1986

The Constitution in the Supreme Court: 1921-1930

David P. Currie

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The selection of William Howard Taft to succeed Edward D. White as Chief Justice in 1921 was followed by three additional appointments in the next two years: George Sutherland, Pierce Butler, and Edward T. Sanford replaced William R. Day, Mahlon Pitney, and John H. Clarke. The upshot was something of a reign of terror for state and federal legislation.¹

White himself had been no great supporter of progressive legislation, and neither Day nor Pitney was in later terms a flaming liberal. The last two, however, had frequently voted with Holmes, Brandeis, and Clarke to sustain social legislation against due process attacks. Sutherland, Butler, and Sanford, like Taft, tended to cast their lot with Van Devanter, McReynolds, and McKenna, who had been frequent dissenters in substantive due process cases before 1921; thus a vocal minority became a solid majority within a two-year period. The replacement of McKenna by Harlan F. Stone in 1925 merely increased the number of regular dissenters from two to three.²

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¹ See Brown, Due Process of Law, Police Power, and the Supreme Court, 40 Harv. L. Rev. 943, 944 (1927) ("[I]n the six years since 1920 the Supreme Court has declared social and economic legislation unconstitutional under the due process clauses of either the Fifth or the Fourteenth Amendment in more cases than in the entire fifty-two previous years . . . .").

² Justices of the Supreme Court during the Chief Justiceship of William Howard Taft

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During the Taft years, the Court not only wielded due process with unprecedented ferocity to annihilate social measures but extended it to new fields as well, forbidding the outlawing of foreign languages and of private schools in *Meyer v. Nebraska* and *Pierce v. Society of Sisters*. The Court assumed in *Gitlow v. New York* and in *Whitney v. California*, and may have held in *Fiske v. Kansas* that due process protected freedom of expression or assembly as well, but continued to construe those freedoms narrowly over famous objections by Holmes and Brandeis. The taking clause of the fifth amendment—which the Court had long held applicable to the states by virtue of the fourteenth amendment—was given new content by none other than the normally restrained Holmes in *Pennsylvania Coal Co. v. Mahon*. And federal cases arising largely out of Prohibition began to develop the contours of fourth amendment search and seizure law.

In matters of federalism, the record of the Taft period is mixed. One of the Chief Justice's first opinions departed strikingly from the direction of earlier tax cases by invalidating a federal tax on goods made by child labor, and in another decision the Court held that baseball was not interstate commerce under the Sherman Act. At the same time, however, the Court not only gave a broad reading to congressional authority to enforce the prohibition amendment, but reaffirmed Holmes's conclusion that stockyards were part of the current of commerce, and seemed to recede from *Hammer v. Dagenhart* by permitting Congress to forbid interstate transportation of stolen cars. Justice McReynolds's pet doctrine limiting the maritime application of state laws underwent an interesting modification, while Justice Stone contributed new insights into the recurring problems of commercial and governmental immunities.

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With the possible exception of the due process revolution, the most interesting product of the Taft years was a series of major decisions respecting the separation of federal powers. The case-or-controversy limitation that had been applied in *Muskrat v. United States* was elaborated in *Tutun v. United States*, *Massachusetts v. Mellon*, *Keller v. Potomac Electric Co.*, and a variety of decisions respecting ripeness and declaratory judgments. Judicial independence received a setback when *Ex parte Bakelite Corp.* concluded that the Court of Customs Appeals had been established without regard to article III. The great case of *Myers v. United States* resolved an ancient controversy in upholding the President's authority to fire a subordinate despite a statutory requirement of Senate consent. *Springer v. Philippine Islands*, construing the act setting up a local government, implied important constitutional limitations on legislative powers of appointment. *J.W. Hampton Co. v. United States* upheld yet another broad delegation of discretion to the President. The *Pocket Veto Case* gave a liberal interpretation to the President's power to avoid the overriding of a veto, and *McGrain v. Daugherty* legitimatized the legislative investigation.

It was an exciting time. Let us get directly to the particulars.

### I. Liberty, Property, and Equality

#### A. Constricting the Social State.

1. **Equal Protection.** The equal protection clause had played little part in controlling state action before 1921. Not only had the separate-but-equal doctrine—which the Taft Court unanimously reaffirmed—limited the reach of the clause even in the racial field, but in other areas the

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10. 219 U.S. 346 (1911).
11. 270 U.S. 568 (1926).
15. 272 U.S. 52 (1926).
17. 276 U.S. 394 (1928).
18. 279 U.S. 655 (1929).
21. See Gong Lum v. Rice, 275 U.S. 78 (1927) (Taft, C.J.) (upholding state authority to exclude child of Chinese extraction from “white” school because “equal” facilities were provided for non-
Court had made clear that equality required only that persons similarly situated be treated alike. Reasonable classifications were permissible; only when the Court could find no justification beyond what Cass Sunstein has called a “naked preference” would the clause be invoked. The test, moreover, was a deferential one. An ordinance excluding locomotives from a single street, for example, was upheld on the ground that other streets might have lesser problems, without any proof that they had. Given such an attitude, it was not surprising that the Court had found very few unreasonable classifications.

Before he had been in office three months, however, Chief Justice Taft, in *Truax v. Corrigan*, found another. Arizona had forbidden injunctions against picketing by striking workers. Similar conduct by a competitor, the Court observed, could have been enjoined, and there was no reasonable basis for the distinction.

Pitney, Holmes, Clarke, and Brandeis vainly protested that the employment relationship had often been singled out for special treatment. Those cases had concerned work-related injuries, Taft retorted, without saying why that was significant. No matter; the question was whether the Arizona injunction law was reasonable. The dissenter argued that in the labor field problems had been encountered with the use of the injunc-

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23. See, for example, Missouri Pac. Ry. v. Mackey, 127 U.S. 205, 210 (1888) ("[T]he hazardous character of the business of operating a railway would seem to call for special legislation . . . ."); Barbier v. Connolly, 113 U.S. 27, 32 (1885) (equality means equal treatment of those "similarly situated"); and *Truax v. Raich*, 239 U.S. 33, 41 (1915) ("The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself . . . ."). *See generally D. CURRIE, supra note 20, at 383-92; Fuller I, supra note 20, at 369-86; White, supra note 20, at 1136-38.*

24. Railroad Co. v. Richmond, 96 U.S. 521, 529 (1878) (adding that it was "the special duty of the city authorities to make the necessary discriminations in this particular"); *see also Fifth Ave. Coach Co. v. City of New York*, 221 U.S. 467, 484 (1911) (allowing city to prohibit advertising on bus exteriors while permitting ads on stairs and structures of elevated railways, saying only "[t]his difference, too, is within the power of classification which the city possesses"); *Beers v. Glynn*, 211 U.S. 477, 484-85 (1909) (upholding state inheritance tax on nonresident's local personality only when decedent also owned realty within the state); *Florida Cent. & Peninsular R.R. v. Reynolds*, 183 U.S. 471 (1902) (allowing state to collect delinquent taxes from railroads while failing to collect from other taxpayers); *see 9 A. BICKEL & B. SCHMIDT, HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 294-300 (1984) (concluding that during the early White years the equal protection clause had been almost explicitly abandoned).


26. Id. at 331-39.

27. Id. at 343 (Holmes, J., dissenting); id. at 352-53 (Pitney and Clarke, J.J., dissenting); id. at 355-56 (Brandeis, J., dissenting).

28. Id. at 338-39.
tion; the majority ridiculed the suggestion by asking whether the frequency of labor violence would justify exempting strikers from the law of criminal assault.

That the Court was not looking very hard for justification seems evident. The same critical attitude was reflected a few years later in *Quaker City Cab Co. v. Pennsylvania.* After decades of indifference to special corporate taxes, the Court in *Quaker City Cab* held, over the usual dissents, that a state could not limit a taxicab receipts tax to cabs operated by corporations.

Accustomed to a more deferential approach to economic classifications, the late twentieth-century reader may find these decisions quite foreign. Yet there is a very modern ring about the Chief Justice’s insistence in *Truax* that a classification affecting “fundamental rights” be subjected to “attentive judgment” and that an earlier decision upholding a classification was distinguishable on the ground that it had dealt only with “economic policy.” Later Justices would not agree with his characterization of the employer’s business and property interests as fundamental, though it certainly fits the Lockeian model. But a later

29. Id. at 342-43 (Holmes, J., dissenting); id. at 352-53 (Pitney, J., dissenting); cf. Whitney v. California, 274 U.S. 357, 370 (1927) (Sanford, J.):

A statute does not violate the equal protection clause merely because it is not all-embracing... A State may properly direct its legislation against what it deems an existing evil without covering the whole field of possible abuses... The statute must be presumed to be aimed at an evil where experience shows it to be most felt, and to be deemed by the legislature coextensive with the practical need; and is not to be overthrown merely because other instances may be suggested to which it also might have been applied; that being a matter for the legislature to determine unless the case is very clear.

30. *Truax,* 257 U.S. at 359. The majority did not respond to Pitney’s powerful argument that the employer had no standing to invoke the constitutional rights of his competitors. See *id.* at 349-50 (Pitney, J., dissenting).


32. Id. at 400-02. Dissents were entered by Justices Holmes, Brandeis, and Stone. *Id.* at 403-12. Cf. Frost v. Corporation Comm’n, 278 U.S. 515 (1929) (Sutherland, J.) (holding over same dissents that cooperatives could not be exempted from public necessity requirement applicable to other cotton gin operators). But see, e.g., Florida C. & P.R.R. v. Reynolds, 183 U.S. 471 (1902) (upholding validity of state law that compelled collection of delinquent taxes from railway companies for certain years, but which contained no similar provision regarding other property owners); *Quaker City Cab,* 277 U.S. at 411-12 (Brandeis, J., dissenting). Even the Taft Court, soon after *Quaker City Cab,* held it permissible to reassess a corporation’s taxes without doing the same for individuals. See White River Lumber Co. v. Arkansas ex rel. Applegate, 279 U.S. 692, 696 (1929) (Sanford, J.), which offered no reason for the discrimination and distinguished *Quaker City Cab* on the insufficient ground that case had not involved back taxes. In *White River,* Butler, Van Devanter, and Taft dissented. For another example of exacting equal protection scrutiny by the Taft Court, see Schlesinger v. Wisconsin, 270 U.S. 230 (1926) (McReynolds, J., over the usual dissents by Holmes, Brandeis, and Stone) (state could not tax all gifts made within six years before death to prevent evasion of succession taxes).


34. See J. LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT 56-58 (L. DeKoster ed. 1978): “The great and chief end, therefore, of men’s uniting into commonwealths and putting themselves
generation reached a conclusion strikingly similar to that of *Truax* in holding that, in light of the fundamental interest in freedom of speech, discrimination in favor of labor invalidated a ban on residential picketing.\(^{35}\)

The Taft Court was not consistently vigorous in scrutinizing classifications. Laws forbidding aliens to own land, for example, were emphatically upheld on the basis of the state's concern for security,\(^{36}\) although the interest in owning property seems at least as "fundamental" as the incident of ownership protected in *Truax*, and although a limitation on alien employment had been struck down during the White years as supported by no legitimate purpose.\(^{37}\) Indeed, when it came to something less fundamental—the right to operate billiard parlors—the Court upheld a discrimination against aliens with barely a hint of speculation as to why it might be reasonable.\(^{38}\) At the other extreme, however, when Texas excluded blacks from voting in primary elections, the Court seemed unwilling to admit the possibility of any justification:

> [The Fourteenth] Amendment, while it applies to all, was passed, as we know, with a special intent to protect the blacks from discrimination against them... States may do a good deal of classifying that it

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under government is the preservation of their property..."—by which Locke meant "their lives, liberties, and estates."

35. Carey v. Brown, 447 U.S. 455 (1980). The remedial consequences of finding an equal protection violation, however, were quite different in the two cases: While *Truax* held only the labor exception invalid and contemplated that the picketing would be enjoined on remand, *Truax*, 257 U.S. at 341-42, Carey held that the entire prohibition on picketing must fall because of the invalid exception, Carey, 447 U.S. at 459 n.2.

36. *e.g.*, Porterfield v. Webb, 263 U.S. 225 (1923) (Butler, J.); Terrace v. Thompson, 263 U.S. 197 (1923) (Butler, J.). In neither case was there dissent on the merits.

37. *See* *Truax* v. Raich, 239 U.S. 33, 43 (1915) (striking down ban on alien employment), *noted in White*, supra note 20, at 1137 n.140. In fact, the White Court had drawn much the same distinction between alien ownership of land and alien employment, upholding an alien land law with little effort at justification in Toop v. Ulysses Land Co., 237 U.S. 580 (1915). The laws upheld in *Terrace* and in *Porterfield*, however, excluded only those aliens who had not declared their intention to become citizens, or those who were ineligible for citizenship; the Court declined to find in these distinctions a disguised discrimination against Japanese and Chinese, who were not eligible for citizenship. *See* *Terrace*, 263 U.S. at 220; *see also* Collins, *Will the California Alien Land Law Stand the Test of the Fourteenth Amendment?* 23 YALE L.J. 330 (1914) (arguing that statutory terms were euphemisms for forbidden racial classifications); Powell, *Alien Land Cases in United States Supreme Court*, 12 CALIF. L. REV. 259, 270-74, 273 (1924) (arguing persuasively that justification given to sustain discrimination against those not planning to become citizens showed irrationality of excluding only those who were ineligible: "Mr. Justice Butler's two opinions disclose no satisfactory reasons, since when taken together they destroy the only reason suggested...")

38. Ohio *ex rel.* Clarke v. Deckebach, 274 U.S. 392, 397 (1927) (Stone, J.) (noting that the ordinance "presupposes that aliens in Cincinnati are not as well qualified as citizens to engage in this business" and advertising to "the view admitted by the pleadings that the associations, experiences and interests of members of the class disqualified the class as a whole from engaging in a business of dangerous tendencies"). The contrast between this decision and *Quaker City Cab* suggests in later terms that the Court thought corporations a more suspect classification than aliens.
is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case.\textsuperscript{39} The notion that more than one level of scrutiny might be available in equal protection cases seemed to be well on its way.

2. \textit{The Duty to Protect Property.} More interesting still was the distinct and broader rationale that the majority in \textit{Truax v. Corrigan} embraced before it even began to discuss equal protection: Free access to the employer's premises was a part of the employer's property right; picketing interfered with that right; and a “law which operates to make lawful such a wrong ... deprives the owner of the business and the premises of his property without due process.”\textsuperscript{40}

There were three difficulties with this cryptic reasoning. First, the Court nowhere referred to Arizona law in determining the extent of the property right in question. Nearly a century before, the Court had established that article 1, section 10 forbade the states to impair only those contractual obligations that were defined by state law.\textsuperscript{41} The \textit{Berea College} case seemed to have applied the same principle in defining “property” under the due process clause by holding that a corporation’s property rights were limited by its charter.\textsuperscript{42} If the law applicable when Truax acquired his property did not give him the right to be free of labor pickets, the denial of a remedy did not deprive him of property.\textsuperscript{43}

\textsuperscript{39} Nixon v. Herndon, 273 U.S. 536, 541 (1927) (Holmes, J., for a unanimous Court). The Court refrained from invoking the facially more obviously applicable fifteenth amendment, which deals explicitly with racial discrimination in voting, presumably because of the narrow construction given similar language respecting congressional authority over federal elections, see, e.g., Newberry v. United States, 256 U.S. 232, 255-58 (1921) (congressional authority under U.S. Const. art. I, § 4 did not reach primary elections), \textit{discussed in White, supra} note 20, at 1128 n.88. As an original matter, the applicability of the fourteenth amendment's prohibitions to political matters such as voting had been extremely doubtful not only in light of the alternative remedies for voting discrimination provided elsewhere in the same amendment, but because of the repeated assurances of the sponsors. These arguments had been sidestepped rather than rejected in the jury discrimination cases of the 1880's, which had focused on the defendant's interest in a fair trial. See D. \textit{Currie, supra} note 20, at 383-85 (discussing Strauder v. West Virginia, 100 U.S. 303 (1880)). Holmes did not address the issue in \textit{Nixon}.

\textsuperscript{40} \textit{Truax}, 257 U.S. at 328.


\textsuperscript{42} \textit{Berea College} v. Kentucky, 211 U.S. 45, 56-58 (1908), \textit{discussed in Fuller I, supra} note 20, at 369 n.273; see also Bishop v. Wood, 426 U.S. 341, 344 (1976) (“A property interest in employment can, of course, be created by ordinance, or by an implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law.”); \textit{Board of Regents v. Roth}, 408 U.S. 564, 577-78 (1972); \textit{Demorest v. City Bank Co.}, 321 U.S. 36, 42-43 (1944).

\textsuperscript{43} In fact, picketing had been enjoinalbe in Arizona until passage of the statute at issue in \textit{Truax}, 257 U.S. at 323, but the Court did not rely on that circumstance in explaining that there had been a deprivation of property.
Second, despite frequent statements that the only deprivations of liberty or property compatible with due process of law were those imposed after a criminal trial, a long series of cases had established that both liberty and property were themselves qualified by the police power. In contrast to earlier decisions, the Court made no effort in *Truax* to show why the law immunizing picketing was not a reasonable police power measure.

