Supreme Court DRAMA

Cases That Changed America

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BUSINESS LAW
FEDERAL POWERS AND SEPARATION OF POWERS
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Law that addresses business activities cover a broad range of economic topics including laws related to contracts, corporations, and trusts and monopolies. Responsibility for governmental oversight has greatly changed through time and is split between various governmental parts. For example, the Supreme Court has had relatively little affect on contract and corporate law where states have the primary responsibility for oversight. The federal government has responsibility in certain situations, such as interstate commerce.

Early History of Corporation and Contract Law

One of the most common types of business worldwide is the corporation. A corporation is a business that has been formally chartered (grant of ownership rights) by a state. It gains its own identity apart from the owners and investors. Chartering corporations has a long history. In the sixteenth century English merchants faced the dangers of the high seas both

from weather and pirates. The shipping businesses sought protection from financial responsibility for cargo losses. As a result, early corporate charters granted by the English monarchy limited liability (financial responsibility) for any losses of corporate property. Many of these early corporations were also given monopoly (one company dominates a particular market) powers over territories and industries that the crown considered critical to English interests. In fact, English law had granted monopolies to specific trade and craft guild organizations by decree even in the Middle Ages. Some of the best known early English corporations in the eighteenth century were the East Indian Company and Hudson's Bay Company. The American colonies, with settlement beginning in the seventeenth century, were also chartered corporations. However, drafted in 1787, the U.S. Constitution makes no mention of corporations. They were primarily subject to state regulation. By 1800 the states had granted about 200 corporate charters.

To enforce business agreements including contracts, the English Parliament passed the Statute of Frauds in 1677. The law established standards for settling legal disputes over contracts. Later after American independence, all U.S. states adopted various forms of the English act establishing the basis for U.S. contract law. The only mention of contracts in the Constitution was the Contract Clause of Article I which reads, "No State shall . . . make any . . . Law impairing the Obligation [responsibility] of Contracts." Early in U.S. history, the Supreme Court applied the Contract Clause in ruling a state law unconstitutional in ***Fletcher v. Peck*** (1810). The Court gave a broad definition to what a contract is. Thus, employers were quite free to contract for labor with their employees and establish agreements with other businesses. Cases involving the Contract Clause were numerous in the nation's early years.

In 1819 the Court in *Dartmouth College v. Woodward* first recognized private profit-making corporations by extending protection of the Contract Clause to corporate charters. The Court considered the corporate charter a form of contract between the state and the private corporation. Protection of corporations by the Clause from unreasonable state regulation provided assurance to individuals to invest money in corporations and spur economic growth of the nation. In *Charles River Bridge v. Warren Bridge* (1837) the Court further defined a balance between a state interest in regulating corporations and protecting corporations from arbitrary (inconsistent) laws.

Freedom to Trade

Efforts by businesses to restrain trade by blocking activities of competitors in some way is as old as profit-making business itself. Early English and later U.S. efforts at restricting such anti-competitive behavior in business was largely based on common law principles dealing with contracts and conspiracies. Approaches varied greatly among the states. The Court ruled in *Swift v. Tyson* (1842) that federal courts should decide business disputes including accusations of restraint of competition using a "rule of reason." The rule of reason worked in the following manner. If state law applied restrictions broadly, the restrictions were often considered illegal. If more limited in time or geographic extent, the restraints might be allowed.

Congress held constitutional powers to regulate interstate commerce (trade or business across state lines) in the Commerce Clause in Article I, Section 8, of the Constitution. The Clause states that Congress could "regulate Commerce . . . among the several states." But the Court long interpreted the clause very narrowly and the federal government had little means to address unfair business practices. The courts through the nineteenth century were very protective of business interests shielding them from most forms of government interference. They supported a *laissez-faire* economy believing the marketplace, not government regulation, should primarily guide economic growth.

Rise of Trusts

Following the Civil War (1861–1865) the rise of industrialization greatly increased the output of U.S. manufacturers, as a result big business expanded rapidly. As the nation's economy changed from agriculture to industry. At the same time, construction of a national railroad system provided cheaper transportation for the increased supply of goods, greatly expanding markets.

As competition heightened because the supply of goods soon exceeded the demand, businesses sought means of protecting profits. However, state corporate laws strictly controlled mergers, forbidding companies to own stock in other companies. An alternative was for businesses to simply join with their competitors to set prices and control production. Therefore, given few legal restrictions over the rules of business competition, companies began to join together forming trusts to protect themselves from competition.

Trusts involved creating one corporation to manage the stocks of the cooperating corporations. Standard Oil became the first trust in 1882. Trusts began accumulating great economic power which they used to fix prices and drive out new competitors through price wars. Such business combinations in various industries, such as oil, steel, mining, tobacco, beef, whiskey, and sugar, led to concentration of capital (available money) and control by only a few people. Trust became a general term applied to national monopolies. Consumers, farmers, and small business owners became powerless. In addition, railroads often gave special treatment in the form of lower rates to their larger customers, the trusts. Yet, even more protections were extended to businesses rather than consumers. The Court ruled in *Santa Clara County v. Southern Pacific Railroad* (1886) that private corporations are "persons" under the Equal Protection Clause of the Fourteenth Amendment. This decision meant that corporations were protected by the Bill of Rights including freedom of speech.

Public demand for government intervention into trusts and unfair business practices that posed a threat to free market competition rose dramatically through the 1880's. In response, states began adopting various laws, but these proved inconsistent and did not apply to interstate commerce which was federal responsibility. Congress responded with two landmark pieces of federal legislation. First, Congress passed the Interstate Commerce Act of 1887 requiring railroads to maintain fair rates and stop their discriminatory practices against smaller customers.

In 1890 Congress passed the Sherman Antitrust Act, the first major national legislation addressing business practices. For the first time, national consistency existed for business regulation. Adopting the notion that competitive decisions made by businesses acting independently is the best guide for the American economy, the act prohibited trusts and other forms of cooperation which could potentially restrain interstate or international trade. In other words, the more independent companies competing with each other the better. Basically, all restraint of trade through cooperation is unacceptable. The act allowed for both criminal and civil prosecution of violators. The act also targeted actions of individual companies acting as monopolies.

Though strongly worded, the act was vague concerning enforcement leaving decisions to the courts and executive branch of government. Enforcement of antitrust law has been heatedly debated since. For example, President Grover Cleveland (1893–1897) did not favor enforcement believing trusts were a natural result of technological

advances and actually kept the nation's economy stable by eliminating waste. Applying the narrow view of commerce, the Supreme Court even ruled in *United States v. E.C. Knight* (1895) that manufacturing was not considered interstate commerce although the goods produced were shipped throughout the United States. Consequently, despite the Sherman Antitrust Act, many key industries were left free to continue operating under trusts out of reach of government regulation. In this business climate, a major wave of mergers resulted in the late 1890s and early 1900s.

Antitrust Movements—A Zig-Zag Process

Bt the start of the twentieth century there was still no coordinated broad structure to the nation's economy. Neither a federal government tax collection system nor a safely regulated stock market existed. Britain remained the dominant player in the world economy and American business was largely controlled by wealthy industrialists. A few hundred large companies controlled almost half of U.S. manufacturing and greatly influenced almost all key industries. In 1901 J.P. Morgan and John D. Rockefeller together controlled 112 corporations consisting of over $22 billion in assets under the trust, Northern Securities Corporation of New Jersey.

Public concern lead to more federal antitrust enforcement efforts. The trustbusting movement took off in 1904 with the Supreme Court's decision in *Northern Securities Co. v. United States* (1904) breaking up a railroad trust. Over forty antitrust lawsuits were filed under President Theodore Roosevelt (1901–1909). Though best known as the "trustbuster," Roosevelt actually sought a middle ground in government oversight of corporate activities not intending to end all corporate mergers, just those causing hardships on consumers. Roosevelt believed the courts were favoring powerful business leaders and that some regulation was needed.

Another important victory for recognizing federal authority came in the ***Swift & Co. v. United States*** (1905) ruling. The Court reversed the previous *Knight* ruling and adopted a "stream of commerce" doctrine. The doctrine significantly broadened the Court's interpretation of congressional powers under the Commerce Clause. All business, including manufacturing, that may have an affect on interstate commerce was subject to congressional regulation.

However, other barriers to regulation of economic matters quickly came forward. The Due Process Clause in the Fifth and Fourteenth amendments states "No person shall be . . . deprived of life, liberty, or property, without due process of law." The courts looked at businesses and pursuit of business success as property and liberty protected from government control under those amendments. The Court began striking down state laws regulating work conditions such as hours and wages as in ***Lochner v. New York*** (1905) using the Due Process Clause to protect freedom of contract. Use of the Due Process Clause in the Fourteenth Amendment largely took the place of the Contract Clause in Article I to negate state laws regulating business activities and the Fifth Amendment blocked federal government regulations.

Nevertheless, antitrust law remained effective. Major Supreme Court decisions in 1911 ordered the break-up of Standard Oil in *Standard Oil Co. of New Jersey v. United States,* a corporate giant controlling railroads, sugar, and oil, and the tobacco trust in *United States v. American Tobacco Co.* These were the two largest industrial combinations in existence. Though the decisions supported the federal government's role in overseeing marketplace economics, they also reaffirmed the Court's use of the "rule of reason" in determining when regulations are too restrictive for specific business practices being questioned.

The continued unpredictability of antitrust rulings led, yet again, to public pressure for more effective trustbusting laws. Congress responded with the 1914 Clayton Act. The act more clearly described prohibited business practices that significantly limited competition or created a monopoly. Under that act companies could not charge different buyers different prices for the same products, or force buyers to sign contracts restricting them from doing business with competitors. It also restricted business mergers between competing companies and companies from buying stock in competing companies. Importantly, the act prohibited application of antitrust law against unions. Congress also passed the 1914 Federal Trade Commission Act creating the Federal Trade Commission (FTC) to tackle unfair business practices. Congress gave the FTC legal powers to issue cease-and-desist orders to combat unfair business activities.

With the economic boom years of the 1920s, political desire to protect business by freeing them from regulations increased. Protection of the freedom of contract rose to its height with decisions such as *Adkins v. Children's Hospital* (1923) overturning a minimum wage law, therefore allowing businesses to set their own wages in contracts with employees.

Given a relatively free hand in dealing with employees, unions, and consumers, corporations flourished in the 1920s but came to a crashing halt in 1929.

Dramatic Shift to Regulation

The stock market crash of 1929 resulted in the collapse of the American economy. Public confidence in business leaders dwindled in the early 1930's during the Great Depression. Federal regulation of business activity expanded considerably with passage of the Securities Exchange Act of 1934 placing securities (documents representing a right held in something, like stocks) under strict oversight. The public wanted greater reliability in what they actually were purchasing interest in, including protection from fraud in common stocks. In 1936 Congress passed the Robinson-Patman Act. Designed to protect small businesses from larger competitors, the act prohibited price discrimination in which companies favor one business over others through the prices they charge. Coupled with President Franklin D. Roosevelt's (1933–1945) attack on monopolies in the late 1930s trustbusting had returned. Eighty antitrust suits were filed in 1940.

In the late 1930s the Court and the nation made a dramatic shift away from emphasizing protection of business to accepting substantial government regulation of economic matters. Passage of the National Labor Relations Act of 1935 promoting labor unions and the landmark ruling in *National Labor Relations Board v. Jones & Laughlin* (1937) marked that transition. The liberty of contract doctrine under the Due Process Clause came to an end, as did use of the Contract Clause by the Court in recognizing states power to regulate private business. The Fair Labor Standards Act of 1938 established wage and hour regulations for all businesses involved in interstate commerce.

Following World War II, two key court decisions came in 1945. In ***International Shoe Co. v. State of Washington*** the Court recognized state authority to regulate out-of-state corporations operating within their boundaries. A lower court in *United States v. Aluminum Company of America* recognized the social, as well as economic, importance of antitrust law. With the Clayton Act ban on mergers rarely applied in courts, in 1950 Congress passed the last trustbusting law, the Celler-Kefauver Antimerger Act, closing some Clayton Act loopholes. Through the 1970s, demand grew for extensive and uniform regulation in the form of a body of federal corporate law. However, the Court in *Santa Fe*

Industries v. Green (1977) reaffirmed the states' primary role in regulating corporations except in matters concerning securities.

Trustbusting continued with the FTC decreasing the Xerox Company's control of the photocopy industry and the break-up of American Telephone and Telegraph (AT&T), accused of restricting competition in long-distance telephone service and telecommunications equipment. AT&T lost control over Western Electric, the manufacturing part of the company, and various regional operating telephone companies. Courts were skeptical of any cooperation between competitors and of mergers.

With the President Ronald Reagan (1981–1989) administration in power, the 1980s brought a major change in acceptance of government oversight. Reagan reduced the FTC budget as a historic wave of corporate mergers occurred in the mid-1980s. By 1990 states began picking up the slack as they increasingly challenged mergers. By the early 1990s federal interest grew again to examine anticompetitive practices. President Bill Clinton (1993–) increased the budgets of the Justice Department's Antitrust Division as 33 lawsuits were filed in 1994. The most publicized antitrust case involved the Microsoft Corporation, one of the most successful companies of the late twentieth century, accused of various monopolistic activities. Yet, another wave of mergers swept the United States in the late 1990s.

The Global Scene

With the end of World War II (1939–1945) in sight, forty-four nations met in New Hampshire to plan ahead for a new global economy. The meeting led to establishment of three important international organizations as special agencies to the United Nations: the International Bank for Reconstruction and Development more commonly known as the World Bank; the International Monetary Fund (IMF), and the General Agreement on Tariffs and Trade (GATT). Other arrangements followed In 1993 the United States, Canada, and Mexico signed the North American Free Trade Agreement (NAFTA) to share labor and resources. In 1995 the World Trade Organization (WTO) was created by GATT for enforcement of international trade and commerce agreements.

By the beginning of the twenty-first century, the age-old question still persisted as to how much government should limit corporate power and activities. Public opinion was mixed as it had been throughout much

of history. In addition, the various international agreements and organizations greatly altered trade and commerce in general. Business issues and disputes became increasingly global in nature. Given increased international competition, public support for government regulation declined. Antitrust concerns also began changing in recognition of new kinds of corporate structures brought on by the transition from a manufacturing to information economy. New technologies challenged past notions of market domination. Ironically, recognition that mergers served to actually increase competitiveness in some global markets rose. Potential economic benefits to the nation and to business efficiency became much more important factors weighed in court decisions concerning both government and private interests.

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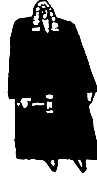

Fletcher v. Peck
1810

Appellant: Robert Fletcher

Appellee: John Peck

Appellant's Claim: That a 1796 act passed by the Georgia legislature could not take away property rights gained by land companies under the Yazoo Land Act of 1795.

Chief Lawyer for Appellant: Luther Martin

Chief Lawyers for Appellee: John Quincy Adams, Robert G. Harper, Joseph Story

Justices for the Court: Samuel Chase, William Cushing, William Johnson, Henry B. Livingston, Chief Justice John Marshall, Thomas Todd, Bushrod Washington

Justices Dissenting: None

Date of Decision: March 16, 1810

Decision: Ruled in favor of Fletcher by finding that a legislature could repeal or amend its previous acts, but could not undo actions that legally occurred under the previous act.

Significance: The ruling marked the first time that a state law had been overturned by the U.S. Supreme Court. The case was also the first affirming the Contract Clause of the U.S. Constitution. The solid legal standing of state land grants established by the Supreme Court reassured the public about purchasing lands as they became available as the United States expanded westward.

Fletcher v. Peck

North America had long been settled by Native Americans before arrival of the first European colonists on the East Coast in the sixteenth century. Through conquest and agreements, the colonies increasingly assumed control of Indian lands. As part of this westward push, the state of Georgia took from the Indians a large thirty-five million acre region to its west in the Yazoo River area. Known as the Yazoo Lands, much later it became the states of Alabama and Mississippi. But in 1795 the Georgia legislature divided the area into four tracts and sold them to four land companies for a modest total price of only $500,000, or only one-and-a-half cents an acre. This was a good deal for the companies even at 1790s prices. The Georgia legislature overwhelmingly approved this land grant (a transfer of property to another), known as the Yazoo Land Act of 1795. Only one legislator voted against it. The four land companies then began dividing their lands into smaller tracts to sell at considerably higher prices for a substantial profit.

Public outrage erupted when stories of secret deals and partnerships soon came to light. Some of the legislators had been stockholders of the four land companies. In addition, almost every state legislator, two U.S. senators, and a number of judges including Supreme Court Justice James Wilson, had received bribes from the companies including a promised share of the expected large profits. A copy of the act was publicly burned and evidence of the law was erased from public records. The public ousted the corrupt legislature and voted in a new one.

Responding to the public outrage over the fraud and corruption, the new legislature passed a bill in 1796 canceling all property rights gained from the original sale and seeking to regain the lands. Refunds at the original purchase price were offered, but the new owners refused to return the land.

Meanwhile, parcels of the land were being sold and resold to others not involved in the scandal. Questions about the legality of the sales continued to grow. Because of the 1796 act, did the new owners hold legal rights to the lands they had purchased? Because many of the new owners lived far from Georgia in New England, it became a national issue and subject of debates in Congress.

John Peck's Property

One piece of the property of about 15,000 acres passed through several hands in the late 1790s until John Peck of Massachusetts acquired it in

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1800. Three years later Peck sold the property for $3,000 to Robert Fletcher, a citizen of New Hampshire. With the 1796 act in mind, Peck wrote in the sales contract that all previous sales were legal. The contract read,

> **[T]he title to the premises [lands] as conveyed [sold] by the state of Georgia, and finally vested in [owned by] . . . Peck, has been in no way constitutionally or legally impaired [limited] by virtue of any subsequent [later] act of any subsequent legislature of the . . . state of Georgia.**

This section meant that despite the 1796 act, Peck still claimed a legal right to sell the land to Fletcher.

Fletcher became increasingly uncomfortable with the sale. Fearing losing both the land and his money, he filed suit in Circuit Court against Peck to challenge the 1796 act. Fletcher claimed that either the contract was not valid or the 1796 act canceling the original sale of the Yazoo tract was unconstitutional. If the act was constitutional, then it was not Peck's land to sell.

Arguments focused on a major issue of which principle should take priority: the state legislature's and public's desire to reverse the land deal, or protection of individual property rights. The Circuit Court ruled in favor of Peck that the sale was valid. Fletcher appealed the decision to the U.S. Supreme Court. The arguments were presented to the Court on February 15, 1810. One of Peck's lawyers was thirty-year-old Massachusetts attorney Joseph Story who, two years later, would become the youngest nominee in the Supreme Court's history.

Recognition of Contracts

The legendary Chief Justice John Marshall (1755–1835), writing for the Court on March 16, stated that the main question was if the 1796 law could negate all property rights established under the 1795 act. Marshall, although deploring the extensive corruption in the earlier state legislature, wrote that contracts signed under the original law must be accepted as valid. Motives of the legislators could not be formally considered by the Court and certainly were not the responsibility of those buyers who were following the law. Regarding the effect of the 1796 act on the 1795 act, Marshall first accepted the general principle that "one legislature is competent to repeal any act which a former legislature was competent to

pass." However, it was clearly a different matter about a legislature undoing actions of people taken under the previous act while it was valid.

Importantly, Marshall considered the original land grant a type of contract. Therefore, the U.S. Constitution's Contract Clause found in Article I, section 10 applied. The section reads, "No State shall . . . pass any . . . ex post facto law [see sidebar], or Law impairing the Obligation [responsibility] of Contracts . . . " This clause, according to Marshall, applied to all parties, including states and individuals.

The right to land ownership created by a contract cannot be so readily taken away. The government could not seize property honestly acquired without just compensation (fair payment) for the loss of property. The intent of the Contract Clause, wrote Marshall, was to restrict state power over the property of its citizens. The 1796 law was an unconstitutional *ex post facto* law for penalizing one person "for a crime not committed by himself, but by those from whom he purchases." In spite of the profits dishonestly made by the land speculators, states could not negate the later contracts of sale. Political corruption charges were more a matter for the state government, not the Supreme Court.

A Historic Ruling

Peckham, coming out of one of the biggest scandals in Georgia history, was historically important for at least five reasons. First, it was the first Supreme Court ruling to strike down a state law. Secondly, the ruling established a protective attitude to commercial interests (businesses) by the courts. Thirdly, the Court recognized the Contract Clause as a key tool to limit state regulation of economic matters involving contracts and property rights. Federal protection of property rights, often using the Contract Clause, led to overturning numerous state laws through the next century. Fourth, the importance of contracts in American life was established. Lastly, the ruling also established that grants, such as state land grants, are the same under the law as contracts between private individuals.

The decision was considered a major defeat to those advocating stronger state power. The concept of contracts and their importance to property rights was further developed almost a decade later in *Trustees of Dartmouth College v. Woodward* (1819). With the public assured of federal protection of individual property rights and contracts including state land grants, large scale economic development across the nation proceeded as the nation spread across the West for the next half century.

EX POST FACTO LAWS

The term "ex post facto" comes from Latin meaning "after the fact." *Ex post facto* laws are, therefore, laws making certain actions a crime after the actions had already occurred. They have been historically considered unfair. *Ex post facto* laws are prohibited by the U.S. Constitution in Section 9 of Article 1 against federal actions and Section 10 against state actions. In other words, a legislature does not have the power to punish a person after an act has been committed if it was not illegal at the time. Similarly, laws cannot increase the penalties for crimes already committed. It is also illegal to change the rules of evidence to make it easier to convict a person for a crime committed prior to the new law.

For example, laws making parole requirements for convicts tougher for certain crimes cannot be applied to persons who had already committed the crime. Similarly, the creation of war crimes laws after World War II to try German leaders for actions during the war led to considerable legal opposition.

A broader view of the liberty to contract came later in the nineteenth century in other Court decisions which further limited state regulation of economic matters. Use of the contract clause and other constitutional clauses to limit state regulation ended by the 1930s. By 2000, federal and state regulation of contracts was rarely limited by the courts.

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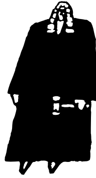

Allgeyer v. Louisiana 1897

Petitioner: E. Allgeyer & Co.

Respondent: State of Louisiana

Petitioner's Claim: That states restricting the right of companies to contract with whom they choose violates the Fourteenth Amendment's Due Process Clause.

Chief Lawyer for Petitioner: Branch K. Miller

Chief Lawyer for Respondent: M. J. Cunningham

Justices for the Court: David J. Brewer, Henry B. Brown, William R. Day, Chief Justice Melville W. Fuller, Horace Gray, John Marshall Harlan I, Rufus W. Peckham, George Shiras, Jr., Edward D. White

Justices Dissenting: None

Date of Decision: March 1, 1897

Decision: Ruled in favor of Allgeyer and reversed a lower court ruling by finding that the Due Process Clause includes an unwritten liberty of contract that cannot be restricted by state law.

Significance: The decision created a new liberty under the Fourteenth Amendment, the liberty of contract. For the first time, the Court ruled a state law unconstitutional because it denied a person the right to make a contract. States were largely blocked from passing laws protecting their citizens and the general public from unfair or unsafe business practices for the next forty years until the Court shifted philosophy in 1937.

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Through much of the nineteenth century, the federal government allowed states to freely regulate business activities within their borders. When laws were struck down by the U.S. Supreme Court for being unreasonable interference with business activities, it commonly used the Constitution's Commerce Clause or the Contracts Clause to justify its action. Regarding the Contract Clause, Article I, Section 10, Clause 3 of the U.S. Constitution states that "No state shall . . . pass any . . . law impairing the obligation of [responsibility to honor] contracts." The Commerce Clause is located in Article I, Section 8 and states that "The Congress shall have Power . . . To regulate Commerce [business activity] . . . among the several States . . . "

Toward the end of the nineteenth century trade and industry were greatly expanding across the nation. As the states began passing more laws to protect their citizens and businesses, the courts became interested in protecting the economic and property interests of the new industries and related business. These interests included the right of employers and employees in determining the work conditions and their employment relationship to one another.

To protect insurance companies in the port of New Orleans from outside competition, the Louisiana legislature in 1894 passed Act No. 66. The act made it illegal for individuals and companies to sign insurance contracts by mail with companies operating outside the state of Louisiana. The act stated,

> **Be it enacted by the general assembly of the state of Louisiana, that any person, firm or corporation who shall fill up, sign or issue in this state any certificate of insurance under an open marine policy . . . for . . . insurance on property . . . in this state [with] . . . any marine insurance company which has not complied in all respects with the laws of this state, shall be subject to a fine of one thousand dollars for each offense . . . for the benefit of the charity hospitals.**

Cotton for Europe

E. Allgeyer & Co. was a New Orleans cotton exporter that shipped cotton across the Atlantic Ocean to ports in Great Britain and other European countries. In 1894 Allgeyer purchased $200,000 of insurance

coverage from the Atlantic Mutual Insurance Company of New York to guard against possible losses while shipping cotton. Atlantic Marine had no agent or place of business actually located in Louisiana. The contract was signed in New York. In preparation for shipping a hundred bales of cotton to Europe, Allgeyer mailed a notification to Atlantic Marine as the insurance contract required. In reaction, the state of Louisiana filed suit against Allgeyer in December of 1894 charging it had violated Act No. 66. Claiming that three violations had occurred, the state sought a $3,000 fine.

Allgeyer, in defense, claimed that the act was unconstitutional, depriving them of property without due process of law. Allgeyer asserted that since its business partner, Atlantic Mutual, was a New York company with offices in New York, then the insurance contract was actually a New York contract, not Louisiana. Further, Allgeyer claimed the Constitution protected the right to make contracts in other states.

The district court, although not necessarily agreeing with Allgeyer's arguments, nevertheless ruled against Louisiana. The court made several observations before issuing its decision. First, it did not deny that the state had authority to regulate companies conducting business within its boundaries. Furthermore, it recognized the validity of Article 236 of the Louisiana Constitution. The article prohibited insurance companies from other states doing business in Louisiana unless they had an actual place of business and authorized agent in the state. Regarding Allgeyer's contract, the court asserted that once it was signed in New Orleans, it became valid contract under New York law, even with the cotton still in Louisiana. But, to be legal in Louisiana, Atlantic Mutual must have purchased a license of the state and employed an agent in the state. Despite the uncertain nature of Allgeyer's insurance contract, the authority of the state, and the state's constitution, the court concluded the act violated Allgeyer's constitutional rights and overturned it.

Louisiana appealed the decision to the Louisiana Supreme Court which overturned the district court's decision. The court ruled that in violation of Act No. 66, Allgeyer, a Louisiana company, had indeed contracted for insurance for cotton located within Louisiana with an out-of-state company. The court found Allgeyer guilty of one violation of Act No. 66 and fined it $1,000. Allgeyer appealed the decision to the U.S. Supreme Court.

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Liberty of Contract

In a unanimous decision, the Court reversed the Louisiana Supreme Court's decision and ruled Act No. 66 unconstitutional. Justice Rufus Peckham, in delivering the Court's ruling, defined a broad new unwritten right protected by the Due Process Clause of the Fourteenth Amendment, the liberty of contract. Peckham wrote,

> **the 'liberty' mentioned in that amendment . . . is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation [hobby]; and for that purpose to enter into all contracts which may be proper, necessary, and essential.**

In regard to the specific facts of this case, Peckham noted,

> **The contract in this case was . . . a valid contract, made outside of the state [in New York], to be performed outside of the state [on the Atlantic Ocean], although the subject was property temporarily within the state [Louisiana]. As the contract was valid in the place where made and where it was to be performed, the party to the contract . . . must have the liberty to do that act and to give that notification within the limits of the state [of Louisiana].**

Because Allgeyer had not actually signed the contract in Louisiana, the company had not violated Act No. 66. Only a notification had actually been sent in the mail from New Orleans. Furthermore, neither Allgeyer nor Atlantic Mutual had violated the state constitution because Atlantic Mutual had not conducted business in Louisiana. Nonetheless, Peckham held the act was unconstitutional because it inappropriately interfered with Allgeyer's liberty to sign a contract to insure its cotton shipment with whomever it chose. Peckham concluded, "In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, must be embraced [accepted] the right to make all proper contracts in relation thereto . . . "

RUFUS WHEELER PECKHAM

Rufus Wheeler Peckham (1838–1909) was born in Albany, New York to a prominent family of lawyers and judges. His law training was by studying in his father's law firm. Peckham received an honorary degree from Columbia University in 1866. His public career in law began in 1869 as the district attorney for three years for Albany County, New York. After over a decade of private practice, in 1883 he was elected to the New York Supreme Court and in 1886 to the New York Court of Appeals. Peckham was nominated to the U.S. Supreme Court by President Grover Cleveland (1885–1889; 1893–1897) in 1895. His brother, Wheeler H. Peckham had been nominated the previous year, but was not approved by the U.S. Senate. Rufus Peckham, however, was readily approved.

With many corporate clients in his private practice, Peckham became well known for favoring property rights and contract rights on the Court. His two opinions for the majority in *Allgeyer v. Louisiana* (1895) and ***Lochner v. New York*** (1905) gained reputation through the years as substantial misinterpretations of the Fourteenth Amendment. Promoting an economic liberty, the rulings had far-reaching implications by leaving businesses essentially free to treat their employees as they desired. Peckham served on the Court until his death in October of 1909.

A Decline in State Powers

The *Allgeyer* decision marked a significant decrease in the power of states to regulate business activities within their boundaries. It also increased federal oversight of state government activities through the courts. The Due Process Clause for the first time was expanded to protect business activities from government regulation. Rather than protecting individual rights as intended when the Fourteenth Amendment was adopted in 1868 following the American Civil War (1861–1865), it now replaced the Commerce and Contract Clauses in protecting commercial activity. The decision was further developed in *Lochner v. New York*

(1905) which struck down a New York law setting maximum bakers hours and setting sanitation standards.

Legislation regulating economic activities and protecting workers was discouraged for the next four decades until 1937 when the Court changed course again becoming much less protective of contract and business rights.

Suggestions for further reading

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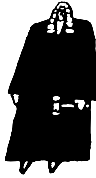

Swift and Co. v. United States 1905

Appellant: Swift and Company

Appellee: United States

Appellant's Claim: That the Sherman Anti-trust Act of 1890 was vague and did not apply to businesses operating solely within a single state

Chief Lawyers for Appellant: John S. Miler and Merritt Starr

Chief Lawyers for Appellee: William H. Moody, U.S. Attorney General, and William A. Day

Justices for the Court: David J. Brewer, Henry B. Brown, William R. Day, Melville W. Fuller, John Marshall Harlan I, Oliver Wendell Holmes, Joseph McKenna, Rufus W. Peckham, Edward D. White

Justices Dissenting: None

Date of Decision: January 30, 1905

Decision: Ruled in favor of the United States by finding that the actions of Swift and Company affected interstate commerce and were an integral part of a larger interstate meat-packing industry.

Significance: This decision greatly expanded federal power under the Commerce Clause of the U.S. Constitution. The ruling held that even locally operating businesses that made products eventually sold in interstate markets could be subject to federal regulation.

ANTITRUST, BUSINESS, CORPORATE AND CONTRACT LAW

Before the birth of the United States, English common law restricted business activity very little. By the mid-nineteenth century. Congress and the courts began restricting certain business efforts, known as restraint of trade, which limited competition. But, if specific trade restraints were limited in the time they were used or carried out in a small area, they were often allowed. A *laissez-faire* approach to business conduct persisted meaning that little governmental interference existed over business practices.

The Rise of Trusts

A rapidly expanding national railroad network spurred increased industrialization (growth of large businesses manufacturing goods) in the 1870s and 1880s. Prospects of ever-increasing profits led many businesses to join together in business combinations with the intent of forcing other, usually smaller, competitors out of business. These businesses combinations were called trusts. The public considered many actions of the trusts unfair. Trusts rose to dominate certain industries including sugar, oil, steel, meat-packing, and tobacco.

To many, trusts threatened the idea of free-enterprise in which businesses freely compete with one another. Public demand for government intervention into trusts dramatically increased through the 1880's. States tried adopting various laws to control trust activities, but these proved inconsistent and could not apply to interstate commerce (business activity between states) in which the trusts largely operated. The Commerce Clause of the U.S. Constitution reserves the responsibility to regulate interstate commerce to Congress, not the states. Congress, responding to the public outcry against the power of trusts, passed the Sherman Antitrust Act in 1890. The act, the first major national legislation addressing business practices, prohibited every "contract, combination in the form of trust . . . or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations."

Though strongly worded by prohibiting all restraint of trade through business cooperation, the act was vague leaving enforcement to the courts and executive branch of government. President Grover Cleveland (1885–1889; 1893–1897), believing trusts were a natural result of technological advances and good for eliminating waste, was not inclined to enforce the act. Likewise, the very conservative U.S. Supreme Court of the time preferred not to inhibit business activities of employers. The first rul-

ing involving the Sherman Act, *United States v. E.C. Knight Co.* (1895), provided a very narrow interpretation of what the court considered interstate commerce. Manufacturing was not considered interstate commerce thus leaving many key industries free to continue operating under trusts.

Swift Meat Packers

One meat packing company in operation at the beginning of the twentieth century was Swift and Co. Though Swift had slaughterhouses in various states including Illinois, Nebraska, Minnesota, and Missouri, they did not consider themselves an interstate business since each plant operated independently of other Swift plants. Strategically located at major railway terminal locations, each plant purchased livestock at the local stockyards, slaughtered the purchased stock in its facility, then sold the meat products to local purchasers. An interstate character to the process existed, however. The livestock was normally shipped thousands of miles from distant states to the stockyards where Swift would purchase them. Also, the local purchasers of Swift products would sell to wholesale meat companies, often located in other states, thus shipping the fresh meat on interstate railroads.

Swift and Co. had become very successful in the meat-packing industry, controlling about 60 percent of the national fresh meat market. Some of its methods to achieve that success were dishonest, however. For example, forming a beef trust through extensive agreements with other meat-packing houses they would manipulate (fix to their satisfaction) the interstate price of livestock. For example, they would send several buyers to a livestock auction and appear to compete against each other for the price. Though sometimes trying to manipulate low prices, other times they tried to make prices appear high for livestock. When word would get out to other livestock companies that high prices were being bid in a certain town, they would ship their livestock there to get higher profits, often flooding a particular market with livestock. The beef trust would then let the prices fall sharply allowing them to purchase the livestock at a bargain price. As a result, Swift and the beef trust would get much of its livestock at artificially-reduced prices, then sell its products at regular prices for a big profit. Through this means, they controlled livestock and meat prices in many stockyards and slaughterhouses around the nation.

Upon discovering Swift's auction practices, the United States filed charges of conspiracy to restrain trade under the Sherman Antitrust Act. The case was first heard in federal district court which ruled in favor of the United States. Swift then appealed to the U.S. Supreme Court.

ANTITRUST, BUSINESS, CORPORATE AND CONTRACT LAW

A Stream of Commerce

Arguments were presented before the Court on January 6 and 7 of 1905. Swift argued that the Sherman Antitrust Act was too vague. How could companies know what activities could be considered illegal? Besides, all of its business activities of purchasing, processing, and selling was local. Only a few miles distance separated the stockyards from its slaughterhouses and meat-packing plants. Consequently, it was not interstate commerce and the federal government had no authority to regulate it. Regarding the bidding practices, Swift argued that livestock sellers always had the option of either not selling or accepting the sometimes artificially high bids. The government argued that even though Swift was intrastate (within a single state) in operation, its effects on the nation's economy were interstate in character.

Justice Oliver Wendell Holmes, Jr., writing for a 9–0 unanimous Court, presented the opinion on January 30. Holmes ruled that clearly Swift was trying to create a monopoly of the meat-packing industry through unfair means. The livestock Swift purchased had to be shipped interstate to supply Swift plants with meat, and Swift had to rely on meat markets in other states to sell its products. Acknowledging the vagueness of the Sherman Antitrust Act, Holmes sought to more clearly define through the ruling the kinds of actions considered illegal restraint of trade. Holmes sought a more "practical" concept of interstate commerce than the courts had previously offered. Holmes wrote,

> **When cattle are sent for sale from a place in one state, with the expectation that they will end their transit [trip], after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part . . . of such commerce.**

The doctrine (idea) of "stream of commerce" was thus applied for the first time. From the time livestock was purchased until the meat products were sold, Swift was part of a larger stream of commerce that involved interstate business. The meat-packing industry clearly relied on a flowing interstate process, regardless if some of its parts might only operate in a single state. Congress, Holmes asserted, has authority to regulate business any where along that stream.

TEDDY ROOSEVELT AND TRUSTBUSTING

By the time Theodore Roosevelt (1901–1909) first became President, only a few hundred large companies controlled almost half of U.S. manufacturing. Forming large trusts, they greatly influenced almost all key industries. The "trustbusting" movement briefly took off in 1904 with the Supreme Court's decision in *Northern Securities Co. v. United States* breaking up a railroad trust. Quickly, over forty more antitrust lawsuits were filed under Roosevelt. Though gaining the reputation as "trustbuster," Roosevelt actually sought a middle ground in government oversight of corporate activities. He, as did his successor President William Howard Taft (1909–1913), used the Sherman Act to force greater social accountability by businesses. Roosevelt did not intend to end all business combinations, only to regulate those considered grossly unresponsive to consumer needs.

The 1905 *Swift* decision came as Roosevelt was trying to shift emphasis from trustbusting to regulation of industry. As a result, the ruling was not applied often to other cases until the late 1930s when the Court began supporting broad federal powers under President Franklin D. Roosevelt's economic recovery program.

Regarding the manipulation of meat market prices, the temporary artificial rise followed by a sharp drop of prices clearly effected interstate commerce. Such manipulation of the free market price of livestock directly restrained trade.

Commerce Clause Expanded

Swift was the most important case concerning the beef trust ever heard by the Court. Abandoning its previous narrow interpretation of interstate commerce, the stream of commerce doctrine became the basic idea later used for expanding federal power under the Commerce Clause. Congress could regulate businesses involved to any degree in interstate commerce. Yet, for the economic boom years of World War I (1914–1918) and the

1920's, political interest in regulating business greatly diminished. President Franklin D. Roosevelt's (1933–1945) New Deal programs of the early 1930's actually encouraged industrial collaboration to boost economic recovery from the Great Depression. Not until Congress passed the Robinson-Patman Act in 1936 was the federal attack on monopolies and trusts renewed. As was the issue in *Swift,* the act was designed to protect small businesses from larger competitors.

Suggestions for further reading

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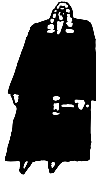

Standard Oil v. United States 1911

Plaintiff: Standard Oil of New Jersey

Defendant: United States

Plaintiff's Claim: That Standard Oil was not in violation of the Sherman Anti-trust Act by conspiring to restrain trade.

Chief Lawyer for Plaintiff: John G. Milburn

Chief Lawyer for Defendant: Frank B. Kellogg

Justices for the Court: Rufus R. Day, John Marshall Harlan I, Oliver Wendell Holmes, Charles E. Hughes, Joseph R. Lamar, Horace H. Lurton, Joseph McKenna, Willis Van Devanter, Chief Justice Edward D. White

Justices Dissenting: None

Date of Decision: May 15, 1911

Decision: Ruled in favor of the United States by affirming a lower court order that Standard Oil be broken apart.

Significance: Although supporting the break up of Standard Oil, the Court through the "rule of reason" left open the possibility that some cooperation in restraining trade among companies may be legal. The question of the government's role and power in restricting private economic activities continued into the twenty-first century with the issue of Microsoft business practices making headlines in the year 2000.

ANTITRUST, BUSINESS, CORPORATE AND CONTRACT LAW

Following the American Civil War (1861–1865), industrialization (growth of large businesses manufacturing goods) increased at a rapid pace. Construction of a national railroad system created cheaper transportation which greatly expanded markets allowing industrial productivity (ability to make more goods) to grow. As competition became more intense, companies sought ways to protect or expand profits. State laws in the late nineteenth century largely restricted economic growth through company mergers. Therefore, one of the more attractive means available for companies to expand profits was to simply collaborate (cooperate) with competitors to set prices and control production. These cooperative relationships often involved creating trusts in which a company would be created to oversee management of the cooperating companies. In 1882 Standard Oil of New Jersey became the first such trust. Trusts would fix prices and drive out new competition through price wars. Trusts in various industries, such as tobacco, beef, whiskey, and sugar, led to major concentrations of capital (money) within those trusts. Eventually, trust became a general term applied to national monopolies where only a few people controlled a major portion of the U.S. economy. Legislatures and the courts focused on protection of new businesses trying to enter markets. The freedom to contract dominated all legal considerations, not individual civil rights or consumer protection.

Standard Oil

Public concern over the practices of Standard Oil grew in the 1880s and continued to swell following passage of the Sherman Antitrust Act of 1890. The act prohibited unfair business practices designed to drive out competition but the government and courts were not willing to apply it very aggressively. By 1906 Standard Oil had become a monopoly, controlling over 80 percent of oil production in the United States. Majority ownership of the company was led by John D. Rockefeller (1839–1937). A $70 million dollar investment, establishing the company in the early 1880s, earned $700 million of profits in only fifteen years.

With little competition for some products, such as kerosene, Standard Oil charged excessive prices leading to remarkable profits. For products where competition did exist, Standard Oil could afford to drastically cut prices driving the smaller companies out of business. In addition, Standard Oil offered rebates (money refunds) to oil producing companies, enticing them to ship their oil only through Standard Oil pipelines. All of these practices are unfair restrictions on interstate com-

merce (conducting economic trade or business across state lines). A phrase often applied to these practices is "restraint of trade."

Although evidence was uncovered describing the unfair practices Standard Oil used in restricting competition, the U.S. government long refused to act. Finally, under President Theodore Roosevelt's (1901–1909) second term of office, public pressure resulted in an investigation of Standard Oil's practices and a lawsuit. The government charged that Standard Oil violated the Sherman Antitrust Act by illegally restricting interstate commerce. Standard Oil responded that many of the individual companies controlled by Standard Oil were actually competitive on their own, relatively free of the overarching trust company. Roosevelt's successor as President, William Howard Taft (1909–1913), inherited the case and kept pursuing prosecution.

Argued for eight months in St. Louis Federal Circuit Court, a decision was issued on November 20, 1909. Judge Walter Henry Sanborn ruled that indeed Standard Oil acted inappropriately to restrict interstate commerce. Although Standard Oil's individual companies might be capable of independent competition, actually they were sufficiently controlled by the Standard Oil trust company to prevent competition. Through this control, Standard Oil had tried to monopolize the petroleum industry. Sanborn wrote that "the combination and conspiracy in restraint of trade and its continued execution which have been found to exist, constitute illegal means by which the conspiring defendants combined, and still combine and conspire to monopolize a part of interstate and international commerce."

The penalty posed by Sanborn, however, was far from damaging for those holding the economic power in Standard. Standard Oil's controlling interest over the various companies was broken up, but that interest was merely shifted to Standard Oil's small group of primary stockholders. Consequently, little actually changed.

Rule of Reason

Standard Oil appealed the decision to the U.S. Supreme Court. Chief Justice Edward D. White, delivered the Court's 9–0 lengthy unanimous opinion in favor of the United States upholding the lower court's decision. White first found that the vagueness of the Antitrust Act "necessarily called for the exercise of judgement." White then proceeded to introduce a standard to be used in outlawing specific monopolies. This soon-

to-be-controversial standard was called the "rule of reason" in outlawing specific monopolies. In a previous case involving the Sherman Antitrust Act, *Northern Securities Co. v. United States* (1904), White and three other dissenting justices had tried to introduce the rule of reason, but the majority of five in the case held that the act prohibited all restraints of trade. White had claimed it only prohibited trade restraints considered unreasonable.

In ***Standard Oil,*** White asserted the rule had long been part of English common law. The rule stated that if the company could justify a restraint of trade as a necessary part of a business transaction, and it was considered reasonable by the participating companies and the general public, then it would not be considered illegal. It would be up to the courts to decide on each case. White added that to ban all restraints of trade would cripple the U.S. economy and that restraint of trade was a key element of most business combinations.

Though agreeing with the decision against Standard Oil, Justice John Marshall Harlan opposed White's rule of reason. Harlan believed the rule would be difficult to apply in future cases consistently. As a result, companies and the public would be left confused about what was considered legally right or wrong in business. Harlan, still believing that all restraint of trade was illegal under the Sherman Act, wrote,

> **the Court has now read into the act of Congress words which are not to be found there, and has thereby done that which it [had judged] . . . could not be done without violating the Constitution, namely, by interpretation of a statute, changed a public policy declared by the legislative department.**

The Ongoing Debate of Monopolies

The individual companies resulting from the break-up of Standard Oil included such major gasoline suppliers as Exxon, Amoco, Mobil, Chevron, and Standard of California. Another trust broken up by a Supreme Court decision in 1911 was the American Tobacco Company. The decisions affirmed (supported) the federal government's role to oversee marketplace economics by determining when trusts restrict competition and restrain trade.

Ironically, although the decision went against Standard Oil, the rule of reason actually opened the door in following years for other large cor-

TRUSTBUSTING IN THE LATE TWENTIETH CENTURY

Public concern over trusts mounted again following World War II (1939–1945). From the 1950's into the 1970's, the federal government aggressively pursued the issue of powerful trusts. An example was the Federal Trade Commission's successful efforts at decreasing the Xerox Company's control of the photocopy industry. Trustbusting in the 1980's and 1990's shifted focus to policing bad conduct of companies rather than actually breaking up monopolies. Some notable trustbusting, however, included the break-up of American Telephone and Telegraph (AT&T). Charged with restricting competition in long-distance telephone service and production of telecommunications equipment, AT&T lost control over Western Electric, the manufacturing part of the company, and various regional telephone companies.

Opposed to government restriction of business activities, President Ronald Reagan (1981–1989) reduced trustbusting efforts as a historic wave of corporate mergers occurred in the mid-1980's. By 1990 the tide again shifted. States began to increasingly address monopolistic mergers and soon federal interest grew again in examining competitive practices. President Bill Clinton (1993–) once again increased federal antitrust efforts as thirty-three lawsuits were filed in 1994. The most important antitrust case of the 1990's involved the computer software company, Microsoft, accused of various monopolistic activities. As another wave of mergers once again swept the United States in the late 1990s, the age-old question still lingered, does government have a legal right to limit commercial power. The American public continued holding conflicting attitudes over business combinations as it had since the nineteenth century.

porate monopolies to continue operating, just as predicted by Justice Harlan. In 1913 the Court, using the rule, held that a combination of shoemaking manufacturers controlling over 80 percent of the market was

not illegal. The Court reasoned that the trust was simply introducing greater efficiency in the industry.

The obvious unpredictability that the rule of reason posed for future court rulings led to public pressure to pass more effective trustbusting laws. Congress responded with the 1914 Clayton Act prohibiting companies from: (1) charging different buyers different prices for the same products; (2) forcing other companies to sign contracts restricting them from doing business with their competitors; (3) prohibiting mergers between competing companies; and, (4) restricting companies from buying stock in competing companies. Associated with the Clayton Act was the 1914 Federal Trade Commission Act creating the Federal Trade Commission (FTC) to combat unfair business practices.

Suggestions for further reading

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Nash, Gerald P. *United States Oil Policy, 1890-1914.* Pittsburgh: University of Pittsburgh Press, 1968.

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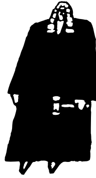

Wickard v. Filburn
1942

Appellant: Claude R. Wickard, U.S. Secretary of Agriculture

Appellee: Rosco C. Filburn

Appellant's Claim: That the federal government has constitutional authority provided in the Commerce Clause to regulate wheat production, regardless if the particular crops were intended for sale in the market.

Chief Lawyers for Appellant: Francis Biddle, U.S. Attorney General, and Charles Fahy, U.S. Solicitor General

Chief Lawyer for Appellee: Webb R. Clark

Justices for the Court: Hugo L. Black, William O. Douglas, Felix Frankfurter, Robert H. Jackson, Frank Murphy, Stanley F. Reed, Owen J. Roberts, Chief Justice Harlan F. Stone

Justices Dissenting: None (James Francis Byrnes did not participate)

Date of Decision: November 9, 1942

Decision: Ruled in favor of Wickard in that the federal government has broad powers under the Commerce Clause to regulate all activities that remotely may affect interstate commerce.

Significance: The ruling established an exceptionally broad interpretation of the federal government's powers under the Commerce Clause. Congress could regulate agricultural production that might affect interstate commerce, even if it is not for sale. Federal and state regulation affecting nearly all forms of agricultural production and trade in the United States grew through the next several decades.

ANTITRUST, BUSINESS, CORPORATE AND CONTRACT LAW

Agricultural production in the United States, largely involving small family-owned farms, enjoyed good economic times following the American Civil War (1861–1865) through World War I (1914–1918). The 1920s saw the rise of mass productivity inspired by the industrial revolution leading to increased production. With the greater supply of farm produce, prices began to substantially decline by the end of the decade. Many family farms folded due to inadequate profits. With the stock market crash of October of 1929 and the following Great Depression through the 1930s, economic hardships for farmers further increased. Much of the public was no longer able to afford farm produce and prices fell dramatically. Without sufficient profits, foreclosures (ending a property right to pay a debt) on farms whose owners could no longer to pay their mortgages increased sharply.

In reaction to the desperate trends, farmers began organizing to save their livelihoods. Some withheld food from markets to force prices back up. Violence erupted as efforts were made to keep some farmers from delivering their produce to market. Agitation against the government for lack of support increased. Some states began passing laws making it more difficult for banks for foreclose on farms. With a national farmer strike planned for May 13, 1933, newly elected President Franklin D. Roosevelt (1933–1945) signed the Agricultural Adjustment Act on May 12 to head off the protests. The act provided payments to farmers who voluntarily reduced their production. The act was part of Roosevelt's New Deal program to bring social and economic change to a struggling country.

However, like many laws passed by Congress at that time to spur economic recovery from the depression, the very conservative Supreme Court ruled the act unconstitutional in 1936. The Court held the federal government had no authority to become involved in what they considered local matters to be resolved by the states. In fact, the Court viewed agriculture as largely out of the realm of federal business regulation.

Beginning in 1935, Roosevelt renewed his efforts at social and economic reform with a second New Deal program. By this time, the makeup of the Supreme Court began to change. Some justices retired under political pressure from Roosevelt who sought to have a Court that would support his programs. Included in the renewed effort was the Agricultural Adjustment Act of 1938. The act provided for increased federal control of farm production, loans to farms, farm insurance, and soil conservation to maintain farm productivity. Unlike the earlier act which paid farmers

to produce less of certain crops, the second act established market quotas (limits set on something) for various farm products. Those farmers exceeding the amounts set for them by the government could be fined.

The act was immediately the subject of a Supreme Court challenge in *Mulford v. Smith* (1938). The revamped Court supported it by ruling in favor of tobacco-growing quotas.

Filburn's Farm

Roscoe C. Filburn was a small-time Ohio farmer raising poultry and producing dairy products. He also grew a small crop of winter wheat. Under the act, the Department of Agriculture had designated eleven acres of Filburn's land for growing wheat. A particular yield for that acreage was also set. In defiance of the set levels, in 1941 Filburn planted wheat on twelve additional acres and exceeded his yield limits. The extra planting produced 249 bushels of wheat. The department fined Filburn $117. He refused to pay and the department put a lien (the property is subject to sale to pay debts) on his wheat.

