in the *Butler* case, as
a plan to control agricultural production, the Court upheld the A. A. A.
of 1938 as a regulation of commerce.\(^6\) A similar situation developed
as to the Bituminous Coal Conservation Act of 1935. It was held in
*Carter v. Carter Coal Co.* that the labor "relation of employer and em-
ployee is a local relation" beyond federal power.

\(^{51}\) 261 U.S. 525 (1923).
\(^{52}\) *Id.* at 570 (dissenting opinion).
\(^{53}\) 300 U.S. 379 (1937).
\(^{54}\) Charles Steward Machine Co. v. Davis, 301 U.S. 548 (1937); Helvering v.
Davis, 301 U.S. 619 (1937).
And the controversies and evils, which it is the object of the act to regulate and minimize, are local controversies and evils affecting local work undertaken to accomplish that local result.\(^{57}\)

But the Court a few years later upheld a tax plan for price regulation of coal under the Commerce Clause, which accomplished the result sought by the earlier legislation.\(^{58}\)

The cases upholding these New Deal statutes are examples of the continuous adjustment of the law through the three branches of government to human needs. The law adapts itself to changing social forces. "At the present time as well as at any other time, the centre of gravity of legal development lies not in legislation nor juristic science, nor in judicial decision, but in society itself."\(^{59}\) The law must be related to the spirit of the time.\(^{60}\) Conditions necessarily change theories of proper legal steps though principles of justice remain fast.\(^{61}\)

The depression legislation has now been generally accepted as conforming to the Constitution. With the exception of the constitutional decisions which welded the Confederacy into a united Nation, no series of Supreme Court judgments have had such an effect on our national life. They have made possible a modern constitutional government.

Interest in legal development turns toward other social needs, particularly the protection afforded by the Constitution to the individual in relation to investigation, regulation, and criminal prosecution by the Government. Of course there is no disagreement in the decisions upon the principle that every man must be protected against the abuse of governmental power, whether of force, the third degree,\(^{62}\) denial of counsel,\(^{63}\) mob intimidation,\(^{64}\) denial of opportunity for review,\(^{65}\) or other unfair methods of trial.

In the field of civil rights few issues have had such continuous discussion as criminal contempt of a court. Should it be punishable in all its phases by the judge without a jury? If so, should such authority ap-

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57. 298 U.S. 238, at 308-309 (1936).
59. Eugene Ehrlich, as quoted approvingly in ALLEN, LAW IN THE MAKING (1958); Cf. SUMNER, FOLKWAYS (1907).
60. LASKI, A GRAMMAR OF POLITICS 377 (1925).
ply when the contempt was committed away from the presence of a sitting court? Should there be any statutory limit on the allowable penalty?

The courts have found such power a useful means of enforcing compliance with their orders but there has been a growing doubt in the mind of Congress and some judges as to the propriety of allowing the imposition of a sentence by a judge without a jury for offenses other than interference with court proceedings during court in view of the Sixth Amendment guaranteeing jury trial for criminal offenses. Recently the Supreme Court in a five-to-four decision continued to uphold the constitutionality of such a proceeding. On March 9 of this year in *Brown v. United States*, the Supreme Court again upheld the judge's power to punish for criminal contempt a grand jury witness who refused to testify although he had statutory immunity from personal prosecution. This case relied upon the protection of the immunity statutes whose constitutionality dates from *Brown v. Walker*, reaffirmed in *Ullman v. United States*. While the traditional view of the desirability of such a power in judges accords with the majority decisions, it is clear that the tendency in the courts of recent years is to hold judges to very careful use of such power. The Congress in the Civil Rights Act of 1957 enacted provisions that give certain protections to the accused beyond those constitutionally required. This may mark a beginning of legislative enactments to clarify the differences of views as to the desirability of allowing judges to exercise such broad contempt powers over lawyers, litigants, or witnesses.

To emphasize the impact of the drive to protect the individual against arbitrary or oppressive action of government or governmental officials, reference is made to the decisions concerning the right to travel, those requiring legislative bodies to carefully and clearly advise witnesses of the scope and purpose of inquiries into their actions or associations, the

68. 161 U.S. 591 (1896).
right of an association as a party to the suit to vindicate constitutional rights of its members when they were affected by the litigation, and the right of confrontation and the right to counsel.

The civil rights interpretations of the Constitution are also important in their denial of claimed rights when claimants abuse rights granted them by the Constitution. A striking example is found in the decision on charges of advocating the overthrow of the Government by force and violence without an overt act. There, notwithstanding the plea of the First Amendment, conviction was sustained. Again when labor unions have gone beyond the limits of persuasion and employed violence to accomplish their ends, the Supreme Court has held repeatedly that the right of organization or of speech did not protect their actions.

When with these decisions one considers the growth of the use of habeas corpus to correct alleged violations of civil rights in the prosecution of crime, one cannot doubt the deep impression these civil rights decisions have made on our national life.

Perhaps I have belaboured the obvious in commenting upon the effect of constitutional decisions upon the American way of life. I realize the courts did not create affirmatively the governmental framework under which we now live. That was done by public men in conventions, as legislators and as executives, aided by a knowledge of legal history and contributions of ideas from other minds with a background of law. Much of our Constitution was the result of experience, but the power of the judiciary to declare governmental actions unconstitutional was an American contribution. Nowhere explicitly granted in the Constitution, early events demonstrated its usefulness as a means of determining the validity of action in all departments of government. Other constitutional governments have adopted specifically a comparable method for such determination. Notably France has done so in her new constitution. Although today's economy differs greatly from that of the Confederation, through these decisions the Country has been held to have power to deal with national issues, the States have been maintained as sovereigns to deal with essentially local matters, and the inhabitants have been confirmed in their civil rights.

Growing population, transportation, communications, labor and welfare organizations have forced government into wider activities to maintain healthy human relations among our people. This calls for especial care for the individual. Each generation must protect its own from the loss of their liberty. So far as words can do so, the Constitution protects our liberties but each generation must stand firm to hold the proven gains of the past. To paraphrase an idea of Woodrow Wilson, perhaps the coming generation, to further its ends, needs to depend less on checks and balances, and more on our "coordinated powers." The intention of the Framers of the Constitution as a body upon particular phrases of the Constitution may be hard to determine. But we know their purpose was to establish here a land of equality and opportunity for all. The constitutional interpretations of the past have been designed to further that purpose. None of us who is familiar with the capacity and ambition of the younger men of the law has any doubt that you will carry forward that purpose.