Finally, the conclusion that the state had deprived Truax of his property by failing to provide him with judicial protection was of the greatest interest and importance. In the Federal Republic of Germany, the Constitutional Court has held that a constitutional right to life requires that abortion generally be made a crime—although there, as here, the relevant constitutional provisions limit only official and not private action. Yet in the usual abortion case, as in *Truax*, it is not the

44. See, *e.g.*, University of North Carolina v. Foy, 5 N.C. (1 Mur.) 57, 63 (1804) (construing law-of-the-land provision):

The property vested in the trustees must remain for the uses intended for the university, until the judiciary of the country in the usual and common form pronounce them guilty of such acts as will, in law, amount to a forfeiture of their rights or a dissolution of their body.

See also Powell v. Pennsylvania, 127 U.S. 678, 692 (1888) (Field, J., dissenting) (liberty inviolable “except in punishment for crime”); Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 Harv. L. Rev. 366, 381-84 (1911). The alternative argument that reasonable legislation constituted the due process necessary to justify a deprivation would have explained, as the argument under discussion did not, why taxation was sometimes permitted.

45. See, *e.g.*, Lochner v. New York, 198 U.S. 45, 53 (1905) (“Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of . . . [police] powers.”); Holden v. Hardy, 169 U.S. 366, 391 (1898) (upholding maximum hour legislation for miners because the “right of contract . . . is itself subject to certain limitations which the State may lawfully impose in the exercise of its police powers”); Munn v. Illinois, 94 U.S. 113, 145 (1877) (Field, J., dissenting) (“The doctrine that the right of each one must so use his own as not to injure his neighbor . . . is the rule by which every member of society must possess and enjoy his property.”); T. COOLEY, CONSTITUTIONAL LIMITATIONS 573 (1st ed. Boston 1868) (quoting Chief Justice Shaw in Commonwealth v. Alger, 7 Cush. 53 (Mass. 1851): “[E]very holder of property . . . holds it under the implied liability that his use of it shall not be . . . injurious to the rights of the community. All property in this Commonwealth is . . . held subject to those general regulations which are necessary to the common good and general welfare.”).

46. As the dissenters argued in *Truax*, 257 U.S. at 349, it was not even clear that the statute forbade all remedies for labor picketing. In terms it forbade only an injunction, leaving open the possibility of both damages and criminal prosecution. Taft grasped at the state court’s probably loose statement that the statute made picketing “lawful” and went on to question the adequacy of the criminal law that was arguably applicable. *Truax*, 257 U.S. at 328-29. See Frankfurter & Greene, *Congressional Power over the Labor Injunction*, 31 Colum. L. Rev. 385, 408 (1931) (arguing for the constitutionality of a law denying federal jurisdiction to enjoin labor activity, and distinguishing *Truax* on the ground that the Court had viewed the Arizona law as legalizing the conduct itself by removing all sanctions).

47. 39 BVerF 1, 65 (1975).

48. *Id.* at 42 (concluding that under the Basic Law [Grundgesetz], the State’s comprehensive duty to protect every human life not only “prohibits . . . direct governmental encroachments upon the developing life, but also commands the State . . . to safeguard it from illegal encroachments by others”). *See* GRUNDGESETZ [GG] arts. 1(3), 2(2) (W. Ger. 1949, amended 1956): “The following
government but a private individual who has brought about the deprivation. In this country, as Judge Posner wrote in denying that the due process clause required the state to rescue an accident victim, the Constitution is generally understood to be "a charter of negative rather than positive liberties"—a guarantee of protection from rather than by the government.49

The possible ramifications of Taft's contrary conclusion are considerable: The state deprives an individual of life, liberty, or property whenever it fails to protect those interests from invasion by private parties.50 The Constitution requires that murder and theft be prohibited. Common law tort remedies may be abolished only if adequate substitutes are provided. Governments must prevent private interference with freedom of expression or religion.

Indeed, the German cases have carried this principle further: Freedom of telecommunications requires the government to assure public access to broadcasting facilities; freedom of education may require the state to provide schooling.51 Though Taft would no doubt have been horrified, the logic is forceful: If the state infringes liberty by failing to protect it against third parties, the state also does so by failing to remedy a deficiency of funds. The state deprives a woman of her freedom to have an abortion if it does not assure that she can afford it and of her life if it

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50. Compare the language of the German court quoted supra note 48.
51. See 12 BVerfG 205 (1961) (interpreting the provision of GRUNDGESETZ [GG] art. 5(1) (W. Ger.) that "[f]reedom of the press and freedom of reporting by means of broadcasts and films are guaranteed"): Article 5 GG demands . . . that this modern instrument of opinion formation not be handed over either to the state or to any one social group. Broadcast stations must therefore be so organized that all interests worthy of consideration have an influence in their governing council and can express themselves in the overall program . . . 12 BVerfG at 262-63. See also 33 BVerfG 303 (1972) (interpreting the provision of GRUNDGESETZ [GG] art. 12(1) (W. Ger.) that "[a]ll Germans shall have the right freely to choose their . . . place of training"): The constitutional protection of basic rights in the field of education is not limited to the protective function against governmental intervention traditionally ascribed to the basic rights. . . . [T]he free choice of the place of education aims, by its nature, at free access to institutions; the right would be worthless without the actual ability to make use of it. Accordingly, the draft of a framework law respecting higher education proceeds from the assumption that every German is entitled to carry out his chosen post-secondary study program if he demonstrates the requisite qualifications. Recognition of this entitlement is not at the discretion of the lawmakers.

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33 BVerfG at 330-31 (emphasis omitted).
allows her to starve.\textsuperscript{52}

In a series of decisions culminating in the \textit{Civil Rights Cases} in 1883, the Supreme Court had made clear that the fourteenth amendment and various other constitutional limitations applied only to official action.\textsuperscript{53} The Taft Court reaffirmed this conclusion in \textit{Corrigan v. Buckley},\textsuperscript{54} unanimously holding that judicial enforcement did not make the government responsible for a privately imposed racial covenant.\textsuperscript{55} \textit{Truax} suggests that the state could have been held responsible for the private acts in all these cases simply by pointing out its failure to prevent them. This interpretation would reduce longstanding precedents thought to have established landmark limitations on constitutional rights to technical barriers avoidable by clever pleading.

None of this seems to have occurred to Chief Justice Taft, who cited nothing in support of his crucial conclusion that to deny a remedy for picketing would deprive the owner of his property. The sweeping implications of his position indicate the importance of inquiring into possible analogies to support him.

The question had arisen twenty years before in an obscure case in which it had been argued that a law eliminating liability for harm done to unlicensed dogs deprived the dog owner of his property without due process. In resting its rejection of this argument on the imaginative conclusion that there was no true property right in dogs,\textsuperscript{56} the Court seemed to assume a duty to protect other property from private harm.\textsuperscript{57} More im-

\begin{footnotes}
\textsuperscript{52} For rejection of this argument in the abortion context, see Maher v. Roe, 432 U.S. 464, 474-75 (1977) (state may favor childbirth over abortion and may implement that decision through its allocation of public funds), and Harris v. McRae, 448 U.S. 297, 316 (1980) ("[A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation."). A distinction might be based on the traditional conception of government duty as one of protection against third parties, see J. Locke, supra note 34, at 56-58, but hardly on the text of the Constitution.

\textsuperscript{53} \textit{E.g.}, The Civil Rights Cases, 109 U.S. 3, 11 (1883) (Congress may not forbid private discrimination under fourteenth amendment). \textit{See generally} D. Currie, supra note 20, at 393-402.

\textsuperscript{54} 271 U.S. 323 (1926) (Sanford, J.).

\textsuperscript{55} The Court later changed its mind on this specific issue, without questioning the requirement of state action. \textit{See} Shelley v. Kraemer, 334 U.S. 1 (1948).

\textsuperscript{56} Sentell v. New Orleans & C.R.R., 166 U.S. 698, 701 (1897) ("[P]roperty in dogs is of an imperfect or qualified nature . . . "), \textit{discussed in Fuller I, supra note} 20, at 382 n.34. The Court based its conclusion largely on Louisiana law, Sentell, 166 U.S. at 706, and derived this result largely from the argument that dogs, unlike farm animals, generally served only ornamental purposes, \textit{id.} at 701. This hardly seems to distinguish them from jewelry, however, which one supposes qualifies as "property" under the amendment. \textit{Cf.} Currie, \textit{The Most Insignificant Justice: A Preliminary Inquiry}, 50 U. Chi. L. Rev. 466, 475, 478 n.70 (1983) (also disparaging dogs).

\textsuperscript{57} Some years later, when a related argument about the sanctity of common law rules was made against workmen's compensation, the standard defense was not to deny the premise, but to argue there had been a quid pro quo: What the employer gave up in freedom from strict liability he gained by a limitation of damages. \textit{See, e.g.}, New York Cent. R.R. v. White, 243 U.S. 188, 205
\end{footnotes}
portant than this unstated implication was a long succession of contract clause cases holding that a state impaired the obligation of private contracts if it placed excessive limitations on judicial remedies for breach.\footnote{58} The same reasoning supports a similar reading of the taking clause: To deny all remedies for trespass would effectively transfer private property to public use. For the essence of private property is the right to exclude other individuals.\footnote{59}

Herein may lie a limiting principle that can reconcile \textit{Truax} with the general notion that the Constitution does not require government to take affirmative action. Property and contract are legal constructs that almost by definition entail governmental protection from third parties. Life and liberty are not. A ban on state deprivation of life makes sense if it means only that the government itself shall not kill; a similar statement with regard to contract or property is less convincing. Perhaps theft, but not murder, must be made a crime.

To state the matter this way makes it look suspect. Moreover, there are substantial arguments for a broader version of the \textit{Truax} principle. The theory of the social contract that underlies our Constitution entails a surrender of the right of self-help in exchange for government protection.\footnote{60} This understanding is made explicit by the original meaning of the equal protection clause: If the state protects whites against private violence, it must protect blacks as well.\footnote{61} Chief Justice Marshall put the point more broadly: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, when-

\(\text{(1917). However, the Supreme Court did not rest entirely with this narrow defense, as emphasized by dissents complaining of the absence of a quid pro quo when the Court later upheld a law imposing unlimited strict liability on the basis of the police power. Arizona Employers' Liability Cases, 250 U.S. 400, 450 (1919) (McReynolds, J., dissenting). Moreover, from the employer's point of view, the problem of state inaction was not in issue in the compensation cases. There was no doubt that the state was responsible for any deprivation that took place, for instead of merely refusing the employer a remedy, the state had imposed on him a duty to pay.}\)

\footnote{58. E.g., Bronson v. Kinzie, 42 U.S. (1 How.) 311, 317, 318 (1843), discussed in D. Currie, supra note 20, at 211-13.}

\footnote{59. That this right might be preserved by allowing the owner to use force to protect his own property suggests only, as the workmen's compensation cases illustrated, that the state may have a broad range of choice among means to meet its protection obligation. For the right of self-help would be no better than no property right at all unless the state continued to forbid the use of countervailing force by trespassers.}

\footnote{60. See, e.g., J. Locke, supra note 34, at 58: But though men when they enter into society give up the equality, liberty, and executive power they had in the state of nature, into the hands of the society, . . . yet it remains the intention of everyone the better to preserve himself, his liberty, and his property[,] . . . the power of that society . . . is obliged to secure every one's property . . . . This passage seems to suggest that government has assumed the obligation of giving more protection than the individual had in a state of nature, not that it can absolve itself of responsibility by restoring the law of the jungle.}

\footnote{61. See generally D. Currie, supra note 20, at 342-51, 369-86.}
ever he receives an injury. One of the first duties of government is to afford that protection." Though Marshall did not invoke the Constitution in this passage, it would not be a huge step beyond his position to argue that because of this understanding, the life, liberty, and property protections of the due process clauses imply a right to governmental protection without regard to equality.

The problem of government inaction raised by Truax v. Corrigan is profoundly troubling. We shall not get to the bottom of it here. But the Court seemed unaware that the problem even existed.

3. Later Due Process Cases. When maximum hour legislation for factory workers was approved in 1917 without so much as a citation to Lochner v. New York, the earlier decision seemed thoroughly discredited. When a minimum wage law for District of Columbia women succumbed to a due process assault in Adkins v. Children's Hospital in 1923, however, Lochner formed the cornerstone of Justice Sutherland's opinion. Maximum hour legislation, the Court said, had been upheld


63. Given such a reading, the equal protection clause as originally understood is redundant; but, as Marshall demonstrated, so are the necessary-and-proper clause and the tenth amendment. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405-09, 419-21 (1819), discussed in D. Currie, supra note 20, at 160-68. For suggestions of affirmative government duties in other interesting contexts, see Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (holding that fourteenth amendment incorporates sixth amendment command that "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence" and requires state to provide counsel for indigent criminal defendant); Ex parte Young, 209 U.S. 123 (1908) (provision setting fines so high as to discourage violating the law in order to obtain a judicial test of its validity worked a deprivation of property—presumably of the underlying right to charge remunerative rates—without due process), discussed in Fuller I, supra note 20, at 384-86; and the series of public forum cases holding that the first and fourteenth amendments required governments to permit use of certain public properties for speech purposes, e.g., Schneider v. State, 308 U.S. 147 (1939) (invalidating bans on distribution of handbills on streets and sidewalks). The first two examples seem readily distinguishable: In both, the government had taken affirmative action against the individual, either by prosecution or by regulation of rates. Some of the public forum cases also involve prosecution after the fact, but only to enforce the government's asserted right not to contribute its property for the promotion of individual speech.

64. This problem is further explored in Currie, Positive and Negative Constitutional Rights, 53 U. Chi. L. Rev. ___ (1986) (forthcoming).

65. 198 U.S. 45 (1905).


67. 261 U.S. 525 (1923).

68. Id. at 548-50 (quoting at length from Lochner v. New York, 198 U.S. 45 (1905)); cf. id. at 564 (Taft, C.J., dissenting) ("It is impossible for me to reconcile the Bunting Case and the Lochner Case and I have always supposed that the Lochner Case was thus overruled sub silentio."). When the minimum wage issue had come up during the White years, the Court had divided 4-4 after the death of Justice Lamar, who apparently had cast the fifth vote for invalidity in conference. See Stettler v.
only when necessary to preserve health. To the dissenting arguments of Taft, Sanford, and Holmes that minimum wages likewise served to keep women healthy and chaste, Sutherland responded with the improbable observation that "[i]t cannot be shown that well paid women safeguard their morals more carefully than those who are poorly paid," adding that "the inquiry in respect . . . of the income necessary to preserve health and morals . . . must be answered for each individual considered by herself and not by a general formula prescribed by a statutory bureau." Sutherland concluded that it was unfair in any event to place the burden of ameliorating the worker's poverty on her employer. The ritually invoked presumption of constitutionality had become a hollow shell.

A law forbidding nighttime employment of women in restaurants

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O'Hara, 243 U.S. 629 (1917); 9 A. BICKEL & B. SCHMIDT, supra note 24, at 592-603 (discussing Stettler v. O'Hara); White, supra note 20, at 1131 n.102.

69. See Adkins, 261 U.S. at 566-67. Brandeis did not participate. McKenna, who had written Bunting, voted silently with the majority. See A. MASON, WILLIAM HOWARD TAFT, supra note 2, at 264, which describes Taft's dissenting vote in Adkins as an aberration from his conservative values, but attributable to his respect for precedent. Precedent was applicable only for those who believed minimum wage laws to be plausible health measures.

70. Adkins, 261 U.S. at 556.

71. Id.

72. Id. at 557-59. The economically apparent connection between poverty and prostitution was a frequent theme in nineteenth-century literature. See, e.g., F. DOSTOEVSKI, CRIME AND PUNISHMENT (C. Garnett trans. 1938); T. FONTANE, IRRUNGEN, WIRRUNGEN (H. Fikentscher rev. ed. 1929); J. GOETHE, BEGRIFFS (C. Thomas trans. 1892); V. HUGO, LES MISERABLES (L. Wraxall trans. 1887). The Chief Justice invoked more scientific studies, disclosed in the briefs and records, that found a direct relation between low wages and poor health. Adkins, 261 U.S. at 564 (Taft, C.J., dissenting). See Brown, Police Power—Legislation for Health and Personal Safety, 42 HARV. L. REV. 866, 887, 898 (1929) ("it cannot be denied that starvation wages contribute to sickness and immorality"; Adkins stands alone in rejecting a law supported by substantial health or safety considerations). For contrasting academic views at the time the issue first reached the Court, compare Brown, Oregon Minimum Wage Cases, 1 MINN. L. REV. 471, 484 (1917) (invoking, among other things, the familiar economic argument that minimum wage laws were bad for workers because they led to curtailment of jobs), with Powell, The Constitutional Issue in Minimum Wage Legislation, 2 MINN. L. REV. 1, 16-17 (1917) (defending such laws on ground that, though some workers would lose their jobs, greater number would gain financial security). For the barely civil comments of Professor Powell after Adkins was decided, see Powell, The Judiciality of Minimum-Wage Legislation, 37 HARV. L. REV. 545, 569, 571 (1924) (arguing that employers should provide a "living wage" because employees must be fed in order to work, and finding Adkins opinion "ignorant" or "emotionally obtuse" in overlooking analogous precedents).