In reaction, Filburn filed a lawsuit in federal district court against U.S. Secretary of Agriculture Claude R. Wickard. Filburn sought to overturn his wheat production restrictions. He claimed that limitations on crop production was outside the federal government's power to restrict agriculture. In his defense, Filburn also claimed his excess wheat was only for use on the farm to feed animals and would not be sold at the market. The district court decided in favor of Filburn by ruling that the federal government did not have authority to fine him. Wickard appealed the decision to the Supreme Court.

A Stronger Commerce Clause

By the time the case came before the Court for arguments on May 4, 1942, only one justice, Owen Roberts, remained from the earlier group which had staunchly opposed increased federal regulation proposed by Roosevelt and Congress in the New Deal programs. The Court ruled unanimously in favor of Wickard, overturning the lower court's ruling. Justice Robert H. Jackson, writing for the Court, wrote that even excess agricultural produce not intended to be sold at commercial markets could still affected interstate commerce. Jackson wrote that even though the amount of Filburn's excess wheat was itself small, taken in combination

ANTITRUST, BUSINESS, CORPORATE AND CONTRACT LAW

with other wheat farmers there could be a significant impact on interstate commerce. If Filburn grew his own wheat, then he would not need wheat from the open market. This would hurt other farmers by causing the demand and prices for wheat to go down. Jackson wrote,

> **The maintenance by government regulation of a price for wheat undoubtedly can be accomplished as effectively by sustaining or increasing the demand as by limiting the supply . . . That [Filburn's] own contribution to the demand for wheat may be trivial [very small] by itself is not enough to remove him from the scope of federal regulation where, as here, taken together with that of many others similarly situated, is far from trivial . . . Home-grown wheat in this sense competes with wheat in commerce . . . Congress may properly have considered that wheat consumed on the farm where grown if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing [the act's] purpose to stimulate trade . . . at increased prices.**

The Commerce Clause in Article 1, Section 8 of the U.S. Constitution states that Congress may "regulate Commerce . . . among the several States." The Court had long debated whether federal commerce power authorized the federal government to only be able to control actual goods and produce being shipped between states, or if it applied to the actual production and how the kind and level of production could influence commerce. Jackson decided the difference between production and sales did not really matter,

> **Whether the subject of the regulation in question was 'production,' 'consumption,' or 'marketing' is . . . not material for purposes of deciding the question of federal power . . . But even if [Filburn's] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.**

The use of wheat quotas, even on crops not to be sold at market, was upheld by the Court.

COMMERCE CLAUSE AND THE TENTH AMENDMENT

With fear of centralized power brought by British rule, initially the states held almost total control over commercial activities under the Articles of Confederation, drawn up in 1781. However, much confusion resulted as each state established different regulations, often engaged in economic rivalries among themselves. Merchants were obviously reluctant to take economic risks in such an unpredictable and chaotic setting. Great agreement could be found to establish federal control over interstate and foreign trade when the Framers of the Constitution went to work in 1787 at the Constitutional Convention. As a result, creation of the Commerce Clause in Article 1, Section 8 of the Constitution drew little debate. Congress held power to "regulate Commerce with foreign Nations, and among the several States" under the Clause.

In 1791, the Tenth Amendment was ratified which recognizes states' powers. The amendment reads, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States . . . " The U.S. Supreme Court gave Congress broadly interpreted powers in the first case involving the Commerce Clause in ***Gibbons v. Ogden*** (1824). However, little developed from that power as often conflicting court opinions followed. With some exceptions, such as the railroads in the 1880s, respect for states' rights to regulate business under the Tenth Amendment dominated for over a century. In ***NLRB v. Jones & Laughlin Steel Corp.*** (1937) the Court dramatically changed course. For decades following 1937 the Tenth Amendment was much less emphasized and federal regulations grew to address almost every aspect of economic activities that even remotely affected interstate commerce.

Growth of Agricultural Law

The decision in *Wickard* represented the greatest expansion of federal regulatory power through the Commerce Clause by the courts. Any effect

on interstate commerce, even activity seemingly distant from actual commerce, fell within the scope of federal control. The important use of the Commerce Clause later involved race discrimination cases. In ***Heart of Atlanta Motel v. United States*** (1964) the Court affirmed the 1964 Civil Rights Act and access by people of all races to commercial places used by interstate travelers.

Within this broad scope of authority, the field of agricultural law developed by the late twentieth century to stabilize and promote production of the national food supply and other farm products. Federal regulation, addressing cultivation of various crops and raising of livestock, continued under the oversight of the Secretary of Agriculture.

Suggestions for further reading

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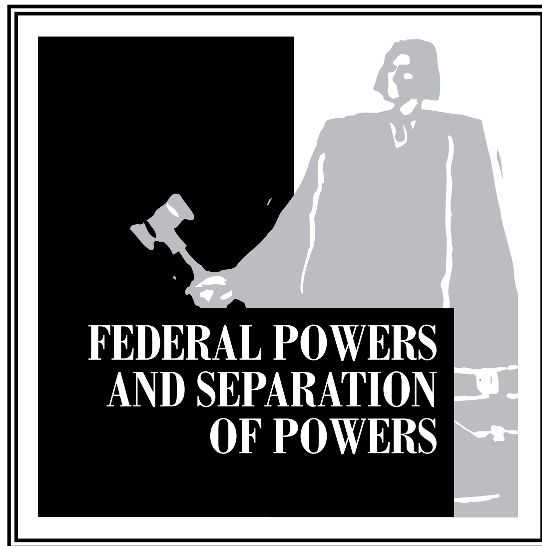

Through the eighteenth century Great Britain sought to make its American colonies a key source of revenue by applying an economic concept known as mercantilism. The colonies were to send to Britain raw materials such as food, timber, and furs at low prices while importing British finished products at high prices. To make mercantilism most effective for Britain the colonies were also prohibited from trading with other countries. In reaction to Britain's heavy hand, the colonists refused to fully cooperate. Often, in defiance, taxes were not paid and trade with other countries occurred.

At the conclusion of the French and Indian War in 1763, England had doubled its North American territory but also found itself with a huge war debt. The British government believed the colonies should help pay this debt and enacted a series of strict financial control measures. The most hated of these attempts to raise money for the British was the Stamp Act of 1765. The act required colonists to buy a revenue stamp each time they registered a legal document or bought such items as newspapers, almanacs, liquor licenses, or even playing cards. In 1767 Parliament passed the Townshend Acts which taxed paint, glass, lead, paper, and tea. Eventually, the tea tax lead to the "Boston Tea Party." To

punish the colonists, the British passed more measures which the colonists labeled the Intolerable Acts of 1774. At this time tensions reached the breaking point.

In September of 1774, the colonists assembled the First Continental Congress which drafted a message to Britain claiming they would no longer tolerate being deprived of their life, liberty, and property. Open rebellion leading to the Revolutionary War (1775–1783) followed. During the war, the Second Continental Congress met in 1781 to create a new government. But fearful of strong central governments as Great Britain's, the colonial leaders created the Articles of Confederation which established a weak union of strong state governments. The new national government was given few powers. The national legislature consisted of only one house in which each state had one vote. No federal courts existed.

Following the end of the war in 1783, the new union experienced major difficulties. The weak central government had no tax powers to raise money, and each state coined its own money, regulated commerce (business and trade) as it saw fit, and had state courts hearing cases involving federal law. A Constitutional Convention was called in May of 1787 to revise the Articles of Confederation and solve the problems it created. Debate focused on the role and structure of the federal government. Federalists wanted a strong central government. Antifederalists, states' rights advocates, wanted most power to remain with the states. A compromise led to division of political power between federal and state governments. The leaders, rather than fixing the Articles of Confederation, drafted the U.S. Constitution. Those leaders, known as the Framers, created a stronger federal government consisting of three branches, the legislature, the executive, and the courts. This idea for a separation of governmental powers was largely credited to James Madison (1751–1836) who was influenced by the writings of eighteenth century French philosopher Baron Montesquieu (1689–1755). Montesquieu had contended that tyranny (political oppression) would usually result when a government, like Great Britain, had all of its power concentrated in one body.

The Framers of the U.S. Constitution sought "to form a more perfect union, establish justice, insure domestic tranquility [peace], provide for the common defense, promote the general welfare, and secure the blessings of liberty" for the nation's citizens. The Constitution consisted of several main sections, called Articles. The first three articles divides powers among the three branches. Article I defined the powers of the

legislature, Congress, Article II the role of the executive branch, the president, and Article III the powers of the Supreme Court, the judicial branch. The legislative branch makes laws, the executive branch carries out the laws, and the judicial branch interprets the laws and decides legal disputes. The remaining articles described other aspects of government.

The Legislative Branch

The legislative branch was considered the heart of the new nation with major governing powers. Therefore, the structure of Congress drew considerable debate. One proposal, known as the Virginia plan, called for a legislature composed of two houses, called a bicameral legislature. Representatives in both houses would be elected by the states based on their individual populations. As a result, the states with more people would have greater representation. In response, another plan, the New Jersey Plan, proposed a one-house legislature, unicameral. All states would have equal representation. Therefore, less populated states would have an equal voice with the more populated states. After much debate, a compromise was reached known as the Connecticut Compromise. The Framers of the Constitution decided on a bicameral legislature consisting of a Senate with each state equally represented and a House of Representatives with membership based on the population size of each state. The House was originally the only part of federal government elected by the people, hence considered the most important in representing people's views.

In modern times, the Senate contains 100 members with two from each of the fifty states. Though originally elected by the state legislatures, Senators are now elected directly by the people for six-year terms. A third of the Senate comes up for reelection every two years. Regarding the House, in 1929 Congress set the total number of representatives at 435. The national census taken every ten years determines how many representatives each state can have and those representatives are elected every two years.

Remembering the oppressive British central government and determined to avoid a legislature which could abuse its power, the Framers were more detailed about Congress' powers than for the other two branches of government. Congress received powers to tax and spend, approve treaties, regulate interstate and foreign commerce, conduct foreign affairs, raise an army and navy, coin money, and declare war. The supremacy of the federal government over state governments was established in two

clauses. The Necessary and Proper Clause in Article I gave Congress broad powers to pass any laws that it can reasonably justify to carry out its powers. The Supremacy Clause in Article VI simply states that such laws passed by Congress, in addition to the Constitution itself and treaties approved by Congress, are the supreme law of the land. Whenever a conflict between a federal law and a state law occurs, the federal law always takes priority. Exercising its duty to interpret the Constitution, the Supreme Court recognized in ***McCulloch v. Maryland*** (1819) that Congress has implied powers not specifically mentioned in the Constitution, powers that come to all independent sovereign governments.

Some restrictions on Congress were included, such as prohibition against passing laws singling out specific individuals for punishment in *ex post facto* (after the fact) laws. Though the main body of the Constitution contains some restrictions on congressional power, the Bill of Rights added as the first ten amendments to the Constitution offers far more restrictions. Adopted in 1791 to appease states' rights advocates who feared the new central government would have too much power, the Bill of Rights protects various individual rights from federal actions, including freedom of speech, religion, and the press, the right to assemble in groups, and protections from certain search and seizures. Also included was the Tenth Amendment which limited the power of the federal government. The amendment reads that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." However, the precise line between federal and state powers was not drawn leaving an ongoing debate between federalists and states' rights advocates.

A constant problem in separation of powers has been Congress' power "to declare War." Repeatedly through history, presidents have committed troops to armed conflict in foreign countries without first obtaining a declaration of war from Congress. President Abraham Lincoln did this when ordering blockades of Southern seaports in the Civil War (1861–1865), and the sending of troops a century later to the Vietnam war (1964–1975) was another example. Though presidents have been challenged in court on several occasions, the Supreme Court has largely stayed out of the issue leaving it to Congress to take whatever action it chooses which normally has been none.

Another issue involving separation of powers between the legislative and executive branches has been the frequent delegation of congressional powers to the president through laws passed. Usually this delegation happens when Congress passes laws to regulate some activity, such

as creation of the Interstate Commerce Act of 1887 to regulate interstate commerce. The Court in *J.W. Hampton v. United States* (1928) gave support to such transfers of power as long as Congress establishes guidelines for the executive branch to follow in carrying out the duties.

The Executive Branch

Article II of the Constitution gives the President of the United States power to enforce the laws. The president must be a natural born citizen, at least thirty-five years of age, and have resided in the United States for at least fourteen years. The president serves a four-year term and is limited to two terms.

Perhaps fearing the concentration of power in a single person as with the late eighteenth century English monarchy of King George III, few powers are granted the executive. Roles and responsibilities are only very generally described. Nonetheless, through time the position has become recognized as the most powerful in the world and presidential powers have steadily grown largely unchecked. The courts have generally recognized broad presidential powers issuing few decisions restricting it. Though a civilian, the president as the commander-in-chief of the armed forces has ultimate control over the military. This power likely came from fear that the military might gain power over the civilian government. The president also has power to make treaties, with the advice and consent of the Senate, and to terminate treaties as recognized in *Goldwater v. Carter* (1979). The president holds broad foreign affairs powers as recognized by the Court in ***United States v. Curtiss-Wright Export Corp.*** (1936).

The president's key responsibility to "take care that the laws be faithfully executed" has been largely delegated to federal agencies of the executive branch, such as the departments of justice, interior, and agriculture. Heads of these various departments are members of the president's cabinet. The president may also propose legislation to Congress including the national budget.

Through executive powers that are largely concentrated in one person, the president can influence public opinion far more than the other two branches. The presidents through time have held widely varying ideas of how to use this power. Beginning with President Theodore Roosevelt (1901–1909), many presidents have expanded on how to use this unique power of persuasion and influence.

The Judicial Branch

Article III of the Constitution established only "one Supreme Court" but gave Congress power to create "such inferior [lower] courts as the Congress may from time to time ordain and establish." Congress exercised its authority to create a three level judicial system with the Supreme Court at the top, courts of appeal in the middle, and district courts at the bottom. The nation was divided into eleven judicial regions in which a court of appeals is in each. Federal district courts are located in each state.

The Constitution states that federal courts may only hear cases involving constitutional questions, federal law, treaties, maritime (activities on the oceans), when the United States is a party, and between two or more states, between a state and citizen of a different state, and between citizens of different states. Only cases involving ambassadors, other public ministers and consuls, and when a state is a party may come directly to the Supreme Court without first going through the lower courts. Federal courts may also issue *writs of habeas corpus* when questions about the legality of an individual's detention by authorities are raised and *writs of mandamus* which force government officials to carry out their public duties. The federal courts can issue arrest and search warrants and hear both criminal and civil cases.

The most important constitutional limitation on the federal court system is that only cases involving actual disputes can be heard. The courts cannot be asked to rule on the constitutionality of a law without an actual incident occurring. Still, the judiciary remains the last word on division of powers among the three branches.

Checks and Balances

To guard against one of the branches becoming too powerful or abusing its powers, the Framers constructed a complex series of checks and balances in which each branch watches over the other two. The Framers were more concerned about abuse of powers than government efficiency in making decisions. In reality, the three branches are more interrelated than they are actually separate. The president can veto laws passed by Congress or simply not carry out duties assigned to him by congressional acts. Congress can override a presidential veto with a vote by two-thirds of both houses. Congress can also determine the executive branch's budget and must confirm presidential appointees to various posts, including

cabinet members and judges. Congress can also impeach the president, or other members of the executive branch. No one can be a member of the legislative and executive branches at the same time.

The president can keep check on the courts by appointing all federal judges including the Supreme Court justices. Because judges serve for life, presidents can exert an influence on U.S. policies well beyond their term of office. Life tenure also protects judges from the whims of public opinion. No Supreme Court justice has ever been removed from office by impeachment, but Congress has the power to do so. If Congress so desired, it could eliminate all federal courts except the Supreme Court. More realistically, Congress has the responsibility to confirm all judicial nominees.

In practicality, the Supreme Court is the least-checked branch of government. Because of their life time appointments, the judicial branch is least accountable to the public through the election process. The federal courts have power to declare unconstitutional acts of Congress or actions by the executive. As stated by Chief Justice John Marshall in the landmark ***Marbury v. Madison*** (1803) case establishing the concept of judicial review, "It is, emphatically, the province and duty of the judicial department to say what the law is." The judicial power has been well dramatized in numerous decisions, such as striking down the federal income tax in *Pollack v. Farmers' Loan and Trust Co.* (1895) and federal child labor laws in ***Hammer v. Dagenhart*** (1918). Having the power of judicial review as recognized in *Marbury,* the courts can review presidential actions and agency activities for their constitutionality and rule them void if found unconstitutional. Only four times in U.S. history have Supreme Court decisions been overridden by constitutional amendments which have been passed by Congress and ratified (adopted) by the states.

Although never mentioned in the Constitution, two established doctrines, executive immunity and executive privilege, shield the president to a certain degree from interference by the other branches. Executive immunity protects the president from judicial interference. A court cannot order the president to take, or to stop taking, action to carry out his executive duties. Executive immunity was recognized by the Court in ***Mississippi v. Johnson*** (1867) and later expanded in ***Nixon v. Fitzgerald*** (1982). Executive privilege refers to the president's ability to withhold information, documents or testimony of aides from congressional or judicial probes. The Supreme Court recognized the existence to at least a limited privilege in ***United States v. Nixon*** (1974).

In the slow-paced society in which the Framers lived in the late eighteenth century, concern over government abuse of power outweighed interest in government efficiency. The separation of powers was designed with that in mind. But, as the general pace of American life increased dramatically through the twentieth century, concerns over government efficiency grew. Yet, the idea of separation of powers has remained strong though their specific nature has changed with the Supreme Court having the final say in what it means at any particular time for any particular occasion.

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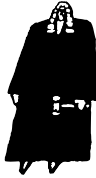

Marbury v. Madison
1803

Plaintiffs: William Marbury, William Harper, Robert R. Hooe, Dennis Ramsay

Defendant: James Madison, U.S. Secretary of State

Plaintiff's Claim: That U.S. Secretary of State James Madison must deliver judicial commissions issued by his predecessor to their rightful recipients.

Chief Lawyer of Plaintiffs: Charles Lee

Chief Lawyer for Defendant: Levi Lincoln, U.S. Attorney General

Justices for the Court: Samuel Chase, William Cushing, Chief Justice John Marshall, William Paterson, Bushrod Washington

Justices Dissenting: None (Alfred Moore did not participate)

Date of Decision: February 24, 1803

Decision: Ruled in favor of Madison by finding that the Judiciary Act of 1789 giving legal authority to federal courts to order government officials to act was unconstitutional.

Significance: The ruling is considered by many the most important decision in American legal history. The Court established the guiding principles of judicial review which recognized the federal courts' role in reviewing acts of Congress and states regarding their constitutionality. The Supreme Court thus became a significantly powerful part of the American governmental system.

FEDERAL POWERS AND SEPARATION OF POWERS

"It is, emphatically, the province [within court's power] and duty of the judicial department [the courts] to say what the law is." This dramatic and often quoted statement was made by Chief Justice John Marshall in *Marbury v. Madison* (1803). Often called the single most important decision in the history of the U.S. Supreme Court, *Marbury* established the power of judicial review. Judicial review allows federal courts to review laws enacted by Congress and to declare a law invalid if it is found to violate the Constitution. However, the Court may not invalidate (overturn) just any law merely because it violates the Constitution. Such a decision by the Court may be made only when a specific lawsuit is brought before the Court requiring a determination that a law is constitutional. Additionally, judicial review allows federal courts to see that government officials, including the president, act in accordance with constitutional principles.

An Active, Living Constitution

Unlike many constitutions of countries around the world, the Constitution of the United States is more than just a description of the existing governmental system. It is also an active, living instrument in which is found the source of power and limits of power among the three governmental branches.

Chief Justice Marshall viewed the Constitution as a broad outline describing important goals. The details of how to carry out those goals, of how to fill in the outline, was left to the working government. But, which part of government would have the ultimate responsibility to guard the written terms of the Constitution and to see that the power of each branch of government was properly limited? This question was first debated at length in the Philadelphia Constitutional Convention of 1787. They found little guidance in the history of English law as to who should be the Constitution's final interpreter. Although the Framers made it clear some sort of review of legislation needed to be established, the exact nature of the review was left undefined. In *Federalist Paper No. 78,* written by Alexander Hamilton (1757–1804) in 1788, the judiciary (courts) was described as the "least dangerous to the political rights of the Constitution." Hamilton saw the executive branch, the president, as carrying the "sword" and the legislative branch (Congress) carrying the "purse" which could be opened or closed at the political whim of the day. But, he noted the Supreme Court held neither and likely would be the fairest defender of liberty.

Madison was charged with not delivering judicial commisions left over from the previous secretary. Courtesy of the Library of Congress.

The answer came in 1803 in *Marbury,* a declaration that the Supreme Court would have the final say in guaranteeing that the intent of the Constitution was being carried out by the governmental branches. This decision was intertwined with the political scene of the day.

The Politics of 1800

In 1800, two political parties dominated America, the Federalists and the anti-Federalists, who were called the Democratic-Republicans at the time. The Federalists, in power at the time with John Adams (1797–1801) as president, believed in a strong national government to expand the country's economic and geographic interests and protect U.S. citizens. The anti-Federalists, a leading member being Thomas Jefferson, believed a strong central government would weaken the power of the states, and, therefore, the people. The anti-Federalists sought to halt further growth of the national government. Thomas Jefferson became the anti-Federalist's or Democratic-Republican party's candidate against John Adams in the presidential election of 1800.

The "Midnight Judges"

After a bitter battle, Thomas Jefferson emerged in February of 1801 as the presidential victor. Adams and his party feared Jefferson would undo

everything the Federalists had accomplished the past twelve years. He decided to pack the federal courts with as many new Federalist judges as possible before the Jefferson administration took power in March. Adams appointed his Secretary of State John Marshall to be Chief Justice of the U.S. Supreme Court. However, Marshall would remain Secretary of State through the last day of Adams' term. Adams proceeded to nominate more that two hundred loyal Federalists to new judgeships including forty-two justices of the peace in the District of Columbia. The Senate confirmed the nominations of the justices of the peace on March 3, Adams' last day in office. Working late into the night, Adams signed the commissions and Secretary of State Marshall placed the official seal of the U.S. government on them then supervised their delivery. The new judges became appropriately known as the "midnight judges." During these moments of confusion, several of the commissions were not delivered, including one to William Marbury.

Writ of Mandamus

Jefferson became President the next day, March 4, and ordered the new Secretary of State, James Madison, not to deliver the remaining commissions. Marbury and several others who similarly did not receive their commission petitioned the Supreme Court, whose Chief Justice was now John Marshall, for a *writ of mandamus,* ordering Madison to deliver their commissions. An amusing twist to Marbury's petition to the Court was that it was Chief Justice Marshall who had failed to deliver the commission the night of March 3. The *writ of mandamus* is a court order requiring a government official to take action and carry out his duties. In the Judiciary Act of 1789, Congress had authorized the Supreme Court to issue to federal officials *writs of mandamus.*

A Skillfully Written Opinion

Chief Justice Marshall wrote the opinion for a unanimous Court. Marshall, who history remembers as the greatest chief justice to serve, managed to craft a skillful opinion amid a highly charged political atmosphere. Marshall hoped to avoid a direct conflict with Jefferson, Madison, and the anti-Federalist whom he feared would simply say no if he ordered them to deliver the commissions. At the time, the Supreme Court had little recognized power to actually force other branches of the government to comply with its decisions. In an attempt to aid the growth of

the young governmental system by deciding who would be the ultimate interpreter of the Constitution, Marshall established the principle of judicial review. The new principle allowed the Supreme Court to have final word on the meaning and application of the Constitution.

Marshall's historic opinion was divided into five parts. The first three parts were simple. First, Marbury had a legal right to be a justice of the peace. Second, Secretary of State Madison violated this right by withholding the commission. Third, the *writ of mandamus* was a proper way to direct a government official to carry out his duty. But, the question of who could issue the writ led to the fourth part of the ruling.

A Cornerstone of the American System

The fourth and fifth parts of the *Marbury* decision, brilliantly reasoned, established a cornerstone of the United States' system of government. In the fourth part, Marshall considered whether or not the Supreme Court had the power, or in other words the jurisdiction, to issue a *writ of mandamus.* Article III of the U.S. Constitution gave the Supreme Court two types of jurisdiction, original and appellate. Original jurisdiction meant the Supreme Court could be the first court to receive a petition and hear the resulting case. Article III gave the Supreme Court original jurisdiction over politically sensitive issues such as those involving "ambassadors" or when one of the states was named as a party. In all other cases, the Supreme Court has appellate jurisdiction, meaning petitions or cases must work their way through the lower courts before arriving at the Supreme Court.

Yet, section 13 of the Judiciary Act of 1789 allowed the petitioning of the Supreme Court and all federal courts directly asking them to issue writs. Although Marbury was neither an ambassador nor a state government, the Judiciary Act gave him the right to petition the Supreme Court first. Marshall ruled that this legislation violated the intent of the Constitution by giving the Supreme Court original jurisdiction in matters not mentioned in Article III. He concluded the Judiciary Act was unconstitutional, therefore invalid and not enforceable by a court of law. As a result, the Supreme Court, in response to Marbury's petition, could not issue the writ. This decision avoided a direct conflict with the Jefferson administration. At the same time, it also negated an act passed by Congress. Marshall wrote that it would be absurd to insist that the courts must uphold unconstitutional acts of the legislature. No act of Congress could do something forbidden by the Constitution. Marshall's reasoning

THE GREAT CHIEF JUSTICE

From 1801 to 1835 John Marshall served as chief justice of the U.S. Supreme Court, writing 519 of the 1,100 opinions issued during that period. His personality dominated the Court and the justices who served with him. His opinions, brilliantly reasoned and masterfully written, transformed the Court into a powerful branch of the American government system.

Born and raised in Virginia, Marshall was mainly educated by his father. An avid reader, he educated himself in law, taking only one formal law course at the College of William and Mary in 1780. Marshall served in the Continental Army during the American Revolution for almost six years and endured the harsh winter with George Washington at Valley Forge. From 1781 until his appointment to the Supreme Court in 1801, he held various government service jobs, first in Virginia and later as U.S. minister to France from 1797 to 1798, U.S. representative from Virginia from 1799 to 1800, and U.S. Secretary of State from 1800 to 1801.

Marshall's greatest decisions form the heart of commentary on the U.S. Constitution. He established judicial review of the courts over laws enacted by Congress and over acts of state government when either was challenged as not obeying the Constitution. His judgements defended the reliability of contracts and protected private property rights. He also convincingly argued that the Constitution was the permanent supreme law of the United States, to be interpreted by the Supreme Court. Marshall died in Philadelphia, Pennsylvania while still serving on the Court on July 6, 1835.

established the Court's power to declare an act of Congress unconstitutional — a monumental first which became a cornerstone of the American democratic system.

Lastly, Marshall considered whether the judiciary was indeed the proper branch of government, as opposed to the executive (president) or

legislative (Congress) to have the final authority to overturn unconstitutional legislation. Although by the year 2000 this had long been accepted, the Constitution did not actually identify which branch should have this power. Marshall, describing for the first time the doctrine of judicial review, stated that the federal courts, above all the Supreme Court, have the power to declare laws unenforceable if they violate the Constitution. Marshall wrote, "This is the very essence of judicial duty."

A Check on Legislative Power

In 1801, when John Marshall became Chief Justice, the Supreme Court was considered weak and unimportant. The *Marbury* decision began its transformation into the most powerful judiciary in the world. *Marbury* provided reasoning for constitutional examination of laws by the courts. Although scholars have extensively debated the legal reasoning behind *Marbury,* the significance has never been challenged. Judicial review provided a clear check on the exercise of legislative power over the people.

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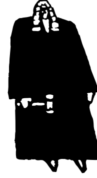

McCulloch v. Maryland 1819

Appellant: James William McCulloch

Appellee: State of Maryland

Appellant's Claim: That a Maryland state tax imposed on the Bank of the United States was unconstitutional interference with federal government activities by the state.

Chief Lawyer for Appellant: Daniel Webster

Chief Lawyer for Appellee: Joseph Hopkinson

Justices for the Court: Gabriel Duvall, William Johnson, Henry B. Livingston, Chief Justice John Marshall, Joseph Story, Bushrod Washington

Justices Dissenting: None (Thomas Todd did not participate)

Date of Decision: March 7, 1819

Decision: Ruled in favor of McCulloch by finding that Congress had a constitutional power to establish a national bank and states could not legally interfere with federal law.

Significance: The ruling established the principle of implied powers through a broad interpretation of the U.S. Constitution, giving Congress an expanded role in governing the nation. The decision also reinforced the supremacy of federal law over state law when the two conflict. The landmark ruling became the basis for key Court decisions throughout the nineteenth and twentieth centuries supporting congressional activities.

Article I of the U.S. Constitution gives Congress power to make laws. Section 1 provides "all Legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." Furthermore, Section 8 of Article I enumerates (specifically names or lists) the specific areas where Congress may exercise its law making powers. These include the power to declare war, raise and support armies, provide a navy, regulate commerce, borrow and make money, collect taxes, pay debts, regulate immigration and naturalization, pass bankruptcy laws, and provide for the common defense and general welfare of the United States. Clause 18 of Section 8 also declares that "Congress shall have Power . . . to make all Laws which shall be *necessary* and *proper*" for executing (carrying out) its powers.

Almost immediately after the birth of the new nation, a question inevitably arose concerning the list of enumerated powers. Was Congress' power limited by the "necessary and proper" clause to only a few laws needed to carry out the indispensable activities clearly listed in the Constitution? Or, did the clause actually grant Congress broader powers to do almost anything "necessary and proper" to provide for the welfare of its citizens?

The answer came in 1819 in *McCulloch v. Maryland. McCulloch* provided the U.S. Supreme Court its opportunity to define how broad Congress' power should be and, additionally, to what extent states could regulate activities which fell within the powers of the national government. In *McCulloch* the Court specifically was asked to consider if Congress had the constitutional power to charter a national bank, and, if so, could a state constitutionally impose a tax on that bank.

An Unpopular National Bank

Following the American Revolution War (1776–1783) the new country urgently needed a sound financial system. In response, Congress established in 1791 the First Bank of the United States, located in Philadelphia. Many argued that the Constitution did not give Congress the power to establish such a bank. However, the bank closed in 1811 and the issue largely died. The need for a second national bank soon became apparent again in 1816, after the expenses of the War of 1812 (1812–1814) pushed the country into a financial crisis. The second bank was established by an act of Congress and began providing loans to state banks and private individuals.

Foreshadowing a long period of up and down swings in the nation's economy, the boon created by the national bank loans soon turned to a bust. Mismanagement of the national bank plus its extension of too much credit forced the bank to call in many of its loans causing many state bank failures. The national bank became very unpopular among the states. Individual states attempted to restrict the bank's operation within their boundaries. Maryland chose to try to tax the national bank's branches out of existence by passing legislation which, in effect, applied to those branches only. The Maryland law provided that all banks not chartered in the state but operating within the state must issue their bank notes (paper money) on paper bearing the tax stamp of the state. The tax stamp was a 2 percent tax on the value of every note issued, or 2 cents on every dollar. James McCulloch, the cashier at the Baltimore branch of the national bank, continued to issue notes without paying the tax. The state of Maryland convicted and fined McCulloch for issuing bank notes without paying the appropriate state tax. He appealed to the U.S. Supreme Court which agreed to hear the case.

Daniel Webster's Argument

McCulloch's chief lawyer, Daniel Webster, argued Congress had the constitutional right to charter a bank and its branches even though the Constitution did not actually enumerate the power to charter a national bank. He further pointed out that a state could not tax a federal activity. If that were allowed, separate states could control federal government actions, greatly weakening the federal government. Maryland simply responded that Congress had no power to charter the bank, and the state indeed had power to tax the bank.

The Court had two questions before it. First, did the "necessary and proper" clause imply (hints at) that Congress had the power to charter a national bank? Secondly, could the states tax a national bank or should national activities be supreme?

To Endure for Ages

Chief Justice John Marshall, writing a brilliantly crafted opinion for the Court, established two key constitutional principles which still persisted in the year 2000. In the first, the implied powers principle, Marshall reasoned that congressional powers actually listed in the Constitution such as the powers to issue money, borrow money, collect taxes, and maintain

armies *implied* that Congress could do whatever was "necessary and proper" to carry out these activities including chartering a national bank. As a result, the Necessary and Proper Clause is also known as the Implied Powers Clause. Marshall's reasoning enables Congress to undertake activities not specifically enumerated by the Constitution but nevertheless implied. Marshall wrote that as long as congressional actions had a "legitimate" basis consistent "with the letter and spirit of the Constitution" they were constitutional. This interpretation greatly expanded congressional authority.

Marshall emphasized in *McCulloch* the Constitution must be flexible and adapt to human needs. He wrote, the Constitution was "intended to endure for ages to come, and, consequently, to be adapted to the various crisis of human affairs."

The second principle, that of national supremacy, prohibits states from interfering with constitutional activities of the federal government. Marshall stated that allowing states to tax part of the national government disrupted the supremacy of the Constitution and of national laws over conflicting state laws. Hence, states could not tax the national bank.

A Long Document

In *McCulloch,* Marshall made it clear that the Constitution of the United States was to be applied by courts with flexibility and awareness of the nature of each problem. The Constitution was to be a living document, adapted to new conflicts and situations that arise through the years. It was not to be applied in a narrow fashion limiting legislative power to the exact words written in the Constitution. Many laws passed later by Congress throughout the nineteenth and twentieth centuries were enacted based on Marshall's broad interpretation of the Necessary and Proper Clause.

The *McCulloch* decision also strengthened the idea of nation supremacy. Although the Supreme Court became more supportive of states' rights after the American Civil War (1861–1865), by the late 1930s the Court shifted back toward Marshall's earlier position. It began to invoke the Supremacy Clause found in Article VI, Section 2 of the Constitution, and again firmly established that constitutional acts of Congress were supreme and state law must yield to them.

Marshall's words furnished an insightful beginning for the new nation in interpreting the Constitution regarding the evolving active nature of the document and the concept of supremacy of constitutional

DANIEL WEBSTER

"Liberty and Union, now and forever, one and inseparable!" These words were spoken by then-Senator Daniel Webster (1782–1852) in a 1830 debate with Senator Robert Y. Hayne of South Carolina in opposition to a South Carolina proposal to reverse a federal law.

Webster is one of the most eloquent and powerful speakers in American history. He also was a lawyer, representative, senator, and secretary of state. Born in Salisbury, New Hampshire on January 18, 1782, Webster graduated from Dartmouth College in 1801. Beginning a law practice in 1807 in Portsmouth, New Hampshire, he quickly became a spokesman for the business community. In 1817 he moved on to become an influential lawyer in Boston, Massachusetts.

As an attorney, Webster argued more cases before the U.S. Supreme Court than any other. Many of the cases, including *McCulloch v. Maryland,* have been the most important cases in U.S. legal history, defining the powers of government under the U.S. Constitution. Being a strong advocate for broad national government powers in opposition to states' rights proponents, Webster became known as the "Expounder of the Constitution." First appearing before the Court in 1814, he won in *Dartmouth College v. Woodward* (1819) which prohibited states from interfering with contracts, won in *McCulloch* the same year recognizing broad congressional powers, and won in ***Gibbons v Ogden*** (1824) which first defined federal powers over interstate commerce.

Webster's eloquent speaking skills were further demonstrated in Congress. He served in the U.S. House of Representatives from 1812 to 1817 and 1822 to 1827 and in the U.S. Senate from 1827 to 1841 and 1845 to 1850. Though unsuccessfully running for President in 1836, Webster did serve as U.S. Secretary of State from 1841 to 1845 and from 1850 to 1852 when he died at his farm in Marshfield, Massachusetts. Daniel Webster was truly one of the most influential politicians and lawyers in U.S. history.

national laws. Marshall's reasoning endures at the start of the twenty-first century.

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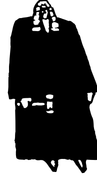

McGrain v. Daugherty 1927

Appellant: John J. McGrain

Appellee: Mally S. Daugherty

Appellant's Claim: That the U.S. Senate had not exceeded its authority in requiring a private citizen to testify before its investigation committee concerning the Teapot Dome scandal.

Chief Lawyer for Appellant: George W. Wickersham

Chief Lawyer for Appellee: Arthur I. Vorys, John P. Phillips

Justices for the Court: Louis D. Brandeis, Pierce Butler, Oliver Wendell Holmes, James C. McReynolds, Edward T. Sanford, George Sutherland, Chief Justice William H. Taft, Willis Van Devanter

Justices Dissenting: None (Harlan Fiske Stone did not participate)

Date of Decision: January 17, 1927

Decision: Ruled in favor of McGrain by finding the Senate had an implied constitutional authority to carry out a congressional investigation of Daugherty.

Significance: The ruling clearly established Congress' power to conduct investigations even without stating a specific legislative purpose. The decision dramatically expanded Congress' ability to investigate the lives and activities of citizens. This power has been regularly exercised by Congress ever since. The decision was also considered the first to uphold the power of Congress or the courts to override on certain occasions claims of executive privilege if a president, his cabinet members, or presidential aides were called to testify.

In 1927 the U.S. Supreme Court issued a landmark ruling, *McGrain v. Daugherty.* The ruling firmly established Congress' power to conduct investigations, even without any specifically stated legislative (law making) purpose and to gather information by requiring private citizens to give testimony. The ruling arose out of a situation referred to as Teapot Dome. Teapot Dome was one of the most infamous (bad reputation) government scandals in U.S. history and became a symbol of corruption in the U.S. government.

The Teapot Dome Scandal

In 1909, President William Howard Taft (1909–1913) set aside three tracts of oil-bearing land, Elk Hills and Buena Vista in California and Teapot Dome in Wyoming, for use by the U.S. Navy in case of an emergency oil shortage. In 1921, President Warren G. Harding (1921–1923) took office and within a year transferred control of the three naval oil reserves to his good friend and newly-appointed Secretary of the Interior, Albert B. Fall. With neither congressional approval nor competitive bidding, in 1922 Fall leased the reserves at Elk Hills and Teapot Dome to private oil companies of Edward L. Doheny and Harry F. Sinclair. Fall received $100,000 from Doheny for helping to organize the Elk Hills transfer. For the Teapot Dome transfer Fall had received more than $300,000 in cash, bonds, and valuable livestock from Sinclair.

Fall resigned his post at the Interior Department in 1923 when an investigation uncovered his dealings and joined Sinclair's company. Not until 1929 was Fall convicted of bribery, fined $100,000 and sentenced to a one-year prison term. For the first time in U.S. history an officer in a president's cabinet had been convicted of a felony and served a prison sentence.

A Senate Investigation

For some time after his 1922 dealings with Doheny and Sinclair, Fall had enjoyed protection provided by other government officials including U.S. Attorney General Harry M. Daugherty. Press coverage of the scandal flamed public distrust of the Department of Justice and Daugherty. Many questioned Daugherty's failure to prosecute those involved in the scandal. Daugherty resigned his attorney general post in 1923.

In response to widespread charges that Daugherty had mismanaged the Department of Justice the Senate passed a resolution enabling a com-

mittee to investigate his activities. The Senate twice issued a subpoena (formal order to a person to give testimony) to Mally S. Daugherty, bank president and brother of the former attorney general and, to appear before the committee and bring his bank records. He refused to respond to the subpoenas. Congress declared Daugherty in contempt (deliberate disregard of public authority) and John M. McGrain, Sergeant-at-Arms of the Senate, placed him under arrest. Daugherty gained his release when a lower court declared that the Senate had exceeded its powers under the Constitution by requiring him to testify on a non-legislative issue. The court said the Senate was acting as if it was a court but it had no power to do that.

McGrain appealed directly to the U.S. Supreme Court which accepted the case. The Court addressed the issue of whether Congress had the power to make these demands on citizens when no specific provision existed in the Constitution for congressional investigations.

Essential to the Legislative Function

Upholding the Senate investigation and contempt conviction against Daugherty, the Court issued a unanimous 8-0 decision. Justice Willis Van Devanter, writing for the Court, broadly interpreted the implied power (not actually written in the Constitution but suggested) of Congress to conduct investigations and issue subpoenas even without stating a specific legislative law making purpose. The ruling extended, as never before, Congress' power to investigate the lives and actions of private citizens by requiring them to appear before investigating committees to answer questions involving the matters at hand.

The Court addressed two key questions in coming to this decision. First, could Congress demand a private person to appear before it to give testimony even though this power is not specifically written in the U.S. Constitution? Justice Van Devanter wrote that "the power of inquiry — with process to enforce it — is . . . essential and appropriate . . . to the legislative function." Van Devanter continued that a legislative body can not wisely legislate (make laws) without being informed about conditions which it seeks to change. Frequently, it must turn to others for this information and "some means of compulsion (demand) are essential to obtain what is needed." Yes, Congress could require a private person to testify.

Second, was the testimony requested for aid in a legislative function? Rejecting the lower court's ruling that the Senate had attempted to

CONTEMPT OF CONGRESS

In 1857 Congress passed a law making it a criminal offense to refuse to give information requested by either the U.S. House of Representatives or Senate. The law is still in effect in an amended form at the end of the twentieth century. The offending person is considered "in contempt" of Congress. The first Supreme Court case asserting the Court's right to review contempt cases and set standards for congressional investigations was *Kilbourn v. Thompson* (1881). The Court ruled that investigations had to be in subject areas over which Congress had authority, their purpose had to be related to the passage of legislation, and they could not simply probe into the private affairs of citizens. Sixteen years later in *In re Chapman* (1897) the Court eased the standard. The Court ruled that Congress did not have to specifically state the legislative purposes of its investigations and that witnesses could be questioned in more areas of their lives than allowed in *Kilbourn.* In *McGrain v. Daugherty* (1927) the Court firmly established Congress' power to obtain information by conducting legislative investigations and forcing private citizens to testify, even without a legislative purpose being stated.

The modern-day language of the law, known as Section 192, states that a person may be "summoned [called forth] as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by . . . the two Houses of Congress, or any committee of either House of Congress . . . " If the summoned person fails to appear or refuses to answer any question relating to the inquiry subject, that individual will be guilty of a misdemeanor and punished "by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month or more than twelve months."

carry out a court function, Van Devanter concluded that the information gained from Daugherty's testimony could be used in creating future laws. "The only legitimate object the Senate could have in ordering the investi-

gation was to aid it in legislating," he wrote. Van Devanter added that while it would have been desirable to state beforehand what the legislative purpose was, it was not absolutely necessary. So, a legislative goal did not have to be stated before an investigation is conducted.

However, while the Court gave Congress broad investigative power, it did establish limits. Van Devanter wrote, "A witness may rightfully refuse to answer where the bounds of the power are exceeded or the questions are not pertinent [do not apply] to the matter under inquiry."

An Often-Used Power

Although the phrase executive privilege had not yet come into use, *McGrain* is considered the first Supreme Court ruling to uphold the power of Congress to override this privilege on certain occasions when the president, his cabinet members, or his aides are requested to testify. The phrase, first used by Justice Stanley F. Reed in 1958, refers to the doctrine that a president may withhold certain information, documents, or testimony of aides from congressional investigation.

The investigative powers of Congress set out in *McGrain* were repeatedly put into action throughout the rest of the twentieth century. In the 1950s those suspected of being communists were called to testify before House and Senate committees during the McCarthy hearings. The next decades saw investigations of the Watergate break-in scandal, Iran-Contra arms deals, and finally the impeachment hearings of President Bill Clinton (1993–). Countless numbers of less publicized investigations took place as new laws were crafted by Congress.

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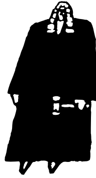

Barron v. Baltimore 1833

Appellant: John Barron

Appellee: The Mayor and city council of Baltimore, Maryland

Appellant's Claim: That Baltimore's city improvements severely damaged his harbor business constituting a taking of property without just compensation in violation of the Fifth Amendment.

Chief Lawyer for Appellant: Charles Mayer

Chief Lawyer for Appellee: Roger Brooke Taney

Justices for the Court: Gabriel Duvall, William Johnson, Chief Justice John Marshall, John McLean, Joseph Story, Smith Thompson

Justices Dissenting: None (Henry Baldwin did not participate)

Date of Decision: February 16, 1833

Decision: Ruled in favor of Baltimore by finding that the Supreme Court has no jurisdiction in the case because the Fifth Amendment only applies to federal government actions and not state disputes.

Significance: The ruling legally established the principle that the first ten amendments, the Bill of Rights, apply to and restrain the federal government's powers but do not apply to state governments. This legal doctrine was not reversed until the twentieth century when the Supreme Court gradually included the Bill of Rights into the Fourteenth Amendment guarantees.

FEDERAL POWERS AND SEPARATION OF POWERS

"Beware! Beware!—you are forging chains for yourselves and your children—your liberties are at stake." Words spoken by Elbridge Gerry, Massachuset's delegate to the Constitutional Convention in 1787.

Gerry was one of a handful of delegates refusing to sign the newly crafted Constitution. As did many citizens of the newly forming nation, he feared a domineering central government. Memories of British rule were fresh. The British army had forced owners of private homes to house soldiers, they assessed unfair taxes, and customs officials invaded homes to search for smuggled goods. The Constitution as written did not contain a bill of rights, a summary of the basic rights and liberties of the people. The lack of a bill of rights, which many believed would guard against a strong-arm central government, was the most serious obstacle to ratification by the states. Only after the federalists, who favored a strong central, or federal, government and believed a bill of rights was unnecessary, compromised and agreed to draft a list of basic rights to be added later to the Constitution was the tide turned toward ratification. Thus, one of the first acts of the new Congress in 1789 was to pass the first ten amendments (changes or additions) to the Constitution that came to be known as the Bill of Rights. Moreover, it was common knowledge of the day that the Bill of Rights was added because people feared the federal government and not because they dreaded abuses of power by their state governments.

Approximately forty years later in *Barron v. Baltimore* (1833) the U.S. Supreme Court was asked to decide if an amendment in the Bill of Rights applied to state governments as well as the federal government. Their decision started an argument that lasted well into the twentieth century.

Barron's Business, Baltimore's Needs

John Barron and John Craig were owners of a large and highly profitable wharf on the east side of the harbor in Baltimore, Maryland. Located in the deepest water of the harbor, the wharf was a popular docking place for ships to unload cargoes into nearby warehouses. Renting their wharf to ship owners, Barron and Craig collected large sums of money.

As Baltimore grew two city issues arose. First, the city needed new streets. Secondly, with the larger population the older sections of Baltimore's harbor became filled with stagnant water, garbage, and debris. Responding to the need for new streets and in an attempt to end

the health hazard in the harbor, the city carried out an extensive public works program between 1815 and 1821. The program involved regrading and paving streets, building embankments, and diverting the natural course of streams. The stream diversions happened to lead right toward Barron's and Craig's wharf.

During storms those diverted streams carried large amounts of sand and soil which ended up at the front of Barron and Craig's wharf. Through time the water steadily grew shallower until large ships could no longer use the wharf. His profitable business ruined, Barron sued the city in the Baltimore County Court for money to compensate (pay him back) for his financial loses. His partner, John Craig, had died, so Barron represented Craig as well.

The Bill of Rights and State Governments

In the Baltimore County Court, Barron argued the city had violated his property rights but the city denied his claim. The city attorneys justified their projects by stating that the Maryland legislature had granted the city power to pave streets and regulate the flow of water. The silting up of the harbor was an unfortunate "nuisance" affecting all of Baltimore's residents but not directed specifically at Barron. The County Court found in favor of Barron and awarded him $4,500 in damages. The city appealed to the Maryland Court of Appeals which reversed the lower court decision and ruled against Barron. Barron took his case to the U.S. Supreme Court. Before the Court, one of the arguments presented on Barron's behalf dealt with the Fifth Amendment to the Constitution. Remember, the first ten amendments make up the Bill of Rights. After hearing arguments, the Court decided the case should focus only on the Fifth Amendment argument.

The Fifth Amendment states that "private property" shall not "be taken for public use without just compensation." Barron claimed the city of Baltimore had violated his constitutional rights under the Fifth Amendment by destroying his profitable business without compensating him. Barron contended that the Fifth Amendment "declares principles which regulate the legislation of the states, for the protection of the people in each and all the states . . . " The question before the Court was: Did the Fifth Amendment, or any part of the Bill of Rights, apply to and "regulate" the powers of state government as well as applying to the federal government or did the Bill of Rights only restrict actions of the federal government?

FEDERAL POWERS AND SEPARATION OF POWERS

"Of Great Importance" But Not Difficult

Chief Justice John Marshall wrote the opinion of the unanimous Court. This was Marshall's last major constitutional decision and, unlike many of his previous opinions, it restricted rather than expanded federal authority over the states. Marshall began, "The question thus presented is of great importance, but not of much difficulty." Marshall concluded that the Bill of Rights was designed to regulate the activities of and avoid possible abuses of power by the federal government and was "not . . . applicable to the states." Conveying his reasoning for the decision, Marshall wrote that the people of each state had enacted their own constitutions to control their state and local governments. He also pointed out that, unlike certain parts of the Constitution, no language appeared in the Bill of Rights saying the amendments applied to the states. He believed if the authors had intended the Bill of Rights to apply to the states they would have specifically said so. Finally, Marshall reviewed "the history of the day," finding the Framers of the first ten amendments intended them to guard against abuse of power by "the general [federal] government—not against those of the local governments." Thus, the Fifth Amendment could not be used by Barron to require "just compensation" from Baltimore for making his wharf useless. The Fifth Amendment could only apply to cases involving the federal government.

Finding the Supreme Court could not apply the Fifth Amendment to Baltimore or Maryland, Marshall dismissed the case.

Enormous Significance

As Marshall had written, *Barron* was of enormous significance. Courts in future cases expanded the decision to include all amendments in the Bill of Rights. As a result, the courts prevented the federal government from interfering when a state violated an individual's basic liberties and rights. Not until 1868 with passage of the Fourteenth Amendment did Congress try to limit the powers of state governments and protect the rights of individuals. Yet, the Supreme Court did not begin using the Fourteenth Amendment's guarantee to all persons of equal protection of the laws and due process or fairness in application of those laws until well into the twentieth century. However, by the year 2000 the Court had ruled that almost every right and liberty contained in the Bill of Rights must be protected by state governments, like the federal government, under the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

AMENDMENTS ALLOW FOR CHANGES

Realizing the nation would need to make changes to the Constitution, the Framers provided a way to amend it or make formal changes. A constitutional amendment can be proposed by a two-thirds vote of the House of Representatives and the Senate. Also, two-thirds of the state legislatures can call together a national convention to propose an amendment, but this method has never been used. Once Congress proposes an amendment, three-fourths of the state legislatures must ratify or approve it. A second path to ratification is by approval of three-fourths of the states meeting in special conventions, but this method has only been used once.

The first ten amendments were ratified in 1791 shortly after adoption of the U.S. Constitution. They are known as the Bill of Rights.

Approximately 9,000 resolutions for amending the Constitution have been proposed in Congress. However, only thirty-three have gone to the states for ratification. Only twenty-six amendments have been passed and made part of the Constitution. Amendments generally fill a need the Framers of the Constitution did not address. Examples are the Civil Rights Amendments (the Thirteen to Fifteen amendments), need for an income tax (the Sixteenth Amendment), the right to vote for women (the Nineteenth Amendment), and limits on presidential terms (the Twenty-second Amendment). The latest amendment, the Twenty-sixth, was ratified in 1971 and gave citizens eighteen to twenty years of age the right to vote.

