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# Executive Pardon of Direct Contempt of Court

James Parker Hall

*Beatrice Creamery Company* v. *Cline*[1] reads: "Colorado Anti-trust Act, prohibiting all combinations to fix prices of commodities or to otherwise restrict trade or commerce, held violative of Const. U. S. Amend. 14, in view of Colorado Co-operative Marketing Act, exempting nonprofit agricultural associations marketing agricultural products from its application."

This doctrine is novel and somewhat startling, and we are inclined to think that the judicial Jupiter must have nodded. It is that a comprehensive anti-trust or other regulatory statute will be rendered unconstitutional if an attempt is afterwards made to authorize a combination in restraint of trade in some particular commodity or in some branch of trade which otherwise would have been prohibited by the general act, and even though the second act does not in terms amend or re-enact the prior statute but merely states that such statute shall not be applicable to it. By analogy a statute which provides that all high school graduates shall have the privilege of attending the state university will become unconstitutional if it is afterwards followed by an independent but obviously unconstitutional enactment that red-headed persons shall be denied the privilege.

Unless the Supreme Court of the United States shall disaffirm its prior holdings and come to recognize a valid distinction between a combination of primary producers and a combination of manufacturers or middlemen, which perhaps it may do at no distant date, we have no doubt of the invalidity of the second Colorado statute.[2] We are not able to believe, however, that the invalidity of this second and independent act would or should affect the prior enactment.

Each act, we believe, should be allowed to stand upon its own foundations. The latter should be declared void but the former should be left untainted. Otherwise we must keep our legislators under lock and key, lest in their desire to enact new legislation and to meet the needs of to-day, they may unwittingly render invalid all of the legislation of the past and all that our ancestors have done for us.

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1. 9 Fed. (2d) 176.
2. *Connolly* v. *Union Sewer Pipe Co.* 184 U. S. 540.

CONSTITUTIONAL LAW—SEPARATION OF POWERS—PARDON BY GOVERNOR OF DIRECT CONTEMPT OF COURT.—[New Mexico] The doctrine laid down by Chief Justice Taft in the *Grossman* case[1] last year has just been carried to its logical extreme by the New Mexico Supreme Court, holding that the governor may pardon a defendant committed to jail by a judge for direct contempt effected by words uttered in court and addressed directly to the judge while on the bench.[2] What was actually said by the defendant and the judge is

1. (1925) 267 U. S. 87.
2. Ex parte, *Magee* (1925 N. Mex.) 242 Pac. 332.

not repeated in the opinion of the court, but the curious may find what purports to be verbatim account of the episode in the *New Republic* for August 20, 1924, page 353ff. The court refers to the local situation in the following language:

"It is said in the briefs that no case is to be found in the books wherein it has been decided that a direct contempt may be pardoned. From this fact it is sought to be argued that the power does not exist in such cases. We deem the argument faulty. In the first place, that no such case is to be found may be accounted for by the fact that no such circumstances have heretofore existed, either in the mental attitude of the Governor or the judge concerned in such a transaction."

The court adopts *in toto* the reasoning of Chief Justice Taft in the *Grossman* case, which is indeed so persuasive that it is likely to command general assent in all subsequent cases of like tenor arising in the United States.[3]

JAMES PARKER HALL.

CONSTITUTIONAL LAW—STATE HIGHWAYS—AUTOMOBILES—RIGHT OF STATE TO REGULATE USE OF HIGHWAYS BY PRIVATE CARRIERS FOR HIRE.—[United States] The case of *Frost* et al. v. *Railroad Commission of State of California*[1] is an example of the tendency of the Supreme Court of the United States, especially apparent since the appointment of Justices Sutherland and Butler, more and more to extend the scope of federal governmental control and to use the fourteenth amendment and the interstate commerce clause of the Constitution as a means for centralizing business control under a federal judicial rule of reason. It evidences a policy against which a minority of the court has frequently protested, and concerning which Mr. Justice Holmes once said:

"There is nothing that I more deprecate than the use of the fourteenth amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect. The fourteenth amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike."

In the case under consideration the Supreme Court of the United States holds invalid a statute of the state of California which requires intrastate private carriers for hire who carry on their business by the use of automobiles upon the public highways to obtain a certificate of necessity and public convenience from the state railway commission and to submit to the regulations of that commission both as to the conduct of their business and the amount of their fees and charges. All of the members of the court seem to concede that, if it were limited to common carriers only,

3. See comments upon the *Grossman* case in (1924) ILL. LAW REV. XIX:176; (1925) ID. XX:165.

1. 46 Sup. Ct. Rep. 604.