73. See Adkins, 261 U.S. at 544; see also J. PASCHAL, supra note 2, at 124 ("Basically, the decision in the Adkins case was an attack on the very idea of government."); Biklé, Judicial Determination of Questions of Fact Affecting the Constitutionality of Legislative Action, 38 HARV. L. REV. 6, 12-13, 27 (1924) (noting inconsistencies in methods by which the Court ascertained factual premises on which it based its determinations of reasonableness of laws, and urging that, as in Bunting, the Court decline to set aside law without record proof that it was unreasonable); Finkelstein, From Munn v. Illinois to Tyson v. Banton: A Study in the Judicial Process, 27 COLUM. L. REV. 769, 783 (1927) (concluding, in light of Truax, Adkins, and other decisions, that the Court was exercising a "judicial veto" whenever the court does not think that the legislation ought to have been adopted").
passed muster the following Term as a health measure.\textsuperscript{74} In its next breath, however, with only Brandeis and Holmes dissenting, the Court extinguished a law regulating the size of bread loaves in order to combat consumer fraud.\textsuperscript{75} A year later, six Justices joined in nullifying a law forbidding the use of shoddy in quilt manufacturing.\textsuperscript{76} In three successive split decisions, Justice Sutherland, writing for the Court, held that neither the resale price of theater tickets, the rates charged by employment agencies, nor the price of gasoline could be regulated, because none of the businesses in question was “affected with a public interest.”\textsuperscript{77} Fi-

\textsuperscript{74} Radice v. New York, 264 U.S. 292 (1924) (Sutherland, J.) (without dissent).

\textsuperscript{75} Jay Burns Baking Co. v. Bryan, 264 U.S. 504 (1924) (Butler, J.). See also \textit{id}. at 517 (Brandeis and Holmes, JJ., dissenting). The majority objected particularly to the fixing of a \textit{maximum} loaf size, conceding that a \textit{minimum} might be permissible. Brandeis sensibly responded that the “prohibition of excess weight is imposed in order to prevent a loaf of one standard size from being increased so much that it can readily be sold for a loaf of a larger standard size.” \textit{See id}. at 513-17, 519.

\textsuperscript{76} Weaver v. Palmer Bros., 270 U.S. 402 (1926) (Butler, J.). The Court distinguished the sharply contrasting decision in Powell v. Pennsylvania, 127 U.S. 678 (1888), \textit{discussed in D. CURRI, supra note 20}, at 377-78, which had upheld the prohibition of oleomargarine despite evidence that the product produced by the litigant was healthful, by noting that the \textit{Powell} Court had assumed that other oleo was dangerous; in contrast, the \textit{Weaver} Court assumed that sterilization would remove the dangers of shoddy. \textit{Weaver}, 270 U.S. at 414; \textit{see also Weaver}, 270 U.S. at 415 (Holmes, Brandeis, and Stone, JJ., dissenting) (finding it reasonable for the legislature to conclude that inspection and tagging were inadequate means of protecting the public against unsterilized materials).

\textsuperscript{77} Williams v. Standard Oil Co., 278 U.S. 235, 239 (1929); Ribnik v. McBride, 277 U.S. 350, 355 (1928); Tyson & Brother v. Banton, 273 U.S. 418, 430 (1927). Of the four dissenters in the earliest case, Sanford bowed to precedent in the next, and Brandeis and Stone apparently in the last, leaving only the obdurate Holmes. \textit{See Williams}, 278 U.S. at 245; \textit{Ribnik}, 277 U.S. at 359-75; \textit{Tyson}, 273 U.S. at 445-56. According to the majority in these cases, German Alliance Ins. Co. v. Kansas, 233 U.S. 389 (1914), which had upheld regulation of insurance rates, had gone to the verge of constitutionality; the Court explained Block v. Hirsch, 256 U.S. 135 (1921), which had upheld rent control, on the basis of an emergency. \textit{See Tyson}, 273 U.S. at 434-37; \textit{White}, supra note 20, at 1129-31. It was not enough, the Court concluded, that a business was large or the public legitimately concerned; the business “must be such . . . as to justify the conclusion that it has been devoted to a public use and its use thereby in effect granted to the public.” \textit{Williams}, 278 U.S. at 240. Protested Stone:

As I read the decisions, such regulation is within a state's power whenever any combination of circumstances seriously curtails the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that a legislature might reasonably anticipate serious consequences to the community as a whole. \textit{Ribnik}, 277 U.S. at 360 (Stone, J., dissenting). It may be that this criterion was not met in the gasoline case, \textit{see Williams}, 278 U.S. at 240 (Sutherland, J., denying the existence of a monopoly), but Justice Stone did not explain his concurrence in the result. \textit{See also J. PASCHAL, supra note 2}, at 127-30 (noting that original formulation of public interest test had been ambiguous); Rotschaef, \textit{The Field of Governmental Price Control}, 35 YALE L.J. 438, 451-60 (1926) (arguing that price control of necessities was reasonable regardless of competition); Hamilton, \textit{Affectation with Public Interest}, 39 YALE L.J. 1089, 1103 (1930) (criticizing reliance on Lord Hale's "affecte
nally, in 1928, over two dissents, the Court struck down a requirement that drugstores be owned by licensed pharmacists: "[M]ere stock ownership in a corporation, owning and operating a drug store, can have no real or substantial relation to the public health . . . ." 78 In this climate, it was perhaps surprising that residential zoning was upheld by analogy to nuisance laws. 79 Substantive due process had grown teeth such as it had never exhibited before. 80

Yet Tennessee had not shown that the business [of selling gasoline] was particularly subject to abuse in the matter of price."

78. Louis K. Liggett Co. v. Baldridge, 278 U.S. 105, 113 (1928) (Sutherland, J.); see also id. at 114 (Holmes and Brandeis, JJ., dissenting) ("Argument has not been supposed to be necessary in order to show that the divorce between the power of control and knowledge is an evil.").

79. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (Sutherland, J.) (over une-laborated dissents by Van Devanter, McReynolds, and Butler, id. at 397). But see Nectow v. City of Cambridge, 277 U.S. 183 (1928) (Sutherland, J.) (unanimously striking down a particular zoning boundary as unreasonable). For the suggestion that Sutherland had initially planned to vote against the validity of the zoning law in Euclid, see A. Mason, Harlan Fiske Stone, supra note 2, at 252 (stressing Stone's role in persuading Sutherland to change his mind); J. Paschal, supra note 2, at 127 (adding that "[t]he opinion makes clear that Sutherland saw in the zoning act not the deprivation of property, but its enhancement"); id. at 9-20 (recounting Sutherland's affinity for the idea of Spencer and Cooley that government's sole function was to prevent people from injuring others). It may also be significant that zoning laws, unlike others considered in this section, dealt with external harms whose private resolution, as in the nuisance case, would often have entailed high transaction costs. See Coase, The Problem of Social Cost, 3 J.L. & Econ. 1, 15-18 (1960); Brown, supra note 72, at 873 (finding nuisance cases easy because of traditional rule of sic utere tuo). Euclid was previewed in Bettman, Constitutionality of Zoning, 37 Harv. L. Rev. 834, 846-51 (1924), and applauded in Ribble, The Due Process Clause as a Limitation on Municipal Discretion in Zoning Legislation, 16 Va. L. Rev. 689, 699 (1930) (noting the Court's tendency to be more tolerant of land use regulations, with the striking exception of the racial segregation case of Buchanan v. Warley, 245 U.S. 60 (1917), discussed in White, supra note 20, at 1134-38, than of other purported exercises of the police power).

80. See also Fairmont Creamery Co. v. Minnesota, 274 U.S. 1 (1927) (McReynolds, J., over dissents by Holmes, Brandeis, and Stone) (striking down state law forbidding geographical price discrimination); Chas. Wolff Packing Co. v. Court of Indus. Relations, 262 U.S. 522 (1923) (Taft, C.J.) (unanimously invalidating state law requiring arbitration of wage disputes in meat-packing industry); Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 594 (1926) (Sutherland, J.) (resoundingly reaffirming doctrine of unconstitutional conditions in holding that state could not condition carrier's use of highways on agreement to serve public generally: "If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."); cf. Terral v. Burke Constr. Co., 257 U.S. 529 (1922) (Taft, C.J.) (state may not revoke foreign corporation's license to do local business for exercising federal right to remove case to federal court). For an excellent and approving summary of the development of the unconstitutional conditions principle, see G. Henderson, The Position of Foreign Corporations in American Constitutional Law 110-11, 134-47 (1918).

Procedural due process decisions of the Taft era include Ng Fung Ho v. White, 259 U.S. 276 (1922) (Brandeis, J.), which held that a person who had been ordered deported after an administrative hearing was entitled to a judicial redetermination of his claim to citizenship: "To deport one who so claims to be a citizen, obviously deprives him of liberty . . . . The difference in security of judicial over administrative action has been adverted to by this court." This was a significant step beyond Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920), discussed in White, supra note 20, at 1138 n.140, which had found a right to a de novo judicial determination of the question
B. Civil Liberties.

1. Meyer v. Nebraska. Before the Taft period, the Supreme Court had wielded substantive due process only to protect economic interests such as property and the notorious liberty of contract. The Court’s definition of the liberty protected by the due process clauses, however, had always been broader. A vaccination law, for example, had been upheld during the Fuller days only on the ground that it was a reasonable health measure.\(^{81}\) In two important decisions in the Taft years, the Court took further steps to entrench the amendment’s protection of noneconomic liberties.

The first was *Meyer v. Nebraska*,\(^{82}\) decided in 1923, which set aside a conviction for teaching German to a child who had not completed the eighth grade. Earlier broad definitions of fourteenth-amendment “liberty” were elaborated:

> [I]t denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.\(^{83}\)

whether a quasi-legislative utility rate was confiscatory. Deportation of those not claiming to be citizens, which would seem to involve a similar loss of liberty, was distinguished on the nonobvious ground that citizenship was a “jurisdictional fact”; cases holding that a claim of citizenship did not give a person excluded at the border a right to judicial hearing were distinguished without reasons. See *Ng Fung Ho*, 259 U.S. at 282, 284; see also *Hess v. Pawloski*, 274 U.S. 352, 356-57 (1927) (Butler, J.) (indulging the fiction that by using the highways a nonresident motorist appointed a local agent to receive process in auto accident suits, but adding in more modern terms that “[i]n the public interest the State may make and enforce regulations reasonably calculated to promote care on the part of all . . . who use its highways”); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (Taft, C.J.) (holding that judge may not be compensated according to fines imposed); *A.B. Small Co. v. American Sugar Ref. Co.*, 267 U.S. 233, 239-40 (1925) (Van Devanter, J.) (extending void-for-vagueness doctrine to case involving civil sanctions); *Moore v. Dempsey*, 261 U.S. 86, 90-91 (1923) (Holmes, J.) (expanding the availability of habeas corpus in reaching the unsurprising conclusion that a criminal trial dominated by a mob did not provide due process). See Easterbrook, *Substance and Due Process*, 1982 Sup. Ct. Rev. 85, 105 (describing *Moore* as novel because “reasoned wholly as a matter of natural law” and *Tumey*, while based on history, as “the first case to declare a state law unconstitutional for want of adequate procedures (other than ex parte procedures)”).  

81. Jacobson v. Massachusetts, 197 U.S. 11, 35 (1905), noted in Fuller I, supra note 20, at 379 n.326; see also *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (dictum):

> The liberty mentioned in [the fourteenth] amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term 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, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

82. 262 U.S. 390 (1923) (McReynolds, J.).

83. *Id.* at 399.
The right to teach a foreign language, and the right to engage a language instructor, fell within this definition; and "[m]ere knowledge of the German language cannot reasonably be regarded as harmful."\(^8\)

Strictly speaking, the inclusion of the right to educate one's children may have been dictum, since ordinarily the accused teacher would lack standing to argue that the parents' rights had been infringed; and the teacher's own right to teach was an economic liberty of the type that had long been protected.\(^8\) Nevertheless, the Court stressed the parents' right as if it were a part of the holding.\(^8\) This application of the term "liberty" seems neither more nor less justifiable than the original inclusion of "liberty of contract." Once torn from its historical moorings,\(^8\) "liberty" may as well embrace freedom of any kind.

Not even Holmes took issue with that conclusion. His objection, which Sutherland of all people joined, was that requiring a youngster to hear only English at school was a reasonable means of achieving the legitimate end of assuring "that all the citizens of the United States should speak a common tongue" despite their varied origins.\(^8\) Admitting the hardly disputable legitimacy of the end, the majority found the means too extreme—less intrusive measures could have achieved the goal at a lower cost to liberty.\(^8\)

*Meyer* strikes a responsive chord today. Substantive due process was there for the first time drawn upon to protect an intellectual freedom dear to the modern observer against a ham-handed measure most would now find seriously misguided. Justice Brandeis, a staunch holdout against most economic applications of the doctrine, went along without a murmur. But Holmes was entirely consistent in deferring to a legislative judgment that was rational, though benighted; the price of deference to legislative determinations is that bad laws must sometimes be upheld.\(^9\)

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8. *Id.* at 400.

85. On the standing point, see, for example, Buchanan v. Warley, 245 U.S. 60, 73, 81 (1917), where the Court carefully noted that the plaintiff was asserting only his own property rights. *See also White,* supra note 20, at 1134-38 (discussing *Buchanan*). For the conclusion that *Meyer* involved traditional economic rights, see Warren, *The New "Liberty" Under the Fourteenth Amendment,* 39 HARV. L. REV. 431, 454 (1926).

86. *Meyer,* 262 U.S. at 401-02 (stressing that ideas favoring state control over upbringing of children are "wholly different from those upon which our institutions rest").


89. *Id.* at 401-02.

90. Deference alone, however, does not seem to account for the evident relish with which Holmes wrote, over the lone and unexplained dissent of Butler, to sustain a law providing for the
The doctrinal basis for Meyer is as shaky as that of Lochner itself, for it is the very same.

2. Gitlow v. New York. Not even Holmes dissented, however, when the Meyer principle was applied two years later to forbid the effective outlawing of private schools in Pierce v. Society of Sisters. Moreover, Holmes and Brandeis were far less deferential to legislative judgment than their brethren one week later when they dissented from the upholding of a conviction for the publication of a revolutionary screed in the famous case of Gitlow v. New York.

On the threshold question whether the fourteenth amendment made the principles of freedom of expression applicable to the states, Holmes was brief: “The general principle of free speech . . . must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word ‘liberty’ as there used . . .” Brandeis expanded on this theme in his celebrated concurring opinion two years later in Whitney v. California:

Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause . . . applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States. The right of free speech, the right to teach, and the right of assembly are, of course, fundamental rights.

In other words, if you can’t lick ‘em, join ‘em; if your pet rights are protected by the shaky notion of substantive due process, so are mine. Fair enough. But this all goes to show that—apart from the consistently rejected theory that the fourteenth amendment incorporates the entire Bill of Rights—the doctrinal basis for holding that the states are without power to abridge expression is essentially that of Lochner v. New York.
As in earlier cases, the Court in *Gitlow* assumed, without deciding, that freedom of speech fell within the "liberty" protected against state invasion by the due process clause and treated the case as if it had involved a federal prosecution. Earlier decisions, Justice Sanford rightly observed, had established that this freedom was not absolute. It "does not deprive a State of the primary and essential right of self preservation." Sanford further noted that "utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion." And that was what the statute in *Gitlow* forbade: By punishing one who "advocates . . . the duty, necessity or propriety of overthrowing . . . organized government by force or violence," the state had penalized only "the advocacy of action," not "the utterance or publication of abstract 'doctrine' or academic discussion having no quality of incitement to any concrete action."

The resemblance between these passages and Learned Hand's fa-
mous formulation in *Masses Publishing Co. v. Patten*\(^{103}\) is striking. By insisting on actual incitement, both Hand and Sanford, in contrast to *Schenck*'s formulation of the clear and present danger test, had made clear that the mere probability of harm would not suffice to make speech punishable.\(^{104}\) Yet posterity, while generally applauding *Masses*, has dealt harshly with *Gitlow*. There seem to be at least two explanations for this discrepancy.

First, despite its advantages, the incitement test alone, as *Gitlow* demonstrates, is not sufficient to satisfy anyone who believes that encroachments upon the interest in free expression may be justified only when the countervailing concern is overwhelming. Whether or not the Court was right in concluding that the publication in question employed "the language of direct incitement,"\(^{105}\) Holmes was surely right that "there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views."\(^{106}\) Indeed, as he added, there was ample room for "doubt whether there was any danger that the publication could produce any result" at all.\(^{107}\) Having dismissed the *Masses* prosecution for failure to establish incitement, Judge Hand had not had to deal with this problem.

Whatever its weaknesses, the test Holmes had enunciated for the Court in *Schenck v. United States*\(^{108}\) had required that the danger be

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103. 244 F. 535, 540-42 (S.D.N.Y. 1917), rev'd, 246 F. 24 (2d Cir. 1917):

> If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation. . . . The question . . . is . . .: Could any reasonable man say, not that the indirect result of the language might be to arouse a seditious disposition, for that would not be enough, but that the language directly advocated resistance to the draft?

See *White*, supra note 20, at 1149-51.