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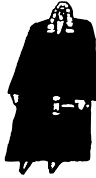


Dred Scott v. Sandford
1857

Plaintiff: Dred Scott

Defendant: John F.A. Sandford

Plaintiff's Claim: That Scott, a slave, became a free man when taken by his owner to a non-slave state as recognized by the Missouri Compromise.

Chief Lawyers for Plaintiff: Samuel M. Bay, Montgomery Blair, George T. Curtis, Alexander P. Field, Roswell M. Field, David N. Hall

Chief Lawyers for Defense: Hugh A Garland, H.S. Geyer, George W. Goode, Reverdy Johnson, Lyman D. Norris

Justices for the Court: John A. Campbell, John Catron, Peter V. Daniel, Robert C. Grier, Samuel Nelson, Chief Justice Robert B. Taney, James M. Wayne

Justices Dissenting: Benjamin Curtis, John McLean

Date of Decision: March 6, 1857

Decision: Ruled that Scott was still a slave and that slaves and their descendants were property and could never be U.S. citizens and can never become a citizen. The Court also found the Missouri Compromise unconstitutional.

Significance: Instead of settling the slavery issue, the decision fueled the controversy further. The ruling most likely hastened the start of the Civil War.

A slave is a person who works for another person against his or her will as a result of force. Dred Scott was a Missouri slave who attempted to gain his freedom through the courts. His case reached the U.S. Supreme Court and on March 6, 1857 the Court handed down a decision. The ruling in *Dred Scott v. Standford* has been described as the Court's greatest mistake, a tragic error, a political calamity. Not only did the opinion cast a dark shadow over the Court's trustworthiness and prestige, but it most likely hastened the beginning of the Civil War (1861–1865).

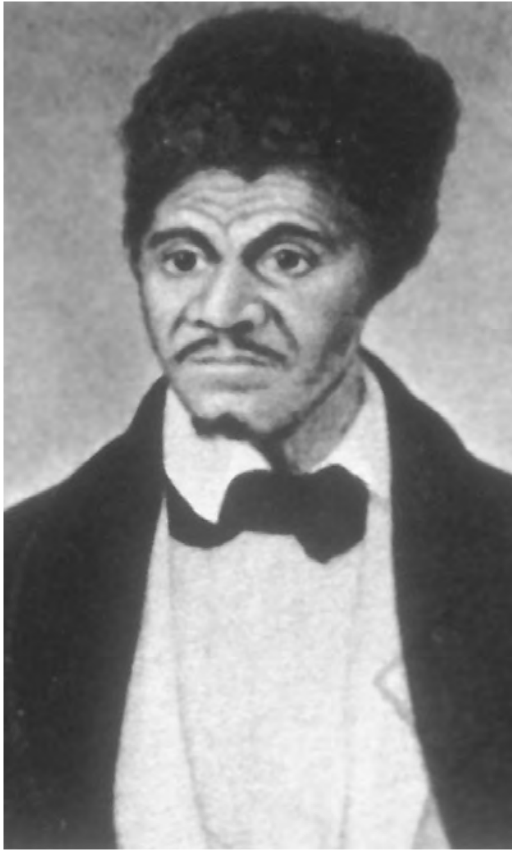
Born in Virginia in the late 1790s, Scott was owned by Peter Blow. A plantation owner, Blow took Scott to Alabama in 1819 then, after growing tired of farming, moved his family and slaves including Scott to the booming frontier town of St. Louis, Missouri in 1830. Scott was sold in 1833 to an army surgeon, Dr. John Emerson of St. Louis.

Missouri Compromise

Scott's travels west mirrored U.S. westward expansion during the same time period. Americans had pushed west from the original thirteen states to beyond the Mississippi River. Slavery, which was permitted by the U.S. Constitution, became a serious political problem as westward expansion continued. Northern states who had chosen to be free states, not allowing slavery, wanted to keep the new western territories free. Southern states, slave states, wanted to bring slavery and the plantation lifestyle to the territories. Both sides feared that as new states were admitted to the Union, the other side would gain a controlling vote in the Senate.

In 1818 the Territory of Missouri applied for admission to the United States. Slavery was legal in the territory and most people expected Missouri to enter as a slave state. At this time there were eleven free states and eleven slave states. Therefore, twenty-two senators were from free states and twenty-two senators from slave states. Admitting Missouri would tip the balance. In 1820 an agreement called the Missouri Compromise was reached in Congress between its Northern and Southern members. Missouri was admitted as a slave state and Maine was admitted as a free state. The Compromise also banned slavery from north of Missouri's southern boundary, except in the state of Missouri.

The Compromise proved far from a final solution as slavery remained an explosive issue for the next four decades. Many questioned if Congress had the authority to prohibit slavery in any territory. The con-



Dred Scott was a slave who, like most slaves, wanted his freedom.
Courtesy of the Library of Congress.

troversy would play a key role in the *Dred Scott* decision.

Scott's Travels North

Scott accompanied his new owner, Dr. Emerson, on his assignments. In 1834 Dr. Emerson took Scott out of Missouri to a military post in Illinois, a free state, where Scott served his owner until 1836. Emerson then took Scott with him to a new assignment at Fort Snelling in the Wisconsin Territory (in modern-day Southeast Minnesota). At that time, the territory of Wisconsin was free according to the Missouri Compromise. Dr. Emerson kept Scott as a slave at Fort Snelling until 1838 when they returned home to Missouri.

Within a few years of their return, Emerson died, leaving Scott to his widow. Mrs. Emerson moved to New York in the mid-1840s and left Scott in the care of Henry Blow, a member of the family that had originally owned him. Blow, opposed to the extension of slavery to the western territories, financially supported Scott to test in court whether living in the free state of Illinois and in the Wisconsin Territory had made him a free man. Scott brought suit in a Missouri court for his freedom, arguing that since he had been a resident of a free state and in a free territory, his status had changed. The Missouri court held in January of 1850 that Scott was a free man based on certain Missouri state court precedents

(previous rulings) which said that, even though Missouri was a slave state, residence in a free state or territory resulted in a slave's emancipation (freedom). However, the Missouri Supreme Court in 1852 reversed that decision by stating that blacks were destined to be slaves.

In 1854 Mrs. Emerson arranged a sale of Scott to her brother John F.A. Sanford (the Supreme Court records misspelled Sanford's name as Sandford) who lived in the state of New York. The sale to Sanford enabled Scott to again file suit, this time in a federal circuit court. Suits may be brought in federal court if the two opposing parties are citizens of different states. Sanford was a citizen of New York and Scott needed to show he was a citizen of Missouri. The circuit court ruled that Scott, as a black slave, was not a citizen of Missouri, therefore he could not bring suit in federal court. Scott immediately appealed to the U.S. Supreme Court.

With the issue of slavery persisting and Congress unable to find a political solution, the Court felt mounting pressure to seek a final solution to the slavery question. Therefore, the Court agreed to hear the case. First argued before the Court in February of 1856, the justices decided to post-

pone their decision until after the November presidential election because of the political sensitivity. After a second round of oral arguments in December of 1856, a majority of seven decidedly pro-slavery justices favored a narrow ruling saying it was up to Missouri to determine if Scott was slave or free and the Court could not interfere with that decision. However, the two dissenting justices, John McLean and Benjamin R. Curtis, both fiercely antislavery, made it clear their dissents would be much more far reaching. They were preparing to consider whether or not a slave could ever become a citizen, whether living on free soil made a slave a free man, and whether Congress had the authority to ban slavery in the territories. In response, each of the seven majority justices decided to write their own opinions. Chief Justice Roger B. Taney's opinion was widely viewed as the official position of the majority.

Never a Citizen

First, Taney declared that never could Scott or any slave or his descendent be a citizen under the Constitution. Taney wrote that,

> **. . . they are not included and were not intended to be included under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to the citizens of the United States.**

Taney arrived at this conclusion by examining the historical view of slaves and the original intent of the Framers of the Constitution. With stinging words he wrote that slaves "had for more than a century before [the Constitution was ratified] been regarded as being of an inferior order . . . with no rights which the white man was bound to respect . . . " Further, Taney said that blacks were not included in the words of the Declaration of Independence, "all men are created equal." Not only were slaves not citizens but, Taney continued, that slaves were actually regarded in the Constitution as property.

Taney, having presented ample reasons why Scott could not be considered a citizen, could have stopped at this point and dismissed the case. For if Scott was not a citizen, he could not bring suit in federal court, just as the lower federal circuit court had ruled. However, in order to let the nation know where the Court stood, the Chief Justice felt it necessary to address the issues of the free man on "free soil" argument and of slavery

in the territories. Taney dismissed the idea that a slave became free just because he entered a free state. Whatever claim to freedom Scott might have had in Illinois was lost when he left that state and Missouri was not obligated to enforce an Illinois law.

Taney next decided that the ban on slavery in territories by the Missouri Compromise was unconstitutional, therefore Scott's living in the Wisconsin Territory did not make him a free man. Taney had reasoned that Scott was property and the Fifth Amendment said that no one could deprive a person of his property without "due process of law [fair legal proceedings]" and "just compensation [payment]." For Congress to deprive slave owners their property just because they came into a free territory would be denying slave owners due process of law in violation of the Fifth Amendment. Hence, the Court declared the Missouri Compromise unconstitutional and said that Congress was bound to protect slavery in the territories. This was only the second time the Supreme Court had used the power of judicial review which allows the Court to declare an act of Congress unconstitutional. The first was ***Marbury v. Madison*** (1803).

Stage Set for Civil War

Intended to settle the legal question of slavery, the decision actually fueled the controversy over slavery and seriously damaged respect for the Court. Animosity heightened between the Northern and Southern states. The Democratic Party split into northern and southern wings over the slavery issue, allowing Republican Abraham Lincoln (1861–1865), strongly antislavery, to be elected President in 1860. Historians widely believe the Scott decision hastened the onset of the Civil War just four years later.

The outcome of the Civil War and the amendments Congress passed immediately following its conclusion overturned the Scott decision. Congress passed the Thirteenth Amendment, ratified in 1865, abolishing slavery. The Fourteenth Amendment, passed in 1866 and ratified in 1868, declared all persons born or naturalized in the United States were citizens of the United States and the state in which they lived. It also prohibited the states from depriving any person of life, liberty, or property without due process of law or denying any person equal protection of the laws. These guarantees, indirectly the legacy of the slave Dred Scott provided the basis for the emphasis on civil rights later in the twentieth century.

MAN OF CONTRADICTIONS

Roger Brooke Taney (1777–1864), the fifth chief justice of the United States serving from 1836 until his death in 1864, was born in Maryland in 1777. Taney's ancestors had settled in Maryland in the 1660s and his father was a prosperous tobacco plantation owner. Taney built a thriving legal practice in Maryland, and married Anne Phoebe Carlton Key, sister of the author of the "Star Spangled Banner," Francis Scott Key.

Taney was appointed to the Court by President Andrew Jackson (1929–1937), whom he staunchly supported, to fill the seat left by Chief Justice John Marshall's death. Taney often appeared to be a man of contradictions. Taney, the aristocrat, insisted on wearing ordinary trousers instead of formal knee britches under his judicial robes. Although a persuasive leader, Taney assigned important opinions to associate justices to write rather than issuing all opinions himself, a break from past tradition.

Taney adhered to the Jacksonian principle that power should be divided between the states and federal government and believed the Court must determine that split. Many feared he would dismantle Marshall's federalist vision of a strong central government. While he did transfer some power to the states, particularly in the area of commerce (trade), he did not completely break from the nationalism of the Marshall Court.

Although Taney served on the Court with great distinction, he is best remembered for his infamous decision in *Dred Scott v. Sandford* (1857) where he ruled that slaves were so inferior as to possess no rights, could never be citizens, were property, and that Congress was bound to protect slavery in the territories. Ironically, years earlier Taney had freed his own slaves at considerable financial sacrifice and stated that slavery was an "evil" and "a blot on our national character." Taney remained Chief Justice until his death a year before the end of the Civil War.

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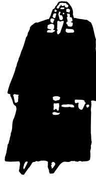

Mississippi v. Johnson 1867

Plaintiff: State of Mississippi

Defendants: U.S. President Andrew Johnson, General Edward O. C. Ord P **laintiff's Claim:** That the president should be stopped from enforcing the Reconstruction Act of 1867 because it violated the U.S. Constitution.

Chief Lawyers for Plaintiff: W.L. Sharkey, R. J. Walker

Chief Lawyer for the Defense: U.S. Attorney General Henry Stanberry

Justices for the Court: Chief Justice Salmon P. Chase, Nathan Clifford, David Davis, Stephen J. Field, Robert C. Grier, Samuel F. Miller, Samuel Nelson, Noah H. Swayne, James M. Wayne

Justices Dissentig:

Date of Decision: April 15, 1867

Decision: Ruled in favor of President Johnson by finding that the Constitution's separation of powers prevents the Court from stopping the President in carrying out his executive duties.

Significance: The Court refused to limit a president's power to carry out the laws passed by Congress, keeping the separation of powers intact. The ruling was important in defining the executive's immunity from lawsuits designed to block his political duties. The decision also held that the Court could not stop a president from enforcing an act of Congress, but could rule on the constitutionality of an act once executed.

Executive immunity refers to a concept highly important to the nation's chief executive, the president. While exercising his executive powers, executive immunity shields the president from judicial (the courts) interference. A court cannot demand or require a president to take action or, on the other hand, stop action on any specific political duty such as enforcing laws made by Congress. The concept is part of the Constitution's system of separation of power. The three branches of federal government, the executive (president), the legislature (Congress), and the judicial (courts), are each protected from undue influence by the others. However, the president's immunity has limits from all challenge. Under Article II, Section 4 of the Constitution. Congress may impeach and remove a president from office if it finds him guilty of "Treason, Bribery, or other high Crimes and Misdemeanors."

A key U.S. Supreme Court ruling on executive immunity, *Mississippi v. Johnson* (1867), came during a difficult time in American history.

Reconstructing the South

Following the devastating Civil War (1861–1865), the country was trying to heal and address problems that came with the end of slavery. The governmental programs designed to restore order and rebuild the South were called Reconstruction.

Although the post-Civil War battles were fought with words and laws, not cannons and guns, Reconstruction policies pitted North against South, almost as fiercely as the war itself. The North, as the Civil War victor, clearly held an advantage. Following in the footsteps of President Abraham Lincoln (1861–1865), President Andrew Johnson (1865–1869) tried to make Reconstruction a healing process. But, by 1867 a group of politicians in Congress known as the Radical Republicans had taken control. Most of the Republicans had been strong abolitionists (anti-slavery) before the war. Controlling the beaten Confederacy (Southern states) and establishing rights of newly freed slaves was their primary concern and mission.

Reconstruction Act of 1867

One of the Radical Republicans' first major pieces of legislation was the Reconstruction Act of 1867. The act divided the Southern states into five military districts and required the President to assign an army officer as

military governor to each district. Military courts would hear civil (non-military) disputes. Further, the President was to provide a sufficient military force to assist the officer in enforcing his authority within his district. As a condition for reentering the Union, the act required states to draft new constitutions giving former slaves the right to vote.

South Outraged

The Reconstruction Act outraged the South. Within a month of its passage, the state of Mississippi charged the act was overwhelmingly unconstitutional and challenged the president's authority to carry out its programs. The state asked the Supreme Court to issue a permanent injunction (court order to stop an action) to stop President Johnson and their area's military governor, Edward O. C. Ord, from carrying out the congressional programs outlined in the Reconstruction Act. Never before had an acting president been named as a defendant in a case heard before the Supreme Court.

The federal government had been in constitutional trouble only a year earlier by using military authority in civil issues. Calling it a "gross" misuse of power, the Court ruled in *Ex Parte Milligan* (1866) that the government could not declare martial law (military rule) in an area outside a war zone that already had existing civil governments and courts. Mississippi was no longer at war with the federal government and had its own civil government in place. Therefore, the *Milligan* ruling gave the South hope that the Court would also strike down the Reconstruction Act programs.

Before the Court, Mississippi referred to the precedent (previous ruling) of ***Marbury v. Madison.*** In that famous 1803 decision, Chief Justice John Marshall held that the Court could command executive officials to carry out "ministerial" duties in order to fulfill their legal obligations. A ministerial duty was thought of as a rather simple duty not open to an individual's personal judgement. Mississippi claimed carrying out the Reconstruction Act programs was merely ministerial and, therefore, the Court could order the president to stop them.

Mississippi Denied

The Supreme Court unanimously denied Mississippi's request for an injunction. Chief Justice Salmon P. Chase, writing for the Court, held

that the judiciary (courts) could not stop the president from enforcing the Reconstruction Act, even if the act was unconstitutional. The Court chose not to focus on the constitutionality of the Reconstruction Act, but rather on its enforcement by the president. To prevent a president from enforcing acts of Congress would stop a president from carrying out his constitutional responsibilities to the legislative branch.

In his reasoning Chief Justice Chase first distinguished between "ministerial" duties and "political" duties. Chase defined ministerial duty as, " . . . one in respect to which nothing is open to discretion [judgement or question]. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law." Chase continued by defining political duties,

> **Very different is the duty of the President in the exercise of power to see that the laws are faithfully executed, and among these laws the [Reconstruction Act} . . . {H}e is required to assign generals to command in the several military districts, and to detail sufficient military force to enable such officers to discharge their duties under the law . . . The duty thus imposed on the President is in no sense just ministerial. It is purely executive and political.**

Therefore, Chase disagreed with Mississippi that the actions required to set the Reconstruction Acts in motion were simply ministerial duties which, according to the *Marbury* decision, the Court could order the president to carry out or, in this case, to stop acting on. Rather, these duties were political requiring the exercise of political judgement. Any attempt by the Court to direct how a president must carry out his political duties was, in the language of John Marshall, "an absurd and excessive" interference with another branch of government. Preventing the president from acting on congressional legislation would cause a "collision . . . between executive and legislative departments of the government." The House would then have grounds for impeachment against the president. With this reasoning the Court kept the separation of powers intact.

Concerning the constitutionality of the Reconstruction Acts, the Court pointed out that the Constitution requires Congress to pass laws, the president to execute (carry out) them, and the Court to review them once they have been put into action. The Court had no power to review the Reconstruction Acts before they had even been put into action.

SALMON PORTLAND CHASE

Salmon Portland Chase (1808–1873) was born in New Hampshire, the eighth of eleven children. He served as the sixth chief justice of the Supreme Court from 1864 to 1873. Chase presided over the Court through America's bitter years of Reconstruction. His rulings generally empowered Congress to direct Reconstruction and rebuild the nation.

Chase graduated Phi Beta Kappa (with high honors) from Dartmouth College at eighteen years of age and built a successful law practice in Cincinnati, Ohio. By the 1830s slavery, which Chase fiercely opposed, was the burning issue. A deeply religious man, Chase was morally incensed by the treatment of slaves and defended those who protected runaway slaves. Elected to the Senate in 1849, he quickly became a leader of the antislavery movement helping to create the Republican Party. President Lincoln appointed Chase secretary of the treasury in 1860 and chief justice of the Supreme Court in 1864 to fill the vacancy left by the death of Roger B. Taney. His firm leadership and commitment to hard work helped regain some of the Court's prestige lost with Taney's *Dred Scott v. Sandford* decision. Chase pushed for voting rights for blacks, but took a moderate approach to Reconstruction winning the support of Democrats. It fell to Chase to preside over the impeachment trial of President Johnson. His fair legal procedure probably saved the Johnson presidency.

Chase was passed over three times for a presidential nomination in 1856, 1860, and 1868. Although his fellow justices often complained of what they considered his excessive political ambition, they regarded him as a strong, efficient leader with superior judicial abilities.

A Presidential Shield

Following the *Mississippi* decision, President Johnson did carry out the Reconstruction Act and in 1868 the state of Georgia filed a similar suit. At that point the Court could properly examine the act's constitutionality.

The Court let the act stand continuing to allow Congress to rebuild the nation in whatever ways it believed appropriate.

In a legal sense, *Mississippi* helped shape the notion of executive immunity. The president was now immune (shielded) from suits that tried to prevent him from carrying out a law. Ironically, President Johnson was personally very opposed to the Reconstruction Act but had felt Mississippi's action was a direct threat to presidential power. Therefore, he had ordered the U.S. attorney general to oppose the state's request.

In ***Nixon v. Fitzgerald*** (1982) the Court expanded presidential immunity by ruling that the president was immune to personal liability (responsibility) lawsuits for actions he took while carrying out his duties in office.

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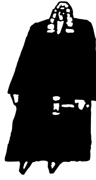

Selective Draft Law Cases 1918

Appellants: Joseph F. Arver and others

Appellee: United States of America

Appellants' Claim: That the Selective Draft Act of 1917 violated various provisions of the U.S. Constitution including Section 8 of Article I and the First and Thirteenth amendments.

Chief Lawyers for Appellants: T.E. Latimer, Edwin T. Taliferro, Harry Weinberger

Chief Lawyer for Appellee: John W. Davis, Solicitor General

Justices for the Court: Louis D. Brandeis, John H. Clarke, William R. Day, Oliver Wendell Holmes, Joseph McKenna, James C. McReynolds, Mahlon Pitney, Willis Van Devanter, Chief Justice Edward D. White

Justices Dissenting: None

Date of Decision: January 7, 1918

Decision: Ruled in favor of the United States by finding that the act did not violate any section of the U.S. Constitution.

Significance: The case was the first to reach the Supreme Court challenging the federal government's legal power to draft men into the military. With the power confirmed, the military draft was used at various times throughout the twentieth century including the Vietnam War (1964–1975).

FEDERAL POWERS AND SEPARATION OF POWERS

In 1917 as America entered World War I (1914–1918), patriotic songs sounded in the hearts and minds of young men enthusiastically answering the call to register for the newly-established draft. Encouraged by government posters as well as the songs, millions stood in long lines to sign up. Yet others chose to not heed the call and refused to register. America has a long history of using conscription (drafting citizens into military service) to raise short-term military forces in time of conflict. However, opposition to conscription by pacifists (those who believe disputes must be settled by peaceful means), members of certain religious groups, and opponents of particular wars has an equally long history.

Raising an Army

Historically, during times of tension, America has often relied on volunteers to fight its wars. But, even in colonial times men were sometimes conscripted to serve in local militias (army of citizens called together in emergencies). Though colonies sent local militia troops to fight in the Revolutionary War (1775–1783), they denied George Washington's (1732–1799) request to gather a national army by conscription. The U.S. Constitution, adopted in 1789, gave Congress the "power to raise and support armies" but it neither called for nor prohibited conscription.

Not until the American Civil War (1861–1865), did the need to maintain massive armies bring a taste of national conscription to America. In April of 1862, the Confederate Congress (Southern states) passed a conscription law requiring every white man aged eighteen to thirty-five to serve for three years. However, the law exempted men in certain occupations such as teachers, ministers, and overseers of large plantations. Congress followed with the Union Draft Law of 1863 making every male citizen between twenty and forty-five years of age subject to the draft. Avoiding the unpopular occupational exemptions allowed in the Confederate states, the Union (Northern) law allowed draftees to hire a substitute or pay $300 to escape service. Three hundred dollars was roughly equal to a worker's yearly wages.

In both the North and the South the principle behind the draft laws was the same. In a democracy when the security of a nation is in danger, every citizen has the duty to serve his country. On both sides a majority of citizens accepted the draft as necessary, but much opposition persisted. Many objected to exempting some men from the draft. Others claimed the draft was unfair to the poor because a man with money could hire

someone else to fight for him or simply pay off his obligation. Draft riots broke out across the country with the worst occurring in New York City in July of 1863. Although very controversial, the draft laws were never tested in the Supreme Court. The legality of a national draft remained unchallenged until World War I.

"I Want You"

America entered World War I in February of 1917 and immediately faced the problem of how to mobilize (build) an army. A large army would have to be recruited and trained at short notice. In response, on May 17,1917 Congress passed the Selective Service Act. The act required young men aged twenty-one to thirty to register with the government so that some of them could be selected for compulsory (required) military service. Substitutes and pays-offs were not allowed. The 1917 draft law did allow for exemptions in essential industries and for conscientious objector (CO) status. CO status permitted men who opposed war for religious reasons to avoid combat. Although twenty-four million men registered for the draft, two to three million failed to register. Approximately 64,700 sought CO status. Almost 340,000 failed to report when called or deserted after arrival at training camp. The U.S. government arrested many of the men who tried to avoid military service and some of those arrested challenged the draft law.

Draft Resisters

Among the many Americans arrested for not registering for the draft was Joseph Arver. After his arrest, Arver and several other draft resisters from his home state of Minnesota brought suit against the federal government. The Supreme Court combined the cases of the draft resisters into one case commonly referred to as *Selective Draft Law Cases.* Arver and the others argued that the Constitution did not give Congress power to require men, by use of a compulsory (required) draft, to serve in the military. They also charged the conscientious objector status violated the First Amendment's prohibition against establishment of religion. Lastly, they claimed the draft was a form of involuntary servitude (lacking liberty to determine one's way of life) forbidden by the Thirteenth Amendment.

"Supreme and Noble Duty"

The unanimous (all members are in agreement) Court rejected all of the resisters' arguments and upheld the Selective Service Act. Chief Justice Edward D. White wrote the opinion which all of the justices signed. To answer the first argument, White examined Article I, Section 8 of the Constitution which gives Congress power "to raise and support armies" and "make all laws which shall be necessary and proper" to carry out that power. The words of the Constitution seemed perfectly clear to White. He commented,

> **As the mind cannot conceive an army without the men to compose it, on the face of the Constitution the objection that it does not give power to provide for such men would seem to be too frivolous for further notice.**

White continued by noting that while a "just government" has a duty to its citizens, the citizens have a "reciprocal obligation (a returned duty or commitment) . . . to render military service in the case of need." White concluded the Constitution indeed gives Congress the power to draft men into the military if the need arises.

Next came the justice's quick dismissal of Arver's second and third arguments. White could not imagine how the Act's religious exemption for conscientious objectors could be viewed as establishing a religion and, therefore, in conflict with the First Amendment. He observed this line of thinking was too unsound "to require us to do more."

Lastly, White saw no similarity between what the Thirteenth Amendment called involuntary servitude and military service. The Thirteenth Amendment was intended to prohibit certain kinds of forced labor such as slave labor. The Court ruled citizenship carried with it an obligation to perform the "supreme and noble duty of contributing to the defense of the rights and honor of the nation as the result of a war declared by the great representative body of the people." This obligation does not violate prohibitions of the Thirteenth Amendment.

The Draft's Long History

The *Selective Draft Law Cases* established the clear right of Congress to conscript citizens. Later challenges to the draft often focused on the conscientious objector status. Conscription into the military ended in

CONSCIENTIOUS OBJECTORS

At the end of the twentieth century federal law recognized two types of conscientious objectors, the traditional conscientious objector (CO) and the noncombatant CO. Both were required to register but, if drafted, could object on the basis of religious, ethical, or moral beliefs. Traditional COs objects to participation in war in any form and would normally perform alternative civilian service instead. The noncombatant CO objects to killing in war in any form but would accept noncombatant military duties such as being a medic.

As early as the 1660's members of pacifist religious groups such as the Quakers were exempted from serving in local militias. The Selective Service Act of 1917 provided for CO status and exemptions from military service for members of historically designated "peace churches" including Quakers, Mennonites, and Jehovah's Witnesses. Of the 64,000 men who applied, 57,000 were granted CO status. Of those COs drafted only 4,000 used their certificates of exemption and were placed in various alternative services. Four hundred and fifty of the 4,000 COs were sent to prison for refusal to accept alternative service.

At the onset of World War II (1939–1945), the 1940 draft law required that "religious training and belief" be present for CO status but not necessarily membership in a pacifist religious group. The percentage of inductees exempted as COs was approximately the same as in World War I. However, between 1965 and 1975 with mounting opposition to the Vietnam War resulting in over 100,000 draft evaders, the Supreme Court expanded the definition of CO to include not only religious objections but moral or ethical ones as well.

1973 as the Vietnam War came to an end. Registration for the draft temporarily ended in 1975, only to resume in 1980 under President Jimmy Carter (1977–1981) and continue toward the end of the twentieth century. The goal has been to maintain a list of available young men in case a need arises.

The Court heard two cases concerning draft registration in the 1980's. In *Rostker v. Goldberg* (1981), the Court denied a claim that draft registration was unconstitutional because it excluded women. In 1984 another draft case ruling gave Congress power to withhold federal student aid from men refusing to register.

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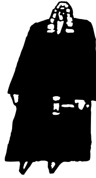

United States v. Curtiss-Wright Export Corp. 1936

Appellant: United States

Appellee: Curtis-Wright Export Corporation

Appellant's Claim: That the president has constitutional authority to prohibit arms sales to foreign nations at war.

Chief Lawyers for Appellant: Homer S. Cummings, U.S. Attorney General; Martin Conboy

Chief Lawyer for Appellee: William Wallace

Justices for the Court: Louis D. Brandeis, Pierce Butler, Benjamin N. Cardozo, Chief Justice Charles E. Hughes, Owen J. Roberts, George Sutherland, Willis Van Devanter

Justices Dissenting: James Clark McReynolds (Harlan Fiske Stone did not participate)

Date of Decision: December 21, 1936

Decision: Ruled in favor of the United States by finding that the president holds unwritten powers to conduct foreign policy.

Significance: By broadly describing executive power in foreign affairs, the Court provided a justification for the president to act in foreign affairs without requiring congressional approval. The ruling laid the groundwork for the exercise of future presidential authority in decisions concerning U.S. activity in foreign countries.

FEDERAL POWERS AND SEPARATION OF POWERS

In keeping with the principle of separating power between the branches of the government, in 1787 the Framers of the U.S. Constitution assigned some foreign affairs powers to Congress and some to the president. However, much was left undefined, particularly responsibilities during peacetime. Congress can regulate international commerce (trade), declare war, and approve treaties signed by the president. The president is commander-in-chief of the military, appoints ambassadors to foreign nations, and negotiates foreign treaties. The role of the states and the courts in foreign affairs is fairly limited.

Through the nineteenth century, the United States was not a world power and foreign affairs not a primary concern. However, at the beginning of the twentieth century the United States began to emerge as a world power with the president often playing the main role in shaping and carrying out U.S. foreign policy. Congress began regularly assuming a lesser role in developing policy, instead primarily reacting to actions taken by the president such as, providing funds for presidential initiatives (programs) or approving treaties.

Bolivia and Paraguay at War

In the mid-1930s Bolivia and Paraguary, two South American countries, went to war over a dispute as to who controlled an area known as the Chaco region following the discovery of oil in the area. U.S. arms (weapons) manufacturers were selling weapons to both countries. Concerned about remaining officially neutral in the war, Congress passed a resolution in May of 1934 giving President Franklin D. Roosevelt (1933–1945) authority to impose an embargo (prohibit trade) on arms shipments to the two countries, particularly if he believed it might contribute to the ending of the war. Four days after passage of the resolution, Roosevelt, believing it would help restore peace, used the authority to proclaim an embargo.

Curtiss-Wright Export Corporation continued selling armed aircraft to Bolivia. The U.S. attorney general filed suit in federal district court to force Curtiss-Wright to comply with the embargo. The company argued the embargo was an illegal use of presidential power because Congress, as the regulator of interstate commerce, had unconstitutionally delegated its powers to the executive branch, in violation of the separation of powers doctrine. The district court ruled in favor of Curtiss-Wright and the United States appealed the decision to the Supreme Court.

Broad Executive Powers

United States v. Curtiss-Wright Export Corp.

Before the Court was the primary question: did Congress' resolution unconstitutionally delegate (give your authority to another) congressional powers to the executive branch? If so, how much power could Congress constitutionally delegate. Justice George Sutherland, writing for the 7-1 majority, noted that this case fell into an area of governing not specifically addressed by the Constitution. However, he found that simply by the Unites States being a sovereign (politically independent) nation before the Constitution was written, that it had certain inherent (natural) powers to conduct international relations regardless if written in the Constitution or not. The United States had to meet international responsibilities. Sutherland wrote,

> **[T]he investment of the federal government with the powers of [conducting foreign affairs] did not depend upon . . . the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested [fixed] in the federal government as necessary concomitants [parts] of nationality [being an independent nation] . . .**

Further, Sutherland wrote it was primarily the president's responsibility to carry out foreign policy and he did not need an act of Congress before taking action. Sutherland commented that the president has "plenary [absolute] and exclusive [not shared] power . . . as the sole organ of the federal government in the field of international relations — a power which does not require as a basis for its exercise an act of Congress." No specific grant of foreign affairs powers to the president needs to be provided in the Constitution. Unlike domestic issues where Congress must supply clear guidelines to the executive branch when delegating congressional powers, delegation of foreign affairs powers can be broad giving the president considerable discretion (choice) on how to proceed.

Since the nation needed strong and decisive leadership for conducting world affairs, Sutherland concluded that such national sovereign powers as dealing with foreign nations must be controlled by the executive branch of the federal government. Therefore, the Court ruled that Roosevelt was acting within his authority in establishing the embargo and the companies must comply.

JUSTICE GEORGE SUTHERLAND

The *United States v. Curtiss-Wright Export Corp.* (1937) decision was remarkable not only for recognizing very broad presidential powers in foreign affairs. It was also a rare instance for Supreme Court Justice George Sutherland (1862–1942) to write a Court opinion in support of an action taken by President Franklin D. Roosevelt (1933–1945). The justice had long been an obstacle to Roosevelt's governmental programs.

Sutherland was born in Buckinghamshire, England in 1862 and received a law degree from the University of Michigan Law School in 1883. He became a U.S. House representative from Utah from 1901 to 1903 and a Senator from 1905 to 1917. President Warren G. Harding appointed Sutherland to the U.S. Supreme Court in 1922.

A strong advocate for private rights and limited government, Sutherland was a key member of a conservative Court that repeatedly overturned laws regulating business activity, claiming they were an invasion of property and contract rights. Typically, in *Adkins v. Children's Hospital* (1923) Sutherland wrote the decision striking down a law setting minimum wage standards for female workers. Sutherland claimed it violated a woman's right to negotiate contracts. In the 1930s Sutherland and the Court consistently struck down federal acts passed to revive the nation's ailing economy as part of the New Deal program. With strong pressure from President Roosevelt and the public for the Court to adopt a more flexible perspective on economic regulation, Sutherland retired in 1938. He died in July of 1942 in Stockbridge, Massachusetts at the age of eighty years.

Controversial Interpretation

Justice Sutherland's finding was controversial for its assumptions that foreign policy power was so strongly located with the president. However, the landmark decision established the doctrine of inherent powers. With this sweeping view of presidential powers provided by the

Court, the decision provided justification for future presidents, on numerous occasions, to make foreign affairs decisions that were later sent to Congress only after the commitment had already been made. The Court has almost always supported presidential actions in foreign affairs and war actions. Twice the Court even upheld executive agreements that did not receive Senate ratification (formal approval).

Primary examples of executive foreign affairs power were presidential actions taken in the course of the Vietnam War (1957–1975). Rebellion and disarray escalated in the country of South Vietnam in the late 1950s and early 1960s. In 1964 Congress passed the Tonkin Gulf Resolution giving the president power to take "all necessary measures" and "to prevent further aggression" in South Vietnam. Through the remainder of the 1960s presidents Lyndon B. Johnson (1963–1969) and Richard M. Nixon (1969–1974) committed a half million American soldiers to Vietnam and ordered countless military actions in an attempt to halt a communist takeover of South Vietnam. Largely failing to achieve the set goals, the presidential actions came under increasing scrutiny by Congress and the American public. In 1973 Congress passed the War Powers Act in an effort to restrict presidential authority in committing American troops overseas without first reaching an agreement with Congress.

Overall, this landmark decision further added to the growth of presidential powers through U.S. history. The powers of the president over two hundred years had grown well beyond what the original Framers of the Constitution likely had envisioned. It also reaffirmed under the principle of the separation of powers the Court's commitment to stay out of foreign policy disputes. Foreign relations issues are to be resolved by the two political branches of government, the president and Congress.

Suggestions for further reading

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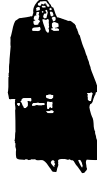

Oregon v. Mitchell
1970

Plaintiff: State of Oregon

Defendant: John N. Mitchell, U.S. Attorney General

Plaintiff's Claim: That certain provisions of the Voting Rights Act Amendments of 1970 were unconstitutional because the U.S. Constitution reserves the right to regulate elections to the states.

Chief Lawyer for Plaintiff: Lee Johnson

Chief Lawyer for the Defense: Erwin N. Griswold

Justices for the Court: Hugo L. Black, Harry A. Blackmun, William J. Brennan, Jr., Chief Justice Warren E. Burger, William O. Douglas, John Marshall Harlan II, Thurgood Marshall, Potter Stewart, Byron R. White

Justices Dissenting:

Date of Decision: December 21, 1970

Decision: Ruled largely in favor of the United States by finding that the eighteen-year-old minimum age requirement is valid for national elections but not for state and local elections. The act's ban on literacy tests and state residency requirements for voting in national elections was also upheld.

Significance: The decision allowed young adults eighteen years of age to vote in presidential and congressional elections, but left it to states to lower the age in their state and local elections. This split in authority created considerable confusion in state election systems.

Speaking to a U.S. Senate committee hearing in 1970, then Attorney General Ramsey Clark urged Congress to grant eighteen to twenty year old citizens the right vote. Forcefully, Clark noted,

> **Young people are skeptical . . . about our [government] institutions. But youth cares. Care as it may, it seems powerless . . . What can the 18-year-old do about war which seems unbearably cruel, starvation . . . racial discrimination . . . threats to the environment . . . Youth is excluded from the initial step in the decision process devised by our system of government — the vote . . . We must start our young people voting during their last year of high school . . . involve them in our system . . . in meaningful participation . . . If we do, the system will work . . . The 18-year-old vote is an essential element . . . of American democracy.**

(Quoted from *The Right to Vote.* (1972) by Bill Severn, pg. 1)

Young adults, eighteen to twenty years of age, would be the last block of American to receive the right to vote in all elections, federal, state, and local with the ratification of the Twenty-sixth Amendment in July of 1971.

The People's Struggle

At the birth of the United States, only white males with property or wealth could vote. The Founding Fathers who wrote the U.S. Constitution in the 1780s left it to the states to decide who could vote. Consequently, gaining the right to vote for most Americans, such as black Americans and women, became a step by step battle spanning almost two hundred years. Young adults would also struggle for decades to gain the right to vote.

Twenty-one Equals Adulthood Equals Right to Vote

The concept that twenty-one was the age at which a boy became a man was long rooted in English common law. In the eleventh century a young man was not considered strong enough to bear the weight of armor and,

therefore, unable to take on adult responsibilities until twenty-one. English settlers brought to America the idea that twenty-one was the accepted age of adulthood and applied it to the age at which a young person could first vote. The Constitution did not set a voting age. The states, free to set their own voting qualifications including age limits, consistently adopted twenty-one as the standard age to first vote.

Arguments to lower the voting age were often heard during times of war and hardship. The American Civil War (1861–1865), World War I (1914–1918), the Great Depression (1929–1940), and World War II (1939–1945) all forced many young people to take on adult responsibilities and brought the cry for change in voting age.

"Fight at 18, Vote at 18"— Georgia's Slogan

Georgia became the first state to grant all those eighteen years of age the right to vote in 1943. By the mid-1950s opinion polls repeatedly showed a majority of Americans favored giving young men who had to fight the vote. Yet, it would be twelve years before the next state, Kentucky, joined Georgia in lowering the voting age to eighteen.

Beginning with President Dwight D. Eisenhower (1953–1961) in 1954, American presidents through the 1960s continuously called for a national constitutional amendment to lower the voting age for all young Americans, eighteen and older. Young people of the 1960s, faced with the Vietnam War (1964–1975), pushed hard for an amendment. Yet, all attempts to move a constitutional amendment through Congress failed.

Voting Rights Act of 1970

To avoid the slow and difficult process of a constitutional amendment, Senator Edward Kennedy of Massachusetts and Senator Mike Mansfield of Montana amazingly managed to add the eighteen-year-old vote onto the Voting Rights Act Amendments of 1970. The act extended the expiring Voting Rights Act of 1965, put a nationwide ban on literacy tests (ability to read and write), established uniform thirty-day state residency requirements for voting in a presidential election, and reduced the voting age to eighteen in all federal state and local elections after January 1, 1971. Congress based its action in reducing the voting age on the guarantees found in the Due Process and Equal Protection Clauses of the

Fourteenth Amendment to the Constitution. The Due Process Clause assures no rights may be taken away without fair legal hearings and equal protection guarantees persons in similar situations must be treated equally under the laws. Congress found that requiring a citizen to be twenty-one as a condition for voting "denies . . . the . . . constitutional rights of citizens eighteen years of age but not yet twenty-one years of age . . . [and] has the effect of denying . . . the due process and equal protection of the laws . . . "

Then Speaker of the House John McCormick called the day of the act's passage the "happiest day" in his long congressional career. He feared without the act eighteen-year-olds might be kept from voting for years. President Richard M. Nixon (1969–1974), although strongly favoring the eighteen-year-old vote, felt Congress had no constitutional power to enact it. He believed the decision should remain with each state until a constitutional amendment was passed. Nevertheless, Nixon signed the act and instructed U.S. Attorney General John Mitchell to force states to comply. A U.S. Supreme Court test followed within months in *Oregon v. Mitchell.*

A Flurry of Lawsuits

Oregon and Texas each sued Mitchell in an effort to prevent him from enforcing the act in their states. At the same time the U.S. government sued Arizona and Idaho on grounds that those two states refused to comply with the act. All four cases were combined in the Supreme Court opinion in *Oregon v. Mitchell.*

A Door Opened Part-Way

The states challenged three provisions (parts) of the 1970 amendments to the Voting Rights Act. The challenged provisions were the extension of voting rights to those eighteen years of age, the ban on state literacy tests, and the ban on state residence requirements for voting in presidential elections.

The states argued before the Court the provisions unlawfully took away constitutional power reserved for the states to set their own voting requirements.

On December 21, 1970, the Supreme Court issued its decision opening the door part way to voting by eighteen year olds. Four justices considered the voting age provision entirely constitutional for both feder-

al and state and local elections. Four other justices believed it was entirely unconstitutional in any elections. Justice Hugo L. Black, writing for the Court, sided partly with one group and partly with the other. First, Black concluded,

> **Congress has the authority to permit 18 year old citizens to vote in national elections, under Article I, section 4, Article II, section 1 . . . of the Constitution since those provisions fully empower Congress to make or alter [change] regulations in national elections, to supervise such elections, and to set the qualifications for voters therein.**

But, Black further concluded, "under Article I, section 2, the States have the power to set qualifications to vote in state and local elections, and the whole Constitution reserves that power to the States" except where specific constitutional amendments have taken away the state's power. He found that the due process and the equal protection clauses in the Fourteenth Amendment on which Congress had relied in passing the act applied only to racial issues, not age issues.

Thus, Black's opinion resulted in a majority of five agreeing those young adults eighteen years of age could vote in federal elections and a majority of a different five agreeing those eighteen could not vote in state or local elections unless the states so decided. The justices, in agreement, upheld the provisions banning literacy testing nationwide and residency requirements in federal elections.

An Administrative Nightmare

The Court decision that those eighteen could vote in national elections but not state or local elections threw state election systems into confusion. All the states who had not allowed young citizens to vote would now have to establish two separate systems of registration and voting, one for national elections and another for state and local elections. Hundreds of additional state and municipal employees would have to be hired and millions of dollars spent on voting machines or separate paper ballots to carry out the dual system. Completing the task by 1972 elections seemed impossible. In addition, many people believed it was obviously unfair to say a young person was old enough to vote for those who run the nation but too young to know about issues closest to home. Pressure quickly mounted from the public for a constitu-

YOUTH VOTING AND VOLUNTEERISM

Ratification in 1971 of the Twenty-sixth Amendment, lowering the voting age to eighteen, opened the door to approximately eleven million new voters. Many political observers at the time predicted high numbers of young voters would have a profound effect on U.S. politics. However, those eighteen to twenty years of age have participated in elections at a significantly lower rate than the general population.

Youth voter turn-out in the 1998 elections was the lowest ever. According to exit polls, only 12.2 percent of those eighteen to twenty-four years of age voted in mid-term elections compared to 19 percent in 1994. While voter turnout had hit an all-time low, youth were volunteering in record numbers. The University of California at Los Angeles 1997 annual survey of college freshman found 73 percent had volunteered in 1996. Youth were making a difference in their communities where they could see immediate results from their efforts.

Compared to volunteering, studies indicate youth do not get the same empowering feeling when they go into a voting booth. The two-party system appears old and outdated. A majority of youth who register to vote, register as independent and of the most politically active groups up to 80 percent decline to name a party affiliation.

Suggestions to close the gap between the number of youth voting and volunteering include: (1) expanding the two-party system and (2) allowing registration on the same as elections.

tional amendment to set a uniform voting age of eighteen in all states for all elections.

The Twenty-sixth Amendment was proposed in Congress on March 23, 1971. The Senate and House overwhelmingly approved the amendment. By July 1, 1971 the amendment had been ratified by three-fourths of the states. The ratification period of 107 days was the shortest in American history.

FEDERAL POWERS AND SEPARATION OF POWERS

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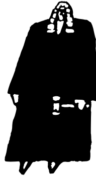

United States v. Nixon 1974

Appellant: United States

Appellee: Richard M. Nixon, President of the United States

Appellant's Claim: That the president must obey a subpoena requesting him to turn over tape recordings of conversations with his aides and advisors to a special prosecutor.

Chief Lawyers for Appellant: Leon Jaworski, Philip A. Lacovara

Chief Lawyer for Appellee: James D. St. Clair

Justices for the Court: Harry A. Blackmun, William J. Brennan, Jr., Chief Justice Warren E. Burger, William O. Douglas, Thurgood Marshall, Lewis F. Powell, Jr., Potter Stewart, Byron R. White

Justices Dissenting: None (William H. Rehnquist did not participate)

Date of Decision: July 24, 1974

Decision: Ruled against Nixon and ordered him to turn over the subpoenaed tapes to prosecutors.

Significance: The ruling established a constitutional basis for executive privilege. It also held that the president is not immune from judicial process, and must turn over evidence subpoenaed by the courts. The doctrine of executive privilege entitles the president to a high degree of confidentiality from the courts if the evidence involves matters of national security or other sensitive information, but the president cannot withhold evidence involving non-sensitive information when needed for a criminal investigation.

FEDERAL POWERS AND SEPARATION OF POWERS

As daylight broke over Washington, D. C. on Wednesday, July 24, 1974, the threat of rain hung heavy in the hot, humid air. At 11:00 AM inside the packed U.S. Supreme Court chamber those who came to observe the day's proceedings sat in anxious anticipation. Suddenly, through the silent stately hall with its pillars and burgundy drapes, the voice of the Court marshal crackled,

> **Oyey! [give ear] Oyey! Oyey! All persons having business before the Honorable the Supreme Court of the United States are admonished to draw near and give their attention for the Court is now sitting. God save the United States and this Honorable Court!**

The opening word "Oyey" came from medieval France, was passed on to England, and now to the United States' highest court. Along with the words came a system of justice based on evidence. The matter of the day, involving seven close associates of President Richard M. Nixon (1969–1974), concerned whether those men could be judged fairly in a court of law when all evidence surrounding their case was not made available. Nixon held that evidence, in the form of tape recordings, and refused to release the tapes by claiming executive privilege.

Chief Justice Warren Burger, strong and steady but without expression, read the Court's decision. Upon completion, at precisely 11:20 AM, the gavel came down and the eight justices (William Rehnquist was not participating) slipped back behind the velvet curtains. The Supreme Court had decided by an 8-0 vote that the executive privilege claimed by the President was not absolute (having no restrictions). The tapes must be handed over to the special prosecutor. For a moment the chamber sat motionless in a hushed stupor, the clack of the gavel ringing in their ears.

Theodore H. White, in his 1975 book *Breach of Faith,* wrote:

> **. . . the Roman lawmakers had said, "Let Justice be done, though the heavens fall." Justice at every level of American power, was now under way: in two weeks a President would fall.**

A Privilege

Executive privilege is the right of the president to withhold certain information, documents, and testimony of members of the government's exec-

utive branch, from public and congressional investigation. Although the Constitution never mentions executive immunity, historically presidents have claimed it to keep information concerning national security confidential or to protect communications between high government officials. Presidents base their claim on the vaguely worded separation of powers principle in Article II which states, "The executive power shall be vested [guaranteed legal right] in a President of the United States of America" to "take care that the laws be faithfully executed [carried out]."

Claims of executive privilege have actually been used sparingly. Presidents have generally honored requests from Congress for information. Yet, claims do go as far back as George Washington (1789–1797), who refused to let the House see papers relating to the Jay Treaty. Likewise, Thomas Jefferson (1801–1809) withheld from the House private letters written to him concerning the Aaron Burr treason charges. Presidents Andrew Jackson (1829–1837), James K. Polk (1845–1849), Franklin Pierce (1853–1857), and Theodore Roosevelt (1901–1909) all withheld information requested by Congress. In 1927 the Supreme Court in ***McGrain v. Daugherty*** ruled that executive privilege, although the

Less than a month after this case was decided, President Nixon resigned from office. Reproduced by permission of AP/Wide World Photos.

actual term was not used, did not protect the executive branch from honest legislative investigation.

During the 1950s in an effort to shield the executive branch from the bullying questions of Senator Joseph R. McCarthy in hearings on communism in the United States, President Dwight Eisenhower (1953–1961) wrote a directive on the presidential privilege. The letter stated that communications between executive branch employees must remain confidential. Not until *Kaiser Aluminum & Chemical Corp. v. United States* (1958) was the phrase *executive privilege* was actually coined.

Presidents John F. Kennedy (1961–1963) and Lyndon B. Johnson (1963–1969) assured Congress that only the president could claim executive privilege. President Nixon also agreed to this principle.

Watergate Scandal

The Watergate scandal began during the 1972 presidential campaign between Democratic Senator George McGovern of South Dakota and the Republican President Nixon. On June 17, months before the election which Nixon won by a wide margin, a group of burglars broke into Democratic headquarters located in the Watergate building complex in Washington, D.C. *The Washington Post* after investigating the story suggested the break in could be traced to officials in the Nixon administration. Of course, the administration denied all charges but it steadily became more apparent that members of the administration and perhaps Nixon himself had been involved in an attempt to cover up the burglary.

Public and congressional pressure forced Nixon to appoint a special prosecutor, Archibald Cox, to look into the matter. Cox filed a subpoena to secure tapes Nixon had secretly taped in the Oval Office of the White House which he believed would shed light on the Watergate burglary. A subpoena is an order issued by a court requiring a person to do something. Furious, Nixon refused the request and immediately had Cox fired. However, public outrage forced Nixon to appoint a new special prosecutor, Leon Jaworski. Jaworski was charged with the responsibility of conducting the Watergate investigation for the government.

On March 1, 1974 a grand jury indicted (charged) U.S. Attorney General John N. Mitchell and six other persons, all senior Nixon administration officials or members of the Committee to Re-elect the President. They were charged with conspiracy to obstruct (get in the way of) justice by covering up White House involvement in the break-in at Democratic

headquarters in the Watergate complex. A conspiracy is a combination of two or more persons to commit a crime or unlawful act. Nixon was named as an unindicted co-conspirator.

In April 1974, Jaworski obtained a subpoena ordering Nixon to release certain tapes and papers related to specific meetings between the President and those indicted by the grand jury. Those tapes and the conversations they revealed were believed to contain damaging evidence involving the indicted men and perhaps the President himself.

Hoping Jaworski and the public would be satisfied, Nixon turned over edited transcripts of forty-three conversations, including portions of twenty conversations demanded by the subpoena. James D. St. Clair, Nixon's attorney, then requested Judge John Sirica of the U.S. District Court for the District of Columbia to "squash" (stop) the subpoena. Sirica denied St. Clair's motion and ordered the president to turn the tapes over by May 31.

Both St. Clair and Jaworski appealed directly to the Supreme Court which heard arguments on July 8. St. Clair argued the matter should not be subject to "judicial [court] resolution" since the matter was a dispute within the executive branch. The branch should resolve the dispute itself. Also, he claimed Special Prosecutor Jaworski had not proven the requested materials were absolutely necessary for the trial of the seven men. Besides, he claimed Nixon had an absolute executive privilege to protect communications "between high Government officials and those who advise and assist them" in carrying out their duties.

Less than three weeks later the Court issued its decision. The justices struggled to write an opinion that all eight could agree to. The stakes were so high, in that the tapes most likely contained evidence of criminal wrongdoing by the President and his men, that they wanted no dissent. All contributed to the opinion and Chief Justice Burger delivered the unanimous decision. After ruling that the Court could indeed resolve the matter and that Jaworski had proven a "sufficient likelihood that each of the tapes contains conversations relevant [important] to the offenses charged in the indictment," the Court went to the main issue of executive privilege. The Court rejected Nixon's claim to an absolute, unqualified executive privilege from the judicial process under all circumstances.

The Court Says What the Law Is

In their discussion of executive privilege, the justices first restated the principle in ***Marbury v. Madison*** (1803), "We therefore reaffirm that it is

the province and duty of this Court 'to say what the law is' with respect to the claim of privilege presented in this case."

Next, the Court confirmed that the concept of executive privilege, although not specifically named, is rooted in the Constitution. Burger stated,

> **the protection of the confidentiality of Presidential communications has . . . constitutional underpinnings . . . A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive [supposed to be true] privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably [forming a tangle] rooted in the separation of powers under the Constitution . . . to the extent . . . [the privilege] relates to the effective discharge [carrying out] of a President's powers, it is constitutionally based.**

However, Burger found that the claim of absolute privilege in the absence of "a claim of need to protect military, diplomatic, or sensitive national security secrets" failed when weighed against the need for evidence in criminal proceedings. Burger wrote, "the President's generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial." Burger ordered Nixon to turn over the tapes to Judge Sirica for inspection.

Presidency Doomed

Nixon, in San Clemente, California at the time, issued a statement that he would obey the Court's order. He turned over sixty-four tapes to Sirica. Portions of indeed revealed the president himself had clearly been involved in attempts to cover-up White House involvement in the Watergate burglary. One tape, recorded on June 23, 1972, produced the voice of Nixon directing the Central Intelligence Agency (CIA) to stop a Federal Bureau of Investigation (FBI) investigation of the burglary. This was a clear obstruction of justice. Realizing Congress was ready to impeach him and, his presidency doomed, Nixon resigned on August 9, 1974.

United States v. Nixon

NIXON AND THE SUPREME COURT

In the presidential campaign of 1968, Richard Milhouse Nixon promised to reshape the Supreme Court. The Court under Chief Justice Earl Warren had taken what many, including Nixon, felt was a liberal turn, being too sympathetic to defendants in the criminal justice system. Determined to move the Court toward his more conservative views, Nixon appointed four justices including, upon Warren's retirement, Chief Justice Warren E. Burger in 1969. Burger had been a hard line, tough-on-criminals judge in the U.S. Circuit Court of Appeals for the District of Columbia. Nixon also appointed Harry A. Blackmun in 1970, and Lewis F. Powell, Jr., and William H. Rehnquist, both in 1971. In the year 2000, only Rehnquist remained on the Court serving since 1986 as its chief justice.

Nixon's presidency saw more legal confrontations with the Court over presidential powers than any other administration. Although four justices were his appointees, Nixon was dealt a series of setbacks from the Court in the 1970s. In *United States v. U.S. District Court* (1972) the Court rejected 6–2 Nixon's claim of presidential power to carry out electronic surveillance (wire-tapping) without a court warrant in order to investigate suspected subversive activities. In a catastrophic decision for Nixon in ***United States v. Nixon*** (1974), the Court voted 8–0 to reject Nixon's claim of executive privilege in withholding tape recordings in the Watergate scandal. Nixon resigned his presidency only weeks after the ruling.

During his presidency, Nixon had claimed broad authority to impound (hold and not spend) funds provided by Congress. In 1975, the Court in *Train v. City of New York* ruled unanimously that Nixon had overstepped his authority when he had refused to distribute $18 billion in state aid under the Water Pollution Control Act of 1972.

No Man Above the Law

United States v. Nixon established the constitutional basis for executive privilege but recognized it was not an absolute privilege covering all presidential communication. The doctrine could not prevent disclosure of evidence needed in criminal prosecution.

Interviewing Jaworski over lunch within an hour of the decision, White related in his book that Jaworski said he had pursued this process to the end not for fame but for America's young people. He observed that young people must believe in America's system of justice for it to survive. White quoted Jaworski, "What happened this morning proved what we teach in schools, it proved what we teach in colleges, it proved everything we've been trying to get across — that no man is above the law."

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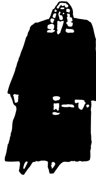

Nixon v. Fitzgerald 1982

Petitioner: President Richard M. Nixon

Respondent: Ernest Fitzgerald

Petitioner's Claim: That a president should not be held legally liable for his actions while performing the duties of his office.

Chief Lawyer for Petitioner: Herbert J. Miller, Jr.

Chief Lawyer for Respondent: John E. Nolan, Jr.

Justices for the Court: Chief Justice Warren E. Burger, Sandra Day O'Connor, Lewis F. Powell, Jr., William H. Rehnquist, John Paul Stevens

Justices Dissenting: Harry A. Blackmun, William J. Brennan, Jr., Thurgood Marshall, Byron R. White

Date of Decision: June 24, 1982

Decision: Ruled in favor of Nixon by holding that the president possesses absolute immunity from civil lawsuits while performing his official duties

Significance: The ruling expanded the principle of executive immunity first recognized by the Court in 1867. The president holds "absolute immunity" from civil liability for actions taken during the course of carrying out his constitutional duties. The Court held that the presidency is a special office worthy of special protections against civil lawsuits.

The first key U.S. Supreme Court ruling on executive immunity, ***Mississippi v. Johnson*** (1867) came amid the bitter years of Reconstruction. Congress and President Andrew Johnson (1865–1869) were attempting to carry out policies to rebuild the nation following the Civil War. Executive immunity shields the president from judicial (the courts) interference as he exercises his executive powers. In *Mississippi,* Chief Justice Salmon P. Chase acknowledged that, according the ruling in ***Marbury v. Madison*** (1803), the Court could order a president to perform a ministerial duty. A ministerial duty is a simple, specific duty to carry out a government function. This type of duty requires no political interpretation or judgement. But, Chase explained presidential actions which did involve political judgements were beyond the reach of judicial interference. In *Mississippi* the Court had been asked to stop President Johnson from carrying out an act passed by Congress, an activity which would require the president to make judgement calls. This, Chase said, the Court could not do. It could neither require the president to take specific action nor, on the other hand, prevent him from acting in such situations. This ruling had its roots in the Constitution's system of separation of power—allowing the three branches, executive (president), the legislature (Congress), and the judicial (courts) to function without undue influence from each other.

Over one hundred years later, the Court in *Nixon v. Fitzgerald* (1982) strengthened executive immunity further. The Court granted the president legal protection from civil liability lawsuits when his official presidential actions caused loses to another party. Civil liability are legal terms describing the situation of being subject to a legal obligation or responsibility such as having to pay damages (money) to an injured party when a dispute is settled. Civil means these disputes are between individuals in such areas as contracts, property, and family law. They do not involve criminal law. In *Nixon,* the Court decided on a very broad protection for the president from civil liability which they called "absolute immunity." The case arose from the predicament of Ernest Fitzgerald.

Ernest Loses His Job

Employed by the U.S. Air Force, Ernest Fitzgerald worked as a cost analyst, one who analyzes the spending of an agency or company. In the last months of President Lyndon B. Johnson's (1963–1969) administration, Fitzgerald testified before Congress that he had discovered serious cost overruns, excessive unbudgeted spending, on the C-5A transport plane

development project. Angry over Fitzgerald's testimony, embarrassed officials at the Defense Department planned a way to eliminate his job. Supposedly, as part of a money saving reorganization effort, Fitzgerald's job was done away with in 1969 when President Richard M. Nixon (1969–1974) came into office. Nixon in a news conference said he was responsible for Fitzgerald's removal but later retracted (changed) that statement and denied responsibility. Fitzgerald believed he had lost his job directly because of his testimony on Capitol Hill. Fitzgerald complained to the Civil Service Commission which, although not finding a political plot, reinstated him saying he was removed for personal reasons. In 1982, Fitzgerald sued former President Nixon for damages.

The lower federal courts declared the president immune and dismissed Fitzgerald's suit. However, the court of appeals reversed the decision saying Nixon did not have immunity. Nixon appealed to the U.S. Supreme Court.

Many Important Questions

Many important questions were in front of the Court. Should the president be immune from actions taken in performance of official duties? If

Ernest Fitzgerald felt that his job was unfairly eliminated. Reproduced by permission of AP/Wide World Photos.

so, should the immunity be absolute (with no exceptions) or should there merely be limits set on when a president can be sued? Taking a different approach, should focus be on the actions themselves with some actions immune and others not? Or, finally, should a president simply be shielded from all suits because of the distraction and disruptions they would create? These were the important questions the Court considered.

An Easy Target

In a 5-4 decision, the Court ruled in favor of Nixon saying a president is immune from all civil lawsuits resulting from his actions as president. Justice Lewis F. Powell, Jr., wrote the majority opinion observing that the president's office was unique and different from all other executive offices. The president dealt with incredibly important issues often highly sensitive and highly charged, arousing citizens' passions. Powell commented,

> **In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages . . . this personal vulnerability [open to attack or criticism] frequently could distract a President from his public duties, to the detriment [harm] not only of the President and his office but also the Nation that the Presidency was designed to serve.**

Due to these "special" circumstances the Court found "absolute immunity" from all civil lawsuits appropriate. The Court rejected the line of thinking that immunity should be based on the action with some actions immune and others not. If this rule was adopted, every action a president takes would be subject to cries of unfairness. Therefore, the Court said the office as a whole, not individual actions, would be shielded with immunity.

Above the Law?

The dissenting justices believed the Court's opinion placed "the President above the law." To them the president could cause injury to "any number of citizens even though he knows his conduct violates a statute [law] or tramples on the constitutional rights of those who are injured."

Justice Powell responded by listing the many other ways besides a civil lawsuit that a president may be held accountable for his actions. The

EXECUTIVE IMMUNITY AND EXECUTIVE PRIVILEGE

While no mention of either is made in the U.S. Constitution, both executive immunity and executive privilege are important to the president as he exercises his power. Both immunities shield the president to a large degree from interference by the other two branches of government. Executive immunity and privilege are grounded in the Constitution's system of separation of powers.

Executive immunity protects the president from court interference with his policy-making duties. For example, a court cannot require a president to take action or, on the other hand, stop action on any specific political duty such as making policies to carry out laws passed by Congress. The president is also immune from any civil lawsuits brought against him for actions taken in performance of his duties.

Executive privilege allows the president to withhold, in certain instances, information, testimony of aides, and documents from public or congressional probes. This privilege was first used by George Washington, but not until ***United States v. Nixon*** (1974) did the Supreme Court recognize it formally as a limited privilege.

list included impeachment, scrutiny by the media, the desire to avoid misconduct or win reelection, and consideration of one's reputation in history.

Companion Case

Decided the same day as *Nixon* was the companion case *Harlow v. Fitzgerald.* In this case the Court held that the president's aides were not entitled to absolute immunity from civil lawsuits. Their immunity was qualified meaning they were protected unless their actions violated a clearly established law which a "reasonable person" should have been aware of.

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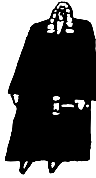

Morrison v. Olson
1988

Appellant: Alexia Morrison

Appellee: Theodore B. Olson, Edward Schmults, Carol E. Dinkins

Appellant's Claim: That the Ethics in Government Act of 1978 which allowed for appointment of an independent counsel to investigate wrongdoing by federal officials did not violate the Appointment Clause of the Constitution or the principle of separation of powers.

Chief Lawyer for Appellant: Alexia Morrison

Chief Lawyer for Appellee: Thomas S. Martin

Justices for the Court: Harry A. Blackmun, William J. Brennan, Jr., Thurgood Marshall, Sandra Day O'Connor, Chief Justice William H. Rehnquist, John Paul Stevens, Byron R. White

Justices Dissenting: Antonin Scalia
(Anthony M. Kennedy did not participate)

Date of Decision: June 27, 1988

Decision: Ruled in favor of Morrison by finding that the act was constitutionally valid.

Significance: The ruling reaffirmed the role of independent counsel in investigating federal officials, including the president. The Court determined that a judicial office within the executive branch of government did not violate the separation of powers concepts basic to the federal government.

FEDERAL POWERS AND SEPARATION OF POWERS

"Whether ours shall continue to be a government of laws and not of men is now for Congress and ultimately the American people [to decide]." Words spoken by Archibald Cox immediately after being fired as special prosecutor investigating the Watergate scandal.

It all began in the summer of 1972 when someone broke into offices belonging to the Democratic Party in Washington's Watergate Complex. By 1973 newspaper stories suggested involvement by officials in the administration of President Richard M. Nixon (1969–1974). As a result, Attorney General Elliot L. Richardson, in May of 1973, selected Archibald Cox as special prosecutor to investigate the affair.

As the investigation widened, it appeared that White House officials had played a part and Cox requested from Nixon audio tapes of White House conversations. On Saturday night October 20, 1973 an outraged Nixon ordered Richardson to fire Cox. Refusing to carry out Nixon's order, Richardson and then his deputy attorney general, William D. Ruckleshaus, the top two officials of the Justice Department, resigned in protest. Later that night Robert Bock, the solicitor general, fired Cox. The night's events became known as the "Saturday Night Massacre" and left the American public reeling in dismay over Nixon's actions.

By the time the Watergate affair came to an end with Nixon's resignation in 1974, the foundation of the federal government had been shaken. Cover-ups, investigations, and controversies had pitted the three branches of government — executive, legislative, and judicial against each other. Controversy over the special prosecutor's power to investigate officials of the executive branch including the president had been particularly combative and disruptive. Congress decided an independent (free from others) prosecutor was indeed useful to investigate and check government misconduct but guidelines were needed to better define the appointment process and prosecutor's duties. Hence, as a last echo of Watergate, and largely triggered by the Saturday Night Massacre, Congress passed the Ethics in Government Act in 1978.

Ethics in Government Act

Title VI of the Ethics Act provided for the appointment of special prosecutor to investigate and, if necessary, prosecute high ranking government officials for violations of federal criminal law. The term special prosecutor was later changed to the less threatening term, "independent counsel."

Need for an independent counsel (lawyer) on occasion arose because of the severe conflict of interest that had become so clear during the Watergate matter. In the U.S. criminal justice system, prosecutors and law enforcement agencies work under supervision of government leaders in the executive branch. Should those government leaders be accused of misconduct, the federal attorneys and agencies are placed in the difficult position of upholding the law while remaining loyal to their supervisors. As the Saturday Night Massacre illustrated, they would labor under the real threat of being fired. Use of an independent counsel was suppose to avoid this conflict.

The act requires the Justice Department's attorney general (in the executive branch), upon receiving information concerning wrongdoing by a high government official, to conduct an investigation and report to a court of three judges in the judicial branch called the Special Division. The Special Division was placed by the act within the U.S. Court of Appeals for the District of Columbia. In his report, the attorney general may request appointment of an independent counsel to investigate the issue. If so, the Special Division, not the attorney general, chooses and appoints an independent counsel.

The counsel has "full power and independent authority to exercise all investigative and prosecutorial (legal trial proceedings) functions that are allowed any other officer of the Department of Justice." The counsel may be dismissed only by the attorney general and only for "good cause" with follow up reports to the Special Division. The office of independent counsel terminates (ends) when investigations or prosecutions are completed.

The independent counsel must also report on his or her activities from time to time to Congress (the legislative branch) so that Congress can watch over the official conduct of the counsel. The act allows congressional committees to request the attorney general to start the process of selecting an independent counsel to look into particular issues.

Independent Counsel Alexia Morrison

Following passage of the Ethics Act a controversy developed between the House of Representatives and the Environmental Protection Agency (EPA). The EPA only partly-supplied documents subpoenaed (formally ordered) by the House for an ongoing investigation. Upon looking further into the matter, the House Judiciary Committee found that an official

in the attorney general's office, Theodore Olson, had most likely given false testimony during the course of the investigation. A copy of the Judiciary Committee's report was sent to the attorney general requesting appointment of an independent counsel to investigate Olson's actions. The attorney general found evidence of possible wrongdoing, and requested the Special Division to appoint an independent counsel. Alexia Morrison was appointed on May 29, 1986.

Morrison soon began investigating if others in the attorney general's office had joined with Olson to interfer with the House's EPA investigation. When, under Morrison's direction, a grand jury subpoenaed Olson, deputy attorney general Edward Schmults, and Carol E. Dinkins, the three refused to comply. They claimed the office of independent counsel was unconstitutional.

"How the Act Works in Practice"

Morrison went to court to have the subpoenas enforced. Having worked its way through the district court and court of appeals, the case found its way to the U.S. Supreme Court in April of 1988. Chief Justice William H. Rehnquist, writing for the majority in the 7-1 decision, commented that, "the proceedings in this case provide an example of how the Act [Ethics in Government Act] works in practice."

Three Constitutional Concerns

Chief Justice Rehnquist addressed three principle constitutional concerns with the act. The first issue related to the Appointments Clause found in Article II of the Constitution. The clause states, "Congress may by law vest [place authority in] the appointment of such inferior [lower ranking] officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments." Although an earlier part of the clause allows only the president to make major appointments such as ambassadors, judges, the Supreme Court, and cabinet officials, this part permits Congress to give the President or a court of law power to select certain "inferior" officials. The Ethics Act indeed created a special court, the Special Division, to appoint an inferior official, the independent counsel. Rehnquist wrote the act did not violate the Appointment Clause as the Constitution clearly gave Congress power to allow a court of law to appoint an official in the executive department. However, the court of appeals had decided that the independent counsel was more than an

"inferior" official because of the large amount of the counsel's legal power. Rehnquist disagreed. The independent counsel is an "inferior" officer since Morrison could be removed by the attorney general at any time and her office would terminate upon completion of her duties.

Secondly, Rehnquist ruled that the powers given to the Special Division to appoint an independent counsel did not violate Article III of the Constitution. Article III prevents the judiciary (courts) from taking over executive duties of a non-judicial nature in order "to maintain the separation between the Judiciary and the other branches of the Federal Government." Rehnquist wrote that the Special Divisions powers to "receive" reports from the counsel with no authority to act on or approve the reports, and to terminate the office only at the request of the attorney general in no way be considered as the courts taking over executive duties.

Lastly, Rehnquist addressed the issue of separation of powers. The attorney general's office claimed the act's limiting "the Attorney General's power to remove the independent counsel to only those instances in which he can show good cause" unconstitutionally interfered with "the President's exercise of his appointed functions." Rehnquist reasoned, "The congressional determination [through the act] to limit the Attorney General's removal power [and hence the President's power to suddenly fire the counsel] was essential . . . to establish the necessary independence of the office of independent counsel . . . [T]he Act, taken as a whole, does not violate the principle of separation of powers by unduly interfering with the Executive Branch's role."

Politically Charged

Considered a victory for Congress in general, the ruling strongly affirmed the role and power of independent counsels and gave support to other ongoing investigations into administration activities. The very nature of independent counsel removed politically charged since the counsel investigates executive branch officials and their operations. Through the 1980s and 1990s Congress was commonly controlled by one political party while the executive branch by the other, making the role of counsel even more controversial by appearing highly political. Yet, most politicians viewed the independent counsel as necessary to check misconduct and maintain a balance of power in government.

The list of federal government officials investigated by an independent

KENNETH W. STARR

The many pros and cons concerning the role of an independent counsel were dramatized through the 1990s. Prolonged investigations of President Bill Clinton's activities were primarily led by independent counsel Kenneth W. Starr. Starr became the focus of controversy over the usefulness of independent counsels. Born in Vernon, Texas in 1946, Starr attended Duke University Law School and became legal clerk for Supreme Court Chief Justice Warren E. Burger. In 1981 at the beginning of the Ronald Reagan (1981–1989) term, he joined the Justice Department and later appointed by Reagan as judge on the prestigious U.S. Court of Appeals for the District of Columbia. At thirty-seven years of age, Starr was the youngest person ever appointed to the court of appeals. In 1989 he became solicitor general for President George Bush's (1989–1993) administration, returning to private practice with election of Clinton.

In August of 1994 Starr was selected independent counsel to investigate the Whitewater bank scandal of Clinton and his associates. For the next six years Starr also investigated the death of White House counsel Vincent Foster, the firing of White House travel employees, and the Monica Lewinsky scandal. In 1996 during the travel investigation, Starr became the first to ever request the First Lady of the United States to testify before a grand jury. In 1998 Starr subpoenaed Clinton to testify before the grand jury regarding the Lewinsky scandal. Starr's investigation led to the impeachment trial of Clinton which ended in acquittal in February of 1999.

Starr's activities again raised all of the controversies over the appropriateness of independent counsels. He was criticized for being partisan in his inquiries and for running up major expenses, totaling $40 million by late 1998. For all of the expense and effort, few convictions actually resulted. Ironically, in 1999 Starr testified before Congress in opposition to extending the independent counsel portions of the Ethics Act.

counsel have steadily grown. Two White House aides to President Reagan were convicted of wrongdoing in 1987 and 1988. The *Morrison* decision acted to uphold their convictions though one of the convictions was later overturned. Reagan's attorney general Edwin Meese III resigned in 1988 following an investigation which reported possible wrongdoing by Meese. From 1986 to 1993 an independent counsel investigated what was known as the Iran-Contra Affair involving secretly selling arms to Iran and using the funds to finance a war in Nicaragua. Several Reagan administration officials were convicted of wrongdoing related to the operation. Perhaps best known were the ongoing investigations of President Bill Clinton (1993–) and his staff on numerous charges of wrongdoing, ranging from financial to sexual misconduct. Kenneth W. Starr served as independent counsel from 1994 to 2000.

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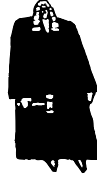

Clinton v. Jones
1997

Petitioner: William J. Clinton, President of the United States

Respondent: Paula Corbin Jones

Petitioner's Claim: That the president of the United States during the term of his presidency is immune from a civil lawsuit challenging his actions prior to his taking office.

Chief Lawyer for Petitioner: Robert S. Bennett

Chief Lawyer for Respondent: Gilbert K. Davis

Justices for the Court: Stephen Breyer, Ruth Bader Ginsburg, Anthony M. Kennedy, Sandra Day O'Connor, Chief Justice William H. Rehnquist, Antonin Scalia, David H. Souter, John Paul Stevens, Clarence Thomas

Justices Dissenting: None

Date of Decision: May 27, 1997

Decision: Ruled in favor of Jones by finding that the president does not have immunity from civil lawsuits relating to personal conduct not part of his official duties.

Significance: The ruling asserted that although a president can not be sued for actions related to his official duties, the president is subject to the same laws regulating purely private behavior as the general population.

Clinton v. Jones

On May 8, 1991, twenty-four year old Paula Corbin Jones, a state clerical employee, was working at the registration desk for a conference given by Arkansas Industrial Development Commission at the Excelsior Hotel in Little Rock. About 2:30 PM Bill Clinton, then Governor of Arkansas passed by the desk while attending the conference to make a speech. Shortly afterward, State Trooper Danny Ferguson approached Jones and persuaded her to go upstairs to visit the governor. Jones followed Trooper Ferguson into the hotel elevator which took them to a business suite where Clinton was waiting. Once inside the suite, Jones would later claim Clinton made crude sexual advances, which she rejected and promptly left the room. Jones would also charge that her rejection of those advances led to punishment by her supervisor in the state job she held by changing her job duties. She also claimed the state police officer had later defamed (damaged) her reputation by stating that she had accepted Clinton's advances.

A Civil Lawsuit

Bill Clinton (1993–) was elected president of the United States in 1992. In May of 1994 Jones filed a civil lawsuit in the U.S. District Court for the Eastern District of Arkansas against Clinton alleging (charging) all of the above activities took place. A civil lawsuit is brought to enforce, make amends for violations, or protect rights of private individuals. It is not a criminal proceeding. Among her charges, Jones claimed her civil rights had been violated and asked for damages of $175,000.

Jones had waited until two days before the three year period of limitations would have expired ending the time period in which a lawsuit could be filed. Jones gave such reasons for not filing earlier as she was afraid of losing her job, the governor was in charge of the state so who could she trust, and now Clinton was the most powerful man in the country.

Clinton's attorneys immediately filed a motion to dismiss the charges based on presidential immunity. Presidential immunity shields the president from court interference as he carries out his executive duties and from any civil lawsuits brought against him *for actions taken in performance of duties.*

No Temporary Immunity

U.S. District Court Judge Susan Webber Wright denied the dismissal on immunity grounds but ordered the trial be postponed until after Clinton's presidency. Both parties appealed the decision to the U.S. Court of

CAN THE PRESIDENT BE SUED WHILE IN OFFICE?

The administration of President Bill Clinton, with its many attendant scandals, raised a number of issues concerning the presidency, ethics, and the law. Among these issues was the question, "Should civil suits against the president be stalled until he is out of office?" Given Clinton's enormous popularity, it is likely that the majority of Americans would have said "yes."

To look specifically at Clinton, Jones, or the suit, however, is to miss the point. In answering the question regarding presidents and civil suits, Americans should evaluate it without regard to personalities. Then they would be left with two issues: on the one hand, there was the fact that the president should not be above the law; on the other hand, responding to personal lawsuits brought against him would distract him from the important business of being president.

Appeals for the Eighth Circuit. The court of appeals affirmed (agreed with) Wright's decision that Clinton did not have immunity from the lawsuit but disagreed with the postponement. Post-poning any trial until the end of Clinton's presidency, Judge Bowman of the Eighth Circuit said, was a "temporary immunity." Finding no reason to grant this to Clinton, Bowman stated, "The President, like all other government officials, is subject to the same laws that apply, to all other members of our society." Judge Bowman could find no "case in which any public official ever has been granted any immunity from suit for his unofficial [not related to his governmental duties] acts." Judge Bowman pointed out that the issue at hand involved "only personal, private conduct by a President." Clinton then appealed to the U.S. Supreme Court which agreed to hear the case.

Court Rejects Clinton's Claims

On May 27, 1997, only months after Clinton's reelection as president, a unanimous Court affirmed the decision of the appeals court agreeing

with Judge Bowman's reasoning. The Court rejected both of President Clinton's principle arguments, one involving presidential immunity and the other based on the doctrine of separation of powers.

No Immunity

In Clinton's first argument, he claimed "that [in] all but the most exceptional cases, the Constitution affords [allows] the President temporary immunity from civil . . . litigation [lawsuits] arising . . . even out of actions that happened before he took office." Clinton based this argument on a Supreme Court's earlier decision in ***Nixon v. Fitzgerald*** (1982). In *Nixon* the Court held that a president is entitled to absolute (without any restrictions) immunity from any civil lawsuit that challenges his official actions. In other words, the president cannot be sued for conduct which relates to his duties as president. This reasoning allows presidents to carry out their designated functions effectively without fear a particular action or decision will lead to a personal lawsuit. John Paul Stevens, writing for the Court, completely denied Clinton's claim of immunity saying *Nixon* could not be applied in this case. "This reasoning [in *Nixon*] provides no support for an immunity for *unofficial* conduct." Clinton's actions certainly were unofficial, not remotely involved with his presidential duties. Furthermore, the Court found no basis of precedent (previous decisions) to allow any immunity toward actions occurring before a president had taken office.

No Separation of Powers Conflict

President Clinton based his second argument on the separation of powers principle. The principle guides the division of power among the three branches of government, executive (the president), legislative (Congress), and judicial (courts). One branch may not unduly interfere with another branch. Stevens wrote, Clinton "contends that he occupies a unique office with powers and responsibilities so vast and important that the public interest demands that he devote his undivided time and attention to his public duties." Clinton continued that the separation of powers places limits on the judiciary not allowing it to burden the presidency with any action such as this lawsuit that would divert the president's energy and attention away from his executive duties. Clinton did not make any claim of being "above the law," he merely argued for a postponement of the court proceeding until completion of his presidency.

FEDERAL POWERS AND SEPARATION OF POWERS

Although the Court accepted that the presidency is uniquely important, it found that the "separation-of-power doctrine does not require federal courts to stay [postpone] all private actions against the President until he leaves office." Stevens wrote that this case and any further legal action it might cause would not "place unacceptable burdens on the President that will hamper the performance of his official duties." The Court sent Jones' case back to district court for trial.

Paula Jones sought to take her case to court while President Clinton was still in office.
Reproduced by permission of AP/Wide World Photos.

An Important Reminder

The Supreme Court refused to allow a sitting president to avoid a civil lawsuit just because he is president. Instead, the president may claim immunity only where the questioned actions relate to official acts and duties of the presidency. The Court's decision was an important reminder that no person in a democratic nation, including the president, is above the law.

With the case back in district court, Jones' attorneys began the process of gathering information for their case. Wright agreed that any information bearing on Clinton's sexual relationships with other state or federal employees while governor and president was relevant. In January of 1998 Clinton gave testimony, the first president to ever do so as part of a trial while in office. On April 1, 1998, in a surprise move to both parties Judge Wright dismissed the Jones lawsuit by finding

PRESIDENT HELD IN CONTEMPT

"I did not have sexual relations with that woman, Miss Lewinsky," Clinton publicly proclaimed while giving formal testimony to federal district court in the Paula Jones sexual assault lawsuit. Giving testimony under oath in the Paula C. Jones sexual assault case in January of 1998, Clinton declared he had no past sexual relations with White House intern Monica S. Lewinsky.

Later, Clinton changed his story while giving testimony during a grand jury appearance in August of 1998. He admitted to "inappropriate intimate contact" with Lewinsky and misleading the public with his earlier statements. Clinton later faced an impeachment trial over the Lewinsky scandal before the U.S. Senate with Chief Justice William H. Rehnquist presiding. The trial ended with acquittal in February of 1999. With thoughts that his legal troubles might be over, U.S. District Court Judge Susan Webber Wright found Clinton in contempt of court on April 12, 1999 for intentionally giving false testimony about his relationship with Lewinsky during his January of 1998 testimony. Wright stated that the "record demonstrates by clear and convincing evidence that the president [gave] false, misleading and evasive answers that were designed to obstruct the judicial process." Wright concluded that Clinton had "undermined the integrity of the judicial system." Though no president had ever been found in contempt of court before, Wright found no constitutional restriction from doing so. She wrote, "the power to determine the legality of the President's unofficial conduct includes with it the power to issue civil contempt citations . . . for his unofficial conduct which abuses the federal [court] process." As the last chapter of the Jones case, in April of 1999 President Bill Clinton became the first sitting president to be found in contempt of court.

that Jones did not provide sufficient proof of emotional injury or discrimination at work. Jones prepared to appeal the decision, but negotiations began for a settlement. Finally, in November of 1998 Clinton agreed to pay Jones $850,000. Though Jones had originally demanded

that Clinton issue an apology or admit guilt, Clinton did neither. The president sent a check for the amount in January of 1999.

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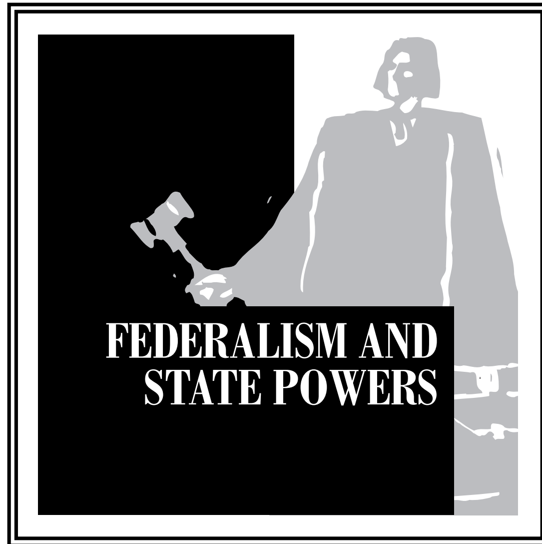

Throughout U.S. history, the division of power between the federal government and state governments has been the subject of continuous political and legal battles. After suffering from the British government's political and economic tyrannical policies applied to the American colonies that eventually led to the American Revolution (1775–1783), many Americans greatly distrusted centralized governmental powers. As a result, when the Continental Congress drew up the Articles of Confederation in 1781, the new central government was assigned few powers. The central government had little authority over commerce, no court system, and no power to tax. The states were essentially a loose union of sovereign (politically independent) governments, each free to regulate commerce as it saw fit, make money, and have their state courts hold judgement over national laws.

It soon became apparent to many Americans that such a fragmented governmental structure based almost solely on state powers would greatly hold back political and economic growth of the young nation. So, in 1787 a Constitutional Convention was called to restructure the government and create a national economy. Debates raged between federalists, those supporting a strong central government as proposed in a Virginia plan, and

anti-federalists supporting continued strong state governments as proposed in a New Jersey plan which greatly resembled the Articles of Confederation. Finally, a compromise, known as the Great Compromise, was struck deciding on federalism as the basis for the governmental structure. Federalism is a dual (split in two) system of sovereignty, splitting power between a central government and various state governments. Both the federal and state governments can directly govern citizens through their own officials and laws. The resulting Constitution in recognizing the sovereignty of both federal and state governments gave to each some separate unique powers and some shared powers. Importantly, both the federal and state governments must agree to any changes to the Constitution.

Selling the Constitution

The new federal system proposed in the Constitution was so controversial in the states, that national leaders, both federalists and advocates for state powers (antifederalists) temporarily joined forces to convince the states to ratify the Constitution. Alexander Hamilton and James Madison along with John Jay wrote a series of eighty-five articles to support ratification of the Constitution. Initially they were published separately in New York newspapers. Collectively, the essays became known as *The Federalist* are considered one of the more important political documents in U.S. history. Purpose of *The Federalist* was to explain various provisions (parts) of the Constitution. As described by the authors, the basic principles of the new government included republicanism (representatives elected by the public), federalism (power split between a central and state governments), separation of powers (power split between two or more branches of government), and free government.

Many of the Constitutional Convention's delegates as well as public citizens feared that too strong of a central government was being established. For example, the Supremacy Clause in Article VI of the Constitution states that the Constitution, federal laws, and treaties are superior to state laws and constitutions. States can not ignore or take actions against federal law or the Constitution. In an effort to ease American's fears and to gain acceptance of the Constitution, therefore moving ratification (adoption by the states) along, the federalists and antifederalists agreed to a compromise. A list of basic rights was written with intentions of adding it to the Constitution. The Constitution then gained the required ratification of the states by 1788. One of the first acts of the new Congress was to add the list of basic rights to the

Constitution. The list contained ten amendments (changes or additions) to the Constitution and became known as the Bill of Rights. The Tenth Amendment in particular protected state powers and became the basis throughout American history for proponents of strong state powers to fight for their cause.

Powers Set Out in the Constitution

Articles I through VI of the Constitution largely define Federal powers and puts some restrictions on state powers. For example, only the federal government has power to coin money, declare war, raise armies and a navy, and govern Indian tribes. Concerning the federal court system, only the U.S. Supreme Court was specifically named in the Constitution, but Congress was given authority to establish other federal courts. The Tenth Amendment assigns all powers to the states not specifically given to the federal government. The amendment states that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." States also retain a common law "police power" to pass laws protecting the health and safety, and economic welfare of its citizens. Both the federal and state governments hold similar powers in some areas such as the power to tax and to borrow money.

Particularly important clauses of the Constitution that have played a key role in determining the boundary between federal and state powers have been the Commerce Clause, the Necessary and Proper Clause, the Supremacy Clause, and the Contract Clause. These clauses recognize the dominance of the central government. The Commerce Clause in Article I gives the federal government exclusive authority to regulate interstate commerce (business between states) and trade with foreign countries. The Necessary and Proper Clause of Article I states that Congress has the authority to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested [granted] by this constitution in the government of the United States, or in any department, or officer thereof." The Supremacy Clause in Article VI states that "This Constitution, and the Laws of the United States . . . shall be supreme Law of the Land; and the Judges in every State shall be bound thereby." When the federal and state governments have passed laws on the same subject, the federal law takes priority if they come into conflict. The Contract Clause in Article I reads that "No State shall . . . make any . . . Law impairing the Obligation of Contracts."

Other limitations on state powers are included in Article IV. Each state must respect the laws, records, and court decisions of other states and that "citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." States can not discriminate against the citizens of other states.

A Long, Intense Debate

Largely due to the intensity of debate between federalists and states' rights advocates (antifederalists), the Constitution did not precisely establish the line between federal sovereignty and state sovereignty. As a result, over two centuries of controversy and a bloody Civil War (1861–1865) have centered on attempting to resolve the differences between those advocating a strong central government and those advocating states rights. In fact, the first two political parties in the nation were based largely on this issue, the Federalist Party and the Democrat-Republican Party (antifederalists). The balance of power between the federal government and the states has steadily changed through time.

Survival of Federalism

With British domination over the colonies still fresh in peoples' minds, a strong public support for state powers persisted through early American history. When a U.S. Supreme Court ruling in *Chisholm v. Georgia* (1793) weakened states' powers by upholding the right of a citizen of one state to sue another state, Congress and the states responded with the Eleventh Amendment to the Constitution which was passed and ratified within only a few years. Overriding the Court's decision, the amendment limited the rights of citizens to sue state governments. However, at the beginning of the nineteenth century the tide would turn towards federalism.

The appointment in 1801 of John Marshall, a Federalist, as Chief Justice of the U.S. Supreme Court marked the beginning of Court decisions favoring a strong federal government over state government power. Chief Justice Marshall's opinions were brilliantly reasoned and masterfully written. In ***Marbury v. Madison*** (1803) Marshall fully recognized judicial review in which the Court is the government body to decide whether laws are constitutional—that is, in agreement with the principles and power established by the Constitution. In 1815, the state of Virginia challenged the Supreme Court's constitutional authority of judicial

review, but lost in ***Martin v. Hunter's Lessee*** (1816). The heavily Federalist Court continued to interpret the Constitution as granting broad (extensive) powers to the national government. In ***McCulloch v. Maryland*** (1819) Marshall ruled that the Necessary and Proper Clause gave Congress power to make any laws considered necessary to carry out its duties in providing for the nation's welfare. This principle is referred to as implied powers, powers not actually written down in the Constitution but needed for the government to function. The decision also reinforced the supremacy of federal law over state law when the two conflict. Likewise, in ***Gibbons v. Ogden*** (1824), another decision limiting state powers, the Court recognized Congress' exclusive power to regulate a broad range of business activity that could affect interstate commerce (trade between states).

One of the earliest and most dramatic disputes involving states powers resulted in the ***Cherokee Nation v. Georgia*** (1831) decision. The state of Georgia even refused to attend the Supreme Court hearing and went ahead with execution of a tribal member in defiance of federal powers. Only a year later in ***Worcester v. Georgia*** (1832) the Court ruled that state sovereignty did not include power to regulate Indian lands. Only the federal government held such power over Indian nations.

During this early period of nationalism and recognition of broad federal powers, the basic provisions of the Constitution most often used by Marshall and the Court was the Necessary and Proper Clause, the Supremacy Clause, the Commerce Clause, and the Contract Clause.

A Turn to State Powers

Marshall, through his rulings favoring the federal governments strong role, has been largely credited for saving federalism during the early period of American history. However, his decisions still maintained a respect for state sovereignty as demonstrated in the ***Barron v. Baltimore*** (1833) decision. Marshall ruled that the restraints to governmental powers in the Bill of Rights did not apply to state governments but only protected Americans from abuses of power by the federal government. With John Marshall's death in 1835 while still serving as Chief Justice, the Court took a decided turn away from recognizing strong federal powers and began favoring protection of state police powers. This was at a time that Jacksonian politics favoring strong state powers and a weaker federal government dominated public thought. The emphasis on state powers, promoted by President Andrew Jackson (1829–1837), prevailed for sev-

eral decades. Similarly, the Court adopted the doctrine of "dual federalism" meaning the federal and state governments have equal power with each having its separate authorities to operate under.

By the mid-nineteenth century, state powers became closely tied to the slavery issue. Dismayed with the Marshall decisions, particularly *McCulloch* affirming federal supremacy, the Southern states closely guarded their power to regulate slavery. Victory by Union forces in the American Civil War decided once and for all that the federal government was supreme over states and that under federalism no state has the power to secede (leave) the federal Union. Three new constitutional amendments, known as the Civil War Amendments, were designed to restrict state powers over U.S. citizens, in particular former slaves, and shift the balance of power from states to the federal government. The Thirteenth Amendment banned slavery. The Fourteenth Amendment, adopted in 1868, made the Bill of Rights apply to state governments as it had to the federal government since first adopted in 1791. The amendment states that "No State shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The Fourteenth Amendment also declared that former slaves were indeed citizens entitled to all the privileges of citizens. However, in respect to states' powers the Court did little in the late nineteenth century to enforce the amendment against state regulation and abuses of citizens' rights.

The power of businesses within states gained an upper hand during the late nineteenth and early twentieth century. A period of rapid industrial growth, the courts adopted a *laissez-faire* approach (business free of government regulation) to economic matters by restricting governmental regulation and intervention. The Court would use the Tenth Amendment to negate federal attempts at business regulation by protecting state interests, and would use the Due Process Clause of the Fourteenth Amendment to protect private property rights and freedom to contract from state regulation. For example, the Court in ***Lochner v. New York*** (1905) overturned a state law establishing working conditions including maximum hours for New York bakers by claiming it violated the "liberty of contract" protected under the Fourteenth Amendment's Due Process Clause.

Broad state police powers were recognized in *Euclid v. Ambler Realty Co.* (1926) to protect public health and safety, and to develop natural resources. The concept of dual federalism in the early twentieth century was perhaps most dramatically highlighted by the Court's decision in ***Hammer v. Dagenhart*** (1918). The ruling overturned a federal

child labor law by claiming it was reserved as a state power under the Tenth Amendment. The Court continued to use the dual federalism doctrine to overturn economic recovery measures passed by Congress into the early 1930s.

The Twentieth Century Rise of Federal Government Powers

By the late 1930s the Court, under public and political pressure resulting from reform efforts to recover from the Great Depression resulted in a dramatic change. The idea of federalism and Marshall's earlier positions returned. In *West Coast Hotel Co. v. Parrish* (1937) the Court extended federal power to regulate some economic activities within states. Under a broadened Commerce Clause interpretation, federal powers expanded at the expense of state powers and emphasis on the Tenth Amendment declined. The Court in *NLRB v. United States* (1936) reaffirmed the Wagner Act which brought labor relations under federal oversight. In addition, the Social Security Act creating a national retirement fund, passed in 1935. Another fundamental shift in power had occurred.

Although by the end of World War II (1939–1945), the federal government's powers were clearly dominant over state powers, some important state powers remained. For example, the Court ruled in ***Erie Railroad Co. v. Tompkins*** (1938) that federal courts must recognize previous state court decisions as law. The decision in ***International Shoe Co. v. Washington*** (1945) expanded state powers over out-of-state businesses that operate within their boundaries.

Increased federal powers were further recognized in the 1950s and 1960s, primarily over the issue of racial discrimination. Through the 1940s the states had retained the primary responsibility for governing the rights of its citizens. Therefore, to protect individual rights from state abuses, the Supreme Court began issuing decisions limiting state powers related to freedoms of speech and religion, due process rights to fair trials, and equal protection of the law. The Supreme Court in ***Brown v. Board of Education of Topeka, Kansas*** (1954) barred racial segregation policies in public schools and brought local school districts under federal oversight. How the state and local governments create voting districts came under federal oversight in the *Baker v. Carr* (1962) decision. A 1965 ruling in *South Carolina v. Katzenbach* upheld the Voting Rights Act of 1965 that prohibited state-established voting requirements. Also in

1965, the protection of privacy from state powers was recognized in ***Griswold v. Connecticut*** setting the basis for later recognizing abortion rights. The ruling in ***Miranda v. Arizona*** (1966) and other Court decisions substantially changed state criminal justice systems. All of these cases and more focused on limiting state power over individual behavior. Interpretation of the Fourteenth Amendment's guarantee of equal protection of the laws and due process played a key role in these decisions, allowing the amendment to finally play a role in federalism.

By the late 1970s the pendulum began to swing back to the states. State power advocates joined in opposition to these federal court decisions restricting state rights. Efforts at racial desegregation attracted the most attention. Interest in increasing state powers through greater emphasis on the Tenth Amendment to limit federal powers arose. Opposition to federal welfare programs and limitations on the criminal justice system led to the rise of a states' rights movement in the 1980s under President Ronald Reagan (1981–1989). States began receiving more authority to experiment with social programs. This direction received an additional boost in 1994 with the first Republican-controlled, pro states' rights, House of Representatives since the 1940s. As a result the mid- and late-1990s saw further growth in state powers.

Federalism and State Powers Persist Side by Side

Despite the limiting of state powers under federalism through establishment of Supreme Court judicial review, broad commerce powers of Congress, and application of the Bill of Rights and the Fourteenth Amendment to states, the states maintained constitutional and political sovereignty at the end of the twentieth century. Although the supremacy of the federal government was well established, states were still free to govern much of their own political, economic, and social affairs in areas where Congress had not acted to establish consistency on a national level. Supreme Court decisions continue to either limit or support state powers depending on the particular issue at hand and the interpretation of federalism continues to change through time.

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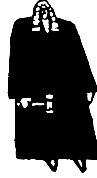

Martin v. Hunter's Lessee 1816

Plaintiff: Thomas Bryan Martin

Defendant: David Hunter

Plaintiff's Claim: That the state of Virginia could not disobey a Supreme Court order to overturn a state law illegally taking land from citizens loyal to the British during the Revolutionary War.

Chief Lawyer for Plaintiff: Jones (first name not recorded)

Chief Lawyer for Defense: Tucker (first name not recorded)

Justices for the Court: Gabriel Duvall, William Johnson, Henry B. Livingston, Joseph Story, Thomas Todd, Bushrod Washington

Justices Dissenting: None (John Marshall did not participate)

Date of Decision: March 20, 1816

Decision: Ruled in favor of Martin by finding that United States treaties with Great Britain constitutionally take priority over conflicting state law.

Significance: The ruling was a historic statement by the Court concerning the supreme judicial review powers of the U.S. Supreme Court over state courts and state law when federal issues are involved. It provided a precedence for numerous other Court decisions involving federal government powers through the following years.

After bitter political struggles with Great Britain over its dominating governmental policies resulting in the war for independence, many Americans opposed creating a strong new federal government. Consequently, the Articles of Confederation, written in 1781, gave the new national government few powers. The document stressed the states' sovereignty (political independence) calling the union between states "a firm league of friendship" and no more. The national government had no powers to tax or regulate commerce (business and trade) and no provisions were made for a federal court system. State courts would hear federal law cases. Each state interpreted federal law their own way leading to inconsistency and confusion with resulting financial and political chaos.

In response to the failures of the Articles of Confederation, a Constitutional Convention was called in 1787 to correct the weaknesses of the Articles. Much debate centered over how to split political power between the national government and the states. Those supporting a more even split in the power between a stronger central, or federal, government and the states were known as Federalists. Those opposed to a stronger national government and supporting continued strong state governments were simply known as anti-federalists. Ultimately, the delegates to the Convention chose a stronger central government.

Though the Constitution as written granted supremacy (higher in power) to the federal government in certain matters and established a Supreme Court, it did not precisely define the balance of power between the states and the federal government. Article VI of the Constitution proclaimed that this "constitution, and the laws of the United States . . . and all treaties made . . . under the authority of the United States, shall be the supreme law of the land." Article III of the Constitution established the Supreme Court. Section 2 of Article III states, "The judicial Power shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made." After much debate in the states over the Constitution creating a stronger central government, it was ratified in 1788. The next year the Judiciary Act of 1789 defined what powers were given to the Supreme Court by the Constitution. The act declared the Court had the power to review state court rulings.

Following ratification of the Constitution, the federalist and anti-federalist debate became so intense that the two groups formed the core of the nation's two primary political parties. The Federalist Party was led by John Adams (1735–1826) and Alexander Hamilton (1755–1804) and

the Democratic-Republicans (anti-federalists) by Thomas Jefferson (1743–1826) and James Madison (1751–1836).

Not surprisingly given the raging political debate over federalism, many aspects of the new government were constantly being tested during the first few decades of the nation's history. The early Supreme Court was dominated by judges who were Federalists. When Thomas Jefferson (1801–1809) became president he swore to replace the justices with those who were Democratic-Republicans so as to give greater support to states' rights issues. Although Jefferson failed in his efforts to transform the Court, his successor to the presidency, James Madison (1809–1817) was able to appoint Joseph Story, the Court's first Democratic-Republican justice. Many key early Court decisions addressed the supremacy of the federal powers. Two involved Denny Martin, *Fairfax's Devisee v. Hunter's Lessee* followed by *Martin v. Hunter's Lessee.*

Thomas Lord Fairfax's Land

Prior to the Revolutionary War (1775–1783), Thomas Lord Fairfax owned over five million acres of valuable land in the northern part of Virginia. Lord Fairfax, a citizen and resident of Virginia, had originally acquired the land through a charter from the English king. Upon his death in 1781 while the war was still raging, his property was left to his nephew, Denny Martin, a British citizen. Also during the war, the state of Virginia passed a law giving the state authority to confiscate (taking away for the public good) property of Loyalists (those colonists supporting Great Britain), such as Lord Fairfax. Denny Martin died sometime prior to 1803 and the property passed on to his heir, Thomas Bryan Martin. In the meantime, the state confiscated the land and sold it David Hunter. Thomas Martin filed a lawsuit with the state courts of Virginia challenging Hunter's right to the land.

The Virginia court found in favor of Hunter and Martin appealed the decision to the U.S. Supreme Court. The Court in 1813 in *Fairfax's Devisee v. Hunter's Lessee* decided in favor of Martin. Chief Justice John Marshall did not take part in the case because of a family connection to the Fairfax family. Joseph Story wrote the Court's opinion. Much to the dismay of his fellow Democratic-Republicans, Story held that the Virginia law was unconstitutional. Story found that Martin's ownership of the land was protected by the Treaty of Paris (1783) and Jay's Treaty (1794). Both treaties, signed by the United States and Great Britain following America's victory in the Revolutionary War, provided that prop-

erty owned by Loyalists would be protected by the U.S. government. In his decision, Story noted that Article VI of the U.S. Constitution stated that treaties are, like laws of Congress, considered the "supreme Law of the Land." Article VI further states that "Judges in every State shall be bound" to the Constitution, federal laws, and treaties regardless of the "Laws of any State." In addition, Section 25 of the 1789 Judiciary Act provided the Supreme Court review power of state court decisions involving issues related to the Constitution, federal laws, and treaties.