104. Holmes had taken significant steps in this direction by emphasizing in his later *Abrams* dissent that the constitutional standard was especially strict in the absence of an intention to cause harm, *Abrams v. United States*, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting). Hand's test of incitement, however, seemed more protective in this respect because of its emphasis on the objective meaning of the words used. See *Masses*, 244 F. at 541-42. For discussion of passages in *Gitlow* that suggest the less protective "natural tendency" test, see *Z. Chafee*, supra note 97, at 323-24.

105. *Gitlow*, 268 U.S. at 665. As quoted in *Gitlow*, id. at 656-60 n.2, the publication said that "[r]evolutionary socialism . . . insists . . . that it is necessary to destroy the parliamentary state" and establish "a revolutionary dictatorship of the proletariat . . . by means of revolutionary mass action" building upon "mass industrial revolts," and ended with the declaration that "[t]he Communist International calls the proletariat of the world to the final struggle!"


107. Id.; see also *Z. Chafee*, supra note 97, at 324: "The terror which these dull and rusty phrases caused our prosecutors and judges would render them the laughing-stock of European conservatives."

both “clear” and “present,”109 and Gitlow could not fairly be said to meet either criterion. Justice Brandeis expanded on the basis for the immediacy requirement in Whitney: “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”110 A later Court would combine the more protective features of both the Holmes and Hand tests by requiring incitement to immediate harm.111 In Gitlow, the majority approved the refusal of an instruction to this effect and denied that the state was “required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction.”112

The second important difference between Masses and Gitlow was the explicit holding in the latter case that the statute should be judged only on its face:

[W]hen the legislative body has determined generally . . . that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration.113

This issue had not been reached in Masses either, because Hand had there held the statute had not been violated.114

Holmes protested that Sanford’s holding contradicted the rule of Schenck that “the words used” in the particular case must create a clear and present danger.115 Sanford cleverly responded that there was more reason to defer to legislative judgment when, as in Gitlow, the lawmakers had focused directly upon the speech issue by enacting a statute specifi-

109. Id. at 52. In his dissent in Abrams v. United States, Holmes had sharpened the idea by insisting that the danger be immediate in cases to which the test applied, Abrams, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). See White, supra note 20, at 1152-55. Holmes was not inconsistent in voting to convict Schenck but not Gitlow, for the two cases raised distinct problems. Schenck showed that Holmes was willing to infer an intention to provoke crime though it had not been clearly expressed. Gitlow showed that he took seriously the separate requirement that the risk be an imminent one.


111. See Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.") (footnote omitted).

112. Gitlow, 268 U.S. at 661, 669. In his dissent in Abrams v. United States, 250 U.S. 616, 627 (Holmes, J., dissenting), Holmes had said it would also suffice if the speaker had intended to create a present danger. In Gitlow, he insisted that the indictment concerned only the publication and not its author's intent to induce an uprising. Gitlow, 268 U.S. at 673 (Holmes, J., dissenting).


114. Masses, 244 F. at 542.

115. Gitlow, 268 U.S. at 672 (Holmes, J., dissenting) (quoting Schenck, 249 U.S. at 52).
cally limiting expression than when, as in Schenck, a statute forbidding the causing of a crime in general terms was interpreted to include speech.\footnote{116. \textit{Gitlow}, 268 U.S. at 670-71. This argument seems also to distinguish such precedents as \textit{Dahnke-Walker Milling Co. v. Bondurant}, 257 U.S. 282 (1921) (striking down application of state regulatory statute to interstate transactions), invoked by Brandeis in \textit{Whitney}, 274 U.S. at 378, and \textit{Collector v. Day}, 78 U.S. (11 Wall.) 113 (1871) (federal income tax law could not constitutionally be applied to salaries of state government officials). Neither in \textit{Dahnke-Walker} nor in \textit{Day} had the legislature directed its attention toward interstate commerce or state officials, respectively.}

In due process cases, moreover, the need for generality in enacting rules had often persuaded the Court that a law did not have to be tailored precisely to the facts. In \textit{Powell v. Pennsylvania},\footnote{117. 127 U.S. 678 (1888).} for example, the Court had held the need to protect the public from unwholesome oleomargarine justified the legislature in banning even that oleomargarine which was healthful.\footnote{118. \textit{Id.} at 684, \textit{discussed in D. Currie, supra} note 20, at 377-78.} In \textit{Village of Euclid v. Ambler Realty Co.},\footnote{119. 272 U.S. 365 (1926).} without an objection from Holmes or Brandeis, the Court upheld the exclusion of all industry from residential neighborhoods because many industries were offensive:

\begin{quote}
[T]his is no more than happens in respect of many practice-forbidding laws which this Court has upheld although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves. The inclusion of a reasonable margin to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity.\footnote{120. \textit{Id.} at 388-89 (citations omitted).}
\end{quote}

If it is permissible to draft a statute broadly enough to embrace inoffensive conduct, then by definition the application of the statute to such conduct is not unconstitutional.

This is not to say, however, that the legislature's decision to extend a prohibition to inoffensive cases was immune to judicial investigation. Deference to the legislature, as Justice Brandeis observed in \textit{Whitney v. California}, had never forbidden inquiry into the reasonableness of a law.\footnote{121. 274 U.S. at 374, 378-79 (Brandeis, J., concurring).} On the contrary, the question whether the statute had been drawn too broadly was part of the general inquiry into the reasonableness of the fit between legislative ends and means, even when, as in \textit{Gitlow}, the legislature had explicitly addressed the question whether the interest asserted should be restricted. Not infrequently, indeed, the legislative judgment was found wanting. This was the basis, for example, of the decision the year after \textit{Gitlow}, that the state could not forbid all use of shoddy in bedding simply because unsterilized shoddy posed a danger of
The basic question in Gitlow, then, was whether the legislative judgment to forbid all incitement to violent overthrow of the government was reasonable, or whether the statute should have been limited to those incitements that created a clear and present danger of harm. For the majority, Justice Sanford did explain why he thought it was permissible not to limit the statute to immediate threats: “If the State were compelled to wait until the apprehended danger became certain, then its right to protect itself would come into being simultaneously with the overthrow of the government, when there would be neither prosecuting officers nor courts for the enforcement of the law.” He did not say, though, why it was reasonable to prohibit publications as puny as Gitlow’s. On the other hand, apart from reliance on a passage from Schenck that had admittedly been qualified by later cases, Holmes offered no reason for his contrary position that harmless incitements could not be included.

In retrospect, the majority appears to have been, as in the oleomargarine case, very deferential indeed. It is not at all clear why the state thought it necessary to punish incitements posing no substantial danger. The intimidating difficulties of enforcing a more selective measure that had led to the flat ban invalidated in the shoddy case, for example, seemed wholly absent in Gitlow. Maybe the Court, unlike Holmes, thought that speech such as Gitlow’s was of such low value that it did not take much to make its inclusion in the prohibition reasonable.

Holmes and Brandeis, on the other hand, seemed far less deferential to the legislative judgment in Gitlow than was their wont. Ever since his celebrated dissent in Lochner, deference had been the hallmark of Holmes’s due process jurisprudence. Not only would both he and Brandeis emphatically dissent from invalidation of the shoddy law, where the legislative judgment was arguably more reasonable than that in Gitlow, they would repeatedly protest that the majority in the later case was substituting its judgment for that of the lawmakers. In Gitlow, by contrast, they found the majority too deferential.

It was consistent enough for Holmes and Brandeis to take a less deferential line when congressional restrictions of expression were concerned. Their deference in due process matters was a natural result of their substantive position that the clause outlawed only unreasonable leg-

122. Weaver v. Palmer Bros., 270 U.S. 402, 415 (1926), discussed supra text accompanying note 76.

123. Gitlow, 268 U.S. at 669-70 (quoting People v. Lloyd, 304 Ill. 23, 35, 136 N.E. 505, 512 (1922)).

124. See supra text accompanying notes 40-80.
islation;\textsuperscript{125} even if Congress was not ousted from the speech field altogether, the first amendment on its face imposed more stringent limitations.\textsuperscript{126} Their hard-line scrutiny in \textit{Gitlow}, however, cannot be so easily explained, for in their view \textit{Gitlow} was a due process case—only the due process clause limited state authority over expression.

Holmes displayed awareness of this distinction by acknowledging generally that the states might enjoy “a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States.”\textsuperscript{127} Further, he couched his conclusion that \textit{Gitlow} could not be convicted in terms that nominally satisfied his usual deferential standard: “[I]t is \textit{manifest} that there was no present danger . . . .”\textsuperscript{128} Whether this conclusion really jibed with Holmes’s position that a state could reasonably find a ban on foreign-language teaching necessary to assure fluency in English, however, may fairly be doubted.\textsuperscript{129} Without spelling out arguments to support such a distinction, Holmes and Brandeis seemed to be moving toward a stricter level of scrutiny in some substantive due process cases than in others. The majority, in contrast, seemed to think speech cases entailed, if anything, more deference than usual.\textsuperscript{130}

3. Whitney and Fiske. \textit{Whitney v. California}\textsuperscript{131} was an even weaker case for conviction than \textit{Gitlow}. Ms. Whitney had been convicted not for making a statement, but for helping to establish an organization that espoused it.\textsuperscript{132} “The novelty,” as Brandeis observed in his separate

\textsuperscript{125} The same can be said of their deferential position in equal protection cases in light of the accepted learning that the clause forbade only unreasonable classifications. \textit{e.g.}, Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389, 403, 405 (1928) (Holmes, J., dissenting, Brandeis, J., dissenting), \textit{discussed supra} text accompanying note 32; F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 418 (1920) (Brandeis and Holmes, JJ., dissenting).

\textsuperscript{126} Professor Thayer’s famous argument for deference, however, like the suggestions in early decisions that the Court should never set aside a legislative judgment except in a clear case, see D. CURRIE, \textit{supra} note 20, at 33, was based on institutional considerations that transcended the requirements of particular provisions. \textit{See J. THAYER, LEGAL ESSAYS} 9-31 (1908). “It is plain that where a power so momentous as this primary authority to interpret is given [to the legislature], the actual determinations of the body to whom it is intrusted are entitled to a corresponding respect . . . .” \textit{Id.} at 11.

\textsuperscript{127} \textit{Gitlow}, 268 U.S. at 672. Without this qualification, the protection of speech against state action would have the paradoxically illiberal result of strengthening Holmes’s \textit{Schenck} argument that the protection of speech against acts of Congress was not absolute: Maybe Congress was not meant to have power over people who shout “fire” in crowded theaters, but surely someone was.

\textsuperscript{128} \textit{Id.} at 673 (Holmes, J., dissenting).

\textsuperscript{129} \textit{Cf.} Meyer v. Nebraska, 262 U.S. 390 (1923) (Holmes, J., dissenting), \textit{discussed supra} text accompanying notes 81-91.

\textsuperscript{130} For later development of the notion of varying levels of scrutiny see, for example, United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).

\textsuperscript{131} 274 U.S. 357 (1927).

\textsuperscript{132} \textit{Id.} at 360.
opinion, "is that the statute aims, not at the practice of criminal syndicalism, nor even directly at the preaching of it, but at association with those who propose to preach it."\textsuperscript{133} For the majority, Justice Sanford was unfazed: "That such united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals, is clear."\textsuperscript{134}

As in Gitlow, the Court said it could not examine the defendant's actual behavior, deferring this time not explicitly to a legislative judgment but to the judicial factfinder: Though couched in constitutional terms, the question whether the defendant had the requisite knowledge of the association's purposes "is one of fact merely which is not open to review in this Court, involving as it does no constitutional question whatever."\textsuperscript{135}

Like the question of review of a statute as applied, the problem of deference to the factfinder in constitutional cases is a knotty one. On the one hand, the Court had already held that it could not examine de novo a state court determination that the compensation awarded for a taking had been adequate.\textsuperscript{136} On the other, the Court had also established that, in order to prevent evasion of due process limitations on state tax power, it was not bound by a state court's finding that the taxes in question had been paid voluntarily.\textsuperscript{137} In concluding not only that the jury's resolution of the question had been reasonable, but that the issue presented "no

\textsuperscript{133} Id. at 373 (Brandeis, J., concurring). See Z. Chafee, supra note 97, at 344-45 for a description of the innocence of Whitney's own activities and for the conclusion that she had been convicted for "being at a meeting and nothing more." Both Gitlow and Whitney were pardoned after the Court had upheld their convictions. See id. at 324, 352-53.

\textsuperscript{134} Whitney, 274 U.S. at 372.

\textsuperscript{135} Id. at 367. In Gitlow the question was whether the statements created a constitutionally sufficient danger; the further question in Whitney was whether there was a constitutionally sufficient intent. As in Gitlow, the Court proceeded on the assumption that the fourteenth amendment made first amendment guarantees applicable to the states, this time without adverting to the question.

\textsuperscript{136} See Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226, 242-46 (1897). At least to the extent that "facts" in the historical sense are concerned, this degree of deference may be compelled in civil jury cases by the seventh amendment: "[N]o fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

\textsuperscript{137} Ward v. Love County, 253 U.S. 17, 22 (1920) ("Of course, if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided."). It is useful to compare Ward to the numerous cases reexamining, for the same reason, a state court finding that a contract allegedly impaired had never existed. See, e.g., Piqua Branch of State Bank v. Knoop, 57 U.S. (16 How.) 369, 382 (1854), discussed in D. Currie, supra note 20, at 218-19. In later years, indeed, the Court would insist on reviewing de novo such questions as whether a confession was coerced, a search unreasonable, or a defamatory statement malicious. See, e.g., Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229 (1985) (discussing Bose Corp. v. Consumers Union of United States, 466 U.S. 485 (1984), and its constitutional requirement that appellate judges review record to determine whether actual malice was shown in defamation cases).
constitutional question whatever,"138 the Court was not necessarily contradicting the latter decision; it may have meant, along the lines suggested in Gitlow, that a statute including unsuspecting members of a prohibitable association would be constitutional. Unfortunately, if this is what Sanford had in mind, he neither said so nor defended that rather extreme conclusion.

Joined by Holmes, Brandeis eloquently enlarged upon the former's explanation of the purposes of the first amendment, reaffirmed that the danger of harm must be both immediate and serious, and rejected Sanford's "suggestion . . . that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment."139 Nevertheless, Brandeis and Holmes did not dissent; finding "other testimony" supporting "the existence of a conspiracy . . . to commit present serious crimes" that "would be furthered by the activity of the society of which Miss Whitney was a member," they concurred on the ground of her failure to preserve the clear and present danger issue in the lower courts.140

What was most remarkable was what Justice Sanford wrote on the same day for an undivided Court in Fiske v. Kansas.141 The statute in issue was much the same as those upheld in Gitlow and Whitney, and in both those cases the Court had refused to review the facts. In Fiske, Sanford both said and did the opposite. "[T]his Court will review the finding of facts by a State court where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it . . . ."142 Though the pamphlets the defendant had distributed indeed sought sweeping social changes, in contrast to Gitlow or Whitney, there was neither "charge [n]or evidence that the organization in which he secured members advocated any crime, violence or other unlawful acts as a means of effecting" them.143

Just how this was to be squared with the reasoning of the earlier cases was left unsaid. Perhaps, in contrast to Gitlow, deference to the

139. Id. at 373, 379 (Brandeis, J., joined by Holmes, J., concurring). Holmes's stress on the marketplace of ideas, see Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), suggested that freedom of expression was a means to an end. Brandeis, insisting that "[t]hose who won our independence believed that the final end of the State was to make men free to develop their faculties," maintained that "[t]hey valued liberty both as an end and as a means." Whitney, 274 U.S. at 375 (Brandeis, J., concurring).
140. Whitney, 274 U.S. at 379 (Brandeis, J., joined by Holmes, J., concurring).
141. 274 U.S. 380 (1927).
142. Id. at 385.
143. Id. at 387.
legislature was unnecessary because that body had never determined that statements like Fiske's should be prohibited. Perhaps, in contrast to Whitney, the facts were of constitutional magnitude because the fourteenth amendment forbade punishment of those who advocated change by lawful means. But Sanford made no effort to explain.

Sanford reached his conclusion that the statute could not be applied to Fiske, moreover, without even discussing the still unresolved question whether the due process clause made freedom of expression limitations applicable to the states. The most natural inference may be that Fiske finally decided that it did. Yet the Court nowhere said that freedom of expression had been infringed; it spoke only in terms of the unspecified "liberty" protected by the due process clause. If by "liberty" the Court meant freedom from a sentence of imprisonment, then Fiske may not have been a free speech decision at all, but rather—though the conclusion that "the Act" was unconstitutional as "[t]hus applied" seems to suggest the contrary—an unexplained application of the later-announced general procedural principle that due process forbids conviction without evidence that a crime has been committed.

However mysterious its basis, Fiske seemed to suggest that the persistent hammering by Holmes and Brandeis was beginning to have an effect: For the first time in its history, the Court had struck down an effort to inflict punishment for the expression of ideas.

144. Fiske's argument had been cast in freedom-of-expression terms, concluding with the statement that the applicability of speech and press guarantees to the states through the due process clause was not being discussed at length because it had been established in Gitlow. Brief for the Plaintiff in Error at 27, Fiske v. Kansas, 274 U.S. 380 (1927).

145. Fiske, 274 U.S. at 387 ("Thus applied the Act is an arbitrary and unreasonable exercise of the police power of the State, unwarrantably infringing the liberty of the defendant in violation of the due process clause of the Fourteenth Amendment.").