Therefore, Story ruled that the treaties negotiated by the federal government took precedence (priority) over conflicting state laws. Martin was the true owner of the property. Story ordered the Virginia court to do the legal work necessary to pass ownership back to Martin. But, the Virginia judges refused. The judges claimed Section 25 violated the powers and rights of state governments.

As a result, Martin filed suit again. The case came back to the Supreme Court to address the constitutionality of the Judiciary Act including the Supreme Court's authority to review state laws and state court decisions. Virginia claimed a state had the right to defy federal treaties or court decisions that the state did not approve of. The Supreme Court, they contended, could only review decisions made by lower federal courts, not state laws or courts.

Story Rules Again

Once again Joseph Story wrote the Court's opinion. Story strongly held that the Supreme Court's appellate jurisdiction (the right to hear appeals of lower court decisions) indeed extended to all cases involving federal issues, both those decided previously in state courts and federal courts. Story wrote that Section 25 of the Judiciary Act was not only constitutional but necessary to guarantee federal laws and treaties were the supreme law of the land.

In rejecting Virginia's claim that states had equal sovereignty to the United States, Story asserted that the American people, not the states, had created the nation. Without the supremacy power of the United States over the states, there could be no nation since no uniform national policies would apply equally throughout the United States. Story wrote,

> **The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble**

FEDERALISM AND STATE POWERS

SUPREME COURT JUSTICE JOSEPH STORY

Joseph Story (1779–1845) was born in Marblehead, Massachusetts in September of 1779. After earning a degree at Harvard College and studying law in Boston, he served in the Massachusetts House of Representatives from 1805 to 1808 and in the U.S. House of Representatives from 1808 to 1809. Story became a member of the Democratic-Republican political party which strongly supported states rights in opposition to the Federalists. Because of his political views, he was appointed by President James Madison to the U.S. Supreme Court in 1811 in hopes of influencing the Court's decision in favor of states' rights.

Story served on the Court for thirty-four years during which time he made a lasting mark in U.S. legal history. Though his greatest opinion was in *Martin v. Hunter's Lessee* (1816), he became Chief Justice John Marshall's closest collaborator on many of Marshall's historic opinions. Much to the dismay of states' rights advocates he strongly supported Marshall's broad interpretations of the Constitution and supremacy of the federal government over state governments.

Story was considered the greatest legal scholar and educator of his time. He was instrumental in restructuring the Harvard Law School where he was a distinguished professor of law. He authored several books which influenced constitutional law throughout the nineteenth century. After Marshall's death in 1835, Story found himself often in the minority on Court decisions with an increased Court emphasis on states' rights. He served on the Court until his death in Cambridge, Massachusetts on September 10, 1845.

[introduction] of the constitution declares, by 'the people of the United States' . . . The constitution was not, therefore, necessarily carved out of pow-

ers already existing in state sovereignties, nor a surrender of powers already existing in state institutions . . . [T]he judicial power of the United States [is] . . . national, and . . . supreme . . . to act not merely upon individuals, but upon states; and to deprive them altogether of the exercise of some power of sovereignty, and to restrain and regulate them in the exercise of others.

A Landmark Decision

The opinion by Justice Story is considered the greatest argument ever made for the Supreme Court's judicial review powers over state courts and laws. The decision, which infuriated states' rights proponents, strongly supported the Federalist's position for a strong national government. The decision formed the basis for numerous later court decisions further defining the strong powers of the federal government.

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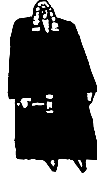

Gibbons v. Ogden
1824

Appellant: Thomas Gibbons

Appellee: Aaron Ogden

Appellant's Claim: That a New York state law granting exclusive rights to individuals to operate steamships in New York waters while conducting interstate commerce violates the Constitution's Commerce Clause.

Chief Lawyers for Appellant: Thomas A. Emmet, Thomas J. Oakley

Chief Lawyers for Appellee: William Wirt, Daniel Webster, David B. Ogden

Justices for the Court: Gabriel Duvall, William Johnson, Chief Justice John Marshall, Joseph Story, Thomas Todd, Bushrod Washington

Justices Dissenting: None (Smith Thompson did not participate)

Date of Decision: March 2, 1824

Decision: Ruled in favor of Gibbons by finding that steamship navigation is part of commerce and that states could not pass laws regulating steamship traffic operating between two or more states.

Significance: The landmark ruling was the first to interpret federal powers under the Constitution's Commerce Clause. It provided a broad interpretation of what is commerce under the clause, holding that commerce was more than simply the buying and selling of goods and forming the basis for numerous rulings involving the Commerce Clause throughout the history of the United States.

Gibbons v. Ogden

"Dinner will be served at exactly 2 o'clock . . . Tea with meats . . . Supper at 8 in the evening . . . A shelf has been added to each berth, on which gentlemen will please put their boots, shoes, and clothes, that the cabin will not be encumbered." So read a handbill distributed to passengers on Robert Fulton's (1765–1815) steamship operating on the Hudson River in New York state.

Authority Over Interstate Commerce

Government regulation of business was a deep concern of colonists who had been subjected to the burdensome tax policies of Great Britain, a major issue leading to the Revolutionary War (1775–1783). Fear of national government control of local businesses led the colonists to be very restrictive in granting trade regulation power to a national government when drafting the Articles of Confederation in 1781. The only trade control given to Congress was that concerning trade with Indians. Regulation of interstate and foreign trade was reserved to the individual states. However, business competition between the states grew intense. Each state was more eager to build their own prosperity than seek agreement on trade policy. They each had their own tariff (import tax) policies on goods coming from other states or foreign countries. To further complicate matters, each state held authority to make their own money. Having thirteen currencies greatly inhibited trade. Another problem for businessmen was trying to collect on their bills when interstate trade was conducted. Local courts often proved protective of local businesses from their distant creditors.

The resulting chaotic trade situation was soon widely recognized as a major problem for the economic growth of the new nation. As a result the Framers of the U.S. Constitution during the Constitutional Convention of 1787 with little debate gave broader commerce powers to Congress. Commerce is commonly the conducting of economic trade or business between cities, states, or foreign nations. Clause 3 of Article I states that "Congress shall have the power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The Supreme Court was not called upon to rule on the scope of the Commerce Clause until over thirty years later in 1824.

Rise of Steamship Commerce

A major new technology at the beginning of the nineteenth century began to make a major impact on interstate and foreign travel and trade, the

"OUR OVERWORKED SUPREME COURT"

Cartoonist Joseph Keppler depicted "Our Overworked Supreme Court" in a cartoon with that caption published in the humor magazine *Puck* on December 9, 1885. The scene showed the Supreme Court justices awash amidst a pile of paper. It symbolized the extraordinary caseload in which the court was regularly mired at the time.

In the Supreme Court of John Jay, the first chief justice (1789-95), the caseload was light, and Justices often spent time on administrative matters. By the time of the Civil War, the size of the docket had grown to some three hundred cases. By 1885, the Court was swamped with more than thirteen hundred cases.

In 1891, Congress passed the Circuit Court of Appeals Act, which established the appellate court system as a buffer between the lower courts and the High Court.

steam engine. In 1798 the state of New York passed a law giving Robert R. Livingston exclusive right to navigate steamboats in state waters. Exclusive use means no other business can hold the same right to operate steamships in those waters. It becomes a business monopoly. By 1802 Livingston took on inventor Robert Fulton as a partner. Fulton adapted a steam engine for large ships to carry passengers, greatly expanding the potential of earlier steam powered boats. Fulton and Livingston could also issue licenses to others to operate steamships in New York waters. Experiencing great success, they received the same type of grant in 1811 from the state of Louisiana. As a result, Fulton and Livingston controlled steamship access to two of the major seaports and waterways in the United States, New York City at the mouth of the Hudson River and New Orleans at the mouth of the mighty Mississippi River.

As more businessmen entered the steamship transport business, they too struck similar exclusive use deals with other states. As the new nation was rapidly expanding inland, the transportation of goods from one state to another involved different steamship companies in each state and became increasingly difficult. Public irritation over such inconvenience arose.

Aaron Ogden and Thomas Gibbons

In 1815 Aaron Ogden, a former New Jersey governor from 1812 to 1813, was in a struggling business partnership with Thomas Gibbons. Ogden purchased a license from Livingston to operate a steam-driven ferry line between New York City and Elizabethtown, New Jersey. Soon Gibbons began running his own steamships between New York and New Jersey, in direct competition with Ogden. Gibbons had obtained a license to operate his boats from the federal government under the Coastal Licencing Act of 1793 to operate in a "coasting" trade.

In 1819, Ogden sought a court injunction to block Gibbons' steamships from navigating in New York waters. Ogden claimed New York state law protected his monopoly and took precedence (priority) over the federal law. Gibbons countered that federal laws constitutionally overrode individual state laws.

A New York state court ruled in favor of Ogden by finding the state law took precedence in this case. The court asserted that federal commerce powers did not apply because ship navigation was not commerce. Only a federal law specifically regulating navigation could override the state steamship law, and no such law existed. The court issued the injunction ordering Gibbons to stop operating his steamships in New York waters. An injunction is a court order to stop an action from happening.

Supreme Court

Gibbons appealed to the U.S. Supreme Court. The case drew public attention for it pitted the Federalists who believed in establishing a strong national government against states' rights proponents, including former president Thomas Jefferson (1801–1809). Daniel Webster, famed lawyer and orator, presented Gibbons' case. Webster eloquently argued "that the power of Congress to regulate commerce was complete and entire, and, to a certain extent . . . exclusive." Also, he contended the term commerce included navigation necessary to conduct business transactions. Therefore, Gibbons' federal license took priority over New York law.

Chief Justice John Marshall, writing for the Court, saw things differently from the lower court and agreed with Webster. He saw the key question before the Court was just what kinds of activity did the Commerce Clause include. Also, could states regulate interstate commerce within their own waters? Marshall asserted three major points. First, the term "Commerce" in the Constitution was not just simply restricted to the actu-

JOHN FULTON AND THE STEAMSHIP

The *Gibbons v. Ogden* decision acknowledged the importance of steamship traffic to interstate commerce in the young nation. The ruling opened commerce to a wide range of steamship companies, thus promoting nationwide steamship travel and trade. The earliest steamboats began navigating on the Delaware River out of Philadelphia in 1787, but they were not commercially practical.

Robert Fulton (1765–1815), an American inventor, engineer, and artist, designed and built the first commercially successful steamboat in 1807, the *Clermont.* First he was interested in designing canal boats and a submarine in the 1790s. Having seen experimental steamships in France, Robert R. Livingston, the U.S. minister to France, interested Fulton in 1803 in the prospects of using steam engines on ships. Fulton ordered a steam engine from Britain and brought it to the United States in 1806. On August 17, 1807, the *Clermont* made its first successful voyage up the Hudson River from New York City to Albany. Soon the ship began providing passenger service on the river. Fulton later designed the first steam-operated warship, *Fulton the First,* to protect New York harbor in the War of 1812 (1812–1814) but died before its construction was completed. Fulton had greatly affected the growth of commercial trade in the nation and his statue now stands in Statutory Hall in the nation's Capitol Building.

al buying and selling of goods. It included navigation too when used to promote such buying and selling. Secondly, steamships significantly helped trade between states, hence were a part of interstate commerce when operating between two or more states. Thirdly, states could not pass laws restricting commerce between states, since this power was exclusively given to Congress by the Commerce Clause. Marshall declared that a primary objective in forming the federal government was authority to regulate interstate and foreign commerce. Marshall wrote, "The power over commerce, including navigation, was one of the primary objects for

which the people . . . adopted their government." States retained the power to regulate "completely internal commerce [that] . . . does not extend to or affect other states." When a state law regulating commerce comes in conflict with a federal law, the federal always takes priority.

The lower court's ruling was overturned. Marshall dismissed the injunction against Gibbons and ruled the New York state law invalid since it was in conflict with the federal coastal licensing law.

From Steamships to the Internet

Despite the general acceptance of the Commerce Clause by the Framers of the Constitution, the Clause became the subject of more court cases than any other Congressional power. The publicly popular *Gibbons* decision has been called "the emancipation proclamation of American commerce." Interstate commerce was freed from the jumble of various restrictions imposed by numerous state governments. The decision established the importance of regulating interstate commerce by a central governmental authority, the national government rather than individual state or local governments.

States' rights proponents, including Jefferson, feared the decision would mark a trend toward the federal government taking over all rights believed reserved to the states. The broadening of commerce to include navigation provided a basis for later decisions involving communications, transportation, and manufacturing. Also, the ruling paved the way to consider new technologies that would come along as interstate commerce. Technologies never imagined by the Framers of the Constitution would include railroads, telegraphs, telephones, pipelines, airplanes, and by the 1990s, the Internet. Each new technology has relied upon the *Gibbons* ruling to protect their right to operate efficiently between states. By 2000 little economic activity remained beyond the regulatory authority of Congress under the Commerce Clause.

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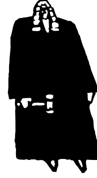

Nebbia v. New York
1934

Appellant: Leo Nebbia

Appellee: State of New York

Appellant's Claim: That New York's Milk Control Act of 1934 violated the Fourteenth Amendment's Due Process Clause by unconstitutionally restricting business decisions.

Chief Lawyer for Appellant: Arthur E. Sutherland

Chief Lawyer for Appellee: Henry S. Manley

Justices for the Court: Louis D. Brandeis, Benjamin N. Cardozo, Charles Evans Hughes, Owen Josephus Roberts, Harlan Fiske Stone

Justices Dissenting: Pierce Butler, James Clark McReynolds, George Sutherland, Willis Van Devanter

Date of Decision: March 5, 1934

Decision: Ruled in favor of New York by finding that the state of New York had acted under its police powers in the best interest of its citizens.

Significance: The ruling established that any business activity could be subject to state regulation. The decision ended the long-standing distinction between businesses considered operating for the public good which could be regulated, and those not of direct public interest which could not be regulated. The decision marked the beginning of greater state government regulation of private economic activities.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." So reads the Tenth Amendment to the U.S. Constitution in its entirety. The amendment was written and adopted as part of the Bill of Rights in 1791 to soothe states' rights proponents during formation of the U.S. government.

Originally, the Articles of Confederation written in 1781 gave almost all governmental powers to the states with few to the federal government. The nation was a loose union of sovereign (politically independent) states. But in only a few years, it became evident that growth of the young nation, particularly business growth and economic development, needed consistency in rules and protection that only a strong central government could provide.

Delegates to the Constitutional Convention met in 1787 to correct this problem. After intense debate between supporters of a strong central government and proponents of states rights, a governmental structure with a strong central government was selected. With a great distaste for strong central governments lingering in the country following political battles and war with the British government, the first ten constitutional amendments were written to protect citizens and the states from potentially oppressive national government powers. The Tenth Amendment reserved all powers to the states that were not clearly given to the federal government.

Can States Regulate Business?

The Constitution established a governmental system based on the idea of federalism, in which power is split between a central federal government and the various states. However, the exact line between the powers of the federal and state governments was not precisely defined. Each would control certain areas. Early on, the Court recognized a broad police power (general authority) of states to protect its citizens and regulate business activities. Falling back on the Tenth Amendment the Court ruled in *Mayor of New York v. Miln* (1837) that a state had "undeniable and unlimited jurisdiction over all persons and things within its territorial limits . . . where the jurisdiction is not surrendered or restrained by the Constitution of the United States." But by the mid-nineteenth century as the industrialization (growth of big business) expanded, the Court became increasingly protective of property rights and took a narrower

view of the state's power to regulate business. Use of the term "property" includes a person's business.

In a key 1877 decision supporting a state's police power over economic matters, the Court held in *Munn v. Illinois* that those business "in which the public has an interest," such as community agricultural grain storage structures, are subject to police power through state regulation. Other businesses are not. However, the "public interest" doctrine proved perplexing when applied in later cases as courts found difficulty in consistently identifying exactly what businesses held sufficient public interest.

Opponents to any state regulation of business argued such restrictions deprived people of their property rights by violating the Fourteenth Amendment's Due Process Clause. The clause states, "No state shall . . . deprive any person of life, liberty, or property without due process of law." Acceptance of this viewpoint grew and became known as "substantive due process" Substantive due process means that the Constitution protects certain rights, including property rights, from governmental interference. States became largely restricted from using police power over economic activity. Through the late nineteenth century and early twentieth century, this legal idea dominated many court decisions. The Court consistently ruled in favor of business interests when economic issues were involved.

Hard Times

With the collapse of the U.S. stock market in October of 1929, the nation entered a desperate economic period. Millions of people were out of work and many turned to the government for relief. The pro-business orientation of the Supreme Court became very unpopular, particularly with President Franklin D. Roosevelt (1933–1945) who was trying to lead the efforts for social and economic change. In the early 1930s, both the federal and state governments began taking action to control prices to ease the economic hardships. The state of New York created a Milk Board to set prices for milk. The resulting emergency legislation was the Milk Control Act of 1934 which set nine cents as the price to be charged for a quart of milk.

Grocer Leo Nebbia

Leo Nebbia owned and operated a small grocery store in Rochester, New York. One day Nebbia sold a quart of milk for more than nine cents. As a

result he was charged with violating the Milk Control Act. Nebbia, claiming New York had no legal authority to control milk prices, lost his case in the county court and again before the New York Court of Appeals. He next appealed to the U.S. Supreme Court which agreed to hear his case.

Writing for the Court's majority on a close 5-4 vote, Justice Josephus O. Roberts revised the earlier *Munn* decision. He ruled that states could regulate all businesses, not just those businesses having public interest. Roberts wrote,

> **[I]n the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority . . . when it is declared by the legislature, to override it.**

Roberts held that states could regulate for the public good any business activity as long as the regulation was reasonable and effective. He wrote that a state "may regulate a business in any of its aspects, including the prices to be charged for the products . . . it sells." Therefore, the New York act did not violate the constitution and Nebbia was appropriately convicted of violating it.

So ended the domination of substantive due process ideas over court decisions concerning economic issues. In dissent, Justice James C. McReynolds still held on to the claim that the Due Process Clause gave the Supreme Court all the authority it needed to override any legislation restricting economic activity that it found unreasonable.

The Rise of Police Power Over Business

McReynolds, along with the other three dissenting justices in the case, Van Devanter, Sutherland, and Bulter, were highly unpopular for their very politically conservative views toward protecting businesses from government interference and regulation. Soon they lost their clout under pressure from Roosevelt and the public. The Court, supporting Roosevelt's programs for recovery, allowed more government regulation of business. Importantly, in 1937 in *West Coast Hotel Co. v. Parrish* the Court upheld the power of the federal government to regulate economic activities in states.

STATE POLICE POWER

Though not specifically mentioned in the U.S. Constitution, "police power" is a recognized general legal authority that states hold to govern their citizens, lands, or natural resources. Courts widely use the concept when considering the limits of state authority over its citizen's activities, or when establishing the line between federal and state regulation. Traditionally, the two main constitutional restrictions on the state use of police power has been the Commerce Clause and the Contract Clause. Only the federal government, not the states, can regulate interstate commerce, and state laws cannot interfere with private contractual relationships. Likewise, the right to freedom of expression and right to privacy are seen as primary limitations to state police powers.

Through the twentieth century, states have been given broader police power authority in protecting public health and safety, morals, and business activity. An early example of the Court recognizing state police power for public safety was by upholding a Massachusetts law requiring everyone to be vaccinated against certain disease. Police power was also recognized in the landmark ruling of *Euclid v. Ambler Realty Co.* (1926). The decision upheld a local government's power to establish zoning laws which allow certain kinds of activities in certain parts of the community. Despite its broad acceptance, police power continues to be a legal concept that cannot be precisely defined.

By the end of World War II (1939–1945), the federal government had become the dominant power in the U.S. governmental system. The Court's emphasis switched from property rights and business issues to issues of protecting individual civil rights from police power.

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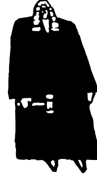

Erie Railroad Co. v. Tompkins 1938

Petitioner: Erie Railroad Company

Respondent: Harry J. Tompkins

Petitioner's Claim: That state law rather than federal common law should determine the responsibility of a railroad to pay damages to an injured private citizen.

Chief Lawyer for Petitioner: Theodore Kiendl

Chief Lawyer for Respondent: Fred H. Rees

Justices for the Court: Hugo L. Black, Louis D. Brandeis, Charles E. Hughes, Owen J. Roberts, Harlan F. Stone, Stanley F. Reed

Justices Dissenting: Pierce Butler, James Clark McReynolds (Benjamin N. Cardozo did not participate)

Date of Decision: April 25, 1938

Decision: Ruled in favor of Erie Railroad reversing a lower court decision that had awarded damages to Tompkins

Significance: The ruling reversed a previous court decision made almost a century earlier recognizing a federal common law. The *Erie* decision held that no such law exists. Federal court decisions involving citizens from different states follow state law when neither constitutional issues nor acts of Congress are not involved. The decision also gave state high court rulings the same degree of importance as laws passed by state legislatures.

Common law is a collection of rules and principles that come from longstanding customs or traditions. In the United States, they often come from early English customs, general law, and judicial (court) decisions recognizing a custom. English common law, finally established in written form in England in the eighteenth century, forms the basis for U.S. law and still applies to many cases in modern America.

When the Framers of the Constitution were busy creating a new national governmental system, a major issue receiving considerable debate raged between the Federalists wanting a strong central government and states' rights supporters wanting most power to be held by state governments, not the central federal government. In creating the U.S. legal system, the Framers of the document established a U.S. Supreme Court in Article III and identified federal jurisdiction on specific kinds of cases. Though no other federal courts were established by the Constitution, it did give Congress power to establish federal courts as it saw the need. Quickly, Congress used their authority to establish a federal court system under the Judiciary Act of 1789. Federal district courts were established in each state. According to the act, federal courts must apply state laws, not create its own general law. The "laws of the several states" are to be "regarded as rules of decision" in civil actions in federal courts "in cases where they apply." In regard to civil (private noncriminal disputes) cases, federal courts could only accept cases involving citizens from different states, known as diversity jurisdiction.

An early idea that federal general law did exist for diversity jurisdiction cases was expressed by Supreme Court in *Swift v. Tyson* (1842). The Court believed that all decisions by state court judges actually did not create law. Therefore, federal judges could ignore state court rulings when making their own rulings. They create federal general law that would take priority over previous state court decisions. The *Swift* ruling gave federal judges considerable power over state law. The opinion, however, created much confusion within each state rather than uniformity in law that was intended, especially as the list of legal topics created under a new federal general law grew through time.

Tompkins Hit by Train

The Erie Railroad Company, a corporation chartered (an ownership license) in New York state, operated a railroad in northeastern United States. Under law, Erie would be considered a New York "citizen." One

day while Harry J. Tompkins, a Pennsylvania citizen, was walking on a footpath alongside Erie railroad tracks in Pennsylvania when he was struck and injured by an open boxcar door on a passing train. Tompkins filed a lawsuit in a Pennsylvania federal district court seeking compensation (money payment) for his personal injuries. He claimed Erie was negligent (careless) in operating the railroad. Because the case involved diversity of citizenship, a Pennsylvania resident and a New York corporation, he filed the suit in federal court.

Because neither federal law nor any acts passed by the Pennsylvania state legislature existed covering such situations, the court had to determine what law should be applied in the case. A Pennsylvania court decision had previously established standard rules to guide courts in such cases. The rules stated that people using paths along railroads not at crossings would be considered trespassers. Railroads would not be liable (responsible) for injuries unless the trespassers were intentionally injured by reckless and deliberate acts of the railroads. Using the *Swift* decision, the district court judge refused to apply the Pennsylvania rule. Instead, he asked a jury to determine if the railroad was negligent. The jury found Erie negligent and awarded Tompkins $30,000 in damages, a substantial amount at that time. Erie appealed the district court decision to the federal Circuit Court of Appeals and lost again. Erie then appealed to the U.S. Supreme Court which accepted the case.

Erie posed two questions before the Court. First, should the federal judges have used a Pennsylvania state rule created by state judges to determine Erie's liability? Secondly, was not Tompkins to blame since he failed to pay attention to the warnings of a moving train including a horn and its headlight? Tompkins responded by focusing on the long-standing *Swift* rule that federal judges should not use state court rulings to guide their decisions. Federal law takes priority over state rules.

No Federal General Law

Justice Louis D. Brandeis, writing for the Court's 6-2 majority, declared that the doctrine established in the *Swift* ruling ninety-six years earlier was "an unconstitutional assumption of powers by the Courts of the United States." The earlier Court had mistakenly interpreted the act, according to Brandeis. Brandeis bluntly wrote, "There is no federal general common law." Referring to numerous legal studies critical of the *Swift* decision, Brandeis held that the Judiciary Act actually intended for federal courts to follow all laws of the state "unwritten as well as writ-

ten," including those rules made by state courts. Brandeis contended that the *Swift* decision basically violated equal protection of the law since citizens could win some civil cases in a federal court that they could not have won in state courts. They could do this simply by moving to another state and filing the suit in a federal court as a diversity case. Corporations could even reestablish in a new state without actually moving. People or corporations could "shop around" for a federal court that would likely give the best ruling. As a result, plaintiffs (those filing a lawsuit) held a legal advantage over defendants (those the target of lawsuits). Brandeis noted that under the *Swift* rule, Tompkins' chances of winning an award depended on whether the railroad was a New York company or a Pennsylvania company, and that was not just. If Tompkins had filed suit in a Pennsylvania state court, he could not have received an award as he did from a federal court since the state court must follow the state rule. Brandeis also ruled that the *Swift* interpretation of the Judiciary Act was an unconstitutional invasion of state sovereignty. He wrote, the doctrine of federal general law "is an invasion of the authority of the state, and, to that extent, a denial of its independence."

In conclusion, Brandeis held that for diversity cases the proper law to apply is the law of the state. Whether that law was made by a state legislature or by a state court decision "is not a matter of federal concern." He could find nowhere in the Constitution that the federal government, Congress or the federal courts, can create rules of common law in states. Quoting from Justice Oliver Wendell Holmes' dissent in an earlier case, Brandeis wrote that the "authority and only authority is the State, and . . . the voice adopted by the State as its own . . . should utter the last word."

With the *Swift* precedent removed, Brandeis sent the case back to the lower court for review again. The lower court's ruling was not automatically overturned because the issue of negligence under state rule was to be resolved.

No Federal General Rules of Law

The *Erie* ruling significantly cut back the legal authority of federal judges in diversity jurisdiction cases. No longer could they create and apply a general common law at the federal level. Instead, federal judges must apply the state laws in which the federal court is located except when dealing with constitutional issues or matters specifically governed by acts of Congress. Federal courts in a sense became yet another level of state court in diversity cases not involving federal law.

DIVERSITY JURISDICTION

The Framers of the U.S. Constitution believed that for civil cases involving citizens from different states, some neutral means must be available to resolve disputes. As a result, Article III reads that "The [federal] Judicial Power shall extend . . . between Citizens of different States . . . " Section 34 of the act, which later became known as the Rules of Decision Act, established what cases the courts could hear and how law should generally be applied. The Judiciary Act of 1789 gave the newly established federal courts authority to hear such cases. The Judiciary Act considers corporations as citizens of the states in which they are chartered.

Though some believe the need for such protection no longer existed toward the end of the twentieth century, diversity jurisdiction for federal courts persisted. To keep the number of potential cases under control for federal courts, Congress sets minimum dollar figures for civil disputes to qualify for federal courts. In 1789 the amount was $500. By 1988 it was raised to $50,000.

In diversity cases, the federal courts must first look to apply the appropriate federal law. If no federal law for the particular situation exists, then the court must apply the law or principle of the state that is involved, whether established by the state legislature or the state's highest court of law. As a result, national uniformity only exists for situations where federal law applies. Otherwise, state's are free to develop their own rules federal courts must use in diversity cases. If no clear state law or rule exists, then the federal court must consider the way the state's highest court might decide the case.

The decision also put state court rulings on an equal footing as laws passed by state legislatures. The power of state courts was, therefore, substantially raised. The decision discouraged citizens from shopping around for a federal court in various states to file suit in that would likely give a more favorable ruling.

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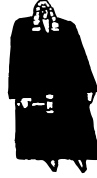

International Shoe Co. v. State of Washington 1945

Appellant: International Shoe Company

Appellee: State of Washington

Appellant's Claim: That a state can not require a company based outside the state to contribute monies into the state's unemployment compensation fund simply for selling products in the state.

Chief Lawyer for Appellant: Henry C. Lowenhaupt

Chief Lawyer for Appellee: George W. Wilkins, Washington Assistant Attorney General

Justices for the Court: Hugo Lafayette Black, William O. Douglas, Felix Frankfurter, Frank Murphy, Stanley Forman Reed, Owen Josephus Roberts, Wiley Blount Rutledge, Harlan Fiske Stone

Justices Dissenting: None (Robert H. Jackson did not participate)

Date of Decision: December 3, 1945

Decision: Ruled in favor Washington by finding that International Shoe had sufficient contacts in the state to pay state unemployment tax.

Significance: The decision established an important rule to determine when an out-of-state company has enough presence in a state to come under that state's jurisdiction. The rule of "minimum contacts" established that very little contact by an out-of-state corporation was necessary to make it subject to state regulation.

International Shoe Co. v. State of Washington

If a person living in Oregon took a road trip across country and happened to cause a minor traffic accident in Ohio, the Ohio resident involved in the mishap could sue the Oregonian under the state laws of Ohio. The out-of-state driver could not claim that, as a resident of Oregon, he was bound only by decisions made in an Oregon court. In legal terms, this kind of problem is known as personal jurisdiction. Jurisdiction refers to a geographic area over which a government or court has authority. When the term personal is added to jurisdiction, the phrase refers to the power of a court to hear cases where the court is located based on the situation or amount of contact a person, the defendant, has within the court's jurisdiction.

A Shoe Company's Predicament

Now suppose that a large shoe company has several sales agents working in the state of Washington. The shoes are all made in St. Louis, Missouri. The company's headquarters are located in Delaware. The only thing the company does in Washington state is to have its salesmen sell shoes there. The question arises as to whether the shoe company must pay unemployment tax—a percentage of the salespeople's salaries—to the state of Washington.

In the 1930s, a time of high unemployment, Washington had passed a law setting up a state compensation (to make up for lost income) fund to pay unemployment wages to individuals who had lost their jobs through no fault of their own. To help with expenses of the program, companies who employed workers in the state were required to make annual contributions, known as the employment tax, to the program.

Should the Delaware shoe company be required to pay this tax to the state of Washington? The Supreme Court was faced with this problem in the case of *International Shoe Co. v. State of Washington.* The Court considered the case as a question of personal jurisdiction. The decision still carries enormous influence in settling problems of personal jurisdiction.

Personal Jurisdiction and Corporations

Legally a corporation is considered a person under U.S. law. Therefore, corporations are covered by personal jurisdiction laws. Chief Justice Harlan F. Stone commented in *International Shoe,* " . . . the corporate

personality is a fiction although a fiction intended to be acted upon as though it were a fact."

Personal Jurisdiction and Minimum Contacts

Business in the late 1930s for International Shoe Company in the state of Washington was good. Between ten and thirteen salesmen employed by the company lived and worked in the state earning a total of $31,000 from 1937 to 1940, a large sum for the times. Washington wanted the tax due on those earnings. A state official personally delivered a notice to one of the company's salesmen living in the state and mailed a copy to the company's office in Delaware demanding that the company pay unemployment tax. The notice asserted the company owed back taxes from 1937 to 1940 when it had not paid unemployment tax.

The company refused to pay claiming that even though they had salesmen working in the state, they did not really have a corporate presence. No company offices were located in the state, no stocks of shoes were kept there, and no contracts of sale were actually signed there. All orders were normally sent by the salesmen to St. Louis where the orders were accepted and the shoes were then shipped from one of several places, all located outside the state of Washington. Since the company itself was not physically present in the state, the company claimed it should not come under Washington state jurisdiction. Therefore, it should not be required to pay unemployment tax.

In such a situation, the idea of a corporation as a person hence falling under personal jurisdiction laws becomes important. Returning to the example of an Oregonian causing a traffic accident which in Ohio, the Oregonian, upon receiving a summons at home in Oregon from Ohio, could argue that he is not present in Ohio, therefore Ohio has no personal jurisdiction over him. However, although the Oregonian was back home, it could be said that the traffic accident in Ohio established "minimum contacts" with Ohio. This minimum contact under personal jurisdiction laws in fact brings him under the jurisdiction of a Ohio state court. Similarly, did International Shoe Company's salesmen working in Washington establish enough contact for the company to fall under Washington state's jurisdiction?

The case first went to a Washington state Superior Court which ruled in favor of the state, ordering International Shoe to make the pay-

PERSONAL JURISDICTION

Personal jurisdiction refers to the legal power a court holds to hear and decide a civil law (private noncriminal) case based on the degree of contact that defendant (individual who is the target of a lawsuit) has in the area in which the court is located. Every state has personal jurisdiction over all its residents and all visitors within its boundaries. This includes residents who leave the state for a brief period of time or people from out-of-state who enter the state only briefly. This jurisdiction comes from the sovereign (politically independent) governmental powers held by each state. However, if the person named in a suit is located outside the state boundaries, then they must have made some form of contact within the state for the state's courts to take the case.

Questions of personal jurisdiction when dealing with individuals as defendants have been fairly straightforward. However, when corporations, who are considered "citizens" by law, are involved, complications can readily occur. For national corporations located in one state, but doing business in others, state courts sometimes have difficulty determining if they have jurisdiction. The corporation is always subject to personal jurisdiction in the state it is chartered. To conduct business in some states, out-of-state corporations have to sign agreements stating that they agree they are subject to personal jurisdiction. Other states require corporations to at least have an agent within the state to receive legal papers if a lawsuit should be filed against them. The general rule is that if a corporation wants the privilege of conducting business in a state, then it must accept responsibilities as well. Sometimes only a single contact made by a corporation within a state, such as a telephone call or letter can be sufficient contact to come under a state's personal jurisdiction. State laws establishing personal jurisdiction over out-of-state corporations are referred to as "long-arm statutes" for extending jurisdiction out long distances beyond state boundaries.

ments. International Shoe appealed the decision to the state supreme court which affirmed the lower court's decision. The company then appealed to the U.S. Supreme Court which accepted the case.

How Much Contact Is Enough Contact?

The Court was left to decide how much "contact" in a state is enough for a citizen, hence a corporation, to fall under that state's jurisdiction. Justice Harlan F. Stone wrote the Court's opinion in the unanimous 8-0 opinion. In finding in favor of Washington, Stone reasoned that by maintaining a sales staff and selling shows International Shoe had established enough contact with the state to require it to be subject to Washington laws for the activities it conducted in the state. These "minimum contacts" were sufficient whenever a corporation had "sufficient contacts or ties with the state . . . to make it reasonable and just, according to our traditional conception of fair play and substantial justice." Stone held that if a corporation enjoys the privilege of conducting business in a state, then it must also meet the obligations of doing business within the state. Also, if a company employs labor in a state, it should be expected to contribute taxes to the unemployment program.

A Major Precedent

The ruling set a major precedent (principles set by earlier court decisions) for determining personal jurisdiction matters. International Shoe made it significantly easier for states to seek jurisdiction over out-of-state corporations. Following the decision, states passed numerous laws defining state jurisdiction over out-of-state businesses. These laws have normally received favorable review in the courts, which strengthens state powers in this area. However, the issue of just what constitutes "minimum contact" was left for courts to explore further in future cases.

The growth of the Internet in the 1990s raised more complex questions concerning what qualifies as corporate contact in a state. The application of state sales taxes to electronic commerce in cyberspace became a major issue among state governments. This question and other new ones in an era of rapid developments in telecommunications pose new problems concerning state regulation of out-of-state businesses.

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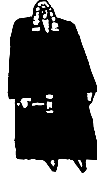

Puerto Rico v. Branstad 1987

Petitioner: Commonwealth of Puerto Rico

Respondent: Terry Branstad, Governor of Iowa, et al.

Petitioner's Claim: That Iowa violated the Extradition Clause of the U.S. Constitution by refusing to extradite Ronald Calder, who was wanted for murder in Puerto Rico.

Chief Lawyer for Petitioner: Lino J. Saldana

Chief Lawyer for Respondent: Brent R. Appel

Justices for the Court: Harry A. Blackmun, William J. Brennan, Jr., Thurgood Marshall (writing for the Court), Sandra Day O'Connor, Lewis F. Powell, Jr., William H. Rehnquist, Antonin Scalia, John Paul Stevens, Byron R. White

Justices Dissenting: None

Date of Decision: June 23, 1987

Decision: The Supreme Court said federal courts could require Iowa to extradite Ronald Calder to Puerto Rico.

Significance: With *Branstad,* the Supreme Court said federal courts have the power to order state governments to obey the U.S. Constitution and federal laws.

The Extradition Clause of the U.S. Constitution requires states to extradite fugitives who are hiding in their states. A fugitive is someone who escapes from law enforcement and fails to appear to be tried for a crime. When a state extradites a fugitive, it arrests him and delivers him to the

state where he is wanted for a crime. In 1793, Congress passed the Extradition Act, which requires states and territories of the United States to obey the Extradition Clause.

In *Kentucky v. Dennison* (1861), the U.S. Supreme Court issued a strange ruling about the Extradition Clause. It said states must obey the clause, but the federal government may not enforce the clause or punish states for disobedience. The Supreme Court said state and federal governments are equal sovereign powers, so one cannot order the other to do anything. In *Puerto Rico v. Branstad* (1987), the Supreme Court had to decide whether *Dennison* was still good law.

The Fugitive

Ronald Calder was an air traffic controller from Iowa who worked for the Federal Aviation Administration in San Juan, Puerto Rico. On 25 January 1981, Calder got into an argument with Antonio de Jesus Gonzalez in the parking lot of a grocery store. An angry Calder got into his car and drove it into Gonzalez and Gonzalez's pregnant wife, Army Villalba. After striking the couple, Calder backed his car up over Villalba's body two or three times. Gonzalez survived, but Villalba and her unborn child died.

Puerto Rican authorities arrested Calder, charged him with first-degree murder and attempted murder, and released him on $5,000 bail. Calder did not think a white American could get a fair trial in Puerto Rico, so he fled to his family's home in Iowa. Puerto Rico notified Iowa that Calder was wanted in Puerto Rico to stand trial for murder.

On April 24, 1981, Calder surrendered to authorities in Iowa. On May 15, the governor of Puerto Rico asked Governor Robert Ray of Iowa to extradite Calder to Puerto Rico. Governor Ray held an extradition hearing, at which Calder argued that he could not get a fair trial in Puerto Rico. Governor Ray then tried to get Puerto Rico to reduce the charges against Calder. When Puerto Rico refused, Governor Ray denied the extradition request. Terry Branstad, who became governor in Iowa after Ray, also denied Puerto Rico's extradition request.

In 1984, Puerto Rico sued Iowa in federal court. Puerto Rico wanted to force Governor Branstad to extradite Calder to Puerto Rico. Relying on *Kentucky v. Dennison,* both the trial court and the court of appeals said they were powerless to order Iowa to obey the Extradition Clause. Puerto Rico took the case to the U.S. Supreme Court.

FEDERALISM AND STATE POWERS

The Justice

With a unanimous decision, the Supreme Court ruled in favor of Puerto Rico. Writing for the Court, Justice Thurgood Marshall said it was time to overrule *Dennison.* When the Supreme Court overrules a prior case, it announces a new rule of law that replaces the rule from the old case.

Justice Marshall said the Supreme Court decided *Dennison s*hortly before the American Civil War began, when the federal government was its least powerful point in American history. With the United States falling apart, there was no way the Supreme Court could have ruled that the federal government could order states to obey the Constitution.

In cases decided after the Civil War, the Supreme Court found the courage to make such rulings. As an example, Justice Marshall referred to the famous case of ***Brown v. Board of Education*** (1955). In *Brown,* the Supreme Court ordered the states to end segregation—the practice of separating white and black students in different public schools. The Court said segregation violated the Equal Protection Clause under the Fourteenth Amendment. According to *Brown* and many other cases,

Governor Terry Branstad refused to extradite a man who was wanted for murder.
Reproduced by permission of AP/Wide World Photos.

KENTUCKY V. DENNISON

In 1861, the United States was on the verge of the American Civil War. Southern states wanted to maintain power by keeping slavery, which made southern agriculture highly profitable. Northern states wanted to abolish slavery. By 1861, many southern states had ceded from, or left, the union of the United States to form a separate Confederacy. In the midst of this turmoil, the U.S. Supreme Court had to decide a case concerning a slave who escaped from captivity.

Charlotte was a slave girl who lived in Louisville, Kentucky. One day she was allowed to go with her owner, C.W. Nichols, to visit her mother in Wheeling, Virginia, where Nichols had business. On their way to Wheeling, Charlotte and Nichols passed through Ohio, which had abolished slavery. While in Cincinnati, Charlotte met some people who helped her escape from Nichols and she became a free woman in Ohio.

Kentucky believed that Willis Lago, a free African American in Ohio, helped Charlotte escape from Nichols. Kentucky Governor Beriah Magoffin asked Ohio Governor William Dennison to arrest Lago and send him to Kentucky to face charges of assisting the escape of a slave. When Dennison refused, Kentucky sued him in federal court.

With tension over the slavery issue high, the question of whether federal courts could order states to comply with the Constitution was difficult. When the case made it to the Supreme Court, the Court said Ohio was required to send Willis Lago to Kentucky to face criminal charges. The Court also said, however, that the federal government had no power to force Ohio to send Lago to Kentucky. Lago escaped charges, the United States fought a civil war, and it took another 125 years for the Supreme Court to overturn *Dennison in* Puerto Rico v. Branstad.

when a state violates the U.S. Constitution, the federal government can force it to obey. Marshall said the idea that state and federal governments are equal sovereign powers is no longer true.

Iowa, then, had a duty to obey the Extradition Clause and the Extradition Act of 1793 by sending Calder to Puerto Rico. If Iowa denied Puerto Rico's request, the federal courts could issue an order giving Iowa no other choice. By reversing *Dennison,* the Supreme Court made sure no state could become a safe haven for fugitives from the law.

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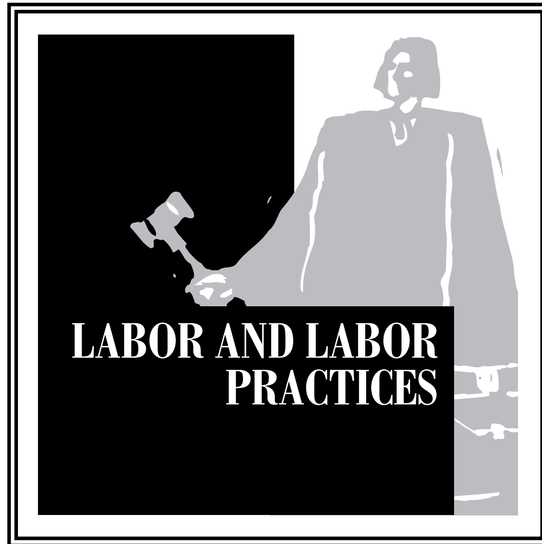

The role of labor organizations in modern U.S. industrialized society has its roots in the European merchant and craft guilds of the Middle Ages. The guilds were associations of people with common interests, usually setting prices and quality standards for their goods and wage rates for their employees. The guilds grew to have considerable political power before eventually dying out by the seventeenth century.

Early efforts in the United States for employees to organize into organizations seeking better pay, fewer working hours, and improved working conditions met with fierce opposition. Labor organizers were often considered criminals. This early conflict between employers and unions shaped labor law and labor relations throughout U.S. history.

Early organized labor actions in the United States included efforts by Philadelphia shoemakers in 1792 to improve their work conditions. Their actions met with little success as their organization was ruled illegal by a Pennsylvania court. Unions were considered illegal conspiracies. President Andrew Jackson (1829–1837) even sent U.S. troops in 1834 to break up a strike by canal construction workers in Ohio. A strike by employees is an organized refusal to work. Jackson claimed the strike

interfered with interstate commerce (trade across state lines) by threatening not to complete the canal construction. Finally, in 1842 a Massachusetts court recognized a worker's right to strike and that unions were legally valid organizations, the first such ruling in the nation.

Labor organizations began to appear in the mid-nineteenth century. Skilled laborers were the first to organize with the railroad workers leading the way. Railroad workers held a particular edge in that they could potentially cause large scale economic disruptions.

Industrialization and Labor Unrest

Following the American Civil War (1861–1865) industrialization (growth of large manufacturers) expanded rapidly. Rapid changes in technology spurred the growth of capitalism (an economic system in which businesses are privately owned and operated for profit) in which the newly emerging large corporations were much more concerned with profits than employee comfort and safety. As a resul, interest in labor unions grew. In 1869, the Noble Order of the Knights of Labor became one of the first national labor organizations. The eight-hour work day and restrictions on child labor were two of its objectives.

Many still considered unions as obstacles to capitalism and, therefore, un-American. Translating new Darwinian theories of biological evolution to society in general, many believed in a social version of survival of fittest. Those persons who did not prosper on their own initiative were obviously deficient in character and should not be aided by organized groups. A *laissez-faire* economic system which was based on freedom from of governmental or labor union interference was considered most desirable for economic success. The unhampered marketplace was to dictate business success and workers were to perform based on the market needs. In the factories and sweatshops twelve hour workdays and six-day workweeks were common with wages barely at subsistence levels. Working conditions were dangerous and unsanitary. Death and injury were common in industrial accidents.

By the 1880s European immigration escalated providing an increased labor force for the industrialists. Unskilled workers and their families living in crowded slums became common. Support for social reform grew more and the public began to push for protective legislation. Confrontations between laborers and their employers and police began to turn violent in the late 1870s continuing in a series of strikes through the

1880s. Federal troops were called to stop one strike. Finally, police killed dozens of strikers in a 1894 incident. Public acceptance of unions decreased with each incident. In addition, discrimination against the immigrants was prevalent. Typical of the labor movement in general, the Knights of Labor declined, disappearing by 1900.

Two notable developments during this period were the formation of the American Federation of Labor (AFL) in 1886 and passage of the Sherman Antitrust Act in 1890. The AFL was a loose organization of twenty-five national trade unions representing skill workers. Stressing cooperation with employers, the AFL represented over 300,000 workers.

Congress passed the Sherman Antitrust in 1890 with intentions of breaking up the business monopolies. Ironically, courts tended to apply the prohibitions against workers' strikes rather than against business activity ruling that strikes were illegal restraints of trade. With strikes proving ineffective and attracting much public scorn, the use of boycotts soon became a popular alternative. Boycott is an organized effort to convince people not to purchase or handle products made by a particular business. Regional or national boycotts proved more effective than localized strikes, but they also met with much legal opposition. In *Loewe v. Lawlor* (1908) the Court ruled that coordinated boycotts by combinations of workers, like strikes, violated the Sherman Antitrust Act of 1890. Even the publicizing of a proposed boycott was considered in violation of the act despite claims of First Amendment free speech rights by the organizers. The First Amendment protection of the freedom of assembly prevented the banning of unions altogether.

Labor and the Courts

The main court activity in the late nineteenth and early twentieth centuries involved the issuing of injunctions (court order to stop an action) against union activities and rulings often striking down reform legislation. Rulings, such as ***Lochner v. New York*** (1908) striking down a state law setting maximum hours of work for bakers, were normally unfavorable to labor because of the court's desire to define and protect the "liberty of contract," as interpreted in the due process clauses of the Fifth and Fourteenth Amendments. The clauses state "No person shall be . . . deprived of life, liberty, or property, without due process of law." The right of an employer to contract for labor with employees was considered a "liberty" protected by the clause.

Employers commonly used court injunctions to stop strikes and hinder organizing efforts. The first came in 1877 against railroad workers. In a national boycott of railway cars built and owned by the Pullman company, a series of injunctions were issued by federal courts. The injunctions were upheld by a unanimous (all justices agree) Supreme Court in *In re Debs* (1895). Likewise, in *Gompers v. Buck's Stove & Range Co.* (1911) the Court reaffirmed the legality of labor injunctions. Between 1880 and 1930 approximately 4,300 court orders were issued against labor activities.

Persistent court losses led labor leaders to begin lobbying Congress for protective laws including prohibition of injunctions against labor activities. To seek improved working conditions, Congress created the U.S. Department of Labor in 1913. The following year Congress passed the Clayton Act of 1914 barring courts from issuing injunctions against peaceful strikes or boycotts. Formation of unions was no longer to be considered a violation of antitrust law. However, the act proved of little help as it was too vaguely worded for lower courts to apply effectively. Use of injunctions continued. In addition, a common means of controlling union activity was yellow-dog contracts. Employers required employees and those applying for jobs to sign an agreement that they were not and would not become union members. The Court upheld yellow dog contracts in *Coppage v. Kansas* (1915). Union membership correspondingly declined from over five million in 1920 to 3.5 million in 1929.

A desire to protect the "vulnerable" (person who could easily be harmed) did exist through this period. In ***Muller v. Oregon*** (1908) a state maximum hour law for women was upheld. But federal child labor laws did not fair as well. In ***Hammer v. Dagenhart*** (1918), the Court ruled that such laws fell outside congressional authority and should be left to the states. Yet, states were unwilling to pass laws prohibiting child labor since children were popular sources of cheap labor for businesses operating in their boundaries. Despite some limited gains with state reform laws, any effort to recognize broad reforms for all workers was found unacceptable. One result was that laws allowing protection of women only led to a gender-based division in America's working class.

Maintaining Peaceful Labor Relations

Finally, greater recognition of unions and protection of workers rights came in the 1930s. The Great Depression brought a decline in business

influence and increased strife among workers. Congress passed the Norris-LaGuardia Act in 1932 more clearly restricting use of injunctions. With improved protection of unions, unskilled workers began to have a voice with the rise of the Congress of Industrial Organizations (CIO).

A truly new era in labor relations and labor law arrived in 1935 with the Wagner Act, also known as the National Labor Relations Act. The act is the most important labor legislation in U.S. history guaranteeing workers "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively, through representatives of their own choosing, and to engage in other concerted activities for . . . mutual aid or protection." Collective bargaining is when the employer and employees' representatives negotiate a labor agreement concerning work conditions including wages, hours, and safety. Employers are required to bargain with their employees' elected representatives. Importantly, the act also prohibited employers from committing "unfair labor practices" that would violate these employee rights. Yellow-dog contracts were outlawed. The act created the National Labor Relations Board (NLRB), a federal agency to enforce the act's provisions. The NLRB has power to investigate employees' complaints and issue orders for employers to stop certain labor practices. The Board can go to a federal appeals court for enforcement of its orders if need be. The NLRB can also conduct elections to determine which union is to represent employees of a particular company.