146. See Thompson v. Louisville, 362 U.S. 199, 204 (1960). But cf. Arrowmith v. Harmoning, 118 U.S. 194, 196 (1886) ("Certainly a State cannot be deemed guilty of a violation of [the due process clause] simply because one of its courts . . . has made an erroneous decision."). Fiske had in fact been sentenced to imprisonment. See Transcript of Record at 3, Fiske v. Kansas, 274 U.S. 380 (1927). The alternative explanation is that the Court understood the state court to have construed the statute not to require unlawful means despite its express terms, and held that the statute so construed invaded freedom of expression. See Z. Chafee, supra note 97, at 352; H. Hart & H. Wechsler, The Federal Courts and the Federal System 615 (2d ed. 1973):

If a state may not, as a matter of federal constitutional law, punish particular conduct—e.g., simply arguing with a policeman—then it is clearly appropriate for the Supreme Court to review and reverse where there is no evidence of any facts which might take the conduct outside of constitutional protection. This is the teaching of Fiske v. Kansas.

147. Both Holmes and Brandeis had gone along when the Court, without significant discussion, held that the government of Puerto Rico could constitutionally punish a libel against its governor in Balzac v. Porto Rico, 258 U.S. 298, 314 (1922). The Court seemed simply to assume that the first amendment limited the Puerto Rico legislature. See id. at 314. The Court also reaffirmed the inapplicability of criminal jury guarantees to Puerto Rico, which the Court concluded had still not been "incorporated" into the United States. See id. at 304-05; see also Fuller II, supra note 20, at 873-80
C. Other Bill of Rights Provisions.

1. Taking and Regulation. The fifth amendment bars taking property for public use without compensation; it says nothing about regulation. The paradigm case in which compensation is required is the appropriation of private land for the construction of government buildings. In light of historical practice, it is hardly credible that, by the apparently narrow and specific language of the amendment, the framers meant to forbid all regulation of the use of property without compensation. Invoking the longstanding precedent of nuisance laws, the Court before the Taft period had upheld such additional limitations as a ban on the manufacture of liquor and on the making of bricks in a populated area.\textsuperscript{148} Though substantive due process cases showed that the right to use one's land was part of the bundle of rights that made up a property interest, Justice Harlan had suggested long before that mere regulation was not a "taking . . . for the public benefit" because the government did not appropriate or use the affected property.\textsuperscript{149}

A rigid distinction according to the form of governmental intervention, however, would have destroyed the protective power of the clause. To forbid an owner to exclude the public from his property, for example, would effectively transfer the property to public use.\textsuperscript{150} Some more functional test had to be devised to accomplish the purposes of the compensation clause without outlawing regulation altogether.

This was what Justice Holmes sought to do in his opinion for the Court in \textit{Pennsylvania Coal Co. v. Mahon}.\textsuperscript{151} Having granted the plaintiffs the right to the surface of its land, the company prepared to exercise its reserved right to remove all the underlying coal. Relying on a later statute forbidding mining that would cause subsidence of other people's houses, the plaintiffs sought an injunction. By an eight-to-one vote the

\footnotesize{(discussing earlier decisions on applicability of various constitutional provisions to insular possessions).}

\textsuperscript{148} Hadacheck v. Sebastian, 239 U.S. 394 (1915) (city ordinance banning brick yards in certain areas held valid exercise of police power); Mugler v. Kansas, 123 U.S. 623 (1887) (state legislation banning manufacture of alcoholic beverages valid exercise of police power); see also D. CURRIE, \textit{supra} note 20, at 375-77; White, \textit{supra} note 20 at 1132 n.103.

\textsuperscript{149} Mugler v. Kansas, 123 U.S. 623, 668-69 (1887). \textit{Mugler} properly distinguished \textit{Pumpelly v. Green Bay Co.}, 80 U.S. (13 Wall.) 166 (1872), which had held the flooding of property by a government dam to be a taking under the Wisconsin constitution, as a case in which the "property was, in effect, required to be devoted to the use of the public" for the storage of surplus water. \textit{Mugler}, 123 U.S. at 668. For examples of the position that the right of use was a property right, see Truax v. Corrigan, 257 U.S. 312, 327 (1921), \textit{discussed supra} notes 25-39 and accompanying text; Munn v. Illinois, 94 U.S. 113, 140 (1877) (Field, J., dissenting).

\textsuperscript{150} See Sax, \textit{Takings and the Police Power}, 74 \textit{YALE L.J.} 36, 46-48, 71-73 (1964) (giving inventive examples of actual "regulations" designed to circumvent technical requirement of a "taking").

\textsuperscript{151} 260 U.S. 393 (1922).
Court held that, as applied to these facts, the statute took the company's property without compensation.

Alert to the danger of the formal distinction suggested by Brandeis's dissenting observation that the state had not “appropriate[d]” or “use[d]” the coal company's property, Holmes protested that the effect was the same as if it had: The regulation practically transferred to the surface owner an easement of support. Although some regulation without compensation was implicitly permitted because otherwise “[g]overnment hardly could go on,” this “implied limitation must have its limits, or the contract and due process clauses are gone.” Thus, it was the “general rule . . . that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”

And how was one to determine whether a particular regulation went too far? “One fact for consideration,” said Holmes, “is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be . . . compensation . . . .” In the present case, “the extent of the taking is great. It purports to abolish what is recognized in Pennsylvania as an estate in land . . . .” The difference between a regulation and a taking was one of degree, not of kind.

Justice Brandeis objected that Holmes had misapplied his own test: If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land. . . . For aught that appears the value of the coal kept in place by the restriction may be negligible as compared with the value of the whole property, or even as compared with that part of it which is represented by the coal . . . which may be extracted despite the statute.

Beyond this, as Brandeis also noted, Holmes's test appeared to contradict earlier decisions that had allowed the complete destruction of property values in liquor and oleomargarine to protect the public interest. Finally, it is difficult to relate Holmes's test to any conceivable purpose of the taking provision. That the state has taken a small bite rather than a

152. Id. at 417 (Brandeis, J., dissenting).
153. "To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." Id. at 414.
154. Id. at 413.
155. Id. at 415.
156. Id. at 413.
157. Id. at 414.
158. Id. at 416.
159. Id. at 419. For further criticism along these lines, see Rose, Mahon Reconstructed: Why the Takings Issue is Still a Muddle, 57 S. CAL. L. REV. 561, 566-69 (1984); Sax, supra note 150, at 60.
large one affects the amount of compensation; it does not alter the fact that, as he suggested in the same opinion, it is unfair to place the burden of a public benefit on the shoulders of the individual owner.\textsuperscript{161}

Holmes also suggested that the public interest in forbidding the undermining of homes was not great: The statute “is not justified as a protection of personal safety. That could be provided for by notice.”\textsuperscript{162} Brandeis responded with a pointed reference to two of Holmes’s own earlier opinions stressing the need for deference to reasonable legislative decisions.\textsuperscript{163} Indeed—as in \textit{Gitlow}—it is not easy to reconcile Holmes’s second-guessing of the adequacy of less intrusive alternatives with his argument that a state could fairly find sterilization of shoddy insufficient to prevent disease.\textsuperscript{164} Elsewhere in the same opinion, moreover, Holmes himself revealed a more fundamental objection to his apparent suggestion that a sufficiently strong public interest would dispense with the need for compensation for what otherwise would amount to a taking:\textsuperscript{165} “The protection of private property in the Fifth Amendment presupposes” a

\begin{footnotesize}
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\item See \textit{Mahon}, 260 U.S. at 416. When property is actually appropriated for public use, this is clearly the law: Not one square inch of land may be taken without compensation, even if the owner remains in possession of the incomparably larger remaining portion of his property. See, e.g., \textit{Loretto v. Telepromter Manhattan CATV Corp.}, 458 U.S. 419, 438 n.16 (1982) (installation of television cable facilities: “[W]hether the installation is a taking does not depend on whether the volume of space that it occupies is bigger than a bread box.”). The utilitarian argument that compensation serves to assure the efficiency of government actions by internalizing their costs does not itself justify Holmes’s test; as Professor Michelman has said, it would require compensation for essentially all government–caused harms. Michelman, \textit{Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law}, 80 \textit{Harv. L. Rev.} 1165, 1181 (1967). For the argument that the magnitude of the taking does relate to the taking clause’s tendency to reduce the risk that productive activity may be deterred by the fear of capricious government action, see \textit{id.} at 1229-34.

\item \textit{Mahon}, 260 U.S. at 414. Nor did the statute protect the safety of lessees of surface rights from coal companies, since it allowed undermining the company’s own land. See \textit{id.; Rose, supra} note 159, at 571-73.

\item \textit{Mahon}, 260 U.S. at 420 (citing \textit{Patstone v. Pennsylvania}, 232 U.S. 138, 144 (1914) (upholding ban on alien ownership of shotguns); \textit{Laurel Hill Cemetery v. San Francisco}, 216 U.S. 358, 365 (1910) (upholding ban on burial within city)). Brandeis added: “[I]t seems . . . clear that mere notice of intention to mine would not in this connection secure the public safety.” \textit{id.} at 422.

\item See \textit{supra} text accompanying note 76 (discussing \textit{Weaver v. Palmer Bros.}, 270 U.S. 402 (1926)). Like the first amendment in \textit{Gitlow}, and unlike the due process clause as construed by the Court, the taking provision does not prohibit only unreasonable action. For Holmes’s explanation of this difference, see \textit{Adkins v. Children’s Hospital}, 261 U.S. 525, 568 (1923) (dissent); see also \textit{supra} text accompanying notes 67-73. Like the first amendment, however, the taking clause applies only to the central government; cases involving state takings, as well as state limitations on speech, are governed by the due process clause. See \textit{Chicago, B. & Q.R.R. v. Chicago}, 166 U.S. 226, 235-41 (1897); \textit{Barron v. Mayor of Baltimore}, 32 U.S. (7 Pet.) 243 (1833), \textit{discussed in D. Currie, supra} note 20, at 189-93.

\item “[W]e should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant’s constitutionally protected rights.” \textit{Mahon}, 260 U.S. at 414; see also \textit{id.} at 415 (distinguishing a requirement that miners leave pillars of coal standing sufficient to prevent flooding as “requirement for the safety of employees invited into the mine”).
\end{enumerate}
\end{footnotesize}
valid public purpose "but provides that it shall not be taken for public use without compensation."' Holmes seemed to be saying property could be taken without compensation if there was sufficient public need.'

Holmes’s arguments, in short, seem less than convincing. Moreover, Justice Brandeis by no means based his dissent on a purely formal distinction between taking and regulation that would eviscerate the clause. He drew, rather, on the established theory that had been employed by so ardent a protector of property rights as Justice Field to explain—long before the taking clause was found embodied in the fourteenth amendment—why the prohibition of nuisances was not a deprivation of property without due process: “Coal in place is land; and the right of the owner to use his land is not absolute. He may not so use it as to create a public nuisance; and uses, once harmless, may, owing to changed conditions, seriously threaten the public welfare.” Harlan had said the same thing in 1887: “[A]ll property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community.” In the ordinary case, the ownership of property does not include the right to undermine a neighbor; thus, in the ordinary case, no property is taken when undermining is forbidden.

The facts of the Mahon case, however, seemed to take the case out of this usual rule. As Holmes insisted, the company in selling surface rights to the plaintiffs had expressly reserved the right to mine all the coal. The terms of the conveyance had negated the normal obligation of support and given the company the extraordinary right to undermine

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166. Mahon, 260 U.S. at 415.

167. Such a conclusion “baffles” not only “legal commentators who take a neoclassical economic approach,” as Professor Rose argues, see supra note 159, at 593-94, but also those who believe, as the taking clause seems to indicate, that the Philadelphia Convention adopted the “Benthamite point of view” that the public must pay for the property it acquires. See id. at 594.

168. Mahon, 260 U.S. at 417; cf. Munn v. Illinois, 94 U.S. 113, 145 (1887) (Field, J., dissenting) (“The doctrine that each one must so use his own as not to injure his neighbor—sic utere tuo ut alienum non laedas—is the rule by which every member of society must possess and enjoy his property . . . .”). See D. Currie, supra note 20, at 372; T. Cooley, supra note 45, at 573.


170. See, e.g., 1 H. Tiffany, The Law of Real Property and Other Interests in Land § 301 (1903).

171. Cf. Rose, supra note 159, at 582 (“[N]oxious fumes may be abated without compensation because the property owner never had a right to inflict noxious fumes on his neighbors, and consequently lost nothing by regulation.”); B. Ackerman, Private Property and the Constitution 101-02 (1977) (humble example of the bicycle owner who rides over his neighbor’s marigolds); see also id. at 150-56 (no compensation required when taking is designed to prevent socially unacceptable practices).

the plaintiffs' land. Thus, the argument that would support Brandeis's position in the usual case failed in Mahon: The prohibition of undermining did deprive the company of a preexisting property right—unless the right to reserve such an interest had been qualified from the outset.

As Brandeis once again neatly pointed out, earlier Holmes decisions suggested that it had been: Despite the clause forbidding impairment of contracts, no one could remove a subject from the police power by making a contract about it. Indeed, decisions under the taking clause itself had gone beyond permitting the enforcement of duties imposed on landowners by the common law. They had upheld the imposition of new and analogous duties, such as the duty not to make or sell liquor, on the broader theory that the ownership of property, like the right to contract, was limited not only by existing laws, but also by a general governmental power to legislate for the prevention of harm.

Brandeis did not explicitly explain how to curtail a police power qualification before it destroyed the taking clause. In answering the Court's suggestion that a provision requiring that miners leave coal pillars along the property line to prevent flooding of adjacent mines was justified by "an average reciprocity of advantage," however, Brandeis drew a distinction that would serve the purpose:

Reciprocity of advantage is an important consideration, and may even be an essential, where the State's power is exercised for the purpose of conferring benefits upon the property of a neighborhood, as in drainage projects, ... or upon adjoining owners, as by party wall provisions. But where the police power is exercised, not to confer benefits upon property owners, but to protect the public from detriment and

173. See H. TIFFANY, supra note 170, § 309 ("[T]he owner of the surface of land may grant or release to the owner of subjacent soil or minerals the right to work or mine the latter, even though this causes a disturbance or sinking of the surface.").

174. Mahon, 260 U.S. at 420-21 (citing Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908)); see also Fuller I, supra note 20, at 334-35 (discussing Manigault v. Springs, 199 U.S. 473 (1905)). Without responding directly to Brandeis's invocation of his own earlier opinions, Holmes seemed to limit those opinions by acknowledging for the first time that their reasoning posed a threat to the very existence of the constitutional provision: "As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone." Mahon, 260 U.S. at 413.

175. E.g., Mugler v. Kansas, 123 U.S. 623, 665, 669 (1887). Compare Cooley's formulation of the relation between the police power and property under the similarly worded due process clause, quoted supra note 45. But for this implicit limitation, the Court might well have had to strike down residential zoning laws as takings without compensation, since they went beyond the analogous law of nuisance. As it was, the Court upheld zoning against a due process attack on the basis of the nuisance analogy without even discussing the taking issue. See Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), discussed supra note 79 and accompanying text. For the alternative argument that zoning was justified by implicit compensation in kind—though hardly well tailored to the facts of the Euclid case, where zoning allegedly reduced the value of the affected land by three quarters—see infra text accompanying notes 176-79.

176. Mahon, 260 U.S. at 415 (citing Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914)).
danger, there is, in my opinion, no room for considering reciprocity of
advantage.177

"Reciprocity of advantage" is compensation in kind; Brandeis and
Holmes both seemed to be saying that it would justify an actual tak-
ing.178 But in Brandeis's view, there was a taking only when the owner
was required to benefit his neighbor, not when he was forbidden to harm
him. It is true that one may suffer economic injury in either case,179 but
nuisance law has distinguished the two for centuries. It is on this distinc-
tion that Brandeis built: It is unfair to require an individual property
owner to contribute his land for a post office, but it is not unfair to make
him stop polluting his neighbors.180

Borderline cases will prove refractory on Brandeis's test, and
Mahon was a borderline case. To undermine the Mahons' land would
harm them; to forbid undermining would give them a right to support
that they had not paid for. That the Mahons had been compensated for
forsaking that right does seem at least to shift the equities; even in Bran-
deis's terms, a strong case can be made for saying the statute gave the
Mahons a benefit for which they had not bargained.

Not long after Mahon, the Court in Miller v. Schoene unanimously
upheld, against a taking objection, a statute requiring the destruction of
ornamental cedar trees infected with a disease damaging to nearby apple
orchards.181 Holmes was silent, although the diminution in value, which
he had so heavily stressed in Mahon, was obviously great if the cedars,
like the right to undermine houses, were to be considered in isolation. In
Brandeis's terms, while the destruction of the cedars could be said to
confer a benefit on the apple growers, the proximity of the case to tradi-
tional nuisance law seemed to suggest, as in the zoning case, that the
statute should be upheld.

Ignoring Mahon altogether, Justice Stone announced a new test that
avoided choosing between two equally accurate characterizations:

177. Mahon, 260 U.S. at 422.
178. See Rose, supra note 159, at 581.
179. See Coase, supra note 79, at 2 (requiring one to avoid causing injuries to another may inflict
economic loss on the enjoined party); Sax, supra note 150, at 48-50 ("Actually the problem is not
one of noxiousness or harm-creating activity at all; rather it is a problem of inconsistency between
perfectly innocent and independently desirable uses.");
180. See also Nashi, C. & St. L. Ry. v. Walters, 294 U.S. 405, 428-29 (1935) (Brandeis, J.)
(holding unconstitutional a requirement that railroad pay for elimination of grade crossing where
reason was promotion of highway speed rather than safety: "[t]he promotion of public convenience
will not justify requiring of a railroad . . . the expenditure of money, unless it can be shown that a
duty to provide the particular convenience rests upon it"); Dunham, Griggs v. Allegheny County in
Perspective: Thirty Years of Supreme Court Expropriation Law, 1962 Sup. Ct. Rev. 63, 73-81. Seen
in this light, the taking clause and the police power can comfortably coexist as complementary com-
ponents of the property owner's general right to be left alone.
181. 276 U.S. 272 (1928).
The state was under the necessity of making a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity. It would have been none the less a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards within its borders to go unchecked. When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another . . . .

Elaborating on this reasoning, Professor Sax concluded that no compensation should be required when the government arbitrated between conflicting uses of adjacent properties. Like Brandeis's distinction, this test serves to separate the abatement of a nuisance from the construction of a post office, where the landowner's activities do not interfere with the use of government land. Yet Professor Sax would permit the government also to favor the perpetrator of a nuisance on the ground that to protect the victim is to limit the other's right to use his own property. On the assumption that the nuisance had previously been prohibited, why the transfer of rights involved in this case is more consistent with the constitutional purpose of avoiding arbitrary imposition of burdens than in the case of the post office is not altogether clear.

The elusiveness of a logically satisfying treatment of the regulations in Mahon and Miller underscores the refractory nature of the problem. However imperfect their solutions, Holmes, Brandeis, and Stone ren-

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182. Id. at 279.
184. Cf. Delaware, L. & W.R.R. v. Town of Morristown, 276 U.S. 182 (1928) (Butler, J.) (striking down as an uncompensated taking a requirement that railroad make its property available for taxi stand). Brandeis, joined by Holmes, concurred in a separate opinion. Decided the same day as Miller, this case can be reconciled with Miller by employing Professor Sax's distinction, because the terminal did not interfere with the use of the cab owner's property. In the language of Brandeis's dissent in Mahon, 260 U.S. at 416, the railroad was required to confer a benefit on the cab owners.
185. See Sax, supra note 183, at 164–66 (distinguishing between requiring adjoining owner put up with airport noise and requiring same owner to surrender land for new runway).
186. See Sunstein, supra note 22, at 1726 ("[T]he seeds of a destruction of the eminent domain clause may lie within the Miller Court's statement."). In an earlier article, Professor Sax had argued that compensation should be required only if the government acted in an "enterprise" capacity as opposed to reconciling private disputes, on the ground that the risk of arbitrary action that gave birth to the compensation requirement was at its height when the government acted to promote its own interest. Sax, supra note 150, at 62–67. As Sax's later example of the new runway seems to acknowledge, however, it is also arbitrary to give one person's property to another without compensation. Sax, supra note 183, at 164–66. Indeed, the independent "public use" requirement has been held to forbid such a transfer even if compensation is paid. For criticism of both versions of Sax's test on grounds of unfairness, see Berger, A Policy Analysis of the Taking Problem, 49 N.Y.U. L. Rev. 165, 177–82 (1974) (urging compensation when justifiable expectations of owner are frustrated by government action).
dered major services by their provocative exploration of the infuriating borderland between regulation and taking.

2. Searches and Seizures. Like the other provisions of the Bill of Rights, the fourth amendment's prohibition of "unreasonable searches and seizures" applied only to the central government and not to the states. Partly for this reason, and partly because of the long absence of any provision for appellate review of federal convictions, the amendment had not figured prominently in Supreme Court jurisprudence before Taft's appointment in 1921.

The Court had begun by giving the clause a broad construction in *Boyd v. United States* in 1886, holding that it prohibited a court order to produce evidence even though there was no physical invasion of the defendant's premises or person. *Gouled v. United States* had held the amendment applicable to an entry accomplished by fraud and had completed the development of the rule requiring exclusion of evidence unlawfully obtained. In other respects, the amendment remained largely unexplored.

The ratification of the prohibition amendment in 1919, however, led to an unprecedented increase in federal criminal enforcement and to a corresponding spate of important search and seizure decisions during the Taft period.

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188. See Evarts Act of March 3, 1891, ch. 517, § 5, 26 Stat. 826, 827 (codified as amended in scattered sections of 28 U.S.C.) ("capital or otherwise infamous crimes"); Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655, 656 (writ of error in capital cases); Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84 (making final judgments in "civil actions" reviewable in district or circuit court); see also H. Hart & H. Wechsler, *supra* note 146, at 1539-41.

189. 116 U.S. 616 (1886); see D. Currie, *supra* note 20, at 444-47.

190. 255 U.S. 298 (1921); see also Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391-92 (1920) (refusing to subpoena evidence that had been returned after unlawful search); Weeks v. United States, 232 U.S. 383 (1914) (upholding a search victim's right to recover property unlawfully seized).

If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. Id. at 393. In *Gouled* itself, where the principle was extended to require the exclusion of evidence, Justice Clarke relied not on the argument of enforcing the fourth amendment, but on unconvincing dicta in the *Boyd* opinion suggesting that the introduction of evidence unlawfully seized would violate the fifth amendment's ban on compulsory self-incrimination. *Gouled*, 255 U.S. at 306. The fifth amendment ground was repeated regularly in the opinions of the Taft period. See, e.g., *Agnello v. United States*, 269 U.S. 20, 33-34 (1925).
a. Open fields. The first case, *Hester v. United States*, was decided in 1924. The evidence objected to had been obtained by revenue agents who had apparently entered private land without permission. Justice Holmes disposed of the fourth amendment objection in two sentences: "[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law."  

Cited for the traditional distinction was a passage from Blackstone dealing with the law of burglary. The law of trespass, as Holmes acknowledged, protected open fields as well, and—unless the text compelled this conclusion—it was not clear why burglary was a more appropriate analogy. The celebrated English case on which *Boyd* had so heavily relied had described permissible searches as an exception to the law of trespass, and *Boyd* itself had said the amendment was designed to protect the "indefeasible right of personal security, personal liberty and private property"—which seemed broad enough to embrace the premises in *Hester*. Since one of the essential prerogatives of the landowner is the right to exclude others, one might well argue that land ownership creates the very sort of legitimate expectation of privacy that the amendment was designed to protect.  

The obvious stumbling block is the text. Pointedly quoted by Holmes, it protects not all property but only "persons, houses, papers, and effects"; and the last term is generally taken to refer to personal rather than real property. As noted by three dissidents when *Hester* was reaffirmed half a century later, a series of decisions beginning in 1967 had renounced this literal interpretation in an effort to effectuate the purposes of the provision. It is possible that the House of Representa-
tives’ unexplained substitution of the term “effects” for Madison’s originally proposed reference to “property” reflected a deliberate judgment that the privacy interest in real property other than “houses” was insufficient to justify further limiting the authority of government to investigate crime.\(^1\) A Court not convinced of this, however, could easily have read the language more broadly after having held that a court order constituted a “search,” a regulation of land use a “taking,” and a photograph a “writing” within the copyright clause.\(^2\) Since Holmes himself had written the opinion in the taking case less than three years before, it is not obvious that he really found the text decisive; and, as so often was the case, he did not say what else was on his mind.\(^3\)

b. **Vehicles and houses.** Whatever the limits of the types of real property protected by the fourth amendment, the Court had no difficulty in treating an automobile as falling within the “effects” embraced by the search and seizure provision. The question in the 1925 case of *Carroll v. United States* was what made a search of protected effects “unreasonable.”\(^4\)

The opinion was long and tedious, but the holding was clear: A moving automobile could be stopped and searched without a warrant if there was probable cause to believe it was carrying illegal beverages.\(^5\) To a substantial degree this conclusion was based upon a longstanding usual search of business premises, the objects searched and seized within the building constituted “effects.”

\(^1\) See Oliver v. United States, 466 U.S. 170, 176-77 (1984); J. Landynski, Search and Seizure and the Supreme Court 41 (1966); 1 Annals of Cong. x (1789).


\(^3\) To hold all private property protected by the fourth amendment would not make every observation of activity on such premises an unreasonable search. Much that is done outdoors on private land can be seen from outside its boundaries, and it does not seem unreasonable to allow the government to see what the owner has knowingly exposed to public view. See infra text accompanying notes 220-22 (discussing United States v. Lee, 274 U.S. 559, 563 (1927)). Beyond this, it does not seem unreasonable for an enforcement officer to enter private property that has been opened to the public by the owner, as in the case of many business establishments. See Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861, 865 (1974) (inspector not required to have warrant to enter property held open to public). The Court did not reach this issue in *Hester* because it held the premises in question wholly outside fourth amendment protection. *Hester*, 265 U.S. at 59; see Oliver v. United States, 466 U.S. 170, 193-94 (1984) (Marshall, J., dissenting).

\(^4\) 267 U.S. 132 (1925).

\(^5\) Id. at 153-56. McReynolds and Sutherland, in dissent, protested that, among other things, there was no probable cause: “Has it come about that merely because a man once agreed to deliver whisky, but did not, he may be arrested whenever thereafter he ventures to drive an automobile on the road to Detroit!” Id. at 174. For similar criticism, see J. Landynski, supra note 199, at 89-90 (citing Black, A Critique of the Carroll Case, 29 Colum. L. Rev. 1068 (1929)). For the majority’s argument that the prohibition agents in *Carroll* had probable cause, see *Carroll*, 267 U.S. at 159-62.
congressional practice\textsuperscript{204} that, as a leading student of the amendment had observed,\textsuperscript{205} had largely been confined to searches at or near international borders—a context in which the Court acknowledged that the ordinary rules did not apply.\textsuperscript{206} More persuasive was the Court's explanation of the basis for the distinction it thought Congress had traditionally drawn: In the case of a vehicle or vessel, "it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."\textsuperscript{207}

On the Court's explicit assumption that it was "unreasonable" to search without a warrant whenever it was practicable to get one,\textsuperscript{208} the Carroll exception made some sense,\textsuperscript{209} as did the similarly supported exception for warrantless searches incident to a lawful arrest, which the Court confirmed in dictum in the same opinion.\textsuperscript{210} The assumption was

\textsuperscript{204} See Carroll, 267 U.S. at 150-53 (listing statutes dating from as early as 1789 authorizing warrantless searches of vessels or vehicles and issuance of warrants to search buildings).

\textsuperscript{205} J. Landynski, supra note 199, at 90 (citing Black, supra note 203, at 1075, and criticizing relevance of Taft's examples).

\textsuperscript{206} Carroll, 267 U.S. at 154 (explaining that "national self protection" justified searching vehicles at border without even probable cause). The 1789 statute cited in Carroll was not strictly limited to ships entering the country, but later cases have extended the notion of somewhat relaxed rules for international travelers miles beyond the actual border, especially when ships are involved. See United States v. Villamonte-Marquez, 462 U.S. 579, 588-93 (1983) (upholding high-seas inspection without probable cause and stressing "need to deter or apprehend smugglers"); United States v. Martinez-Fuerte, 428 U.S. 543, 566-67 (1976) (upholding questioning of vehicle occupants by Border Patrol agents at fixed checkpoints without probable cause). Early statutes dealing with liquor in Indian country, see Carroll, 267 U.S. at 152-53, may have been based upon similar reasoning, and a statute dealing with searches in Alaska antedated congressional recognition that the Bill of Rights applied to that territory. See J. Landynski, supra note 199, at 90 n.12; Black, supra note 203, at 1068. In light of the discussion that follows, it may also be significant that the statutes authorizing warrants to search buildings did not expressly forbid searching them without warrants.

\textsuperscript{207} Carroll, 267 U.S. at 153.

\textsuperscript{208} Id. at 156.

\textsuperscript{209} See Alschuler, Bright Line Fever and the Fourth Amendment, 45 U. Pitt. L. Rev. 227, 275-77 (1984), which notes the absence of any basis in Carroll for arresting the occupants of a vehicle before a search, and comments on the Court's thoughtless extension of Carroll, in Chambers v. Maroney, 399 U.S. 42, 52 (1970), to a situation in which a car had been impounded after arrest, on the ground that "mobility of the car . . . still obtained at the stationhouse." Taft's argument is impaired to some degree by the fact that the articles sought may also be removed from a house before a warrant can be obtained.

\textsuperscript{210} Carroll, 267 U.S. at 158. Applied two years later in United States v. Lee, 274 U.S. 559, 563 (1927) (Brandeis, J.) (alternative holding), this rule has generally been justified on the ground that immediate action is necessary to protect the arresting officer from concealed weapons and to prevent the destruction of evidence. See, e.g., Chimel v. California, 395 U.S. 752, 762-63 (1969). Given this rationale, it is not surprising that the Court refused to find that a search of one house was incident to an arrest made in another. Agnello v. United States, 269 U.S. 20, 30-31 (1925) (Butler, J.). For the same reason, however, it does seem surprising that on this theory the same Justices allowed a search of the entire establishment in which the defendant had been arrested, Marron v. United States, 275 U.S. 192, 199 (1927) (Butler, J.). As later cases would recognize, there was no risk that a defendant in custody would employ or destroy items wholly outside his reach. See Chimel, 395 U.S. at 762-68.
itself confirmed a few months later in *Agnello v. United States*, in which a unanimous Court held that "[t]he search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws." As Justice Butler wrote, the Court had long assumed that this was so; he made no effort to justify his conclusion as an original matter.

Later observers have explained that the fourth amendment expresses a preference for warrants in order to interpose the judgment of an independent magistrate between the investigator and the citizen. More recently, however, support has been growing for the argument that *Agnello* "stood the fourth amendment on its head": "Far from looking at the warrant as a protection against unreasonable searches, [the founding fathers] saw it as an authority for unreasonable and oppressive searches, and sought to confine its issuance and execution in line with the stringent requirements applicable to common-law warrants for stolen goods . . . ."

There is nothing in the text of the amendment to answer the question whether warrantless searches are presumptively unreasonable. Respected Justices have argued, however, that to allow the police to search without a warrant whenever there is probable cause would leave the amendment a hollow shell: The limits on the issuance of warrants would do no good if warrants were not required. The factual basis of a counterargument is found in Chief Justice Taft's opinion for the Court in *Carroll*: A warrant "protects the seizing officer against a suit for damages" even if the search is later held unlawful. The citizen already had some protection against warrantless searches because the officer was liable in tort for acting unreasonably; the warrant clause served the pur-
pose of limiting the occasions when a warrant could deprive the citizen of this protection. Thus, the warrant provision makes ample sense in light of the history of abusive warrants that prompted adoption of the amendment, even if no warrant is ever required; thus one argument for the Court’s conclusion in *Agnello* evaporates.

The mere fact that the opposing argument is not absurd, however, does not prove it correct. It would have been entirely consistent for the framers to seek both to prevent the abuse of warrants and to secure such additional protection as comes from the interposition of a disinterested magistrate—however ephemeral that protection may be or have become in practice. If, as is sometimes said, the reasonableness of some searches and seizures depended upon a warrant at common law,\(^{219}\) *Agnello* may have been right after all.

c. Searchlights and wiretaps. In *United States v. Lee*, a 1927 decision, the Court held that the *Carroll* principle permitting warrantless searches of vehicles on probable cause was applicable to vessels, and it confirmed *Carroll*’s dictum permitting warrantless searches incident to a lawful arrest.\(^{220}\) More interesting, however, was the unanimous conclusion in the same case that the use of a searchlight to reveal the contents of a boat to persons outside it was permissible because it was not a “search” at all.\(^{221}\) Brandeis’s argument was brief: Using a searchlight was like using a field glass, and *Hester* was cited by way of unexplained comparison.

At first glance, the Court’s conclusion seems to follow a fortiori from *Hester*: If one may trespass upon private property to view what is visible there, surely it is less offensive to view it from outside, where one has a right to be. Yet *Hester* was based upon the conclusion that open fields were not “effects” protected by the search provision. Since vessels were assumed to be “effects,” *Hester* did not authorize trespassing upon them to discover evidence, and the analogy fails.

Brandeis cited no authority for his conclusion that the term “search” should be narrowly defined, and he did not say why the use of either searchlights or field glasses did not qualify. In the literal sense a

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219. See, e.g., J. SCARBOO & J. WHITE, CONSTITUTIONAL CRIMINAL PROCEDURE—CASES, QUESTIONS, AND NOTES 306-11 (1977). John Adams’s notes of the 1761 Massachusetts writs-of-assistance case attribute to James Otis the argument that the home could never be invaded without a warrant, and a 1762 newspaper article, also attributed to Otis, fulminated against general writs even on the express assertion that they provided no immunity from damages for wrongful intrusion, on the ground that they left the decision to every “petty officer.” See M. SMITH, THE WRITS OF ASSISTANCE CARE 544, 563 (1978).
220. 274 U.S. 559, 563 (1927).
221. *Id.* at 563 (alternative holding).
search had been made: The officers had examined the deck of the boat in an effort to find contraband. It would have been fair enough to hold that such a search was not "unreasonable," since one who puts his belongings where they can easily be seen can hardly have a legitimate expectation of keeping them secret. Brandeis's choice of the ostensibly more sweeping ground that there had been no "search" at all may perhaps be defended on the ground that the framers would not have wanted to subject the policemen watching passersby to the usual paraphernalia of fourth amendment inquiry.\(^{222}\) By neglecting to specify just why there had been no search in \(\text{Lee,}\) however, Brandeis left the opinion open to the interpretation that there could be no search without physical intrusion into "persons, papers, houses, [or] effects."