With the Supreme Court's rejection of a National Industrial Recovery Act only two months before passage of the Wagner Act, the new act received few favorable rulings in the lower courts for two years until a case finally made it to the Supreme Court. Due largely to considerable political pressures from President Franklin D. Roosevelt (1933–1945) and the public, the Court made one of its most dramatic constitutional shifts in U.S. history. Suddenly, the *laissez-faire* economic concepts and protection of business from labor actions was largely abandoned, replaced by recognition of workers' rights and role of government in regulation of economic activities. The Court first abandoned the liberty of contract doctrine in *West Coast Hotel Co. v. Parrish* (1937) by upholding a state law setting minimum wages for women. Then, in ***National Labor Relations Board v. Jones & Laughlin Steel Corp.*** (1937) the Court upheld the NLRA, greatly expanding federal authority to regulate economic matters. The Court for the first time recognized that individual workers were at a disadvantage in negotiating with employers over work conditions. Unions and government intervention were now considered appropriate to make labor relations more balanced.

In *Hague v. Congress of Industrial Organizations* (1939) the Court went further in using First Amendment protections to protect union organizing activities. Freedom to discuss labor issues was recognized as crucial to a modern industrial society. As follow-up to *Hague,* the Court soon ruled in support of peaceful picketing in *Thornhill v. Alabama* (1940). Picketing is physically interfering with a particular business to influence the public against purchasing its products. As a result of the NRLA and sudden favorable Court rulings, union membership substantially grew for the next several decades.

Unfortunately for labor, the favorable rulings came largely from the Court's concern about the public being informed of key labor issues through picketing, strikes, and boycotts and maintaining labor peace than actually protecting workers' rights. This perspective supported substantial government regulation of labor unions and workers' rights. Two key revisions (amendments) to the Wagner Act occurred in 1947 and 1959 which served to restrict union activities. The Taft-Hartley Act of 1947, also known as the Labor Management Relations Act, applied unfair labor practice prohibitions against labor unions, just as the Wagner Act had against employers. For example, unions and union members could not threaten or intimidate other employees into supporting union activities. It also restricted workers' rights to select their own representatives partly in fear of Communist infiltration of labor unions with onset of the Cold War (1946–1991). These restrictions were upheld in *American Communications Association v. Douds* (1950) in the name of protecting commerce from the threat of disruption. Picketing was also limited by the act.

By the late 1950s workers' rights had declined with the government still emphasizing labor peace. Use of injunctions against union activities reappeared. The AFL and CIO merged in 1955 to form the AFL-CIO to increase its power in the face of increased restrictions. The 1959 Landrum-Griffin Act, also known as the Labor Management Reporting and Disclosure Act, curbed abuses of power by union leaders and regulated how labor unions conduct their internal affairs. Still, a strong U.S. economy in the 1960s, based largely on manufacturing industries which dominated the world economy, led to growth of union membership. The workforce also began to change. Passage of the Civil Rights Act of 1964 opened up employment as well as union memberships to both racial minorities and women. But, unfavorable legal rulings toward labor continued as the Court in *American Ship Building Co. v. NLRB* (1965) upheld an employer's right to "lockout" employees as part of collective bargaining pressure on workers. Lockout means refusal to allow employees to enter their workplace.

Propelled by the Wagner Act and its amendments, the field of labor law grew, focusing on the rights of employees, employers, and labor unions. The process of organizing unions, conducting elections for union representatives, spending union monies, negotiating labor contracts, and resolving disputes became well established. Though both unions and employers are required to bargain when one or the other requests it, there is no requirement that workers and employers must reach agreement on a labor contract. Federal or state government mediators (officials stepping in between the two sides) may even be called upon to help with negotiations. Strikes or boycotts could result from failed negotiations. If disputes threaten public health or safety, the U.S. president has authority to obtain an eighty day injunction from federal courts against strikes or lockouts. This power was often used in the 1950s and 1960s, but much less so after 1970. Almost every labor contract that is established includes a grievance (complaint) procedure designed to settle disputes between workers and employers. Failure of immediate solution may lead to arbitration, meaning another person not connected to the two sides decides the issues. The resulting solution is considered final and both sides must comply with it.

A Changing Economy

Labor relations continued to change in the late twentieth century. A decline of union membership and activity occurred through the 1970s and 1980s. A combination of economic slowdowns, increased automation in factories, and shift of manufacturing jobs to less developed countries with cheaper labor costs contributed to the change. The U.S. economy shifted from manufacturing to service jobs, including health care, food service, information technology, and insurance which generally pay less for lesser skilled employees and are more temporary in nature. In addition, women who were generally less inclined to participate in union activities entered the workforce in substantially larger numbers. Almost 35 percent of the U.S. workforce claimed union membership in 1954 compared to less than 15 percent in 1995.

Changes in the U.S. economy in the 1990s led to more cooperative working relations between employers and labor unions, including agreements in some instances to reduce wages in tradeoff for greater job security. Some employers began giving unions a greater voice in company policies. The NLRA, built on the notion that labor and employers always have opposing viewpoints and goals, became viewed as outdated by both

labor and business as some new workplace cooperative practices were ruled in violation of the act. Some called for repeal of the NLRA and restructuring of labor law to better conform to the changing work environment in the twenty-first century.

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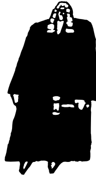

Lochner v. New York
1905

Appellant: Joseph Lochner

Appellee: State of New York

Appellant's Claim: That New York's Bakeshop Act was an unreasonable exercise of state police power to regulate the working conditions at bakeries.

Chief Lawyers for Appellant: Frank Harvey Field, Henry Weismann

Chief Lawyer for Appellee: Julius M. Mayer, Attorney General of New York

Justices for the Court: David J. Brewer, Henry B. Brown, Melville W. Fuller, Oliver Wendell Holmes, Joseph McKenna, Rufus W. Peckham

Justices Dissenting: William Rufus Day, John Marshall Harlan I, Edward Douglass White

Date of Decision: April 17, 1905

Decision: Ruled in favor of Lochner by finding that the Bakeshop law unconstitutionally restricted an employer's liberty to contract for labor.

Significance: The decision recognized a sweeping new freedom of contract loosely drawn from the due process clauses of the Fifth and Fourteenth amendments. The decision had a major effect on twentieth century society to the detriment of the workingman. In the late 1930s, the Court shifted its focus to protection of individual rights over economic interests.

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The way in which the courts interpret the U.S. Constitution changes greatly through time as society changes. From the birth of the nation in the 1780s until the 1870s, courts interpreted the Due Process Clause of the Fifth Amendment as applying primarily to how fairly federal laws were applied, not so much what the intent of the law was. The amendment states that no person shall "be deprived of life, liberty, or property, without due process of law." Citizens should receive sufficient notice and fair legal hearings before government could take action. Individual rights, such as freedom from discrimination, were not a concern as in modern America.

Liberty of Contract

In 1868 the Fourteenth Amendment was added to the Constitution which also contained a Due Process Clause. Aimed at protecting individuals from state actions, the amendment came at a time the American Industrial Revolution was well underway with industry rapidly growing. Major changes in society were also occurring including an ever widening gap between the rich and poor. While employers were accumulating wealth, employees were working longer and longer hours, often in unhealthy conditions. Few laws existed for health and safety standards in places of employment.

Typical of this industrialization trend, many bakers in New York worked twelve hours a day for seven days a week. Conditions in city bakeries, often located in the basements of tenement houses, were cramped and filthy. With little time for rest, many workers essentially lived in their kitchens, sleeping at their workbenches. With poor ventilation, disease and early deaths were common. Believing that unsanitary and unsafe conditions affected the bakers and their products, the New York legislature passed the Bakeshop Act in 1895. Besides setting minimum sanitation standards, the act stated that no employee "shall be required or permitted to work in a biscuit, bread, or cake bakery . . . more than sixty hours in any one week, or more than ten hours in any one day."

Joseph Lochner

Joseph Lochner owned a small bakery in Utica, New York that produced biscuits, breads, and cakes for early-morning customers. Lochner's employees were frequently required to work late into the night, some-

times sleeping in the bakery before rising early to prepare the products for the customers. In April of 1901, one of his bakers, Aman Schmitter worked over sixty hours in one week. A complaint was filed with the police who arrested Lochner and charged him in violation of the Bakeshop Act.

Ten months after his arrest, Lochner's case went to trial in Oneida County Court. Intending to appeal to a higher court to challenge the law, Lochner refused to plead guilty or not guilty, and offered no defense to the charge. Judge W. T. Dunmore found Lochner guilty and sentenced him to pay a fifty dollar fine or spend fifty days in jail. Lochner immediately appealed the decision to the Appellate Division of the New York Supreme Court.

Before the five appeals court judges, Lochner argued that because of the Bakeshop Act he could not freely make a contract with his employees concerning pay and hours of work. This interfered with his right to earn a living and pursue a lawful trade as protected by the Fourteenth Amendment's Due Process Clause. Three of the five judges were unconvinced with his arguments and upheld his conviction. They ruled the law was a proper exercise of the state's police powers to protect

Lochner's Home Bakery in New York. Courtesy of the Library of Congress.

the health and safety of its citizens. Lochner appealed the decision to the New York Court of Appeals, but lost again.

Lochner next appealed to the U.S. Supreme Court which agreed to hear his case. Lochner also decided to change lawyers, hiring Henry Weismann. Weismann was an interesting choice for in the 1890s he had been a lobbyist for the Journeyman Bakers Union and editor of the union's newsletter, the Bakers' Journal. Weismann was an advocate for laws limiting bakers' hours to eight hours a day. Leaving the union in 1897, Weismann opened two bakeries of his own leading a complete change in personal interests. He joined the Retail Bakers' Association to fight enforcement of the Bakers Act.

Before the Court, Weismann argued the law violated Lochner's "liberty of contract." He claimed that employers and employees had a basic right to negotiate a contract over conditions of their labor free from state restrictions as long as they did not interfere with another person's liberty of contract. Weismann asserted that baking was not a dangerous occupation. Therefore, the law was an inappropriate use of police powers depriving bakery owners of their due process rights.

New York countered that state restrictions to protect the health and well-being of workers and general public were nothing new. For example, physicians were required to obtain a license before practicing medicine. Using statistics, the state also argued baking was less healthy than many occupations. It involved heavy lifting and carrying while breathing air containing flour dust and germs. Lung diseases including tuberculosis were common. Because employees had less bargaining power than their employers when negotiating labor contracts, laws were needed for the public good to protect workers from being unfairly exploited.

The Court was left to decide between the right to contract versus the employees protection from poor working conditions. Justice Rufus Peckham delivered the findings of the Court in a close 5–4 decision. Peckham declared the act interfered with the right "to make contracts regarding labor upon such terms as they may think best, or upon which they may agree." Under the Fourteenth Amendment, people were free to purchase and sell labor without state restrictions, contended Peckham. Regarding the state's assertion that baking was an unhealthy occupation, Peckham stated, "The trade of a baker is not unhealthy . . . to such a degree which would authorize the legislature . . . to cripple the ability of the laborer to support himself and his family" by restricting his work.

Concluding that a direct relationship between the act and the health and welfare of New York bakers was not sufficient, Peckham wrote,

> **There is no reasonable ground for interfering with the liberty of a person or right of free contract, by determining the hours of labor, in the occupation of a baker . . . A law like the one before us involves neither the safety, the morals, nor the welfare of the public . . .**

A Strong Dissent

In dissent, Justice John Marshall Harlan believed that baking was a hard occupation. Though agreeing that the due process clause does protect the liberty to contract, the state's have power to regulate that liberty for the health and safety of its citizens. He pointed to many state mining laws limiting miners to eight hour days.

Justice Oliver Wendell Holmes pointed out that the peoples' rights are routinely limited by state laws. Holmes wrote,

> **The liberty of the citizens to do as he likes so long as he does not interfere with the liberty of others to do the same . . . is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.**

Holmes asserted that the state's have broad rights to restrict activities and the courts should be very cautious in overturning them.

Lochner's Legacy

For the next thirty-two years federal courts used *Lochner* to overturn numerous laws attempting to regulate various aspects of business, employment, and property interests. The decision launched a new era of constitutional interpretation lasting until 1937. During this time, public sentiment strongly supported the idea that government should minimally interfere with the newly evolving industrial capitalistic market, an idea known as *laissez-faire* economics.

Following the stock market crash of 1929, President Franklin D. Roosevelt began to attempt to establish a social and economic reform

JUDICIAL RESTRAINT

Article III of the U.S. Constitution describes how U.S. courts of law should operate. It directs the U.S. Supreme Court to keep a sharp distinction between its duties and that of Congress. The Court must restrain (to hold back) itself from doing Congress' job of making policy. To legal scholars the *Lochner v. New York* decision represents the best example of the lack of "judicial restraint" shown by the Court. The Court should give Congress and state legislatures the benefit of the doubt when interpreting laws. It should never overturn a law unless clearly violating some part of the Constitution. Rulings should not promote new ideas or preferences of the justices. The Court should rely only on precedents (previous decisions) or long established common law rather than attempting to promote some general public good considered important at the time. That is the legislature's role.

In *Lochner,* the Court's majority was reflecting the general public mood at the time of a growing young industrialist society based on a capitalistic economy. People believed the least amount of government regulation would allow the economy to grow "naturally." To support this idea in *Lochner,* the Court created an unwritten right from a loose reading of the Constitution, the right to contract. Decades later, the Court adopted a greater role of self-restraint by changing its interpretation of the Due Process Clause and overturning *Lochner.*

program based on a series of new federal laws. The Court, using the *Lochner* decision, and consistently overturned the laws much to the dismay of the president and much of the public.

Finally, in 1937 the Court embraced Holmes' dissent in *Lochner* in the case of *West Coast Hotel Co. v. Parrish.* In letting stand a Washington state law setting a minimum wage for women, the Court ruled the freedom to contract was not unlimited. For the rest of the twentieth century, governments were given freedom to regulate the workplace and other economic affairs.

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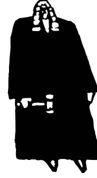

Muller v. Oregon 1908

Appellant: Curt Muller

Appellee: State of Oregon

Appellant's Claim: That an Oregon law prohibiting women from working more than ten hours a day is unconstitutional.

Chief Lawyers for Appellant: William D. Fenton, Henry H. Gilfry

Chief Lawyers for Appellee: H. B. Adams, Louis Brandeis

Justices for the Court: David J. Brewer, William R. Day, Melville W. Fuller, John Marshall Harlan, Oliver Wendell Holmes, Joseph McKenna, William H. Moody, Rufus W. Peckham, Edward D. White

Justices Dissenting: None

Date of Decision: February 24, 1908

Decision: Ruled in favor of Oregon by agreeing with a lower court that women are a "special class" of citizens in need of protection at the workplace.

Significance: The classification of women as a special class brought mixed results. The decision paved the way for men and children to later receive similar protections under state laws regulating workplace conditions. But, the ruling also reinforced sexual discrimination in the workplace experienced by many women through the rest of the twentieth century.

For years women have fought cultural stereotypes depicting females as the "weaker sex." Such perceptions have long been a part of English tradition dating back at least to the medieval period of history. Women were considered primarily as wives and mothers, to be protected from the rough world outside the home. In marriage a wife's identity would be fully merged into the husband's. This idea carried forward until the mid-nineteenth century when states began recognizing wives more as separate persons. Still unable to vote in elections, the growing feminist political movement of the mid-nineteenth century focused on gaining voting rights.

Other issues also began to attract attention as well. During the industrial expansion following the American Civil War (1861–1865), workers' conditions were often deplorable. By the late nineteenth century, mass immigration from Europe to the U.S. industrial cities led to many women seeking work in the factories. "Sweat shops" became common. Almost twenty states passed laws placing women in a special legal class for protection from such harsh work conditions. Among these was Oregon which passed a law in February of 1903 setting the maximum number of hours a woman could work in a day. The act stated that "no female [shall] be employed in any mechanical establishment, or factory, or laundry in this state more than ten hours during any one day."

At the beginning of the twentieth century, the growing public demand for regulation of businesses collided with the prevailing legal ideas that the "liberty of contract" as provided in Section 10 of Article I of the Constitution prohibited just about all forms of government interference in business. The liberty of contract is a basic freedom to make agreements with others. Many claimed the freedom to contract for labor was protected from state regulation by the Due Process Clause of the Fourteenth Amendment which reads that the state shall not "deprive any person of life, liberty or property, without due process of law." The Supreme Court in ***Lochner v. New York*** (1905) negated a New York law setting maximum hours a week that bakers could work based on this concept.

Mrs. Elmer Gotcher

Not long after the *Lochner* decision, Joe Haselbock, foreman at Portland's Grand Laundry required Mrs. Elmer Gotcher, a launderer, to work more than ten hours on September 4, 1905. Gotcher filed a complaint against the shop's owner, Curt Muller, claiming that the laundry

LABOR AND LABOR PRACTICES

violated the Oregon maximum hours law. On September 18, the Multnomah County Court ruled in favor of Gotcher and fined Muller ten dollars. Muller appealed his conviction to the Oregon state supreme court which affirmed the sentence in 1906. Muller then decided to challenge the constitutionality of the state law and appealed to the U.S. Supreme Court.

Oregon Case Attracts National Attention

With similar hours laws under attack in other states, the case attracted considerable attention of national feminist groups who promoted women's issues. The National Consumers' League, with Florence Kelley as executive secretary and Josephine Goldmark an active member, supported the Oregon law. Kelley and Goldmark believed long hours of work was harmful to female workers, particularly pregnant workers and mothers. However, other feminist groups opposed the Oregon law. Alice Paul and the National Woman Party believed that to treat women differently would make it difficult for women to compete with men for jobs. Special protection could hinder their efforts for gaining equality in the work-

place. Other groups opposing the Oregon law were those not so much involved in women's issues, but more concerned about government interference in business and defending the "liberty of contract."

Kelley and Goldmark contended that states held a "special interest" in helping workers in dangerous occupations. Fearful that the recent *Lochner* decision could be a precedent (setting a principle for later court decisions) and restrain states' abilities to enact laws dealing with women's working conditions, they turned to Goldmark's brother-in-law and successful Boston lawyer, Louis D. Brandeis, to argue their case before the Court. Brandeis had gained a strong reputation for effectively arguing in favor of legal protection of people's social needs and had represented several states in defending their wage and hour laws.

Brandeis accepted the case but required the National Consumers' League provide him a massive amount of information within two weeks on the connection between women's health and long hours of factory work. Goldmark and Kelley labored around the clock to produce a 113-page brief (document for the Court) drawing information of many sources including the medical field.

Women Deserve Special Protection

Before the Court, Muller argued that the Oregon law denying women the right to work more than ten hours a day interfered with their liberty to make contracts and ability to support themselves. In addition, the Oregon law directly conflicted with another Oregon law giving men and women equal personal rights. Referring to the Fourteenth Amendment, Muller argued the Oregon law was unconstitutional since "the statute [law} does not apply equally to all persons . . . "

Brandeis, using the lengthy brief, countered that women as a group needed special protection. Brandeis attempted to show that unlike the situation in the *Lochner* case which dealt with mostly male bakers, the Oregon law was justified in protecting the health, safety, and welfare of women. Basing his argument on the notion that women are the "weaker sex," Brandeis stated it was "common knowledge" that permitting women to work more than ten hours a day in such workplaces as factories and laundries was "dangerous to public health, safety, morals [and] welfare." Extended periods of manual labor produced damaging physical and mental effects in women. Consequently, the state indeed had a valid interest in women's health.

Justice David J. Brewer, writing for the unanimous Court, stated that the mere fact that so many states had adopted such laws reflected "a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil."

In a statement that seemed progressive (forward thinking) at the time, but paternalistic (overly protective) ninety years later, Brewer wrote,

> **That woman's physical structure . . . place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not . . . continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.**

Brewer concluded that a woman "is properly placed in a class by herself, and legislation designed for her protection may be sustained." The Court unanimously affirmed the lower court decision. Muller was ordered to pay the fine plus court costs.

Mixed Results

The *Muller* decision opened the door for states to pass more laws regulating work conditions. Brandeis' argument also set a new standard for presenting information in support of reform laws addressing social conditions. The Court's role influence on reform laws was far from over. Still very protective of business interests, the Court ruled in *Adkins v. Children's Hospital* (1923) that state laws regulating workplace conditions were unconstitutional. But the Court changed direction again fourteen years later in *West Coast Hotel v. Parrish* (1937) by upholding a Washington state minimum wage law for women and children, essentially overturning the *Adkins* decision and returning to *Muller.* The sweeping protection of "liberty of contract" had finally declined in favor of protecting the health and safety of citizens. Congress passed the Fair Labor Standards Act in 1938 extending to men the same wage and hour restrictions earlier applied to women. The Court in ***United States v. Darby*** (1941) affirmed the constitutionality of minimum wage laws.

LOUIS D. BRANDEIS

Louis Dembitz Brandeis (1856–1941), a brilliant lawyer and eventual Supreme Court justice, had a lifelong commitment to social reform. Born in 1856 in Louisville, Kentucky to well-to-do European immigrant parents, Brandeis was an excellent student. He graduated from Harvard Law School in 1877 at the top of his class. Brandeis established a highly successful private law practice in Boston. Highly involved in the Progressive Movement at the beginning of the twentieth century and dedicated to social reform, he provided legal services for many causes.

In the *Muller v. Oregon* case, Brandeis introduced a whole new form of legal brief, one that was lengthy including much data from many subjects. The style became known as the Brandeis Brief. In 1916 Brandeis was appointed by President Woodrow Wilson (1913–1921) to the Supreme Court on which he served for twenty-three years. The first Jewish American Court nominee and a staunch supporter of social reform in a time of strong pro-business interests among the American leaders. The writer of many eloquent dissents while on the Court, Brandeis fought for individual rights laying the groundwork for recognition decades later of the right to privacy. Brandeis retired from the Court in 1939 and died in 1941. Widely considered one of the great justices in Supreme Court history, in 1948 a new private university, Brandeis University in Massachusetts, was named in his honor.

Though the *Muller* decision was welcomed by many earnestly trying to protect women from deplorable work conditions, it did add support to the "weaker sex" notion and hindered women from competing with men in many jobs. Women were commonly relegated to low-paying, temporary, unskilled jobs. Women could not deliver the mail, work in foundries and mines, run elevators, sell liquor, and work as streetcar conductors or printers in print shops. In reaction to the *Muller* decision, the *New York Times* wrote in its February 28, 1908 edition, "We leave to the

advocates of women suffrage to say whether this decision makes for, or against, the success of their cause." The Nineteenth Amendment granting women voting rights was added twelve years later in 1920, but other feminist issues continued unresolved. The practice of treating women differently in the workplace continued through the remainder of the twentieth century.

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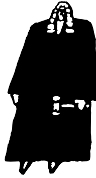

Hammer v. Dagenhart 1918

Appellant: W.C. Hammer, U.S. Attorney for the Western District of North Carolina

Appellee: Roland Dagenhart

Appellant's Claim: That Congress had constitutional authority under the Commerce Clause to pass and enforce the Keating-Owen child labor law.

Chief Lawyers for Appellant: John W. Davis, U.S. Solicitor General; Roscoe Pound, Dean of Harvard Law School

Chief Lawyer for Appellee: Junius Parker

Justices for the Court: William Rufus Day, Joseph McKenna, Mahlon Pitney, Willis Van Devanter, Edward Douglas White

Justices Dissenting: Louis D. Brandeis, John Hessin Clarke, Oliver Wendell Holmes, James Clark McReynolds

Date of Decision: June 3, 1918

Decision: Ruled in favor of Dagenhart by finding that Congress had no authority under the Commerce Clause to restrict manufacturing activities involving children.

Significance: The decision was a strong statement in favor of state powers. The Court continued taking unpopular positions on attempts by the federal government to regulate business and protect workers' rights. Though another child labor law was overturned again four years later, by the late 1930s protection of children in the workplace finally became accepted by the courts.

LABOR AND LABOR PRACTICES

With expansion of industrialization in the late nineteenth century, conditions for workers on the job were often harsh. The Supreme Court justices during this time largely believed in the idea of *laisse-faire* economy, meaning business and industry were free to grow largely unaffected by government regulation. This position led to many unpopular Court decisions blocking government regulation and efforts to promote workers' rights.

In the absence of child labor laws, many children worked long hours at difficult and dangerous jobs in mines and factories and on farms. In 1900, one out of every six children between the ages of ten and fifteen worked for money. Often jobs required children to work ten or more hours a day and paid only a few cents an hour. Chief among these was the South's growing textile industry which heavily relied on the cheap labor of children.

Social reform movements began to grow in reaction to the harsh working conditions, with particular concern focused on the effects on women and children as well as the long range implications for U.S. society. Though a proposed child labor law was unsuccessful in Congress in 1907, it drew increased national attention to the issue. However, reformists faced two major obstacles. One was that labor contracts were considered personal matters outside the authority of government to regulate. For the government to say that children should not work more than ten hours a day, or that children under fourteen years of age should not work at all would be considered interference with a parent's and employer's right to enter into a contract. Second, such matters were considered the responsibility of states to regulate. The Tenth Amendment to the Constitution states that all powers not specifically given to the federal government are reserved for the states. But states were not likely to restrict labor. Since child labor was cheaper than adult wages, influential business interests opposed state laws restricting child labor. They feared that if the state prohibited child labor their businesses would be non-competitive with businesses in other states not restricted by such laws. Businesses in states without child labor laws could likely sell their products at a lower cost.

Keating and Owen

Representative Edward Keating and Senator Robert L. Owen proposed a different legal route to protect children from working long hours for low wages in hazardous conditions. They decided to use federal authority under the Commerce Clause to avoid the issue of regulating work condi-

tions or contracts. The Commerce Clause, included in Article I of the Constitution, gives the federal government authority to regulate interstate commerce (business conducted across state lines). They proposed and soon passed the Keating-Owen Act, commonly known as the Child Labor Act of 1916. The act prohibited the interstate shipment of products made in factories or mines that employed children under fourteen years of age or that allowed children between fourteen and sixteen years of age to work more than eight hours a day. Employers were also prohibited from requiring children to work six days a week, after 7:00 P.M. or before 6:00 A.M. Companies could not ship products until these labor conditions had ceased for at least thirty days.

Immediately opponents to the act rallied to challenge it. Among these was David Clark. Clark was publisher of a trade journal in Charlotte, North Carolina, a major center of the textile industry, and a member of the Executive Committee of Southern Cotton Manufacturers. Looking for a test case to challenge the new law, Clark found Roland Dagenhart who worked with his two teenaged sons at the Fidelity Manufacturing Company, a small cotton mill in Charlotte. Dagenhart's older son, Reuben, was fifteen years of age, and his younger son was thirteen years of age.

Child laborers were not uncommon in the early years of the 1900s. Courtesy of the Library of Congress.

Under the new federal law, Reuben would have to greatly reduce the number of hours worked in a week. The younger son could not work at all.

When Fidelity Manufacturing indicated it would follow the new law, Dagenhart with encouragement from Clark filed a lawsuit in U.S. District Court for the Western District of North Carolina against the company and against W. C. Hammer, the U.S. Attorney who would likely be the person enforcing the law in that area. Dagenhart sought an injunction (a court order to stop an action) to prevent the company from obeying the act and to keep Hammer from enforcing it. The district ruled the act was unconstitutional and issued an injunction to stop enforcement of it. Hammer appealed the decision to the Supreme Court which accepted the case.

Before the Supreme Court, Hammer argued how destructive child labor was to both the children and their families. He also argued that states were unable to pass such protective laws individually because of the fear of losing business to other states. Only the federal government could pass such a law that would be equally applied to everyone. The Keating-Owen Act was, therefore, necessary to protect the public good.

Justice William R. Day wrote the opinion of the Court's bitterly divided 5-4 majority in favor of Dagenhart. Typical for the Court during this time period, Day held a very narrow (restricted) view of federal government authority under the Commerce Clause. Day wrote that the power to regulate commerce is the power "to control the means by which commerce is carried on," not the "right to forbid commerce" as the Keating-Owen Act did. Hammer argued that interstate prohibitions had already been successfully applied to other forms of commerce related to lottery tickets, contaminated food, and kidnaped persons. None of these could be transported between states. However, Day responded that for these situations "the use of interstate transportation was necessary" for harmful activities to occur. However, in the Dagenhart case, Day asserted "the goods shipped are of themselves harmless" therefore the actual transportation of goods is not the problem at hand.

Day concluded that though states who passed child labor laws would likely be more disadvantaged economically than those who did not pass such laws, "this fact does not give Congress the power to deny transportation in interstate commerce." The Tenth Amendment allowed states to freely make their own choices. The first child labor law passed in the United States was overturned.

Justice Oliver Wendell Holmes, known as the Great Dissenter for his frequent disagreements with the Court's majority, wrote one of the

LABOR AND LABOR PRACTICES

CHILD LABOR LAWS

Children have worked to help their families since ancient times, commonly on farms. Social problems with child labor began to rise with the coming of industrialization in the eighteenth century in Britain and the nineteenth century in the United States. Kept out of school, children often worked in filthy, dimly-lighted mines, mills, and factories. The British Parliament passed the first British child labor law in 1802 aimed at protecting pauper children (children dependent on charity). In the United States, by 1832 about 40 percent of New England factory workers were between the ages of seven and sixteen. Massachusetts was the first state to pass a child labor law, in 1836, but few other states adopted laws in the nineteenth century and those few were generally not enforced.

After the Keating-Owen Act, the first federal child labor law, was overturned in the Supreme Court; a national child labor law did not pass successfully until the 1930s. By the year 2000, all fifty states had child labor laws to protect children from risk of injury. The laws vary widely, but generally set a minimum general employment age, a higher age for hazardous work, and limits on hours. Violation of child labor regulations can lead to criminal prosecution. An accused employer can not claim innocence of the child's age as a defense. They have a responsibility to know the age of their workers. Child labor among farmworkers remains a key issue.

best known dissents in Supreme Court history. Holmes passionately wrote, "It does not matter whether the supposed evil precedes or follows the transportation . . . It is enough that in the opinion of Congress that transportation encourages the evil."

An Unpopular Decision

The Court decision in *Hammer* was met with public outrage. The *New York Evening Mail* called the decision a "victory of sordidness [unwhole-

someness] over our little ones." Congress responded by looking at its other authorities such as the power to tax. In February of 1919, Congress passed a revenue act applying a stiff 10 percent excise tax on products made with child labor. However, that law was also struck down in *Bailey v. Drexel Furniture Co.* (1922) with the Court ruling that Congress had no taxing authority for business activities occurring fully within a state.

With a major change in Court direction in the late 1930s supporting federal regulation of many activities, the Court reversed the *Hammer* decision in ***United States v. Darby*** (1941).

Interestingly, five years later at age twenty Reuben Dagenhart made the following comment during an interview about the case,

> **I don't see that I got any benefit. I guess I'd have been a lot better off if they hadn't won it. Look at me! A hundred and five pounds, a grown man and no education. I may be mistaken, but I think the years I've put in the cotton mills have stunted my growth. They kept me from getting any schooling. I had to stop school after the third grade and now I need the education I didn't get . . . It would have been a good thing in this state if that law they passed had been kept.**

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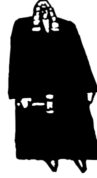

National Labor Relations Board v. Jones & Laughlin Steel Corp. 1937

Appellant: National Labor Relations Board

Appellee: Jones & Laughlin Steel Corporation

Appellant's Claim: That Congress has the constitutional authority under the Commerce Clause to pass legislation protecting the rights of organized labor.

Chief Lawyers for Appellant: U.S. Attorney General Homer S. Cummings, U.S. Solicitor General Stanley F. Reed, and J. Warren Madden

Chief Lawyer for Appellee: Earl F. Reed

Justices for the Court: Louis D. Brandeis, Benjamin N. Cardozo, Chief Justice Charles Evans Hughes, Owen Josephus Roberts, Harlan Fiske Stone

Justices Dissenting: Pierce Butler, James Clark McReynolds, George Sutherland, Willis Van Devanter

Date of Decision: April 12, 1937

Decision: Ruled in favor of the National Labor Relations Board by finding that Congress has authority under the Commerce Clause to regulate labor relations.

Significance: The landmark ruling signaled a radical change in the Supreme Court's acceptance of Congressional power to regulate economic matters.

NLRB v. Jones & Laughlin Steel Corp.

The right of workers to ban together seeking better working conditions was not traditionally recognized in U.S. history. For decades Supreme Court decisions supported a *laissez-faire* form of economy in which businesses operate with minimal government interference, letting the marketplace guide economic growth. The Commerce Clause in Article I, Section 8, of the Constitution did give Congress power to "regulate Commerce . . . among the several states." But the clause was typically interpreted very narrowly by the Court, restricting the power of the federal government in economic matters.

Likewise, the courts did not interfere with the freedom of an employer to contract for labor with his employee. According to the courts, employers and employees had the right to bargain free of government interference under the Due Process Clause of the Fifth Amendment. The clause states that "No person shall be . . . deprived of life, liberty, or property, without due process of law." In addition the Contract Clause in Article I reads, "No State shall . . . make any . . . Law impairing the Obligation [responsibility] of Contracts." Therefore, the Court used the Fifth's Due Process Clause to limit federal regulation of business activities and the Contract Clause to limit state regulation.

Employers were free to take a variety of actions to discourage employees from joining organizations, such as labor unions. Labor unions are groups of workers who have joined together to seek better work conditions. One of the more common means to discourage an employer from forming a labor union was known as yellow-dog contracts. Employers forced employees to sign these contracts agreeing to not join unions, or to quit unions if already a member. Employees could be fired if they did not comply with the contract. The Supreme Court ruled in *Adair v. United States* (1908) that yellow-dog contracts were legal under the "liberty of contract" concept.

Labor and the New Deal

With major economic problems plaguing the nation during the Great Depression of the 1930s, Congress passed various laws designed to guide social and economic reform. The laws, collectively known as the New Deal, gave Congress unprecedented control of the nation's economy. Authority for New Deal legislation largely drew from the Commerce Clause.

LABOR AND LABOR PRACTICES

In 1935 Congress passed the National Labor Relations Act, more commonly known as the Wagner Act. The act, for the first time, recognized the right of workers to organize and bargain collectively with their employers. Collective bargaining is when an employer and a representative of his employees negotiate an agreement concerning work conditions, including wages, hours, and safety. Considered one of the more dramatic pieces of New Deal legislation, the bill was introduced by Senator Robert F. Wagner, a Democrat from New York. President Franklin D. Roosevelt (1933–1945) first feared that strong labor organizations might interfere with the nation's economic recovery. But, he became a supporter of the proposed act when passage became evident. In fact, fear that labor unrest might slow the flow of interstate commerce and economic recovery led, in part, to its passage. The act applied to all businesses conducting interstate commerce (business conducted across state lines) or who were affected by interstate commerce.

The Wagner Act created the National Labor Relations Board (NLRB) to enforce its provisions (parts), The new federal agency was charged with resolving disputes between employees and employers. The

Organized labor unions work democratically to ensure that workers get a say in their work conditions. Reproduced by permission of the Corbis Corporation.

NLRB hears cases involving charges of unfair labor practices and makes decisions which may be appealed to the federal court of appeals.

The Wagner Act outlawed various employer practices aimed at discouraging union participation by its employees including yellow dog contracts. It was now illegal for a company to fire employees because they belonged to unions. It also required employers to bargain with unions chosen by their employees. The act recognized as lawful strikes and other peaceful actions taken by employees to pressure employers into agreement. The act also set up procedures for workers to organize and elect representatives by secret ballot to conduct negotiations.

The idea of a law protecting labor unions seemed in direct conflict with the prevailing mood of the Court. Prior to 1937 the Court had overturned almost every important piece of New Deal legislation. Angry, Roosevelt unsuccessfully led a charge to change the Court. However, Roosevelt's threats and public pressure finally led two justices to retire and two others to alter their attitudes. New justices aapointed by Roosevelt held views supportive of government regulation.

Jones & McLaughlin

Jones & Laughlin Steel Corporation produced steel and shipped it across state lines. In a climate of social unrest throughout the nation in the mid-1930s, relations between Jones & Laughlin and employees at its Aliquippa, Pennsylvania plant deteriorated. Employees decided to form a bargaining unit affiliated with the national American Federation of Labor (AFL) labor union to represent their interests. The company wanted to keep more employees from joining. In July of 1935, four days after President Roosevelt signed the Wagner Act into law, Jones & McLaughlin fired ten workers who were union leaders at the plant. Local 200 of the Amalgamated Association of Iron, Steel, and Tin Workers of America filed a complaint with the NLRB accusing the company of engaging in unfair labor practices by firing union members. The NLRB upheld the complaint by finding that Jones & Laughlin's actions violated the Wagner Act. The Board ordered the company to reinstate the men and provide back pay for their time off. When the company refused to comply, the NLRB filed a petition with the Fifth Circuit Court of Appeals to enforce the order. The appeals court, finding the act unconstitutional, ruled in favor of Jones & Laughlin and refused to enforce the order. The NLRB appealed the decision to the U.S. Supreme Court.

Protecting Interstate Commerce

Before the Court, Jones & Laughlin again argued that Congress did not have authority under the Commerce Clause to regulate labor relations between workers and their employers. They also contended the act violated the Due Process Clause of the Fifth Amendment protecting the "liberty of contract." They claimed federal government had no power to interfere with the rights of the private property owners and their employees.

Chief Justice Charles E. Hughes wrote the opinion for the majority in a close 5-4 decision in favor of the NLRB. Hughes found that the act neither went beyond Congress' powers under the Commerce Clause nor violated due process. He wrote,

> **The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a "flow" of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources . . . That power may be exerted to protect interstate commerce no matter what the source of the dangers which threaten it.**

Hughes believed that labor unrest could lead to strikes which in turn could lead to disruption of interstate commerce. Such interference would be particularly harmful to the nation during such a time of economic crisis.

Most importantly, Hughes found that workers held a "fundamental right" to organize. The Wagner Act paid a particularly beneficial role by requiring employers to negotiate agreements with their workers. This requirement actually increased the employees' protection under the law by having power to negotiate with employers through democratically elected representatives.

Union Power

The landmark ruling gave labor unions the power to organize and negotiate with employers. The Jones ruling also proved to be the major turning point in the battle between Roosevelt and the Supreme Court over federal powers. The Court finally supported Roosevelt's belief that the federal government had authority to regulate the nation's economic affairs by

LABOR UNIONS IN U.S. HISTORY

Labor unions are organizations of workers who join together to improve their working conditions and their lives. Unions began to appear in the United States at the end of the eighteenth century when Philadelphia shoemakers united to obtain higher wages, shorter work hours, and better work conditions. They were largely unsuccessful as a Pennsylvania state court ruled that labor unions violated conspiracy laws. In 1834 workers went on strike refusing to complete construction of a canal in Ohio, but President Andrew Jackson (1829-1837) sent U.S. troops to break up the strike believing it interfered with interstate commerce.

The first state court ruling recognizing the legitimacy of unions and their right to strike came in Massachusetts in 1842. As industrialization (growth of large industry) grew rapidly following the Civil War (1861–1865), work conditions in many factories greatly declined. In reaction, union activity increased as well. Violent strikes resulted on several occasions beginning in 1877. In 1894 dozens of strikers were killed by police. Each time labor came away with decreased public support. Union membership declined significantly after 1894. One of the few large unions prospering during this time was the American Federation of Labor (AFL) which stressed cooperation with business while seeking improved work conditions.

Union membership declined further following World War I (1914–1918) faced with organized opposition from industry and fears of political radicals within some unions. The grim economic condition of the country in the 1930s again renewed interest in union activity. A peak in union membership reached 21 million in 1971. However, with the decline in manufacturing jobs through the 1980s and 1990s and with public sentiment opposed to union activity, membership again dropped by the end of the twentieth century.

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broadening its interpretation of the Commerce Clause. With passage of the Wagner Act and the favorable ruling in Jones, union membership grew from 4.7 million in 1936 to 8.2 million in 1939 and continued to increase into the early 1970s. At the end of the twentieth century the Wagner Act remained the most important piece of labor legislation passed in the U.S. history.

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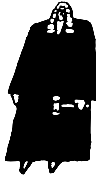

Darby v. United States 1941

Appellant: United States

Appellee: Fred W. Darby

Appellant's Claim: That under the Commerce Clause of the Constitution, Congress may regulate workers' wages and hours.

Chief Lawyer for Appellant: Robert H. Jackson, U.S. Attorney General

Chief Lawyer for Appellee: Archibald B. Lovett

Justices for the Court: Hugo Lafayette Black, William O. Douglas, Felix Frankfurter, Charles Evans Hughes, Frank Murphy, Stanley Forman Reed, Owen Josephus Roberts, Harlan Fiske Stone (writing for the Court)

Justices Dissenting: None (James Clark McReynolds did not participate)

Date of Decision: 3 February 1941

Decision: The Supreme Court upheld the Fair Labor Standards Act.

Significance: *Darby* allowed Congress to use its power under the Commerce Clause, which involves business, to enact laws for public welfare.

In 1938, Congress passed the Fair Labor Standards Act. It was the last important piece of the New Deal. The New Deal was President Franklin D. Roosevelt's plan to improve social and economic conditions in the United States during the Great Depression.

LABOR AND LABOR PRACTICES

The Fair Labor Standards Act set maximum working hours and minimum wages for workers making products that would travel in interstate commerce. Interstate commerce means commerce or business that crosses state lines. The Commerce Clause of the U.S. Constitution gives Congress the power to regulate interstate commerce.

Associate Justice Harlan Fiske Stone.
Courtesy of the Library of Congress.

Industrial Evolution

Fred W. Darby was an industrialist in Georgia. Darby's company made lumber from timber. Much of the lumber was shipped in interstate commerce for sale in other states.

Soon after Congress passed the Fair Labor Standards Act, the federal government charged Darby with violating the Act. The government said Darby's workers received less than the minimum twenty-five cents per hour. It also said Darby's workers worked more than the maximum forty-four hours per week without getting increased pay for overtime.

Darby fought the lawsuit by asking the federal district court to dismiss the case. Darby said that under the Commerce Clause, Congress only had power to regulate businesses that actually crossed state lines. Darby's company manufactured lumber entirely within the state of Georgia.

Darby said it was up to Georgia to decide whether to regulate his business. After all, the Tenth Amendment of the Constitution says the

THE NEW DEAL

Upon taking office in 1933, Roosevelt kept his promise. He helped Congress enact federal programs for relief, recovery, and reform. Relief programs such as the Works Progress Administration (WPA) created jobs by funding federal construction projects. Recovery programs such as the Agricultural Adjustment Administration (AAA) sought to improve agriculture, business, and employment. Reform programs such as the Fair Labor Standards Act and the National Labor Relations Act sought to improve working conditions for Americans.

In the end, the New Deal did not cure the Great Depression. Expanded production for World War II did that. Roosevelt's New Deal, however, left Americans with new public welfare programs such as Social Security that now are part of everyday life.

states have all power not given to Congress. Because Georgia had not enacted minimum wages or maximum hour laws, Darby did not think he had to obey any. The federal district court agreed and dismissed the entire case, so the United States appealed to the U.S. Supreme Court.

Affecting Commerce

With an 8–0 decision, the Supreme Court reversed and upheld the Fair Labor Standards Act. Justice Harlan Fiske Stone delivered the Court's opinion. Justice Stone said the Commerce Clause does not limit Congress to regulating items as they are shipped in interstate commerce. It allows Congress to regulate anything that affects interstate commerce. Manufacturing lumber from timber affects interstate commerce because some of the lumber eventually will be shipped across state lines. Congress, then, had power to regulate Darby's business.

Justice Stone admitted that the purpose of the Fair Labor Standards Act was to improve minimum standards of living necessary for health and general well being. Health and well being are not part of interstate commerce. Justice Stone said, however, that Congress's goal does not

affect whether a law is within its power. The result was important for the future of federal public welfare legislation.

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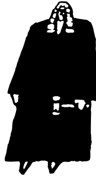

Corning Glass Works v. Brennan 1974

Petitioner: Corning Glass Works

Respondent: Peter J. Brennan, U.S. Secretary of Labor

Petitioner's Claim: That the Court of Appeals erred by ruling that Corning violated the Equal Pay Act.

Chief Lawyer for Petitioner: Scott F. Zimmerman

Chief Lawyer for Respondent: Allan Abbot Tuttle

Justices for the Court: William J. Brennan, Jr., William O. Douglas, Thurgood Marshall (writing for the Court), Lewis F. Powell, Jr., Byron R. White

Justices Dissenting: Harry A. Blackmun, Warren E. Burger, William H. Rehnquist (Potter Stewart did not participate)

Date of Decision: June 3, 1974

Decision: The Supreme Court said Corning violated the Equal Pay Act by paying male nightshift inspection workers higher wages than female dayshift inspection workers.

Significance: With *Corning,* the Supreme Court reinforced the policy of "equal pay for equal work."

Corning Glass Works was a company with production plants in Corning, New York, and Wellsboro, Pennsylvania. Prior to 1925, Corning operated its Wellsboro plant only during the day. The employees who inspected finished products were all female.

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Between 1925 and 1930, Corning began to use automatic production equipment, which made finished products faster than people made them. It became necessary for Corning to hire nightshift inspectors to keep up with the increased production. Corning, however, had two problems. Under New York and Pennsylvania law, women were not allowed to work at night. In addition, men thought inspection work was inferior work for women. Men would not do inspection work unless they got more money than female inspectors received. Corning gave the male nightshift inspectors more money.

Fair Labor Standards

In 1963, Congress passed the Equal Pay Act. The law required companies to pay men and women equally for similar work. By then, New York and Pennsylvania had gotten rid of the laws that prevented women from working at night.

In June 1966, Corning began to allow women to get the higher paying nightshift inspection jobs. Then in January 1969, Corning signed an

Practicing fair labor standards has always been a problem with businesses. Reproduced by permission of the Corbis Corporation.

agreement to pay dayshift and nightshift inspectors the same money. The agreement, however, contained an exception for nightshift workers hired before January 1969. Those workers, most of whom were men, still received higher pay than dayshift inspectors.

The U.S. Secretary of Labor filed two lawsuits against Corning, one in federal court in New York and one in Pennsylvania. The Secretary charged Corning with violating the Equal Pay Act by paying male nightshift inspectors higher wages than female dayshift inspectors. The Secretary said Corning could not fix the problem just by opening up nightshift jobs for women. He wanted Corning to give raises to the dayshift inspectors to make their wages equal to those of the nightshift inspectors.

Corning fought the lawsuit. The Equal Pay Act said companies could pay different wages for people working under different "working conditions." Corning said it paid nightshift workers more because working at night was less desirable. After trials and appeals, the federal court of appeals in New York ruled in favor of the United States while the one in Pennsylvania ruled in favor of Corning. The U.S. Supreme Court decided to review both cases.

The Equal Rights Amendment would ensure that all people would be treated the same, whether they were male or female. Reproduced by permission of Archive Photos, Inc.

THURGOOD MARSHALL

Thurgood Marshall was born on July 2, 1908 in Baltimore, Maryland. The son of a schoolteacher and club steward, Marshall left Baltimore in 1926 to attend the all-black Lincoln University. When Marshall tried to get into law school at the University of Maryland, the school turned him down because he was African American. Marshall attended law school at Howard University in Washington, D.C., where he graduated first in his class.

Marshall practiced law in Baltimore from 1933 to 1938. There he fought for civil rights by working as counsel for the Baltimore branch of the National Association for the Advancement of Colored People ("NAACP"). In 1939, Marshall became director of the NAACP's Legal Defense and Education Fund. In that role, Marshall argued and won many important civil rights cases before the U.S. Supreme Court. His most important case, ***Brown v. Board of Education*** (1954), ended segregation, the practice of separating black and white students in different public schools.

In 1961, President John F. Kennedy nominated Marshall to the U.S. Court of Appeals for the Second Circuit. Southern opposition to Marshall's appointment delayed it for one year. In 1965, President Lyndon B. Johnson appointed Marshall to be U.S. Solicitor General, the attorney who represents the United States in federal court. Two years later President Johnson chose Marshall to be the first African American justice on the U.S. Supreme Court. Many southern senators again opposed Marshall's nomination and again were defeated. During his twenty-five years on the Supreme Court, Marshall regularly voted in favor of individual civil and constitutional rights.

Equal Pay for Equal Work

With a 5–3 decision, the Supreme Court ruled in favor of the Secretary of Labor. Justice Thurgood Marshall delivered the Court's opinion. Marshall said Congress passed the Equal Pay Act to end the notion that

men, because of their role in society, should get paid more than women for the same work. "Equal work should be rewarded by equal wages."

The problem, of course, was deciding whether nightshift and dayshift inspection was equal work. The Supreme Court said it was. Inspectors at night had the same surroundings and same hazards as inspectors during the day.

Marshall emphasized that Corning was free to pay nightshift workers more if working at night had added psychological or physical demands. Corning, however, had not proved that those demands existed. Its pay differential was a relic of the days when men were paid more because they were men. That was illegal sex discrimination under the Equal Pay Act. Corning would have to raise the pay rates for dayshift inspection workers.

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The American military includes the Army, Navy, Air Force, and Marines. Military law applies to people who work in the military. It differs in many ways from civilian law, which governs regular citizens. Civilian law tries to maintain peace by resolving disputes and punishing criminal activity. Military law strives to promote order, morale, and discipline.

Origins of Military Justice in the United States

Like civilian law, military law has its origins in Roman law dating back to the first century B.C. Civil and military law in the Roman empire were part of one system. In the eleventh century, William the Conqueror introduced Roman law into England. As the military grew over the next few centuries, so did the desire to create separate systems for civil and military law. In 1649, England created a separate national system for military justice.

The American colonies that would form the United States created a military justice system even before declaring independence. Just weeks after American and British troops clashed at Lexington and Concord in

April 1775, the Second Continental Congress formed an American army. Later that year, George Washington helped write the Articles of War. The colonies based the Articles of War on the military justice systems of the British and ancient Roman empires, which enjoyed great success as powerful empires.

The U.S. Constitution, which the United States adopted in 1787, made the military subject to civilian control through the president and congress. The president is commander-in-chief of the armed forces. That gives him ultimate authority for operating the military in both peacetime and war. Congress is responsible for raising, supporting, and making rules for the armed forces. Congress also has the power to declare war.

Military Law

The main goal of the Articles of War was to maintain discipline in the military forces. For that purpose it covered military crimes such as mutiny, or rebelling against military authority. Originally the Articles did not cover regular crimes such as murder, rape, and theft. In 1863, Congress revised the Articles to cover regular crimes, but only in times of war or rebellion.

In 1950, Congress replaced the Articles of War with the Uniform Code of Military Justice. The Uniform Code combined different laws for the various military branches into one code of 140 articles. The Code governs criminal and other unlawful military conduct in both peacetime and war. It covers regular crimes such as murder, rape, and theft, as well as conduct that is unlawful only in the military.

Offenses that are unique to the military include being absent without leave, or AWOL, the most common military offense. The Code also covers violation of orders, disrespect for officers, insubordination, mutiny, desertion, and conduct unbecoming an officer. Desertion is avoiding hazardous duty or an important assignment. The Code does not define conduct unbecoming an officer, but the offense generally covers conduct that harms the military's reputation. In *Parker v. Levy* (1974), the U.S. Supreme Court said the offense of conduct unbecoming an officer is not too vague to be enforced.

Court-Martials

In the military, a person charged with misconduct often faces a proceeding called a court-martial. A court-martial resembles a criminal trial

under civilian law. Instead of a jury, however, military personnel hear and decide cases. These personnel are called members instead of jurors.

Under the Articles of War, commanding officers had great power to handle court-martials. They could convene a court, select its members, and review the court's decision with authority to disapprove the sentence and send the case back for reconsideration. Following World War II in 1945, servicemen complained that the military justice system was too harsh and unfair, often giving excessive punishments. When Congress passed the Uniform Code in 1950, it changed the court-martial system in response to these complaints.

The Uniform Code created three types of court-martials: summary, special, and general. The summary court-martial is for enlisted personnel who are accused of minor offenses. One officer hears and decides cases with an abbreviated form of trial. The maximum sentence the court may impose is confinement for one month and a small fine. Enlisted personnel can refuse trial in a summary court-martial and ask for a special or general court-martial.

The special court-martial is for enlisted personnel and officers in all cases except capital cases, those in which the death penalty is available. Special court-martials use three or more members, counsel for both sides, and sometimes a military judge to referee the case. The maximum sentence the court may impose is bad-conduct discharge, confinement for up to six months, and loss of two-thirds pay for the same time. Enlisted personnel can insist that one-third of the members who decide their cases also be enlisted personnel. Members, however, must be ranked higher than the accused.

General court-martials can hear cases for any violation of the Uniform Code, including capital offenses. A general court-martial has five or more members, counsel for both sides, and a military judge. Available sentences include death, dishonorable discharge, bad-conduct discharge, dismissal of an officer, imprisonment, and loss of rank, pay, and allowances.

During a court-martial, the accused has many of the constitutional rights that criminal defendants have. He has the Sixth Amendment right to a speedy, public trial. In special and general court-martials he has the right to counsel. The accused enjoys the Fifth Amendment right against self-incrimination, which means he cannot be forced to confess or to testify against himself. The Fourth Amendment prevents the government from conducting unreasonable searches and seizures. The military cannot

use evidence obtained in violation of the Fourth Amendment during a court-martial.

The Uniform Code allows the military to handle many violations outside the court-martial process. Nonpunitive measures allow commanding officers to discipline personnel for minor offenses such as shoplifting, intoxication, and fighting. Nonpunitive measures include withholding privileges, counseling, reductions in rank, and reassignment of duties. Nonjudicial punishment is more severe and is reserved for cases in which nonpunitive measures are inadequate.

The Military Draft

The military draft is the government's way of building its military forces. The federal government conducted its first draft during the American Civil War from 1861 to 1865.

During World War I in 1917, Congress passed the Selective Service Act to build an army. Many Americans challenged the law by saying the draft violated the Thirteenth Amendment, which prohibits slavery and involuntary servitude. The Supreme Court rejected this argument in the *Selective Draft Law Cases* (1918). It said the Thirteenth Amendment does not protect Americans from fulfilling civic duties such as military service and jury duty.

Following World War II, Congress enacted a peacetime draft with the Universal Military Training and Service Act of 1948. The law exempted people who were opposed to war for religious reasons. It gave no exemption, however, for people who opposed war for moral reasons unrelated to religious beliefs. In *Welsh v. United States* (1970), the Supreme Court said Congress violated the Constitution by distinguishing between religious and non-religious objections to war. As a result of *Welsh,* conscientious objectors can avoid the draft if they oppose war in any form because of deeply held religious, philosophical, or moral beliefs.

After the United States withdrew from the Vietnam War in 1973, Congress ended the military draft. America's military forces since then, including those that fought in the Persian Gulf War in 1991, have been voluntary. Young men age eighteen to twenty-five, however, still must register with the Selective Service System in case the government needs to reactivate the draft and recruit Americans for war.

Gays and Women in the Military

In 1916, the Articles of War made homosexual conduct a military crime. The military believed homosexuality ruined morale among heterosexual personnel. Since then homosexuals have been discharged from military service in great numbers. In the 1980s alone, over 15,000 homosexuals were discharged from the military.

In 1993, President William J. Clinton used his power as commander-in-chief to try to end discrimination against homosexuals in the military. Congress reacted by including a "don't ask, don't tell" policy in military legislation. The policy prevents military authorities from asking military personnel about their sexual orientation. In turn, homosexual military personnel are not supposed to reveal their orientation or engage in homosexual conduct. Keeping everyone silent is supposed to limit the number of homosexuals who get discharged for their sexuality. People on both sides of the issue have criticized the policy.

In 1948, Congress excluded women from combat roles with the Women's Armed Services Integration Act. Because the military academies were designed to produce combat officers, women were excluded there as well. When the draft ended in the mid-1970s, the military found it necessary to include more women in non-combat roles.

Congress and the judiciary finally ended the exclusion at military academies in 1991. President Clinton opened combat roles to women in the Air Force in 1993 and in the Navy in 1994. Only Army and Marine units engaged in direct ground combat remained closed to women. Women and men alike applauded these changes and urged further reform. Critics, however, claimed that a feminist social agenda was hurting the military and national security.

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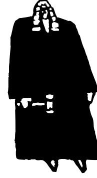

Toth v. Quarles 1955

Petitioner: Audrey M. Toth

Respondent: Donald A. Quarles, Secretary of the U.S. Air Force

Petitioner's Claim: That Congress violated the Constitution by allowing the military to hold court-martials for civilians who used to be military personnel.

Chief Lawyer for Petitioner: William A. Kehoe, Jr.

Chief Lawyer for Respondent: Simon E. Sobeloff, U.S. Solicitor General

Justices for the Court: Hugo Lafayette Black (writing for the Court), Tom C. Clark, William O. Douglas, Felix Frankfurter, John Marshall Harlan II, Earl Warren

Justices Dissenting: Harold Burton, Sherman Minton, Stanley Forman Reed

Date of Decision: November 7, 1955

Decision: The Supreme Court ordered the Air Force to release Robert Toth from custody.

Significance: With *Toth,* the Court said the military does not have power to try civilians for military crimes.

Robert Toth was an enlisted airman in the U.S. Air Force during the Korean War. On 27 September 1952, Toth was on guard duty with Airman Thomas Kinder at an airbase in South Korea. That day the airmen found a Korean civilian, Bang Soon Kil, who appeared to be drunk.

The airmen took Bang Soon into custody and drove him to base headquarters in a jeep.

On the way to headquarters, Bang Soon grabbed at Toth's arm. Toth allegedly stopped the jeep and pistol-whipped Bang Soon. When the airmen arrived at headquarters, their commanding officer, Lieutenant George Schreiber, ordered them to take Bang Soon away and shoot him.

By the time military authorities discovered the murder, Toth had been honorably discharged from service. Schreiber and Kinder, however, were still in the Air Force. Both men faced a court-martial, which is a military trial for violation of the Uniform Code of Military Justice. The court-martial found Schreiber guilty and sentenced him to life in prison, but the Air Force reduced the sentence to five years in prison, forfeiture of pay, and a dishonorable discharge. The court-martial also gave Kinder a life sentence, but the Air Force reduced it to two years in prison and a dishonorable discharge.

Civil Court-Martial?

After being honorably discharged from the Air Force, Toth returned to his home in Pittsburgh, Pennsylvania, and got a job in a steel plant. He had been there five months when Air Force police arrived at the plant to arrest him for Bang Soon's murder. The Air Force put Toth on an airplane for South Korea to stand trial in a military court-martial.

Civilian courts had no power to try servicemen for crimes committed in the military. Article 3(a) of the Uniform Code allowed the military to court-martial a former serviceman for military crimes that were punishable by at least five years in prison. If Toth was guilty, a court-martial was the only way to bring him to justice.

After the Air Force took Toth to South Korea, his sister, Audrey M. Toth, filed for a writ of *habeas corpus* in federal court in the District of Columbia. A writ of *habeas corpus* is an order to release a prisoner who is in custody in violation of the Constitution. Toth's sister said the Uniform Code violated the Constitution by allowing civilians to be court-martialed by the military. It allowed Toth to be tried without the benefits of a grand jury accusation, a neutral judge, and a jury of his peers.

The federal court granted the writ and ordered the Air Force to release Toth. It said the Air Force had no power to take Toth to South Korea for trial without first holding a hearing. The court of appeals, however, reversed. It said the power to hold the court-martial gave the

Air Force the power to transport Toth to South Korea for trial. Faced with a court-martial in South Korea, Toth took the case to the U.S. Supreme Court.

Court-Martial Lacks Power

With a 6–3 decision, the Supreme Court ruled in favor of Toth. Justice Hugo Lafayette Black wrote the Court's opinion. Black said the Constitution gave Congress the power to make rules and regulations for the land and naval forces. Those rules, however, can apply only to people who are in the military forces. Once a serviceman leaves the military and becomes a regular citizen, the military has no power to court-martial him.

Black said allowing the military to court-martial civilians would deprive them of constitutional rights. Article III of the Constitution creates a judicial system run by independent, neutral judges. The Fifth Amendment gives citizens the right to be charged by a grand jury before standing trial for a crime. The Sixth Amendment says criminal trials must be jury trials so that citizens will be judged by their peers in the community. Military court-martials do not use independent judges, grand juries, or jury trials. Letting the military court-martial civilians would deprive them of those rights.

The government argued that the Court's decision would allow military criminals to escape justice. The Court rejected this argument. It said Congress could enact legislation to allow civilian courts to try civilians for crimes committed in the military. The military, however, was not allowed to make up for the lack of such legislation by hauling regular citizens into military court.

Necessary and Proper

Three justices dissented, which means they disagreed with the Court's decision. Justice Stanley Forman Reed wrote a dissenting opinion. Reed did not agree that the military lacked power to try civilians for crimes committed in the military. He thought it was unfair for Toth to escape a trial just because he got out of the Air Force before it discovered the murder.

The Necessary and Proper Clause of the Constitution gives Congress the power to do anything reasonable to carry out its specific powers. One of those specific powers is the authority to make rules and regulations for the military forces. Justice Reed thought it was reasonable

MURDER OF BARRY WINCHELL

Pfc. Barry Winchell was a soldier in the U.S. Army at Fort Campbell on the Kentucky-Tennessee border. Winchell also was homosexual. In the early morning hours of 5 July 1999, fellow soldier Calvin N. Glover beat Winchell to death with a baseball bat as Winchell lay asleep in his barracks. One night earlier, Winchell had beaten Glover in a fist fight that Glover started. When friends teased that he had been beaten by a "fag," Glover vowed to get Winchell back. The murder followed months of anti-gay harassment, which Winchell reported to his superiors to no avail. Gay rights activists called the murder a hate crime. Winchell's parents considered suing the Army for failing to protect their son.

for Congress to promote discipline by allowing the armed forces to court-martial former servicemen for military crimes.

Aftermath

Nobody was punished seriously for Bang Soon Kil's murder. Air Force Secretary Harold E. Talbott dismissed Schreiber from the service after Schreiber had served only twenty months of his five year sentence. Talbott suspended Kinder's dishonorable discharge, allowing Kinder to return to the service. Toth, who insisted that he was not present when Bang Soon was killed, escaped trial as a result of the Supreme Court's decision.

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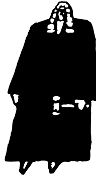

Goldman v. Weinberger 1986

Petitioner: S. Simcha Goldman

Respondent: Caspar W. Weinberger, U.S. Secretary of Defense, et al.

Petitioner's Claim: That Air Force regulations preventing him from wearing a yarmulke while on duty violated his First Amendment religious freedom.

Chief Lawyer for Petitioner: Nathan Lewis

Chief Lawyer for Respondent: Kathryn A. Oberly

Justices for the Court: Warren E. Burger, Lewis F. Powell, Jr., William H. Rehnquist (writing for the Court), John Paul Stevens, Byron R. White

Justices Dissenting: Harry A. Blackmun, William J. Brennan, Jr., Thurgood Marshall, Sandra Day O'Connor

Date of Decision: March 25, 1986

Decision: The Supreme Court said the Air Force regulations did not violate the Constitution.

Significance: *Goldman* allows the military to sacrifice religious freedom for uniformity to maintain discipline and morale.

S. Simcha Goldman was an Orthodox Jew and an ordained rabbi. In 1973, Goldman joined the Armed Forces Health Professions Scholarship Program. The program gave him financial support to study psychology for three years at Loyola University in Chicago, Illinois.

After getting a Ph.D. in 1976, Goldman became a commissioned officer in the U.S. Air Force. He served as a clinical psychologist at the mental health hospital at March Air Force Base in Riverside, California. From 1976 to 1981, Goldman's performance was praiseworthy.

Religious devotion

As an Orthodox Jew, Goldman wore the yarmulke required by his religion. A yarmulke is a skullcap that covers the top of the wearer's head in God's presence. It serves as a reminder to serve God at all times.

Air Force regulation 35-10 made it unlawful for officers to wear headgear indoors. Goldman, however, wore his yarmulke in the hospital without any problems from 1976 to 1981. In April 1981, Goldman testified at a court-martial hearing while wearing his yarmulke. Afterwards a court lawyer complained to Colonel Joseph Gregory, Goldman's commanding officer, that Goldman's yarmulke violated Air Force regulations in the courtroom and in the hospital.

Colonel Gregory told Goldman about the violation and ordered him to refrain from wearing the yarmulke everywhere except in the hospital. When Goldman's lawyer protested to the Air Force General Counsel, Colonel Gregory revised the order to prohibit Goldman from wearing the yarmulke even in the hospital.

Goldman requested permission to wear civilian clothes, including his yarmulke, until the dispute was resolved. The Air Force denied his request. The next day Goldman received a letter of reprimand and a warning that further violations of regulation 35-10 could result in a court-martial. Colonel Gregory also withdrew a recommendation to extend Goldman's active service and submitted a negative recommendation instead.

Goldman sues

Goldman filed a lawsuit against Caspar Weinberger, the U.S. Secretary of Defense, and other government and military officials. Goldman said regulation 35-10 violated his religious freedom under the First Amendment. The First Amendment says "Congress shall make no law . . . prohibiting the free exercise" of religion. It prevents the government from interfering with religious belief and activity unless it has a compelling (very strong) reason for doing so.

Caspar Weinberger upheld the Air Force rule that prevented Airman Goldman from wearing a yarmulke while on duty.
Reproduced by permission of the Corbis Corporation.

After a full hearing, the federal court in the District of Columbia ruled in favor of Goldman. The court of appeals, however, reversed. It said the regulation was permissible to serve the military's interest in uniformity. By requiring everyone to wear similar uniforms, the military discourages individualism and builds a uniform, disciplined military. Faced with having to violate his religion while serving his country, Goldman took his case to the U.S. Supreme Court.

Military uniformity

With a 5–4 decision, the Supreme Court ruled in favor of Weinberger and the Air Force. Justice William H. Rehnquist delivered the Court's opinion. Rehnquist said military personnel do not give up all constitutional rights. The military, however, must foster discipline, obedience, and unity. That is the only way to make sure personnel will follow orders without hesitation in times of war.

To foster unity, Air Force regulations require personnel to wear standard uniforms. Those regulations make it unlawful to wear religious headgear. Exceptions for yarmulkes would foster individualism, not unity. Justice Rehnquist said Goldman's religious freedom was not more important than the military's need to develop unity.

In the armed forces there are strict codes of dress and conduct that aim to keep everyone and everything the same. Courtesy of the Library of Congress.

Rehnquist noted that Air Force regulations did not prohibit all religious clothing. Goldman could wear his yarmulke during indoor religious ceremonies. Commanding officers were allowed to permit officers to wear religious headgear in their living quarters. Commanding officers also could allow officers to wear nonvisible religious clothing of any kind. Air Force regulation 35-10, however, served the military goal of uniformity by forcing officers on duty to wear the standard Air Force uniform. That did not violate religious freedom under the First Amendment.

CHAPLAIN FIRST AMENDMENT CASE

In the summer of 1996, the Roman Catholic Church launched the "Project Life Postcard Campaign." The Church's goal was to defeat President William J. Clinton's veto of a bill that would have banned certain abortions. The Church asked its priests to urge parishioners to send postcards to Congressmen asking them to override the veto.

Father Vincent J. Rigdon was a Roman Catholic priest and lieutenant colonel in the Air Force Reserve who preached at Andrews Air Force base in Washington, D.C. In response to the Church's campaign, the military ordered Rigdon and all other chaplains not to participate in the postcard campaign. The military said the campaign violated rules that prevent military personnel from lobbying for or against legislation in Congress.

Rigdon sued the armed forces to challenge the order. He said it violated his First Amendment rights to free speech and religion. A Catholic officer, an Air Force rabbi, and the Muslim American Military Association joined Rigdon in his lawsuit. They feared the order would prevent chaplains from discussing important issues during sermons, counseling, and confessions.

The military said the order did not prevent chaplains from discussing moral issues during sermons and religious teaching. On 7 April 1997, however, the federal district court ruled against the military and in favor of Rigdon and his fellow chaplains. The court said chaplains are allowed to urge congregants to write letters to Congress on important moral issues. The court said, "There is no need for [the government's] heavy handed censorship."

Irrational military rationale

Four justices dissented, which means they disagreed with the Court's decision. Justice William J. Brennan, Jr., wrote a dissenting opinion. Brennan said the government needs a compelling reason to interfere with religious freedom. Here Brennan said the government could not even

offer a good reason. There was no evidence that Goldman would hurt military discipline by wearing a yarmulke.

There also was no evidence that the military needed to maintain absolute uniformity in dress. In fact, Air Force regulations said, "Neither the Air Force nor the public expects absolute uniformity of appearance. Each member has the right, within limits, to express individuality through his or her appearance. However, the image of a disciplined service member who can be relied on to do his or her job excludes the extreme, the unusual, and the fad." Brennan said there was nothing extreme, unusual, or faddish about wearing a yarmulke. By prohibiting yarmulkes, the military and the Supreme Court forced American Orthodox Jews to choose between obeying their religion and serving their country.

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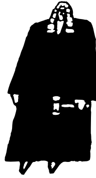

Clinton v. Goldsmith
1999

Petitioner: William J. Clinton, President of the United States, et al.

Respondent: James Goldsmith

Petitioner's Claim: That the Court of Appeals for the Armed Forces lacked authority to review President Clinton's decision to drop an officer from the Air Force.

Chief Lawyer for Petitioner: Michael R. Dreeden

Chief Lawyer for Respondent: John M. Economidy

Justices for the Court: Stephen Breyer, Ruth Bader Ginsburg, Anthony M. Kennedy, Sandra Day O'Connor, William H. Rehnquist, Antonin Scalia, David H. Souter (writing for the Court), John Paul Stevens, Clarence Thomas

Justices Dissenting: None

Date of Decision: May 17, 1999

Decision: The Supreme Court reversed the Court of Appeals' order, which had stopped President Clinton from dropping Goldsmith from the Air Force.

Significance: With *Clinton,* the Court said military officers must follow the proper legal channels to challenge a decision by the president of the United States.

MILITARY LAW AND ISSUES

James Goldsmith was a major in the U.S. Air Force. Goldsmith also was HIV-positive, which means he had the virus that causes AIDS. Because people can transmit HIV during sexual intercourse, Goldsmith's superior told him to inform his sexual partners about his condition. Goldsmith's superior also told him to take precautions during sexual intercourse to avoid giving the virus to his partners.

Goldsmith violated this order by having unprotected sexual intercourse with a fellow officer and a civilian. The Air Force court-martialed Goldsmith for his disobedience. The court-martial convicted Goldsmith of disobeying an order from a superior officer, aggravated assault with means likely to produce death or serious harm, and battery. Goldsmith received a sentence of six years in prison and forfeiture of $2,500 of his salary each month for six years.

Roll call

Officers who spend a lot of time in military jail are costly to the federal government because they still receive pay. In 1996, Congress passed a law giving the President power to drop officers from the rolls after they spend six months in jail as a result of a court-martial sentence. Officers dropped from the rolls forfeit all military pay. In 1996, the Air Force notified Goldsmith that he was going to be dropped from the Air Force's rolls.

At the time, Goldsmith said he was having trouble getting his HIV medication in jail. Goldsmith filed a case with the Air Force Court of Criminal Appeals (AFCCA) under the All Writs Act to get his medication. The All Writs Act allows federal courts to issue orders needed to carry out their powers.

The function of the AFCCA, however, is to review cases decided by court-martials. The AFCCA is not a place for individual requests, like Goldsmith's request for medication. Because of this, the AFCCA ruled that it lacked jurisdiction, or power, to grant Goldsmith's request.

Goldsmith appealed to the Court of Appeals for the Armed Forces (CAAF), which reviews decisions by courts in the military branches. Because the Air Force released Goldsmith from confinement before the CAAF decided the case, the CAAF did not have to consider Goldsmith's request for HIV medication.

Goldsmith, however, argued that President William J. Clinton and the Air Force would violate the Constitution if they dropped him from

The Court decided that President Bill Clinton had final say on whether or not an officer was removed from the Air Force.
Reproduced by permission of AP/Wide World Photos.

the Air Force's rolls. Goldsmith said dropping him would violate the Double Jeopardy Clause, which prevents the government from punishing people twice for the same crime. Goldsmith said it also would violate the Ex Post Facto Clause, which prevents the government from using a law to convict a defendant for something that was not a crime when the defendant did it. When Goldsmith violated his superior's order, there was no law that the President could drop Goldsmith from the rolls. Congress enacted that law later.

The CAAF ruled in Goldsmith's favor. Using the All Writs Act, it ordered President Clinton and various other executive officials not to drop Goldsmith from the Air Force's rolls. President Clinton and the executive officials took the case to the U.S. Supreme Court. The issue was whether the CAAF had the power to prevent President Clinton from acting under Congress's law.

Clinton prevails

With a unanimous decision, the Supreme Court ruled in favor of President Clinton. Justice David Souter delivered the Court's decision. Justice Souter said Congress created the CAAF to review sentences imposed by court-martials. Dropping Goldsmith from the rolls was not part of his court-martial sentence. It was independent action by President Clinton under a law of Congress. The CAAF had no power to

DON'T ASK, DON'T TELL DOESN'T WORK

Homosexual conduct is unlawful in the military and is grounds for being court-martialed and discharged. When William J. Clinton became president in 1993, he wanted to end discrimination against homosexuals in the military. Political pressure, however, forced him to accept a new policy called "Don't ask, don't tell." Congress made the policy a law in 1994.

Under the policy, military authorities are not supposed to ask officers or enlisted members about their sexual orientation. In return, homosexuals are not supposed to reveal their sexuality or engage in homosexual conduct. Keeping everyone silent was supposed to permit homosexuals to serve in the military. It also was supposed to reduce anti-gay harassment, which historically is a problem in the military.

Six years later, people on both sides of the issue agreed that the policy had failed. In December 1999, President Clinton said the policy was "out of whack" and not working as it was supposed to work. In March 2000, the Pentagon revealed a survey of 71,500 service personnel worldwide. Eighty percent of those surveyed said they heard anti-gay comments in the military during the previous year. Thirty-seven percent said they saw anti-gay harassment. Eighty-five percent said they believed the military tolerated verbal abuse of homosexuals.

Failure of the "Don't ask, don't tell" policy led Vice President Al Gore to call for its repeal. Gore vowed to end discrimination against homosexuals in the military if he was elected president in November 2000.

review that action.

Justice Souter noted that Goldsmith had not yet been dropped from the rolls. If that happened, Goldsmith would be allowed to challenge the

decision before the Air Force Board of Correction for Military Records. If the Board ruled against him, Goldsmith could appeal the case to a federal court. What Goldsmith could not do was get relief from the CAAF, which had no power to tell President Clinton what to do.

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The term Native American is commonly used to refer to American Indians living within the United States, though it also includes Hawaiians and some Alaskan natives not considered American Indians. When referred to in general, American Indians often prefer to be called by their tribal names, such as Nez Perce, Navajo, Sioux, or Oneida.

The place of Native Americans in the U.S. legal system is highly unique. Tribes are formally recognized sovereign (politically independent) nations located within the boundaries of the United States. By the 1990s over 2 percent of lands within the United States were actually governed by Native American tribal governments. Such lands under tribal jurisdiction are referred to as Indian Country.

Tracing the history of U.S.-Indian relations from the nation's early years reveals that present-day Native American legal standing in the United States is not the result of a well-organized body of legal principles, but rather an accumulation of policies coming from many sources over time. Although many similarities do exist, each tribe has its own unique cultural and legal history. For over two hundred years, U.S. Indian policy shifted between periods of supporting tribal self-govern-

ment and economic self-sufficiency apart from U.S. society to periods of forced Indian social and economic assimilation (inclusion) into the dominant society.

The Growth of Indian Law

The basis for what is known as Indian law, which is actually U.S. law about Indians and not by Indians, was established well before the birth of the United States. During the seventeenth century British and Spanish colonies began negotiating treaties with the New World's native peoples, treating them as politically independent groups. The treaties recognized Indian ownership of lands they were living on and using. The United States, after independence from Great Britain, inherited this age-old European international policy. As a result, tribal sovereignty, recognized well before the birth of the United States, became the basis for future U.S.-Indian relations.

Fresh from victory over Britain in the American Revolution (1775–1783), the fledgling new government made establishment of peaceful and orderly relations with American Indians one of its first items of business. The 1787 Northwest Ordinance, enacted by the Continental Congress, recognized existing Indian possession of the newly gained lands from Britain that were not part of the original colonies. Attempting to end the practice of private individuals or local governments negotiating treaties with or buying lands directly from the sovereign Indian nations, the Ordinance stated that only the federal government could legally carry out such activities.

Recognition of tribal sovereignty was directly addressed in the U.S. Constitution, adopted in 1788. Authority for the federal government's legal relationship with tribes was placed in the Commerce Clause of Article 1 which reads simply that Congress has power "to regulate Commerce with foreign Nations and . . . the Indian Tribes." The Constitution also recognizes the legal status of Indian treaties in Article VI by stating, "This Constitution, and the Laws of the United States . . . and all Treaties made . . . shall be the supreme Law of the Land." This means congressionally ratified (approved) treaties have the same legal force as regular federal laws. Further reflecting the importance of Indian relations to the new nation, one of the first acts passed by the first U.S. Congress was the Indian Trade and Intercourse Act of 1790. Exercising its new constitutional authority, Congress proclaimed treaty-making policy and brought all interactions between Indians and non-Indians under federal control.

U.S. Indian policy became further defined by three landmark Supreme Court decisions between 1823 and 1832. Known as the Marshall Trilogy after then-Chief Justice John Marshall, the cases of ***Johnson v. McIntosh*** (1823), ***Cherokee Nation v. Georgia*** (1831), and ***Worcester v. Georgia*** (1832) affirmed the tribal right to occupy and govern their lands, tribal sovereignty from state jurisdiction within Indian reservations, and defined a moral trust responsibility of the United States toward the tribes. Marshall described tribes as "domestic dependent nations" essentially free of state controls. The trust relationship toward Indian nations meant the United States is responsible for Indian health and welfare.

Later Court decisions further defined Indian policy. A reserved rights doctrine was established in *United States v. Winans* (1905) meaning that Indians retain certain inherent (native) rights until explicitly taken away by Congress. But, the Court in *Lone Wolf v. Hitchcock* (1903) also gave Congress "plenary" (absolute) power over Indian peoples. Plenary power meant Congress could on its own change U.S. Indian policy, even change treaties and end specific rights without consent of the tribes. However, the trust responsibility requires careful exercise of this absolute power, using it only when considered beneficial to Indian peoples. To resolve legal disputes over treaty interpretations, the "canons of construction" recognized in *Winters v. United States* (1908) state that unclear treaty language should always be interpreted by the courts from the tribal perspective.

U.S. governmental policy concerning Indians proceeded from the Marshall Trilogy to the year 2000 along a zig-zag pathway of alternating goals. Policy swerved from isolation and protection on reservations, to forced integration (assimilation) into American farming society, to recognition of reorganized tribal governments and relations with the federal government, to termination of trust status, and finally to support for tribal self-determination and integrity.

Treaties, Removal, and Reservations

Despite the seemingly protective U.S. Indian policies developed through the first few decades of the nation's history, in reality Indian peoples suffered catastrophic loss of economies, lands, and life during the persistent westward push of white settlements. One of the more tragic examples of U.S. government actions was the 1830's removal policy directed by President Andrew Jackson (1829–1837). Under this policy, the United

States forcefully removed the Five Civilized Tribes from the Southeastern United States to a newly created Indian Territory in what later became Oklahoma. Thousands of deaths directly resulted.

U.S. removal policies continued through the 1850s and 1860s as more treaties were made with tribes in the West. The western treaties created a vast reservation system in which the inherent rights of Native Americans would presumably persist within certain defined territories, called reservations. Some treaties also reserved Indian hunting, fishing, and gathering rights outside reservation boundaries to help maintain traditional economies. Although not written in the treaties, water rights were also implicitly included as later interpreted by the Court in *Winters.* Honoring these treaties conflicted with the promotion of non-Indian settlement and economic development in newly gained U.S. territories.

As opposed to rights of tribal governments, the legal rights of Indian individuals was a major concern of neither the federal government nor the courts throughout much of the nineteenth century. With tribal relations largely guided by the treaties rather than standard U.S. law, legal dealings with Indian individuals were generally avoided. As a result, a system for policing and punishment of Indians developed largely beyond the reach of U.S. courts. Indian agents having ready access to the military, exercised broad authority, often detaining and executing numerous individuals for a wide range of alleged actions.

The End of Treaty-Making

In 1871, Congress ended treaty-making, closing a major chapter in U.S.-Indian relations. By this time, the Indian population had largely been isolated by the U.S. government into remote areas, out of the way of U.S. expansion and settlements. Distant from U.S. markets, as well, prospects for economic recovery were slim at best. Consequently, the fortunes of Indian peoples was only to decline further through the next sixty years. Greed for more lands led to further damaging federal policies. Continued U.S. expansion brought increased natural resource needs and gold discoveries making the remote reservation lands suddenly attractive to Westerners.

In addition, by the 1870s Indian issues rose more in the national public eye as social reformers shifted attention from slavery. Demands for humanitarian action gathered momentum. An 1879 federal court ruling in *United States ex rel. Standing Bear v. Crook* asserted that Indians

off-reservation were "persons" having the same constitutional due process and equal protection rights under the Fourteenth Amendment as U.S. citizens. The U.S. army no longer held broad authority to detain Indians without full civilian constitutional protections. However, much about the legal standing of Indian individuals still remained poorly defined. In 1884 the Supreme Court ruled the Fourteenth Amendment of the Constitution had not automatically granted citizenship to Indians.

Assimilation

A major period of forced cultural assimilation began with the General Allotment Act of 1887 and lasted into the 1930s. Assimilation means the U.S. government tried to blend Native Americans into the mainstream U.S. society. Many believed the Indian tradition of communally-owning property was a key barrier to Indians adopting Western ways. As a result, Congress passed the Allotment Act, also known as the Dawes Act, authorizing the Bureau of Indian Affairs (BIA) to divide all reservation lands into smaller parcels. The agency then allotted (assigned) 160-acre parcels to families and eighty-acre parcels to single adults over eighteen years of age. Indians receiving allotments also received U.S. citizenship. U.S. policymakers reasoned that when people owned their own property they would most likely become farmers and adopt the U.S. farming lifestyle.

Given the still relatively extensive land holdings of the Indians in 1887, much land was left over after every tribal member had received their allotment. Those unallotted lands were declared "surplus" and sold by the United States to non-Indians. In addition to the loss of vast amounts of "surplus" lands, much allotted land went into forfeiture (banks claim ownership) when many Indians could not pay taxes on their often remote unproductive desert properties. Even if the land was productive, markets were usually still too distant. The allotment policy became an economic disaster to Indian peoples, reducing Indian Country in the United States from 138 million acres in 1887 to forty-eight million acres by 1934. In many cases, the more agriculturally productive lands on reservations had passed out of tribal control.

In a further effort to assimilate Indians, all Indians born in the United States became U.S. citizens through the Indian Citizenship Act of 1924. The act also made Indians citizens of the states in which they resided. Although able to vote and hold state office, they are not subject to state law while on Indian lands. The Constitution's Bill of Rights,

however, did not apply to protecting Indians from their tribal governments as it did from federal and state actions because of tribal sovereignty. As a result, tribal members could be subjected at times to harsher legal penalties from their own tribal governments than non-Indians in U.S. society for the same crimes.

Reorganizing Tribal Governments

By the 1930s the calamity of the allotment policy had become apparent. In an effort to end assimilation efforts, U.S. policy returned to stressing tribal sovereignty. The Indian Reorganization Act of 1934 ended the allotment process, stabilized remaining tribal land holdings, and promoted tribal self-government. The act encouraged tribes to adopt U.S.-style constitutions and form federally-chartered corporations. Although many tribes elected to organize under the rules of the act, many others rejected developing constitutions. Some organized new governments under their own tribal rules. However, even this seemingly friendly policy of encouraging formation of modern tribal governments had harmful social effects in Indian Country. The newly established more modern governments often came in conflict with the traditional tribal political leaders.

Urban Indians and Termination

Following World War II (1939–1945), other traditions began changing also. With thousands of Indians returning from military service abroad or working in defense plants, their exposure to mainstream U.S. society made life on poverty-ridden reservations less acceptable. Also, the GI Bill provided educational opportunities. More Indians began moving off-reservation into the newly expanding urban areas, seeking greater economic opportunity. The welfare of these urban Indians became an increasing concern of the federal government under its trust responsibilities.

In a few cases, tribes still held a sufficient land base with marketable natural resources such as timber began to develop an economic base and prosper. However, greed for Indian-owned assets of value rose again. By 1953 U.S. governmental policy significantly shifted back to assimilation, this time through "termination" policies. Termination of a tribe meant ending the special trust relationship and loss of reservation lands. The lands, some very productive, were sold to non-Indians and access to federal health and education services was taken away. The economic base for those Indian communities was devastated. In addition to

termination, Congress also passed Public Law 280 in 1953. The act expanded state jurisdiction onto tribal lands in selected states, decreasing tribal sovereignty yet more in those areas.

Tribal Self-Determination

Congressional support for termination did not last long as U.S. Indian policy again took a dramatic shift back in the 1960s toward a tribal government self-determination (govern own internal affairs) era. Influenced by the black American civil rights movement, a series of Congressional hearing in the 1960s focused on the lack of consistent civil rights protections offered by tribal governments to their members.

As a result, Congress passed the Indian Civil Rights Act (ICRA) of 1968 extending most of the Bill of Rights to Indian peoples including free speech protections, free exercise of religion, and due process and equal protection of tribal government laws. Not extended to Indians was the right to a jury trial in civil cases, free legal counsel for the poor, search and seizure protections, and prohibition on government support of a religion. Issues such as gender discrimination in tribal laws still could not be challenged under federal law. The act also cut back some of the states' authorities granted in Public Law 280. In respect for tribal sovereignty, interpretation of ICRA is left to the tribes and tribal courts, not federal courts. Federal courts can only review tribal court decisions in certain types of criminal cases.

Other legal distinctions for Indians were also identified. Title VII of the 1964 Civil Rights Act explicitly exempted Indian hiring preferences from its due process protections in some instances. The 1974 Court ruling in *Morton v. Mancari* affirmed that American Indians can be treated differently from other U.S. citizens by the federal government despite anti-discrimination laws. Tribes are political not racial groups on occasions when the U.S. government bases it actions on its trust responsibilities to protect Indian interests and promote tribal sovereignty. If the Indian preference laws were only designed to help Indians as individuals, they then could be determined illegal.

With civil rights protections different from other U.S. citizens, determining who is Indian has important legal consequences. Constituting a political rather than racial group, tribal members may gain membership to a tribe through birth or marriage and may have substantial non-Indian ancestry. Conversely, a person of total Indian ancestry

who has never established a relationship with a tribe may not enjoy Indian legal status. Each of the over 550 recognized tribes in the United States is responsible to determine membership as an exercise of their tribal sovereignty. In general, an Indian is anyone with some degree of Indian ancestry, considered a member of an Indian community, and promoting themselves as Indian.

The biggest boost in support of tribal sovereignty and self-sufficiency came in 1975 when Congress passed the Indian Self-Determination and Education Assistance Act. The act gave tribes much greater opportunity to administer federal programs benefitting Indian peoples that were previously administered by the BIA. Many of these programs provided health and education services.

Through the rest of the twentieth century Congress continued passing acts protecting tribal rights and interests, including the American Indian Religious Freedom Act (1978), Indian Mineral Development Act (1982), Indian Gaming Regulatory Act (1988), the Native American Graves Protection and Repatriation Act (1990), and the Indian Self-Governance Act (1994). By the 1990s, tribes could form and reorganize their own governments, determine tribal membership, regulate individual property, manage natural resources, provide health services, develop gaming businesses, regulate commerce on tribal lands, collect taxes, maintain law enforcement and establish tribal court systems. By the end of the twentieth century, tribal court systems had greatly expanded as many tribes gained greater economic and political power. However, due to the broad diversity of tribal legal systems, the meaning of justices and the way it was applied differed from tribe to tribe. Besides those patterned after United States models, some tribes retained traditional systems and others no system at all.

By 2000, the resulting branch of U.S. law, commonly called Indian Law, was a very peculiar part of the U.S. legal system with tribal governments and their peoples possessing a unique legal status. Members of federally recognized tribes were both U.S. and tribal citizens, simultaneously receiving benefits and protections from federal, state, and tribal governments.

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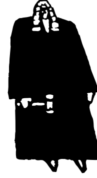

Johnson v. McIntosh
1823

Appellants: Johnson and Graham

Appellee: William McIntosh

Appellant's Claim: That title to land purchased by private individuals directly from Indian tribes before the United States gained independence should be recognized by the United States.

Chief Lawyers for Appellants: Harper and Webster

Chief Lawyers for the Appellee: Winder and Murray

Justices for the Court: Gabriel Duvall, William Johnson, Chief Justice John Marshall, Joseph Story, Smith Thompson, Thomas Todd, Bushrod Washington

Justices Dissenting: None

Date of Decision: February of 1823

Decision: Ruled in favor of McIntosh by denying recognition of land purchases from Indian tribes by individuals.

Significance: This landmark ruling established the legal basis by which the United States could establish its land base. Chief Justice John Marshall had to piece together the concept of discovery as used by early European explorers and Indian sovereignty (governmental independence). Being sovereign governments, the rights to lands that Indians physically possessed could only be acquired by the U.S. government, not by private individuals or states.

When European explorers began arriving on the eastern shores of North America in the sixteenth century, they found numerous long-established Indian societies, each with their own governments, laws, and customs. Although the explorers asserted the "doctrine of discovery" to claim control of lands they "discovered" for their rulers, European colonists who later followed the explorers still had to deal with the question of Indian land possessions. By 1532 Spain officially declared that Indians held a certain right to land that foreign nations could not take simply through "discovery." Actual possession of land occupied and used by American Indians could only be gained by signing a treaty or by waging a "just war."

Mr. Johnson and Mr. Graham

Prior to the Revolutionary War (1776–1783) while the thirteen American colonies were still under British rule, the Illinois and Piankeshaw Indian tribes lived in the Ohio Valley region to the west. During the period of European exploration, France had claimed the region through discovery. A 1763 treaty ending the French and Indian War (1754–1763) between France and Great Britain over North American lands transferred claim to the region to Great Britain. A number of years later, in 1773 and 1775, Mr. Johnson and Mr. Graham, two individuals acting on their own, purchased lands northwest of the Ohio River directly from the two tribes.

At the outbreak of the Revolutionary War in 1776, numerous conflicts erupted between tribes, the colonies, and their citizens. Many of the tribes were sympathetic to the British. Attempting to establish claim and some control over the Ohio Valley to its west, the state of Virginia passed a law proclaiming exclusive right to large tracts of land. Included were the two parcels owned by Johnson and Graham. Consistent with existing legal principles, the law recognized that the Indians held a right of possession to continue living in the region until the lands could be purchased by Virginia. The act also provided that all previous land transactions by Indians to private individuals for their own use were not valid. Additionally, upon defeat, Great Britain gave up its claim to the Ohio River area.

The newly established United States immediately began to address land ownership issues on its frontier. It also needed a national policy for Indian relations as ruthless conflicts continued among tribes and frontier populations. The 1787 Northwest Ordinance established U.S. claim to the newly gained lands and recognized Indian rights of possession to

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their existing holdings on those lands. The Ordinance established how newly acquired lands from the British, not previously part of the original colonies, would be governed. Individual state claims, such as Virginia's, were no longer valid. The Ordinance stated that Indian "lands and property shall never be taken from them without their consent." The U.S. Constitution, adopted in 1789, further recognized Indian nations as one of three types of sovereign governments in the United States, the other two being the states and the federal government. Article 1 of the Constitution gave Congress authority to "regulate commerce with . . . the Indian Tribes" and Article VI recognized Indian treaties along with acts of Congress as the "supreme law of the land."

Questions persisted, however, as to just what kind of title to land did tribes hold and how could that title be transferred to others. In an attempt to further address this issue, one of the first laws passed by the first U.S. Congress in 1790 was the Indian Trade and Intercourse Act. The act recognized the federal government's role in negotiating Indian treaties and prohibited tribes from selling lands to anyone else except the U.S. government. The U.S. government immediately began negotiating treaties with the tribes as equal sovereigns, seeking to establish peace and acquire a land base.

William McIntosh

With the general framework in place for securing peace and acquiring Indian lands on the U.S. frontier, the United States acquired the Ohio Valley area. Selling the land to raise money and encourage frontier settlement, the United States soon sold to William McIntosh some of the land including the original parcels earlier acquired by Johnson and Graham. With McIntosh laying claim to his new lands, Johnson and Graham filed a lawsuit in the District Court for Illinois challenging McIntosh's ownership. Johnson and Graham argued they had legally purchased the parcels directly from the tribes before the United States had gained control of the region. The court rejected their argument and ruled in favor of McIntosh. Johnson and Graham appealed to the U.S. Supreme Court.

The Discovery Doctrine

In a landmark decision establishing the basic principles of property ownership in the new nation, legendary Chief Justice John Marshall wrote the Court's opinion. Supporting the lower court's decision in favor of

THE "TRAIL OF TEARS"

Of the many injustices visited by the United States on Indian tribes, the removal of the Cherokee nation from their Georgia homeland to Oklahoma in the winter of 1838–39 was one of the most inexcusable. Over the course of their journey, on a route called the "Trail of Tears,"one-quarter of the Cherokee people died.

The Cherokee had been almost unique among Indians in their establishment of a European-style government. Hoping in vain to preserve their lands in northwest Georgia against the spread of white settlement, in the early 1800sthey adopted many of the features that they hoped would qualify them as "civilized" in the eyes of the federal government. Not only did they become the only Native American group with a written language, thanks to the efforts of the linguist Sequoyah, they also established a parliamentary and constitutional form of government with a capital at New Echota. In addition, they took up cattle-raising and farming, a departure from the traditional Native American hunter-gatherer economy.

But these efforts proved futile. In 1828, Georgia declared void all Cherokee laws, and claimed their lands for the state.

McIntosh, Marshall carefully detailed the basic rules for land acquisition along the expanding frontier. First, Marshall returned to the early European concepts of discovery that led to settlement of the colonies. Marshall wrote, "that discovery gave title to the government by whose subjects it was made, against all other European governments [which] necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives." In other words, the key importance of the doctrine of discovery was establishing which European nation held the right to acquire particular lands from Indian groups who actually lived on it.

Then Marshall described the implication of discovery to the tribes. According to Marshall, the tribes

were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion [choice]; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made [the discovery].

Although the tribes held right of possession, the individual European countries held a title by discovery. That title of discovery was clearly held by nations and not by individuals. Marshall contended these principles underlying discovery were recognized by all European nations during colonization in the seventeenth and eighteenth centuries.

Regarding Johnson's and Graham's properties, Marshall asserted that title of discovery to the two parcels was held by Great Britain after 1763, but "was forfeited by the laws of war" to the United States. Marshall claimed, "It is not for the courts of this country to question the validity of this [the United States'] title." Consequently, Marshall assumed the United States held clear title of discovery, and the 1790 Indian Intercourse Act established that only the United States could acquire right of possession from the tribes and sell the lands to private individuals. The United States held such a discovery right of acquisition to the Ohio Valley following the Revolution.

Since a national control of lands can only pass from one government to another government, individuals such as Johnson and Graham could not have gained a valid U.S. legal title from the tribes. Their right of ownership could only be recognized under tribal law, not U.S. law. Their title, therefore, "cannot be recognized in the courts of the United States." Marshall declared McIntosh the rightful owner since he had purchased the land from the United States after the United States acquired it from the Indian nations through treaty.

U.S. Expansion

The *Johnson* decision served to more fully interpret the Indian Trade and Intercourse Act. A process was defined for recognizing tribal land rights and the orderly transfer to the United States. The ruling held that

MODERN INDIAN CLAIMS IN THE ORIGINAL STATES

The *Johnson v. McIntosh* (1823) decision laid the legal groundwork for U.S. expansion through the next several decades. Because many of the original thirteen states and their European predecessors had acquired millions of acres directly from Indian tribes without ever gaining approval of Congress, Marshall had hoped to minimize the effects of the ruling on previous land acquisitions. However, the controversy of land ownership in the original thirteen states returned over a century later. In the 1970s tribes began challenging those early land acquisitions of the original colonies. Tribes filed twenty-one lawsuits in seven eastern states as well as Louisiana. They claimed their right of possession as recognized in *Johnson* by Chief Justice John Marshall was never legally acquired by the United States.

As an example, in 1972 several lawsuits sought 7.5 million acres and $150 million in damages for the alleged illegal land transfers in Maine and Massachusetts alone. The Supreme Court in *Passamaquoddy Tribe v. Morton* (1975) confirmed that tribes had legal authority to pursue such claims. Out of court negotiations led to the Maine Indian Claims Settlement Act of 1986 in which the Maine tribes received over $81 million for lost lands.

For claims in the state of New York, the Court ruled in *County of Oneida v. Oneida Indian Nation* (1985) that the 1795 acquisition of 100,000 acres by New York from the Oneida was invalid because it never received congressional approval. These cases highlighted the complex historical relationship between the tribes and eastern states.

Indians did not hold absolute title to their lands, but a lesser right of occupancy. Indians were also restricted in how they could dispose of their lands. They could only sell to the U.S. government or to other parties with approval of the United States. Therefore, the United States held exclusive right to acquire Indian lands, either "by purchase or con-

quest." In practicality, this ruling recognized that Indian nations retained national sovereignty, but in some limited way. Marshall would soon more specifically define the nature of that sovereignty in ***Cherokee Nation v. Georgia*** (1831) in which he would describe tribes as "domestic dependent nations."

In a third ruling establishing the basis of U.S. Indian law, Marshall ruled in ***Worcester v. Geogia*** (1832) that tribal sovereignty meant that states could not enforce their laws on tribal lands. Tribes could govern their own internal affairs, restricted only by Congress which held ultimate legal power. The rulings of *Johnson, Cherokee Nation,* and *Worcester* have been described as Marshall's Trilogy of Indian court cases legally defining U.S.-Indian relationships for most of the next two centuries.

The ruling in someways was a compromise. Discovery did not end tribal ownership but the Indians did not retain full title either. Marshall placed Indian land claims into a European land ownership system.

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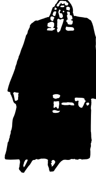

Cherokee Nation v. Georgia 1831

Plaintiff: Cherokee Indian Nation

Defendant: State of Georgia

Plaintiff's Claim: That the U.S. Supreme Court, using its constitutional powers to resolve disputes between states and foreign nations, stop Georgia from illegally and forcefully removing the Cherokee Nation from its lands.

Chief Lawyer for the Plaintiff: William Wirt

Chief Lawyer for the Defendant: None

Justices for the Court: Henry Baldwin, William Johnson, Chief Justice John Marshall, John McLean

Justices Dissenting: Smith Thompson, Joseph Story (Gabriel Duvall did not participate)

Date of Decision: March 5, 1831

Decision: Ruled in favor of Georgia by finding that the Supreme Court had no legal authority to hear the dispute because Indian tribes are "domestic dependent nations," not foreign nations.

Significance: By refusing to hear the case, the Court left the Cherokees at the mercy of the state of Georgia and its land-hungry citizens. In late 1838 the Cherokee were forcefully marched under winter conditions from their homes in northwest Georgia to lands set aside in Oklahoma. Four thousand died in military detention camps and along the infamous "Trail of Tears." The forced removal of Indian tribes from the Southeastern United States was completed by 1858.

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"The whole scene since I have been in this country has been nothing but a heart-rendering one . . . I would remove every Indian tomorrow beyond the reach of the white men, who, like vultures, are watching, ready to pounce on their prey and strip them of everything they have . . . " U.S. General John Ellis Wood in charge of the Cherokee removal quoted in "The Time Machine." *American Heritage,* September/October 1988.

Before settlement by European colonists in the seventeenth and eighteenth centuries, the Cherokee Indians lived along much of North America's southeastern coast. By the 1780s, war, disease, and starvation had killed most American Indians living along much of North America's eastern coastline. The Cherokee population shifted further inland and negotiated treaties with the U.S. government to protect their remaining homelands. Based on a treaty signed with the United States in 1791, the Cherokee were settled on traditional lands in the hills of northwest Georgia and western North Carolina.

As U.S. settlement pressed further inland in the early nineteenth century, many surviving Indian groups forcefully resisted further land loss. Some even sided with Britain against the United States in the War of 1812 (1812–1814). However, the United States won the war in 1814 and General Andrew Jackson (1767–1845) promptly led the U.S. military to victory over the Creeks and other Indian groups who had actively opposed the United States.

In contrast to the Creeks, the Cherokee had early accepted U.S. presence as inevitable and adopted a more peaceful policy of coexistence. In dealing with European intrusion into their lands, the Cherokee sought to hold their ground by adopting many of the white ways. During the early 1800s the Cherokee went through a remarkable period of cultural change. They adopted a farming economy including cattle-raising in place of traditional hunting and gathering. Some Cherokee even became plantation owners with slaves. Others became involved in commerce, managing stores, mills and other businesses. Cherokee children were sent to American schools and mixed marriages with non-Indians were allowed. Seeing the benefits of reading and writing, a Cherokee silversmith, Sequoya, created a Cherokee alphabet that was quickly adopted. They became the only Indian nation in North America with a written language. By the 1820's, the Cherokee had established written laws, a constitution, and a capitol at New Echota.

As the Cherokee became a flourishing independent nation within Georgia's state boundaries, resentment grew among white settlers.

PROTECTION

CHEROKEE PHOENIX.

VOL. I. NEW ECHOTA, THURSDAY APRIL 10, 1828. NO. 8.

CHEROKEE LAWS.

The case involving the Cherokee Nation was followed in the local Cherokee newspaper.
Courtesy of the Library of Congress.

Already eager to grab the rich agricultural lands of the Cherokee, the discovery of gold in Cherokee country in 1828 further escalated the greed for land and wealth. In addition, President Andrew Jackson signed the Indian Removal Act of 1830 that provided funds for removal of eastern Indians to the west beyond the Mississippi River.