The chickens came home to roost the next year in \textit{Olmstead v. United States}, where the Court, over four dissents, allowed the use of evidence obtained by tapping telephone wires without a warrant.\(^{223}\) Said Chief Justice Taft, after another tiresome recapitulation of irrelevant decisions:\(^{224}\) \textit{Hester} made clear that the phone company's wires were not among the speaker's protected person, papers, houses, or effects, and \textit{Lee} established that there had been no "search" of the speaker's "person" or "house" because there had been no trespass.\(^{225}\)

Justice Brandeis's anguished dissent is an eloquent exposition of the values protected by the fourth amendment: "The makers of our Constitution...sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."\(^{226}\) His conclusion: To effectu-

\(^{222}\) See United States v. Dionisio, 410 U.S. 1, 8, 14-15 (1973) (defining a search as intrusion upon reasonable expectations of privacy); Amsterdam, \textit{Perspectives on the Fourth Amendment}, 58 \textit{MINN. L. REV.} 349, 395 (1974) (noting that "to subject [a broad range of police practices] to fourth amendment control but exempt them from the warrant or probable cause requirements would threaten the integrity of the structure of internal fourth amendment doctrines"); Stone, \textit{The Scope of the Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents, and Informers}, 1976 \textit{AM. B. FOUND. RESEARCH J.} 1193, 1211-12. \textit{But see} Terry v. Ohio, 392 U.S. 1 (1968) (holding a stop-and-frisk encounter to be a search and seizure but finding neither warrant nor probable cause required); Amsterdam, supra, at 393 ("[T]o exclude any particular police activity from coverage is essentially to exclude it from judicial control and from the command of reasonableness, whereas to include it is to do no more than say that it must be conducted in a reasonable manner."). Compare the question whether every communicative act is "speech" subject to the stringent standards of the first amendment. \textit{See}, e.g., United States v. O'Brien, 391 U.S. 367, 376 (1968) (burning of draft card).

\(^{223}\) 277 U.S. 438 (1928).


\(^{226}\) \textit{Id.} at 478.
ate these goals, "every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."\textsuperscript{227} The words of the amendment, he insisted, were no barrier: The Court had already construed them liberally by holding them to include, among other things, a court order to produce evidence in \textit{Boyd}.\textsuperscript{228}

All of this was very persuasive as an original matter. As Taft argued, however, it came a little late. Brandeis and Holmes—who also dissented in \textit{Olmstead} but on other grounds\textsuperscript{229}—had laid the foundation for the exclusion of wiretapping by their heedlessly narrow interpretations of "houses," "effects," and "searches" in \textit{Lee} and in \textit{Hester}.\textsuperscript{230} Had they based these decisions on the ground that searchlight and open field searches were not "unreasonable," or that a "search" involved the invasion of a reasonable expectation of privacy,\textsuperscript{231} wiretapping could easily have been distinguished. Contrary to the Chief Justice's suggestion,\textsuperscript{232} it does not seem reasonable to conclude that one who speaks over the telephone intends to broadcast his words to the public generally. Nor should the fact that wiretapping was known to be a technical possibility at the time \textit{Olmstead} spoke require the opposite conclusion. If it did, as Brandeis suggested, new inventions such as x-ray cameras or powerful microphones could obliterate the amendment's protection.\textsuperscript{233} After \textit{Lee} had held that the use of a searchlight was not a "search" at all, however, it

\begin{footnotesize}
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\item \textsuperscript{227} Id. For criticism of \textit{Olmstead} on essentially the same grounds, see Stone, \textit{supra} note 222, at 1201-11 (elaborating on nature of privacy protected): "[T]he amendment's protection of privacy should properly be viewed as extending primarily, if not exclusively, to preservation of the individual's interest in keeping information about him away from the prying hands, eyes, and ears of government." \textit{Id.} at 1209.
\item \textsuperscript{228} \textit{Olmstead}, 277 U.S. at 476; see also \textit{id.} at 472-73 (invoking other examples of broad construction of constitutional provisions).
\item \textsuperscript{229} See \textit{Olmstead}, 277 U.S. at 469-70. Holmes agreed with Brandeis's alternative argument, \textit{id.} at 479-85, that on the basis of the equitable clean hands doctrine the courts should exclude evidence obtained by federal officers in violation of state criminal law. Justice Stone agreed with both dissenting arguments; Justice Butler, with that based on the fourth amendment. \textit{Id.} at 485-88.
\item \textsuperscript{230} See Amsterdam, \textit{supra} note 222, at 381-82.
\item \textsuperscript{231} See \textit{supra} note 222.
\item \textsuperscript{232} "The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside . . . ." \textit{Olmstead}, 277 U.S. at 466.
\item \textsuperscript{233} Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. . . . Can it be that the Constitution affords no protection against such invasions of individual security? \textit{Olmstead}, 277 U.S. at 474 (Brandeis, J., dissenting). See also Amsterdam, \textit{supra} note 222, at 384. Compare Holmes's employment of a similar argument to ignore the literal terms of the taking clause in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), \textit{discussed supra} text accompanying notes 152-55.
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was necessary to explain why a wiretap was; and if there was no search, one never reached the question whether the officers' action was unreasonable.234

II. FEDERALISM

A. Maritime Cases.

As in earlier years, the Court during Taft's tenure was confronted with a flock of cases raising the question whether state law was contrary to the negative implications of the commerce clause. Apart from a dissent by Justice Stone presaging a general recognition that in deciding whether a burden on commerce was "direct" or "indirect" the Court had really been balancing the state's interest in regulation against the national interest in freedom of commerce,235 these decisions added little to previous understanding of the law.236

Of somewhat greater interest were developments in Justice McReynolds's related doctrine that the grant of admiralty jurisdiction implicitly limited state power to regulate maritime transactions.237 Reaffirming precedent allowing state wrongful death laws to provide relief in the case of maritime torts, McReynolds explained in Western Fuel Co. v. Garcia that the subject was "maritime and local in character" and that use of the state death law would not, in terms of the governing standard, "work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity

234. Brandeis was notably reticent about Hester and Lee, explaining unexpectedly that the former had involved "voluntary disclosures by the defendant" (which had not been the Court's basis of decision) and following this statement with the unelaborated direction to "[c]ompare . . . United States v. Lee," Olmstead, 277 U.S. at 478 n.11. This passage may have been a belated attempt to say that the earlier cases had involved searches, but that they had been reasonable. Or perhaps Brandeis meant that a "search" was the invasion of a legitimate expectation of privacy. Cf. United States v. Place, 462 U.S. 696, 707 (1983) (looking in part to the degree of intrusiveness in concluding that subjecting luggage to a dog trained to sniff out narcotics was not a "search" at all); Katz v. United States, 389 U.S. 347, 351-52 (1967) (stressing expectation of privacy in overruling Olmstead and finding warrantless electronic eavesdropping an unreasonable search—without saying whether of persons, papers, houses, or effects).


236. See also Buck v. Kuykendall, 267 U.S. 307, 315-16 (1925) (Brandeis, J.) (state may not refuse license for interstate trucking on ground that existing service is adequate); Pennsylvania v. West Virginia, 262 U.S. 553, 596-97 (1923) (Van Devanter, J.) (reaffirming that state cannot require discrimination against out-of-state customers in sale of natural gas).

237. See White, supra note 20, at 1139-45 (discussing, for example, Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917)).
of that law in its international and interstate relations.”

Why the subject was “local,” and why there was no impermissible disruption of uniformity, was not explained.

A month later, in *Grant Smith-Porter Ship Co. v. Rohde*, the maritime-but-local doctrine cropped up once again. A carpenter had been injured while completing the construction of a ship on navigable waters; the Court held his action for damages under the general maritime law was precluded by a state statute making workmen’s compensation his only remedy. The case, wrote McReynolds, was controlled by *Garcia*: Though the tort was maritime, “the application of the local law cannot materially affect any rules of the sea whose uniformity is essential.”

Though the terms he employed were the same in both cases, it is clear that what made the matter in *Rohde* “local” was not what had done so in *Garcia*. *Rohde’s* case was “local” because of the nature of his employment: “The contract for constructing ‘The Alhala’ was nonmaritime, and although the incompletely constructed structure upon which the accident occurred was lying in navigable waters, neither *Rohde’s* general employment, nor his activities at the time had any direct relation to navigation or commerce.”

*McReynolds* distinguished earlier decisions forbidding application of workmen’s compensation laws to maritime cases, including the seminal *Southern Pacific Co. v. Jensen*, because in “each of them the employment or contract was maritime in nature and the rights and liabilities of the parties were prescribed by general rules of maritime law essential to its proper harmony and uniformity.”

In contrast, it cannot have been the nature of the worker’s employment in *Garcia* that made his case “local,” for he, like *Jensen*, had been a stevedore, and the

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238. *Western Fuel Co. v. Garcia*, 257 U.S. 233, 242 (1921). As the Court added, it seemed to follow from the fact that recovery for wrongful death was based on state law (despite the traditional rule that normally time limitations were a “procedural” matter governed by the law of the forum, see *Restatement of Conflict of Laws* §§ 604-605 (1934)) that no relief could be granted after expiration of the applicable state statute of limitations. *Garcia*, 257 U.S. at 242-44 (invoking the similar conclusion of *The Harrisburg*, 119 U.S. 199, 213-14 (1886)). To justify the opposite result would have required finding either that state death laws were utilized in maritime cases only to provide a framework for enforcing a federal policy or that the state time limitation had been intended only to reduce the docket burdens of state courts. *See* *Currie, Federalism and the Admiralty: The Devil’s Own Mess*, 1960 SUP. CT. REV. 158, 191-93, 192 n.173.

239. 257 U.S. 469 (1922).

240. *Id. at 477*.

241. *Id. at 475-76; see also id. at 477* (“Here the parties[...]. . . rights and liabilities had no direct relation to navigation, and the application of the local law cannot materially affect any rules of the sea whose uniformity is essential.”); accord *Miller’s Indem. Underwriters v. Braud*, 270 U.S. 59 (1926) (McReynolds, J.) (allowing compensation award in death of diver employed by local shipbuilder). *See* *Morrison, Workmen’s Compensation and the Maritime Law*, 38 YALE L.J. 472, 491-99 (1929).

242. 244 U.S. 205 (1917).

defendant had been the operator of a vessel.\textsuperscript{244} It must have been the nature of the wrongful death law itself that allowed its application to a person whose employment was "direct[ly] relat[ed] to navigation or commerce."\textsuperscript{245}

McReynolds did not explain why there was no need for uniformity with regard either to wrongful death laws or to the rights and duties of shipbuilders. We can help him: If the concern is that persons engaged in traffic from one place to another should not be subjected to a variety of confusing or conflicting obligations, it is important that the death law apparently imposed no new rules of conduct and that the shipbuilder and his employee did not travel.\textsuperscript{246}

This may explain why state law was permitted to operate in cases such as \textit{Garcia}, in which maritime law expressed no contrary policy. It does not explain, however, why McReynolds was willing to allow the state to deprive Rohde of a right to relief given by federal law. Uniform-

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\item \textsuperscript{244} See \textit{Garcia}, 257 U.S. at 238-39; \textit{Jensen}, 244 U.S. at 207-08.
\item \textsuperscript{245} McReynolds appeared to confirm the two disparate senses of the maritime-but-local concept in allowing a state wrongful death action on behalf of a repairman who had fallen from a barge: While state compensation law had applied to Rohde because of the local nature of his employment, "[i]here the circumstances are very different"—though in both cases state law applied—because "the rights and liabilities of the parties are matters which have a direct relation to navigation and commerce." \textit{Great Lakes Dredge \\& Dock Co. v. Kierejewski}, 261 U.S. 479, 480-81 (1923).
\item \textsuperscript{246} See \textit{The Roanoke}, 189 U.S. 185, 195 (1903) (the master's "position is such that it is almost impossible for him to acquaint himself with the laws of each individual State he may visit, and he has a right to suppose that the general maritime law applies to him and his ship, wherever she may go."). As Brandeis protested when the Court soon afterwards refused to extend the maritime-but-local doctrine to a compensation claim on behalf of a longshoreman against his equally stationary employer, the uniformity argument is as weak in such a case as in \textit{Rohde} itself, although a maritime contract as well as a tort is involved: "How can a law of New York, making a New York employer liable to a New York employee for every occupational injury occurring within the State, mar the proper harmony of the assumed general maritime law in its interstate and international relations, when neither a ship, nor a shipowner, is the employer affected . . . ?" \textit{Washington} v. \textit{W.C. Dawson \\& Co.}, 264 U.S. 219, 231 (1924) (Brandeis, J., dissenting); \textit{accord} \textit{Morrison}, \textit{supra} note 241, at 482, 502. McReynolds did not respond; reaffirming his earlier unexpected holding that Congress lacked the power to remove the uniformity requirement which was designed to serve the very federal interests the admiralty and necessary and proper clauses had entrusted to Congress, see Knickerbocker Ice Co. v. \textit{Stewart}, 253 U.S. 149 (1920), \textit{discussed in White, supra} note 20, at 1144-45, he obtusely echoed the inapplicable concern of \textit{The Roanoke} that "[t]he confusion and difficulty, if vessels were compelled to comply with the local statutes at every port, are not difficult to see." \textit{Washington}, 264 U.S. at 228. See also \textit{London Guar. \\& Accident Co. v. Industrial Accident Comm'n}, 279 U.S. 109 (1929) (Taft, C.J.) (no state workmen's compensation for seaman employed wholly in intrastate commerce); \textit{Robins Dry Dock \\& Repair Co. v. Dahl}, 266 U.S. 449 (1925) (McReynolds, J.) (denying application of state scaffolding law in suit by repairman against local employer for injury suffered while repairing ship in navigable waters). Indeed, as Brandeis seemed to suggest, application of the uniformity doctrine under such circumstances had the perverse effect of creating disuniformity by making the obligation to pay compensation depend upon whether the accident occurred on the ship or on the shore. If the accident occurred on shore, it was subject to state law because it was not within the admiralty jurisdiction. See \textit{Washington}, 264 U.S. at 229 (citing State Indus. Comm'n v. \textit{Nordenholt Corp.}, 259 U.S. 263 (1922)).
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ity was but one aspect of the Jensen principle, and the less obvious one at that; before Rohde it had been thought fundamental that state law could not take away what maritime law had given, because federal law was supreme.247

B. Congressional Authority.

1. The Child Labor Tax Case. In 1918, the Court in Hammer v. Dagenhart had struck down, over four dissents, a congressional attempt to ban the interstate transportation of goods made in factories employing children, finding the federal law an effort to meddle with the subject of manufacturing—an area reserved to the states.248 Immediately after this decision, Congress imposed a ten per cent tax on the incomes of persons employing child labor; the Court struck down the tax as well.249

The obvious effort to circumvent Hammer v. Dagenhart made the result less than surprising. Stressing the fact that the tax was payable only for knowing actions and without regard to the number of children

247. See White, supra note 20, at 1139-45 (discussing Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917), and other cases). Paralleling the rise of the maritime-but-local doctrine permitting additional state regulation of maritime affairs was the unanimous decision in Metcalf & Eddy v. Mitchell, 269 U.S. 514 (1926) (Stone, J.). Mitchell took a fairly relaxed view of intergovernmental immunity by permitting federal taxation of income derived from contracts with a state. But see Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 584 (1895) (holding that United States could not tax income from state securities), discussed in Fuller I, supra note 20, at 350-52; Collector v. Day, 78 U.S. (11 Wall.) 113 (1870) (holding that United States could not tax state officers' salaries), discussed in D. Currie, supra note 20, at 355. On the other hand, split decisions of the Taft period actually expanded the converse immunity of the United States from state taxation that had been established in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), discussed in D. Currie, supra note 20, at 160-68. See McCallen Co. v. Massachusetts, 279 U.S. 620 (1929) (Sutherland, J.) (effectively overruling Society for Savings v. Coite, 73 U.S. (6 Wall.) 594 (1868), which had permitted a state to include income from federal securities in determining the amount of a privilege tax on the persuasive ground that constitutional immunities may not be evaded by labeling). See also Panhandle Oil Co. v. Mississippi ex rel Knox, 277 U.S. 218, 222 (1928) (Butler, J.) (holding sales to the United States immune from state taxation); Long v. Rockwood, 277 U.S. 142 (1928) (McReynolds, J.) (holding tax on patent royalties received from federal government void). Four Justices dissented from the invalidation of the sales tax in Panhandle, two of them joining Holmes's convincing argument that the decision was inconsistent with Metcalf & Eddy, which had allowed a tax on income from a government contract: In either case there was a chance that the tax might increase the price of government procurement. It was in this dissent that Holmes strongly questioned McCulloch's premise that governments were implicitly immune from nondiscriminatory taxes: "The power to tax is not the power to destroy while this Court sits." Panhandle, 277 U.S. at 223 (Holmes, J., joined by Brandeis and Stone, J.J., dissenting). The fourth dissenter was McReynolds. Id. at 225. Holmes's dissent in Long, analogizing a patent to a grant of federal land, was joined by Brandeis, Stone, and Sutherland. Long, 277 U.S. at 148-51. Stone, Holmes, and Brandeis also dissented in McCallen, 279 U.S. at 634-38. For a perceptive contemporaneous discussion, see Cohen & Dayton, Federal Taxation of State Activities and State Taxation of Federal Activities, 34 Yale L.J. 807 (1925) (urging that government itself should be immune even in proprietary capacity but that nondiscriminatory taxes on government contractors should generally be allowed).