The state of Georgia began enacting laws declaring all Cherokee laws void and seeking to remove the Cherokee from their lands. In reaction to Georgia's actions, the Cherokees hired white lawyers led by

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William Wirt to defend their interests. With the state's antagonism toward the tribe, Wirt clearly did not want to have to defend the Cherokee case in Georgia state courts. Noting that Article III, Section 2 of the U.S. Constitution gives the U.S. Supreme Court original jurisdiction (the geographic area over which a government or court has authority) in cases for which a state is a party, Wirt took the Cherokee case straight to the Court. He requested an injunction (a court order stopping an action) forbidding Georgia from removing the Cherokees. A complicating factor was that all Indians including the Cherokee were not recognized as U.S. citizens. Section 2 restricts Supreme Court jurisdiction only to cases involving American citizens by stating that it may only hear disputes "between a State, or the Citizens thereof, and foreign States . . . " Since the Cherokee Nation was not a state and the Cherokees were not U.S. citizens, Wirt decided to take the position that the Cherokee Nation was a foreign nation, thus placing the case under the Court's jurisdiction.

On the other side, the state of Georgia believed the federal courts had no business judging their state laws. They believed so strongly in states' rights that they refused to send anyone to legally represent them before the Supreme Court.

A political cartoon showing injustice and cruelty against the Cherokee Nation. Reproduced by permission of the Corbis Corporation.

In arguing for foreign nation status on March 5, 1831, Wirt stressed that the Cherokee's "boundaries were fixed by treaty, and what was within them was acknowledged to be the land of the Cherokees. This was the scope of all treaties." On a more human level, Wirt pleaded that,

> **The legislation of Georgia proposes to annihilate [the Cherokee}. As its very end and aim . . . If those laws be fully executed, there will be no Cherokee boundary, no Cherokee nation, no Cherokee lands, no Cherokee treaties . . . They will all be swept out of existence together, leaving nothing but the monuments in our history of the enormous injustice that has been practised towards a friendly nation.**

Responding that very same day, Chief Justice John Marshall delivered the Court's 4–2 decision. Attempting to finally resolve the legal status of Indian tribes within the United States, Marshall stated that tribes such as the Cherokee are "domestic dependent nations," not foreign nations. Marshall wrote that through the doctrine of discovery applied by European nations when exploring North American lands in the seventeenth and eighteenth centuries, the tribes had partially lost their sovereignty as nations when the European nations had laid claim to their lands. Consequently, tribes were no longer fully independent foreign nations. The Indians had essentially become wards (dependent subjects) of the federal government for whom the United States held a special legal responsibility to protect, a trust responsibility. Marshall concluded that since the Cherokee were not a fully independent nation, the Supreme Court holds no jurisdiction to hear the Cherokee claims.

Tragic Consequences

Unable to gain legal support from the American court system, the Cherokee were at the mercy of the state of Georgia and Jackson's removal policy. After years of harassment and antagonism, a small group of Cherokee in 1835 led by Major Ridge and his son ceded by treaty all Cherokee lands. The Cherokee peoples were given two years to leave their traditional lands and move to a special Indian territory created by Congress in 1834 in what latter became Oklahoma. By 1838 the Cherokees were stripped of all their lands in the Southeast.

Under watch of 7,000 U.S. troops, the Cherokee peoples were forced from their homes and marched a thousand miles during the win-

TRAIL OF TEARS

Many Cherokee resisted the government's efforts to remove them from their lands. As the deadline for removal approached in 1837 President Martin Van Buren (1837–1841) ordered federal authorities to force the Cherokee from their homes and place them in temporary detention camps. They remained in the camps through 1838 during a typically hot sweltering Southern summer. Diseases began to spread. Suffering from dysentery, measles, and whooping cough, some two thousand died in the camps.

That October, over fifteen thousand men, women and children began a six month thousand mile journey to the very unfamiliar country of Oklahoma. Most marched overland from northwest Georgia, across central Tennessee, western Kentucky, southern Illinois, southern Missouri and northern Arkansas to eastern Oklahoma. A smaller number were taken by flatboat down the Tennessee River to the Mississippi River and then up the Arkansas River. Lacking adequate food, shelter, and clothing while en route, another two thousand died from exposure, disease, and exhaustion. The Cherokee buried their dead along the route that became known as the Trail of Tears. The forced march became one of the most tragic events in U.S.-Indian relations. The Trail of Tears was later designated a National Historic Trail by Congress.

ter of 1838 and 1839 to the Oklahoma territory. Thousands died as it became known in history as the "Trail of Tears." During their removal, a thousand or more Cherokee fled into remote areas of the East, including the Great Smoky Mountains. They later gained federal recognition as the Cherokee of the North Carolina Qualla Reservation. The massive relocation still stands as one of the saddest moments in U.S.-Indian relations.

Following their tragic journey, the Cherokee reestablished their farming society in the hills of northeastern Oklahoma. They quickly

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setup a new government and signed a constitution in 1839. Tahlequah, Oklahoma became the capital for the displaced peoples.

Removal of the Cherokee Nation left behind only scattered Indian groups in the Southeast. By 1842, most of the Five Civilized Tribes' peoples of the Southeast, the Cherokee, Chickasaw, Choctaw, Creek, and Seminole, had been taken from their prosperous farms and plantations and resettled to government-assigned lands in Oklahoma. The last of the Seminoles of Florida were removed in 1858.

The Cherokee's forced removal dramatized the fate of Indian peoples in the face of U.S. expansion. The tide of U.S. expansion eventually overwhelmed even those tribes with peaceful policies and firmly established economies.

Suggestions for further reading

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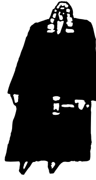

Worcester v. Georgia
1832

Appellant: Samuel A. Worcester

Appellee: State of Georgia

Appellant's Claim: That the state of Georgia had no legal authority to pass laws regulating activities within the boundaries of the Cherokee Nation, a nation recognized through treaties with the United States.

Justices for the Court: Garbriel Duvall, William Johnson, Chief Justice John Marshall, John McLean, Joseph Story, Smith Thompson

Justices Dissenting: Henry Baldwin

Date of Decision: March 3, 1832

Decision: Ruled in favor of Worcester overturning his lower court conviction for living on Cherokee Nation lands without a state of Georgia permit.

Significance: This ruling was the third key decision by Chief Justice John Marshall since 1823 establishing the political standing of Indian tribes within the United States. The ruling recognized the sovereign (politically independent) status of tribes. States did not have jurisdiction to pass laws regulating activities on Indian lands located within their state boundaries. This reaffirmation of tribal sovereignty became the basis for many Court decisions over the next 160 years and eventually helped lead to dramatic Indian economic recovery by the late twentieth century. Despite winning in Court, the Cherokee were still forced from their homeland by the federal government and resettled in Oklahoma.

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After the United States gained independence from Great Britain in the late eighteenth century, landownership issues became an even greater concern. Indian nations, still many and strong, held military supremacy over the new fledgling and economically broke United States. The young nation did inherit from Great Britain several international principles guiding Indian relations. First, tribes have sovereignty, meaning they are politically independent of other nations and free to govern their own internal affairs by their own laws and customs. Secondly, tribes held a pre-existing right to the land they occupied which they could give to others. Third, land could only be exchanged between national governments. Neither private citizens nor state governments could acquire land from tribes.

Congress, Georgia, and the Cherokee

Following the basic international principles of Indian relations, the U.S. Constitution granted exclusive authority to deal with tribes to Congress, not the states. The authority was primarily included in Article 1 of the Constitution which gave Congress sole power to "regulate commerce with . . . the Indian Tribes." Article VI of the Constitution also recognized Indian treaties along with acts of Congress as the "supreme law of the land." Like federal laws, Indian treaties would carry greater weight than state laws. To exercise its authority to regulate activities on Indian lands and to affirm internationally recognized tribal sovereignty, the first U.S. Congress passed the Indian Trade and Intercourse Act in 1790. The act and its basic principles were further affirmed by the Supreme Court ruling in ***Johnson v. McIntosh*** (1823). Consequently, the Indians were considered free and independent nations within their own traditional territories. Although free of U.S. common law, they were subject to congressional oversight.

The state of Georgia during the nation's early years took a hard position on states' rights. Georgia vigorously opposed federal government oversight of state activities. The state equally disliked the Indian presence within its boundaries. Following gold discoveries on Cherokee Nation lands in 1828, a series of laws were passed to antagonize the Cherokee and gain control over them and their lands. One law was titled, "An Act to prevent the exercise of assumed and arbitrary power by all persons, under pretext [claim] of authority from the Cherokee Indians." The act stated that all white persons wishing to live on Cherokee Nation lands must first obtain a license or permit from the state of Georgia and take a state oath. Minimum sentence for violators was four years of hard labor.

Samuel A. Worcester

Samuel Worcester, a Vermont citizen and missionary of the American Board of Commissioners for Foreign Missions, traveled to the Cherokee Nation in the early nineteenth century to pursue his missionary calling. However, soon he and six other white persons were arrested by Georgia officials and physically removed from tribal lands. Worcester was charged "for residing on the 15th of July, 1831, in that part of the Cherokee Nation attached by the laws of the State of Georgia, without license or permit, and without having taken the oath to support and defend the constitution and laws of the state of Georgia." Worcester, in his defense, argued he was preaching the gospel under authority of the President of the United States and with permission of the Cherokee Nation. He also contended that Georgia had no jurisdiction since the United States recognized the Cherokee as a sovereign nation through several treaties. Consequently, he stressed that the Georgia laws regulating activities on Cherokee lands violated the Indian Trade and Intercourse Act and were invalid.

The superior court, disagreeing with Worcester's arguments, found him and the others guilty and sentenced them to four years of hard labor in a prison camp. Worcester appealed his conviction to the U.S. Supreme Court.

A Independent Nation

Chief Justice John Marshall delivered the Court's 6-1 decision. Marshall believed the case raised two important questions. First, legislatures normally have very limited legal powers that extend beyond their established geographic area of jurisdiction. Usually, that power is limited to the actions of their own citizens. Therefore, Georgia's actions amounted to application of jurisdiction over the Cherokee Nation which they did not have. Cherokee lands were not within state jurisdiction and Worcester was not a Georgia citizen.

Secondly, Marshall stressed that the relationship between the federal government and the American Indian nations was inherited from Great Britain following independence by the United States. The several treaties between the United States and the Cherokees affirmed the Cherokee Nation's sovereignty and right to self-government. As a result, the United States and the Cherokee considered the Indian nation to be under the protection of the United States only. The Cherokee was a "distinct commu-

NATIVE AMERICANS

nity occupying its own territory." Because the treaties were recognized in the U.S. Constitution as the supreme law of the land, like acts of Congress, they had greater authority than state laws when they came in conflict. Marshall concluded that Georgia had no legal right to exert control over Cherokee internal affairs and the state law under which Worcester had been prosecuted was void.

Marshall concluded that "Indian nations are distinct political communities, having territorial boundaries, within which their authority is exclusive [total], and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States."

Marshall added that the forcible seizure of Worcester, without the Cherokee's permission or approval of the President of the United States, while he was residing in Cherokee territory violated the U.S. Constitution as well.

Indian Sovereignty

The *Worcester* decision represented the third decision presented by Chief Justice Marshall between 1823 and 1832 establishing the foundation for U.S. Indian law. Known as the Marshall Trilogy, the rulings would influence U.S.-Indian relations for over a century. The cases of *Johnson v. McIntosh,* ***Cherokee Nation v. Georgia,*** and *Worcester* resolved the Indian right of possession to lands they occupied within the European concept of discovery, established the political nature of tribal nations as "domestic dependent nations," and reaffirmed tribal sovereignty to rule its own internal affairs free of state jurisdiction. Tribal regulation of its own activities was limited only by treaties and acts of Congress. The Court recognized Congress' plenary (total) power over tribal rights and activities.

Despite winning their case in court, the Cherokee lost in real life. The federal government pressed to remove the Cherokee which they finally did six years later in one of the more tragic stories in U.S. history.

Through the following 160 years relations between the United States and Indian tribes was to progress through many dramatically different phases. Indian social and economic recovery from disastrous federal policies would not gain momentum until the 1970s with the increased emphasis on tribal self-determination. The self-determination policies gave tribes increasing authority and responsibility to manage

JOHN ROSS

John Ross (1790–1866), though seven-eighths non-Indian by birth and that mostly Scottish, became a long-standing political leader of the Cherokee Nation. Ross was born in present-day Alabama in 1790 and grew up outside native traditions. As a young man, he became a merchant in the present-day Chattanooga, Tennessee area and northwestern Georgia where the Cherokee Nation was centered. In the 1810s Ross became involved in Cherokee political affairs as they established a European form of parliamentary government. By 1828 he was elected principal chief of the Cherokee. The year 1828 is also when gold was discovered in Cherokee country and the state of Georgia stepped up its efforts to remove the Cherokee. The Cherokees became split on how to respond to the mounting pressures for removal. Ross favored resistance. But a Cherokee leader of a smaller group, Major Ridge, signed the 1835 Treaty of New Echota with President Andrew Jackson (1829–1837). The highly unpopular treaty sold all Cherokee lands for $5 million to the United States and agreed to move to lands west of the Mississippi River. Ross tried to cancel the treaty, but without success. In 1838 the Cherokee began their forced, one thousand mile journey under harsh winter conditions. Later known as the Trail of Tears, almost one fourth of the tribe's members died.

Ross continued his prominent role as a Cherokee leader after resettling in Oklahoma. The tribe experienced difficult times adjusting to the new home and loss of many tribal members. Finally, peace within the tribe came in the 1850s only to end with the outbreak of the American Civil War (1861–1865). For still unknown reasons, Ross supported the Confederacy. Following the war, Ross took part in negotiations with the United States leading to an 1866 treaty preserving the Cherokee Nation.

their own internal affairs free from federal oversight. This late twentieth century policy was largely based on *Worcester* and other Marshall decisions almost a century and a half earlier. Numerous Court decisions

throughout the twentieth century would further define the highly unique political status that American Indians hold. The Marshall Trilogy provided the foundation for many of those decisions.

Suggestions for further reading

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Governments need money so they can provide important services to their citizens. Such services can include national defense from foreign threats, police and fire departments, public schools and libraries, health and sanitation systems, roads, and many others. Governments at all levels, including city, state, and federal, charge citizens and businesses for these services through taxes. The raising of funds through taxes is called taxation. Taxes have been raised as long as governments have existed.

In primitive societies, community members supported common services largely through voluntary labor, to build roads and other facilities. In early European history, payment of tribute (forced payments) to leaders, such as feudal lords, for protection was common. With increasing private ownership of property and businesses, taxation was introduced. Taxes assessed by early European monarchies were often harshly, and unequally, imposed. Taxation was a key point of dispute between the United States and Great Britain leading to the American Revolutionary War (1776–1783). Colonists claimed they were being taxed without having any say regarding the taxes forced on them by the mother country. "Taxation Without Representation" began a popular slogan at the time.

Following independence from Great Britain, the nation's Founding Fathers addressed taxation in Article 1 of the U.S. Constitution. Adopted in 1786, the Constitution included the Tax and Spending Clause giving Congress power to "lay and collect Taxes, Duties, Imposts [duties on imported foreign goods], and Excises [taxes on domestic goods], to pay the Debts and provide for the common Defence and general Welfare of the United States." The rise of democratic societies, such as in the United States, required that taxation be more fairly applied in order for taxpayers to cooperate. The growth of trade and commerce led to a more complex taxation system. The change of the U.S. economy in the nineteenth century from agrarian (based on agriculture and farms) to industrial (factories) brought yet new kinds of taxes, and even more complexity including greater difficulty in record keeping and tax collection. Recognizing the importance of taxation to the well-being of the nation, the Court has traditionally interpreted Congress' taxing powers very broadly. Not only does the Tax and Spending Clause give Congress taxation powers, but other parts of the Constitution does also including the Commerce Clause as recognized in the ***Head Money Cases*** (1884) ruling. The Commerce Clause gives Congress power to regulate trade between states and with foreign nations and Indian tribes.

Taxation can take many forms. The federal government relies on import (tariffs), excise taxes, personal income and corporate (business) taxes, and Social Security taxes in addition to other revenues. State governments rely primarily on personal and corporate income taxes, sales taxes, and certain fees, such as hunting and fishing licenses. The property tax is primarily used by local governments. Other taxes include estate, inheritance, and gift taxes.

Federal Government Tariffs

Prior to the American Civil War (1861–1865) funding support for the U.S. government came primarily from tariffs. Tariffs are taxes placed on goods that one nation imports from another. Tariffs date back at least to the 1200s when the European Christian Crusades brought increased trade between Europe and the Middle East. Early tariff agreements were struck between Italian merchants and commercial partners in Asia and Africa. With the discovery in 1492 of New World populations and resources by European powers, foreign trade greatly increased. High tariffs were put in place by European countries.

High tariffs charged by Great Britain on goods exported from the colonies was a major factor leading American colonists to rebel against British domination. Shortly after gaining independence in the American Revolutionary War (1776–1783), Congress passed the Tariff Act of 1783. Tariffs were established to protect the newly emerging American industries and to raise revenue for the government, impoverished from the war effort.

The industrialization period of the nineteenth century led to increased production of goods, particularly in the North. The nation became split over tariff policies. Northern states wanted to raise prices of foreign goods through higher tariff rates to promote sales of their own goods. Southern states sought low tariffs since they still imported much of their goods from Britain. The tariff dispute was one factor besides slavery that led to the American Civil War (1861–1865).

Besides raising revenue for the federal government, tariffs also serve to protect U.S. industries from foreign competition. The tariff taxes increases the price of foreign goods, making U.S. made goods more attractive to buyers. By selling more goods, the tariffs encourage increased production by U.S. firms. The U.S. Constitution prohibits tariffs on exports from the United States to other nations.

Tariffs also can serve political purposes, such as protesting the policies of another nation by increasing the prices of their goods into the country. For example, in the 1990s the United States placed high tariffs on Japanese produced goods because of Japan placing strict limits on the amount of U.S. goods going into their country.

International agreements are often signed between nations setting low tariffs, or maybe even no tariffs at all, on each others goods. The United States maintains special tariff agreements with countries it extends most-favored-nation (MFN) status to. Low, preferential, tariffs may also be applied to underdeveloped nations to assist in their economic development.

In addition to tariffs charged on foreign goods sold in the United States, U.S. citizens also may have to pay duties to the U.S. Customs Service for certain goods purchased.

Excise Taxes

Whereas tariffs deal with foreign made goods, taxes placed on the purchase of domestic goods, goods made within the United States, are called excise taxes. Such taxed items include alcohol, firearms, tobacco, gaso-

line, and diesel fuel. In 2000, the federal tax on gasoline was 18.4 cents per gallon, on truck diesel fuel 24 cents a gallon. States also add taxes that vary from state to state. Revenues from taxes on gasoline and diesel fuel sales are specially directed to road construction projects. For a long time the United States also had a luxury tax applied to such items such as automobiles. However, the tax has been steadily phased out and will end altogether in 2002.

Income Tax

The most commonly known form of tax in modern America is the tax on incomes, both on individuals and corporations. Taxable income can include wages and salaries, rent, interest earned, and corporate earnings.

The personal income tax was first used in the United States during the American Civil War to pay for war expenses. Passed by Congress in 1862, the tax was repealed (canceled) a few years later. In 1894 Congress brought back the income tax on individuals and companies, assessing 2 percent of income. However, the following year the U.S. Supreme Court declared the tax unconstitutional. The Court ruled in ***Pollock v. Farmer's Loan and Trust Company*** (1895) that such a tax would be violating Article I since the revenue gained was not be distributed to services in the states in direct proportion to each state's population as directed by the Article.

Consequently, no national income tax existed until adoption of the Sixteenth Amendment in 1913. The amendment gave Congress authority to levy (collect) taxes on any form of income without the requirement of distributing the funds among the states in proportion to their populations. With its new power, Congress passed the Tariff Act of 1913 creating a tax system for individual and corporate incomes.

Individual, or personal, income taxes are a form of "progressive taxes." The higher a person's income, the higher the percentage of his income is collected for taxes. Therefore, people with higher incomes and a greater ability to pay provide most of the income tax revenue. By the late twentieth century, those with lower incomes paid 15 percent of their income in taxes, the highest incomes paid 40 percent. Corporate income taxes were based on profits and not as progressive as the personal income tax structure.

Social Security and Medicare

In 1935 Congress passed the landmark Social Security Act. The act provides old-age benefits and health insurance, known as Medicare, for people over sixty-five years of age. To fund these government programs, a payroll tax was created. Employers are responsible for paying these taxes instead of the workers. Money is deducted (withheld, subtracted) from an employee's wages before she receives her paycheck. The employers then must equally match that amount of funding from their own funds. The employers pay these taxes directly to the U.S. Treasury. People self-employed (working for themselves) have to pay income, Social Security, and Medicare taxes from their earnings. The tax and spending powers of Congress to withhold money from people's paychecks for retirement benefits was immediately challenged in 1937 after the Social Security Act was passed. The powers were affirmed by the U.S. Supreme Court in ***Helving v. Davis*** (1937).

State and Local Taxes

State and local governments are given authority through the Tenth Amendment to raise revenue in a variety of ways. Under the Tenth Amendment, states can claim powers not specifically reserved for the federal government nor denied to the states. Like the federal government, most states also have income taxes. These taxes are charged at a lower rate than the federal government.

Many state and local governments largely rely on sales taxes. Most goods and services purchased are assessed a certain tax level. Because of the sales tax effect on the poorer citizens, some goods considered essentials, such as food, clothing, and medicine, are exempt from the sales tax or are taxed at a lower rate. Property taxes are also a key means of raising revenue. Land and buildings, such as homes, are taxed a certain percentage based on their assessed (estimated) value. Many local governments rely heavily on property taxes to fund public schools.

Corporations and manufacturers are also assessed business taxes by states and local governments. In addition, various stages of production and distribution of goods can be taxed. These taxes add to the value of the final product and increases the costs paid by the purchasers. Also, companies can be assessed franchise taxes, the cost on the privilege of doing business in the state. Companies must also pay taxes to operate state unemployment compensation programs, government insurance

established by the Social Security Act of 1935 for those who lose their jobs through no fault of their own. The unemployed receive a certain amount of money weekly for a limited period of time.

State and local governments will also charge set fees to professionals for obtaining a license to practice their profession.

Estate, Inheritance, and Gift Taxes

The federal and state governments also assess different kinds of taxes on money and property passing from deceased persons to their heirs. An estate tax is charged for the privilege of transferring property from people who have died to their heirs. It is assessed on the entire estate before it is distributed. The inheritance tax is paid by each heir for the privilege of receiving property from a deceased. A person pays a gift tax if they decide to give a valuable gift to another person.

Collecting Taxes

The Internal Revenue Codes include federal laws directing how the various types of taxes are paid, whether income, business, or estate. The Internal Revenue Service (IRS), first created in 1862, is part of the U.S. Department of Treasury and responsible for collecting federal taxes. It is called Internal Revenue because it collects tax money from sources within the United States. Perceived abuses of the IRS in collecting taxes led to passage of the Taxpayer Bill of Rights in 1988 which was expanded in 1996. Many states passed similar state laws regarding collection of state taxes. The Taxpayer Bill of Rights gives taxpayers greater ability to question IRS findings and to be represented by lawyers or accountants.

Tax Disputes

Considerable debate surrounds the tax systems found in the United States. Fundamental concerns about taxation focus on equality and fairness. The burden of taxation must be imposed as equally as possible on all classes of people. This requirement led to progressive rate income tax systems. Higher rates are charged to people with higher incomes. However, the idea of equality of taxation does not mean that all the people must equally to enjoy the benefits of governments services. For example, couples who do not have schoolchildren still must pay taxes to support local schools.

The U.S. federal tax laws had become incredibly complex by the late twentieth century. The amount of time spent by individuals and corporations to compute and pay taxes was estimated to cost billions of dollars each year. Those supporting tax reform charge that the complexity leads to higher rates of tax avoidance with wealthy individuals and companies taking advantage of numerous legal opportunities to lessen their taxes paid. This is considered unfair to those in the middle and lower income levels with less opportunity to decrease their tax burden. Some want to shift a greater tax burden onto corporations, but others argue that these taxes would generally be passed on to individuals through higher prices for goods and services.

Also, many argue that the income tax which includes a tax on interest gained from savings accounts substantially discourages saving. The United States has the lowest saving rate among the western industrial countries. This situation forces corporations to seek loans outside the country. Many also claim that property taxes discourages home ownership. Reliance on property taxes also means wealthier communities have better schools and better government services.

A major push for tax reform forced consideration of alternative means of taxing. One alternative was the flat-rate tax system which would greatly simply the process. All citizens would pay taxes at a set rate and corporations would pay at a lower rate. However, opponents to the flat-tax claimed this alternative would potentially shift a larger tax burden onto the lower income population. Another alternative would be replacing the federal income tax with a national sales tax. This system could encourage saving but again place a greater burden on lower income citizens.

Tax Court System

Article I of the Constitution also gave Congress authority to establish a tax court system. The U.S. Tax Court was originally established by the Revenue Act of 1924. State and federal tax courts deal solely with tax disputes. Such disputes typically involve arguments over the assessment of property values or tax status of certain organizations. Decisions of the tax courts may be appealed to the U.S. courts of appeals and the U.S. Supreme Court.

Tax evasion is a criminal offense under federal and state laws. Prison sentences and fines may be imposed on those convicted. In order

to gain criminal conviction, a deliberate attempt to illegally avoid paying taxes must be proven as ruled by the Supreme Court in *Spies v. United States* (1943). The decision in *Sansone v. United States* (1969) set further standards for proving criminal conduct.

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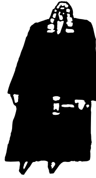

Head Money Cases 1884

Appellants: Edye & Another, Cunard Steamship Company

Appellee: W. H. Robertson

Appellants' Claim: That the Immigration Act of 1882 establishing a tax on immigrants entering the nation was unconstitutional.

Chief Lawyer for Appellants: Edwards Pierrepoint, Phillip J. Joachimsen, George DeForest Lord Chief Lawyer for

Appellee: Samuel Field Phillips, U.S. Solicitor General

Justices for the Court: Samuel Blatchford, Jospeh P. Bradley, Stephen J. Field, Horace Gray, John Marshall Harlan I, Stanley Matthews, Samuel F. Miller, Chief Justice Morrison R. Waite, William B. Woods

Justices Dissenting: None

Date of Decision: December 8, 1884

Decision: Ruled in favor of the Robertson and the United States by finding that Congress had authority to tax immigrant entry through its power to regulate commerce.

Significance: The decision supported Congress' power to regulate immigration into the country. It also recognized that Congress not only had power to tax through the Tax and Spending Clause of Article I of the U.S. Constitution, but also through the Commerce Clause as well. Congress passed numerous other laws regulating immigration through the following century.

TAXATION

Immigration is the act of people coming to live in a foreign country. Often the term is confused with emigration which refers to people leaving their own country to live in another. Immigration to the United States has increased and declined in various time periods since the early colonists to the New World in the seventeenth century.

Through the nineteenth century until the 1930s the world experienced extensive immigration of peoples from one country to another. Over half of those immigrants came to the United States. Though many reasons spurred people to immigrate to a new country, searching for better jobs and economic opportunity was most common.

Through much of the nineteenth century, the U.S. government made little effort to regulate immigration as the California gold rush of 1849 attracted many Chinese laborers. Neither passports nor visas were required. Though immigration had long been central to American settlement, concern over it grew through the 1850s. Immigrants served as a source of inexpensive labor and it was believed took jobs away from U.S. citizens. Also, many immigrants did not readily blend into U.S. society causing considerable suspicion and fear among the general public. Although an economic depression in the United States in the 1870s greatly slowed immigration, Congress passed it first immigration law in 1875 barring entry to convicts and prostitutes.

With improving economic conditions by 1880, America once again became attractive. Immigration increased dramatically as did public concerns over the effects of immigration. Due to a shortage of farmland and increasing poverty in northwestern Europe, the new wave of immigration included many citizens of Denmark, Norway, and Sweden.

Responding to public pressure, Congress began passing more measures in 1882 to regulate immigration. One bill, the Chinese Exclusion Act, prohibited Chinese laborers from entering the country. On August 3, 1882, Congress passed another bill, the Immigration Act. The act read,

> **That there shall be levied, collected and paid a duty of fifty cents for each and every passenger, not a citizen of the United States, who shall come by steam or sail vessel from a foreign port to any port within the United States.**

The purpose of the tax, known as "head money," was to establish "a fund to be called the Immigrant Fund . . . to defray the expenses of regulating immigration under this Act and for the care of immigrants . . . for the relief of such as are in distress."

IMMIGRATION REGULATION TODAY

As of 1998, immigration regulation is governed by the Immigration Act of 1990, also known as IMMACT. IMMACT established a limit of six hundred seventy-five thousand immigrant that will be allowed to move into the United States each year. This limit does not include people who are seeking refuge, asylum, or people who want to come into the United States for other humanitarian-based reasons. There also are no limits for immigrants who are spouses, minor children, or parents of people who are already U.S. citizens.

Under IMMACT, one hundred forty thousand of the total annual admissions may be for employment-based reasons. The act favors the admission of immigrants who are professionals and investors, and places an annual limit of ten thousand on admission of lesser-skilled persons.

IMMACT also has a diversity component that reserves fifty-five thousand annual admissions for immigrants from countries that traditionally do not have strong family or job ties to the United States. Each diversity-based immigrant must have a high school degree or its equivalent, or two years of experience in an occupation requiring two years of training.

Immigrants who enter the United States by commercial aircraft or vessel pay a six dollar fee when their ticket for travel is issued. The U.S. Immigration and Naturalization Service enforces the immigration laws and manages the various admissions.

The Dutch Steamer Leerdam

Two months later, on October 2, 1882, the Dutch steamship *Leerdam* arrived in New York Harbor from Rotterdam, Holland. The ship contained 382 immigrants who planned to settle in the United States. The company of Funch, Edye & Co. which was responsible for the ship in the United States was charged $191 head money on October 12th by William H. Robertson, the customs collector for the port of New York. The com-

TAXATION

pany paid the tax so they could enter the harbor, but within a few days appealed the fee to the Secretary of Treasury. The Secretary denied their appeal. Funch next filed a lawsuit U.S. Circuit Court against Robertson claiming the charge was unconstitutional. The court ruled in favor of the customs collection.

When appealed to the U.S. Supreme Court, the lawsuit was combined with two other similar cases and titled *Head Money Cases.* The shipping companies raised three arguments in their case. First, Congress exceeded its constitutional powers by regulating immigration with an immigrants' entry tax. Article I of the Constitution stated that *Congress shall have the power to lay and collect taxes, duties, . . . and excises, to pay the debts and provide for the common defense and the general welfare of the United States; but all duties . . . and excises shall be uniform throughout the United States.* The companies argued the head tax was not for general welfare and common defense, therefore Article I did not support a head tax. Besides, immigration, the companies argued, is not a business. The United States did not argue the Article I challenge, for it was the Commerce Clause giving Congress power to regulate trade that was used to pass the act. The Commerce Clause, also located in Article I

As new immigrants entered into the United States they had to be given a thorough health screening including shots to ensure they weren't bringing illness and disease into the country. Courtesy of the Library of Congress.

of the U.S. Constitution, gives Congress the power "to regulate Commerce with foreign Nations and among the . . . states." Commerce refers to producing, selling, and transporting goods.

Secondly, the companies argued the tax was applied only at ports where immigrants entered the country. As Article I stated, all taxes levied by Congress must be uniformly applied. Therefore, the tax was unconstitutional because it did not apply to all ports.

Thirdly, the Immigration Act was illegal because it conflicted with existing international treaties between the United States and other nations which permitted immigration. They claimed the tax inhibited immigration.

The Business of Immigration

The Court ruled unanimously, 9–0, in favor of the United States. Justice Samuel F. Miller, writing for the Court, stated that Congress clearly had authority to regulate immigration. Since the Court had ruled in a previous case that states do not have that power, then the federal government must. Miller wrote that it would be unthinkable "that the ships of all nations . . . can, without restraint or regulation, deposit here . . . the entire European population of criminals, paupers, and diseased persons, without making any provision to preserve them from starvation . . . even for the first few days after they had left the vessel." Miller also found that indeed immigration was a business and a very profitable one at that. Consequently, it was not unreasonable to expect those profiting from immigration to bear some of the burden in helping those immigrants who were poor and protecting U.S. states and cities from an excessive financial burden.

Secondly, Miller asserted that the tax was uniformly applied since "it operates with the same force and effect in every place where [immigration] . . . is found." The main concern would be that all ships carrying immigrants was taxed the same way and Miller found that to be the situation.

Lastly, Miller could not see where any treaty had been violated since no foreign country had complained. Besides, Congress had the power to change treaties if it so desired anyway, much like changing its own laws. Miller concluded that the purpose of the act "is humane, is highly beneficial to the poor and helpless immigrants and is essential to the protection of the people in whose midst they are deposited by the steamships." The immigrant tax act was upheld.

IMMIGRATION REGULATION OF THE 1990S

Congress repeatedly exercised its constitutional powers as recognized in *Head Money Cases* to regulate immigration. The Immigration Act of 1990, known as IMMACT, regulated immigration into the United States through the 1990s. The act was administered by the U.S. Immigration and Naturalization Service. IMMACT set a limit of 675,000 immigrant entries per year. The IMMACT limit did not apply to refugees, those seeking political asylum, or other humanitarian admissions, or to spouses, minor children, and parents of U.S. citizens. IMMACT set a limit of 140,000 per year for employment reasons. Various categories of workers were included in the limits, favoring more professionals. Only 10,000 of the 140,000 could be lesser-skilled workers. IMMACT also distinguished among countries from which the immigrants are leaving. Striving for diversity in America, a total of 55,000 admissions were reserved for immigrants from countries that do not traditionally enter the country. Such immigrants had to have high school or equivalent education or two years of experience in an occupation requiring two years of training. "Head money" is still applied in the form of a six dollar fee added to tickets for immigrant travel by commercial airlines or boat.

Immigration Restrictions Continue

From 1881 to 1920, over twenty-three million immigrants came to America from throughout the world. The population of the United States in 1880 was slightly over fifty million. By 1900 the U.S. population had grown by 50 percent to almost 76 million with immigration being a major contributor to the dramatic increase. Given support by the Supreme Court in *Head Money Cases,* regulation of immigration remained a hot issue before Congress throughout the twentieth century.

Until the mid-1890s most immigrants had arrived in the United

States from northern and western Europe. With a major shift then to southern and eastern Europe as a key source, the new immigrants less readily blended into American society. Public concern over immigration escalated again. Quota laws (placing number limits) were passed in the early twentieth century favoring immigration from northern and western Europe. Another wave of immigration came again during the latter part of the twentieth century with many arriving from Asia.

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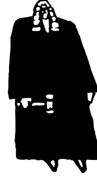

Pollock v. Farmers' Loan & Trust Company 1895

Appellant: Charles Pollock

Appellee: Farmers' Loan & Trust Company

Appellant's Claim: That the Income Tax Act of 1894 violated the tax powers of Congress as provided in Article I of the U.S. Constitution.

Chief Lawyers for Appellant: William D. Guthrie, Clarence A. Seward, Joseph H. Choate

Chief Lawyers for Appellee: Herbert B. Turner, James C. Carter

Justices for the Court: David Josiah Brewer, Henry Billings Brown, Stephen Johnson Field, Chief Justice Melville Weston Fuller

Justices Dissenting: Horace Gray, John Marshall Harlan I, George Shiras, Jr., Edward Douglas White (Howell Edmunds Jackson did not participate)

Date of Decision: May 20 1895

Decision: Ruled in favor of Pollock by finding the general income tax provision of the act unconstitutional.

Significance: After striking down the income tax law, the income tax issue did not fade. Demand for a constitutional amendment grew to give Congress power to levy an income tax. Eighteen years later the Sixteenth Amendment was adopted authorizing Congress to impose income taxes without the taxing restrictions originally written in the Constitution.

During the latter decades of the nineteenth century, the U.S. economy was completing its transition to a more industrialized society. Big business, run by a few elite industrialist leaders, was gaining control of the nation's economy which had earlier been based largely on farming and agriculture earlier. An agrarian reform movement grew in the 1870s and 1880s for the purpose of defending the interests of farmers from the potential economic threats of big business. During the 1890s the agrarian (farming) movement gave way to a broader political reform movement called Populism. The movement included not only farmers, but workers, small business owners and anyone else subject to economic policies of big business.

A key goal of the Populists was passage of an income tax which would place a greater burden on the wealthy to finance government services. An income tax is a charge applied to the money made by individuals and corporations coming from business, investments, real estate earnings, and other sources. A national income tax had existed earlier, created in 1862 to raise revenue to pay expenses of the American Civil War (1861–1865). But, it was repealed in 1872.

With a national economic crisis in 1893 declining government revenues made adoption of an income tax system more attractive to a broader population. The following year, Congress passed the Income Tax (Wilson-Gorman Tariff) Act of 1894, establishing the first peacetime income tax. A two percent tax was placed on incomes over $4,000, which actually affected only about two percent of the wage earners in the nation. The tax was not well received by the wealthier citizens.

Charles Pollock

The Farmers' Loan & Trust Company was an investment bank that bought stocks and bonds and properties. Under the new law, it had to pay an income tax on its profits, including income gained from real estate and New York City bonds. In reaction to the newly passed income tax, Charles Pollock, a Massachusetts investor who owned shares in the company, devised a plan to legally challenge the tax act. With full cooperation of Farmers' Loan and on behalf of the other company stockholders, Pollock filed a lawsuit in a New York federal district court against the company to prevent it from paying the tax. Pollock charged the tax act violated the Tax and Spending Clause of Article I of the Constitution. Congress was exceeding its limited constitutional tax powers.

Though the district court ruled against him, it did allow Pollock to appeal the decision directly to the U.S. Supreme Court. In recognition of the importance of the issue concerning the constitutionality of a national income tax, the Supreme Court accepted the case but with two exceptions to normal Court procedures. First, the Court did not normally accept cases in which both parties were agreeable to the suit. Secondly, the Court allowed the U.S. attorney general to argue the case for Farmers' Loan even though the U.S. government was not named in the suit.

A Major Public Concern

With great public fanfare, case arguments began on March 7, 1895. Only eight justices were present with Justice Howell E. Jackson away ill with tuberculosis. The Court's gallery was overflowing with interested observers and major newspapers closely followed the proceedings. Pollock's lead attorney, Joseph Hodges Choate, had considerable flair and passion in presenting a convincing argument to the justices.

Choate presented three arguments to the Court. First, the income tax was applied to profits from state and municipal bonds. This, he claimed, intruded on constitutionally recognized state powers and their ability to raise revenues.

Secondly, Choate claimed tax on profits from real estate was a "direct tax." Direct taxes are taxes levied by government directly on property, including personal income. The amount of tax is determined by the financial worth of the property. In contrast, indirect taxes by government are applied to certain rights or privileges, such as sales taxes, customs duties, and license fees. They are usually set fees. According to the Tax and Spending Clause of Article I of Constitution, all revenue from direct taxes must be divided among the states in proportion to their populations. The more population a state has, the more federal tax revenue it receives to provide public services. The distribution of revenue from indirect taxes was less restricted. The tax system established by the act did not intend to distribute the revenue back to the states proportionally as directed in Article I.

Thirdly, Article I required that direct taxes must be uniformly applied to all individuals and businesses and this tax was not. Choate claimed the tax was unfair and a threat to traditional American values by taxing people differently. Because the tax in effect would redistribute the nation's wealth

by taxing the rich, Choate exclaimed the tax was " . . . communistic in it purposes and tendencies, and is defended here upon principles as communistic, socialistic — what I should call them — populistic as ever have been addressed to any political assembly in the world."

The Court agreed with Pollock and Choate that the tax indeed infringed on states by taxing state bonds. Also, the Court agreed that the tax on real estate earnings was direct. It was essentially a tax on the land itself. Therefore, it was subject to the Article I limitations. The eight justices were split, 4-4, however over the question of uniformity and whether a tax on income from personal property was direct or not. The Court ignored its earlier ruling in *Springer v. United States* (1881) that the income tax collected during the Civil War was indirect, hence not subject to the limitations in Article I. Because of the importance of the decision and lack of a decisive ruling by the Court, Chief Justice Melville W. Fuller requested a rehearing of the case.

Back to Court

Arguments were presented again on May 6, 1895. A decision resulted two weeks later. Chief Justice Fuller again presented the Courts opinion from a 5-4 decision. Fuller clearly expressed his economically conservative views in denouncing the tax as unconstitutional. He reaffirmed the previous decision regarding the tax on land as direct, and added that the tax on personal property was also a direct tax. Since taxes on land and personal property were the main taxes in the bill, he struck down the entire act. Fuller asserted that such a tax "would leave the burden of the tax to be borne by professions, trades, employment, or vocations; in that way . . . a tax on occupations and labor."

In reversing the earlier district court ruling, the Court ruled the tax act void and sent the case back to district court for final resolution.

The four justices objecting to the decision wrote separate dissenting opinions. The harshest came from Justice John Marshall Harlan. The *New York Times* reported that Harlan gestured wildly at Fuller with "thinly disguised sneers." Harlan aggressiveness, including pounding on the desk, shocked many of the lawyers present in the courtroom. Harlan emphasized that the Court's ruling placed most Americans at a disadvantage with the wealthy. Harlan stated that,

> **undue and disproportioned burdens are placed upon the many, while the few, safely entrenched**

JOHN MARSHALL HARLAN I

John Marshall Harlan, born on June 1, 1833 to a wealthy and prominent family in Boyle County, Kentucky, was named for the great chief justice of the U.S. Supreme Court, John Marshall (1801–1835). Harlan's father was a lawyer and politician, serving as U.S. congressman and state attorney general. Harlan received a college degree from Centre College in 1850 and studied law from 1851 to 1853 at Transylvania University. With solid family connections, Harlan quickly assumed governmental positions including county judge in Franklin County, Kentucky in 1858, and attorney general of Kentucky from 1863 to 1867.

An active member of the Republican Party, Harlan worked for Rutherford B. Hayes (1877–1881) in his successful bid for U.S. president in 1876. As a reward for his political efforts, Harlan was appointed by Hayes to the U.S. Supreme Court in October of 1877. Harlan became known as the Great Dissenter opposing several important decisions during his thirty-four years on the Court. Besides his emotional opposition to the decision in *Pollock v. Farmers' Loan & Trust Company* (1895), Harlan's eloquent dissent the following year in ***Plessy v. Ferguson*** (1896) as the only justice opposing the Court's decision supporting state required racial segregation was supported almost sixty years later in the landmark decision of ***Brown v. Board of Education***. Harlan served until his death on October 14, 1911. His grandson, John Marshall Harlan II, also served on the Supreme Court, from 1955 to 1971.

behind the rule of [Article I] . . . are permitted to evade their share of the responsibility for the support of government ordained for the protection of the rights of all. I cannot assent to an interpretation of the Constitution that . . . cripples . . . the national government in the essential matter of taxation, and at the same time discriminates against the greater part of the people of our country.

An Unpopular Decision

The Court's ruling was not well received by the public. Some legal scholars disagreed with the decision. Taxation remained a controversial political issue, even becoming a topic for the next presidential race. Many recognized that the Constitution needed amending to permit a federal income tax without the requirement dividing revenue among the states proportionately to their individual populations. After eighteen more years of debate, the Sixteenth Amendment to the Constitution was adopted in 1913 giving Congress power to tax income without the distribution requirement to the states. The first revenue gained from income taxes came in 1916. The continued goal of the income tax continued to be a fair distribution of the tax burden among all citizens raising revenue for government.

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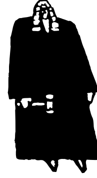

Helvering v. Davis 1937

Petitioner: Guy T. Helvering, U.S. Commissioner of Internal Revenue

Respondent: George P. Davis

Petitioner's Claim: That the Social Security Act of 1935 authorizing payroll taxes to fund a national old-age benefits program neither violates the Tax and Spending Clause of the Constitution nor takes away from powers reserved to the states in the Tenth Amendment.

Chief Lawyer for Petitioner: Homer S. Cummings, U.S. Attorney General

Chief Lawyer for Respondent: Edward F. McClennan

Justices for the Court: Louis D. Brandeis, Benjamin N. Cardozo, Chief Justice Charles Evans Hughes, Owen Josephus Roberts, Harlan Fiske Stone, George Sutherland, Willis Van Devanter

Justices Dissenting: Pierce Butler, James Clark McReynolds

Date of Decision: May 24, 1937

Decision: Ruled in favor of Helvering and the United States by finding that Congress has constitutional powers to establish a Social Security program for the aged.

Significance: In upholding the constitutionality of the Social Security Act, the Supreme Court signaled a major shift by supporting President Franklin D. Roosevelt's New Deal programs. The act introduced a new era in American history by establishing a responsibility of society to care for the aged, unemployed, impoverished, and disabled.

"By 1932, the unemployed numbered upward of thirteen million. Many lived in the primitive conditions of a preindustrial society stricken by famine. In the coal fields of West Virginia and Kentucky, evicted families shivered in tents in midwinter; children went barefoot. In Los Angeles, people whose gas and electricity had been turned off were reduced to cooking over wood fires in back lots . . . At least a million, perhaps as many as two million were wandering the country in a fruitless quest for work or adventure or just a sense of movement." From *Franklin Roosevelt and the New Deal:1932-1940* (1963) by William E. Leuchtenburg, New York: HarperCollins.

A New Deal

The Great Depression, beginning with the U.S. stock market crash in October of 1929, was a worldwide business slump leading to the highest unemployment in modern times. With stores, banks, and factories shut down, millions of Americans became jobless and broke. The substantial economic hardships on American citizens through the following years extended to those too old to work.

In 1932 with the economy continuing to suffer, the nation elected Franklin D. Roosevelt (1933–1945) president. To address the nation's economic plight, Roosevelt soon introduced an ambitious program for social and economic reform that became known as the New Deal. Central to reform was the substantially increased federal government role in the country's internal affairs at home.

However, progress toward carrying out the programs was slow. The Supreme Court repeatedly declared unconstitutional (did not follow the intent of the Constitution) the legislation passed to create federal relief programs. The Court ruled the measures exceeded Congress' constitutional authority. Much to Roosevelt's frustration, most of the Supreme Court justices held conservative views on federal government power and were not favorable to the proposed reforms. Reorganizing his efforts in 1935, Roosevelt unveiled a renewed long-term New Deal plan that included social security. A key to the reform was passage of the Social Security Act of 1935. Designed to bring greater economic stability to the population, Title II of the act created an old age benefits program. Title VIII established a way to fund the program by requiring companies to withhold a certain amount of money from employees' paychecks. That money, matched with an equal amount from the employer, would be paid

to the U.S. Treasury and placed in a national trust fund. The fund would then provide monthly benefits to retired workers over the age of sixty-five if they had worked and paid taxes into the program. The act was primarily aimed at industry with Title VIII exempting certain types of employees, such as agricultural workers, from the program.

Bolstered by winning reelection in 1936, President Roosevelt focused attention on reorganizing the Supreme Court to get more favorable rulings on his programs. Under political pressure some justices in disfavor with the President and public chose to retire while others altered their views on Roosevelt's reform programs.

George P. Davis

George P. Davis was a shareholder for the Edison Electric Illuminating Company of Boston, an electrical power company. When Edison began to deduct money from its employees' wages to comply with the newly passed Social Security Act, Davis filed a lawsuit in the U.S. District Court for the District of Massachusetts against the company. Davis claimed "old age benefits [was] not a purpose for which the Congress has power to tax." He sought "to restrain the corporation from making the payments, and deductions from wages." Davis stated, "The deductions from the wages of the employees will produce unrest among them and will be followed . . . by demands that wages be increased . . . The corporation and its shareholders will suffer irreparable loss, and many thousands of dollars will be subtracted from the value of the shares."

The district court permitted Guy T. Helvering, commissioner of the U.S. Internal Revenue Service (IRS), to intervene (come in to represent) in the suit representing Edison Electric. The district court dismissed Davis' lawsuit. He appealed to the U.S. First Circuit Court of Appeals which ruled in his favor by holding that Title II was an invasion of state reserved powers. Helvering appealed the appeals court decision to the U.S. Supreme Court which agreed to hear the case.

Social Security Secured

Davis argued before the Supreme Court that the Social Security Act inappropriately expanded Congress' power to tax under the Taxing and Spending Clause of Article I of the U.S. Constitution. The clause states, that Congress has power to "lay and collect Taxes, Duties, Imposts

[duties on imported foreign goods], and Excises [taxes on domestic goods], to pay the Debts and provide for the common Defence and general Welfare of the United States." More specifically, Davis charged the act violated the Tenth Amendment which grants powers to the states not specifically reserved to the U.S. government. Providing for social security was such a state power, he contended.

Justice Benjamin N. Cordozo wrote the opinion for the Court in a 7-2 decision. Cordozo stressed that monies spent on the general welfare of the nation's population was indeed the responsibility of the federal government, not state governments. He stated that the severe economic depression of the 1930s was "plainly national" requiring a nationwide solution. Cordozo wrote, "the ill is . . . not greatly different whether men are thrown out of work because there is no longer work to do or because the disabilities of age make them incapable of doing it." Cordozo concluded that the "laws of the separate states cannot deal with it effectively . . . States and local governments are often lacking in the resources that are necessary to finance an adequate program of security for the aged."

The old age benefits program provided by the Social Security Act was indeed constitutionally valid. Cordozo wrote, "Congress may spend money in aid of the 'general welfare.'" In addition, the tax on employers "is an excise tax and thus within the power conferred upon [given to] Congress by . . . the Constitution."

The New Deal Lives

At the time the Court delivered the *Helvering* decision, it also announced a decision in *Steward Machine Co. v. Davis* which challenged another section of the Social Security Act involving unemployment benefits. The two decisions were vital to Roosevelt's programs designed to put America back to work and protect those most affected by the depression. However, it took the demands of World War II (1939–1945) for industrial production of war materials that to ultimately bring the Depression to a close. Though always controversial, the Social Security Act became a major lasting part of U.S. domestic policy.

Days before the *Helvering* decision was presented, Justice Willis Van Devanter, one of the politically conservative justices opposing Roosevelt's programs announced his retirement. Roosevelt was free to select a new justice more supportive of his programs.

THE NEED TO SECURE SOCIETY

Continued expansion of the Industrial Revolution during the nineteenth century brought many basic changes to home life. No longer did the typical family work together on a farm with relatives and other closely associated families. Instead of living in small farming communities, many families moved to newly established industry centers seeking a better life. Fathers would go off to the factories for long work days leaving the wife to raise the children and take care of the home. Fewer economic "safety nets" existed for workers who grew too old to be as productive or if a sudden traumatic event occurred such as death or disability of the breadwinner. The need for social security programs grew to aid such distressed families and provide a more stable society in the industrial workforce. Germany, the first industrial country to establish such a social security program in the 1880s, required sickness and old age insurance. Similar plans were introduced through the few decades in other European and some Latin American countries.

In the United States, "beneficial associations" grew composed of workers joining together to provide sickness, old age benefit, and funeral insurance. With the crash of the stock market in 1929 and prolonged decline of the economy, President Franklin D. Roosevelt included the Social Security Act as a key element of his social and economic reforms. In the 1950s Social Security was expanded to include farmers and those self-employed. Health insurance benefits, known as Medicare, were added in 1965 as well as federally-assisted state unemployment compensation programs.

By the 1990s fears mounted over the future of the Social Security with estimates it would eventually go broke. The president and Congress both worked toward solutions to the problem. The program had become a major part of modern life in America with 90 percent of all workers covered by Social Security in 1997 and 42 million receiving benefits.

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