248. 247 U.S. 251, 276 (1918); see White, supra note 20, at 1121-23.

employed, Taft argued that “a court must be blind not to see that the so-called tax is imposed to stop the employment of children” and quoted Marshall’s famous condemnation of measures adopted by Congress “under the pretext of executing its powers” but “for the accomplishment of objects not intrusted to the [federal] government.”

Grant the validity of this law,” he concluded, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word “tax” would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States.

Amen, Chief Justice Taft. Not even Holmes and Brandeis, dissenters in *Hammer*, took issue with this powerful reasoning. They did not explain why they thought the two cases different. Nevertheless, the cases can respectably be distinguished: Because it is not limited to activities affecting interstate or foreign commerce, the tax power is a greater threat to the notion of a limited central government than is the commerce clause. The odd thing was that in the past the Court had seemed to view the matter in precisely the opposite way: *Hammer v. Dagenhart* appeared to subject commerce clause measures to stricter scrutiny than the Court had ever employed in tax cases. Working his way unconvincingly around precedents that had been indifferent to the dangers of pretextual taxes, Taft seemed to mean that for only the second time in

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250. *Id.* at 37, 40 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819)).
251. *Id.* at 36-40; see also Hill v. Wallace, 259 U.S. 44, 68-69 (1922) (Taft, C.J.) (unanimously striking down a federal tax on grain future transactions not complying with detailed provisions).
252. Justice Clarke, also a *Hammer* dissenter, dissented from the tax decision alone and without opinion. The Child Labor Tax Case, 259 U.S. at 44.
254. See Fuller *I*, supra note 20, at 357-69 (discussing the Court’s interpretation of the commerce clause in years 1889-1910); White, supra note 20, at 1121-23 (discussing *Hammer*).
255. The Child Labor Tax Case, 259 U.S. at 40-43. Taft rightly explained that an alternative ground for upholding the prohibitive tax on state bank notes in *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533 (1869), discussed in D. CURRIE, supra note 20, at 319, had been that Congress could have accomplished the same goal by regulation. The Child Labor Tax Case, 259 U.S. at 41-42. He distinguished *McCray v. United States*, 195 U.S. 27 (1904), on the feeble ground that the law imposing a prohibitive tax on oleomargarine did not “show on its face as does the law before us the detailed specifications of a regulation of a state concern and business.” The Child Labor Tax Case, 259 U.S. at 42. Taft concluded that United States v. Doremus, 249 U.S. 86 (1919), had upheld the imposition of detailed regulatory requirements on the sale of narcotic drugs on the ground that they had “a reasonable relation to the enforcement of” a nominal tax. The Child Labor Tax Case, 259
twenty years the Court was prepared to take seriously the framers' clear instruction that the national government was to have only limited powers.\textsuperscript{256}

2. Commerce. Even as it recognized that federal taxes had to be scrutinized in order to defend the principle of limited central government, the Court continued to construe rather broadly Congress's authority to regulate commerce among the several states. In 1922, for example, in opinions by the Chief Justice, the Court reaffirmed Congress's power to regulate both stockyard sales of cattle between legs of an interstate journey, and intrastate rates that had harmful effects on interstate commerce.\textsuperscript{257} In the same year, it is true, the Court held that Congress could

\textsuperscript{256} Determining where to draw the line promised to be a formidable task. Inquiry into legislative motive, as Marshall had long ago warned, was a ticklish affair. Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810), discussed in D. Currie, supra note 20, at 128-29. Moreover, the Court rightly acknowledged in the \textit{Child Labor Tax Case} that an "incidental motive" of discouraging undesirable activities was consistent with the legitimate exercise of federal tax power. The \textit{Child Labor Tax Case}, 259 U.S. at 38. As the taxpayer had conceded, "Congress could not possibly levy internal excise taxes . . . without some incidental interference with the conduct of citizens in those fields which are directly regulatable only by the States." \textit{Id.} at 31. \textit{Cf.} J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 412 (1928) (Taft, C.J.) (unanimously upholding a protective tariff on the basis of long history: "So long as the motive of Congress and the effect of its legislative action are to secure revenue for the benefit of the general government, the existence of other motives in the selection of the subjects of taxes can not invalidate Congressional action."); Alston v. United States, 274 U.S. 289, 294 (1927) (\textit{discussed supra note 255}). Taft might have added that, as in the \textit{Veazie Bank} case, 75 U.S. (8 Wall.) 533, 541-42 (1869), \textit{discussed supra note 255}, the tariff could not be considered a means to an illegitimate end, because Congress could have accomplished its protective goal by direct regulation under the commerce clause. The Court's insistence that the tax serve a legitimate revenue purpose found substantial analogical support in Guinn v. United States, 238 U.S. 347 (1915), \textit{discussed in White, supra note 20}, at 1134, which had invalidated a grandfather clause for voting under the fifteenth amendment because it served no conceivable purpose other than the forbidden one of racial discrimination. \textit{See also} Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867) (holding a test oath punitive for ex post facto purposes because no legitimate reason appeared for disqualifying former Confederate sympathizers from ministry), \textit{discussed in D. Currie, supra note 20}, at 292-93.

not regulate all grain futures transactions and that the Sherman Act applied neither to professional baseball nor to a mine strike. But the first of these decisions had been influenced by Congress's failure to limit its rules to transactions affecting interstate or foreign commerce and the last by lack of evidence of an intention to disrupt commerce. When these deficiencies were remedied, the Court sustained the application of federal law.

Most striking in its contrast both with the Child Labor Tax Case and with Hammer v. Dagenhart, however, was the unanimous 1925 decision in Brooks v. United States, upholding a federal statute forbidding interstate transportation of stolen cars. Earlier cases had established, wrote the Chief Justice, that Congress could indeed exercise "the police power . . . within the field of interstate commerce" to prevent "the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other States from the State of origin." Interstate commerce facilitated theft by "help[ing] to conceal the trail of the thieves," and that was enough: "Congress may properly punish such interstate transportation . . . because of its harmful result and its defeat of the property rights of those whose machines against their will are taken into other jurisdictions."

Before Hammer v. Dagenhart, all this would have been very plausible; and the Child Labor Tax Case could have been distinguished (instead of ignored) on the ground that the commerce power, unlike the power to tax, could safely be exercised solely for police power ends. But Hammer had limited the use of the commerce clause for police purposes, distinguishing prior decisions on the ground that goods made by child labor, unlike lottery tickets or adulterated food, were "harmless"; Congress could not forbid interstate transportation simply to discourage the perceived evil of child labor.

Recognizing this distinction, Taft proceeded to misapply it, arguing only that interstate transportation encouraged auto theft—the very argu-
ment that he acknowledged had been held insufficient in *Hammer*.\(^2\) He made no effort to show that stolen cars were harmful to anyone in the state to which they were transported.\(^2\) He thus left *Hammer* dangling without visible support and exposed the Court to a serious charge of inconsistency.

Nevertheless, there may be more to *Brooks* than a mere judicial belief that car theft is worse than child labor. In upholding a federal ban on interstate transportation of lottery tickets, the Court had noted that Congress had merely “supplemented” state lottery laws by making clear “that it would not permit the declared policy of the States . . . to be overthrown or disregarded by the agency of interstate commerce.”\(^2\) In *Hammer* it had insisted that the commerce power could not be used “to control the States in their exercise of the police power over local trade and manufacture.”\(^2\) In *Clark Distilling Co. v. Western Maryland Railway*,\(^2\) on which *Brooks* relied, the Court had upheld a federal statute forbidding the transportation of liquor into a state in which its use was prohibited.\(^2\) The pattern seems clear: It is easier to sustain a federal police measure that reinforces state policy than one that contradicts it. And the federal stolen car law, unlike the child labor law, was in aid of state policy.\(^2\)

That congruence with state policy makes a regulation any more one of interstate commerce in the textual sense is a little difficult to swallow. To the extent that the *Hammer* limitation reflects the need to prevent use of the commerce power to undermine state autonomy, however, the distinction makes perfect sense. Taft did not put it in these terms, but the result he reached in *Brooks* followed logically from the premises that had underlain both of the Court’s child labor decisions.

3. *Prohibition.* The eighteenth amendment, which took effect in 1920, forbade “the manufacture, sale, or transportation of intoxicating

268. See id. at 438-39. He might have argued, perhaps, that buyers in the receiving state would be injured by the possibility of having to return the vehicles to their rightful owners without compensation, but he did not.
271. 242 U.S. 311 (1917).
272. See *White*, supra note 20, at 1121 n.55.
273. For early arguments based on this distinction, see Bruce, *Interstate Commerce and Child-Labor*, 3 MINN. L. REV. 89, 99-100 (1919); Cushman, *The National Police Power Under the Commerce Clause of the Constitution*, 3 MINN. L. REV. 289, 300-08 (1919). The child-labor law, as the Court in *Hammer* noted, had been defended on the ground that the law made it possible for some states to pursue policies against child labor by protecting themselves from outside competition; but it did so by undermining the contrary policy of other states. See *Hammer*, 247 U.S. at 273.
liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes." Its second section gave "Congress and the several States . . . concurrent power to enforce this article by appropriate legislation." As already noted, this "noble experiment" gave rise to a number of interesting search and seizure questions that the Court uniformly resolved in favor of law enforcement. It also produced a spate of decisions on more substantive issues, several of which were of lasting significance for their implications as to the interpretation of other grants of congressional power.

Except in two commerce clause decisions near the end of the nineteenth century, the Supreme Court had always displayed a tolerant attitude toward efforts to limit the availability of alcoholic beverages. It had upheld state power to outlaw liquor manufacture even for the maker's own use or for shipment outside the state. Even after overruling its earlier conclusion that the commerce clause allowed the states to forbid sales of out-of-state liquor in the original package, the Court had permitted Congress both to remove the commerce clause barrier to state legislation and to make importation into a dry state a federal crime. And it had upheld a general federal prohibition law on the rather strained ground that it promoted the waging of a war whose fighting had already ended. When the nation decided that previous measures were inadequate and that the Constitution itself should, for only the

274. U.S. CONST. amend. XVIII (repealed by amend. XXI in 1933). The third section, the constitutionality of which the Court upheld, see infra note 283, required that ratification take place within seven years.

275. See supra text accompanying notes 187-234.


277. Clark Distilling Co. v. Western M. Ry., 242 U.S. 311, 322 (1917) (sustaining state law that forbade shipment or transportation of intoxicating liquor for personal use under Webb-Kenyon Act); Kidd v. Pearson, 128 U.S. 1, 23-24 (1888) (state may prohibit manufacturing of liquor intended for export); Mugler v. Kansas, 123 U.S. 623, 661-63 (1887) (state prohibition of manufacture of liquor does not infringe any right, privilege, or immunity secured by the Constitution); Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129, 133 (1874) (usual and ordinary state legislation regulating or prohibiting sale of liquor raises no constitutional issue).

278. Leisy v. Hardin, 135 U.S. 100, 118 (1890) (overruling The License Cases, 46 U.S. (5 How.) 504 (1847)).

279. United States v. Hill, 248 U.S. 420, 425 (1919) (Congress may forbid interstate transportation of liquor without reference to the policy or law of any state); In re Rahrer, 140 U.S. 545, 564 (1891) (sustaining federal act providing that imported liquor should be subject to state laws as if the liquor had been produced in the state itself).

280. Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 163 (1919) (War-Time Prohibition Act valid exercise of Congress's war power despite changed circumstances); see also Jacob Ruppert Corp. v. Caifey, 251 U.S. 264, 301 (1920) (War-Time Prohibition Act within war power of Congress).
second time, outlaw private conduct, the Court not only remained tolerant; it seemed to become an enthusiastic partisan.

Immediately before Taft was appointed, the Court in the National Prohibition Cases had rejected arguments that the eighteenth amendment exceeded the amending power reserved by article V and that the reference to "concurrent power" required joint state and federal action for the adoption of enforcing legislation. Oddly, the Court pointedly announced only its "conclusions," without professing to supply any supporting reasons. Chief Justice White, who concurred, justly protested and gave a reason of his own for the Court's conclusion: To require joint action would be incompatible with the apparent purpose of providing for effective enforcement.

281. The only precedent was the thirteenth amendment's ban on slavery.

282. National Prohibition Cases, 253 U.S. 350, 386-87 (1920) (Van Devanter, J.). Consideration of the explicit limitations on the amending power contained in article V ought to have squelched the argument that the general authority to amend did not mean what it said (despite the clever analogy to implicit sovereignty limits on the tax power drawn by counsel in Leser v. Garnett, 258 U.S. 130, 132 (1922)). The Convention itself had rejected the argument that its authority to propose amendments to the Articles of Confederation was implicitly limited to minor changes. Compare 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 249 (M. Farrand rev. ed. 1937) [hereinafter cited as M. FARRAND] (Lansing argued that "the power of the Convention was restrained to amendments of a federal nature, and having for their basis the Confederacy in being"), with id. at 262 (Randolph responded that "the whole of the confederation upon revision is subject to amendment and alteration") (emphasis in original), and THE FEDERALIST No. 40, at 258-67 (J. Madison) (J. Cooke ed. 1961). See also Leser v. Garnett, 258 U.S. 130, 136 (1922) (Brandeis, J.) (rejecting argument that nineteenth amendment exceeded amending power because admitting women to electorate destroyed states' political autonomy; the analogous fifteenth amendment, which had extended vote to blacks, had been accepted as valid for half a century). Leser added that state constitutions could not limit the ratification authority given state legislatures by article V and refused to look behind official certifications to determine whether ratification had been accomplished in accordance with state legislative procedures, id. at 137. For a sampling of arguments for implicit limitations on the amending power, see generally Abbot, Inalienable Rights and the Eighteenth Amendment, 20 COLUM. L. REV. 183 (1920); Marbury, Limits upon the Amendment Power, 33 HARV. L. REV. 223 (1919); Skinner, Intrinsic Limits on the Power of Constitutional Amendment, 18 MICH. L. REV. 213 (1920); White, Is There an Eighteenth Amendment? 5 CORNELL L.Q. 113 (1920). For a response, see Frierson, Amending the Constitution of the United States, 33 HARV. L. REV. 659 (1920).

283. National Prohibition Cases, 253 U.S. at 388-92. Not only would it have been bizarre to find that an amendment designed to eliminate alcoholic beverages had actually weakened the pre-existing authority of state and federal governments independently to outlaw liquor within their respective spheres, but in neither legislative nor judicial contexts had "concurrent" traditionally meant (as McKenna and Clarke urged in dissent) "joint." Commerce clause decisions finding concurrent state power had upheld the authority of a state to act on its own, see Needham, The Exclusive Power of Congress over Interstate Commerce, 11 COLUM. L. REV. 251, 256-57 (1911), and the notion that two courts would share jurisdiction over the same case is little short of absurd. The Court's construction does not deprive the mention of state authority of all force; the "concurrent" power provision both precludes any implication of exclusive federal power and expands state authority over interstate and international transactions. See United States v. Lanza, 260 U.S. 377, 381 (1922) (Taft, C.J.). Nevertheless, there were respectable arguments for a surprising variety of alternative interpretations. See, e.g., Cushing, "Concurrent Power" in the Eighteenth Amendment, 8 CALIF. L. REV.
This conclusion effectively determined the result of the Taft Court’s first encounter with Prohibition: *Vigliotti v. Pennsylvania* held that a state prohibition law survived the adoption of the amendment. The decision in *United States v. Lanza* that prosecution under a state liquor law did not bar a federal prosecution for the same act was no more surprising, because it had long been established that double jeopardy meant two prosecutions by the same sovereign.

More controversial were the split decisions in *Grogan v. Hiram Walker & Sons, Ltd.* and *Cunard Steamship Co. v. Mellon* that the amendment’s unqualified prohibitions of “transportation” and “importation” applied to sealed shipments across the United States and to sealed supplies on board domestic and foreign ships in United States waters. Brushing aside the dissenters’ precedents as inapposite, Holmes persuasively explained in *Grogan* that the amendment’s ban on exportation of liquor suggested both a concern that liquor in transit might be deflected to local use and a desire to keep the country entirely out of the liquor business. In *Cunard*, Van DeVanter, by employing similar arguments

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284. 258 U.S. 403, 409 (1922) (Brandeis, J.). Day and McReynolds dissented without opinion. Id. at 385.

285. 260 U.S. 377, 382 (1922) (Taft, C.J.) (citing, for example, *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847)). In Taft’s view, state authority to combat liquor was not derived from the amendment, which merely “put an end to restrictions upon the State’s power arising from the Federal Constitution.” *Lanza*, 260 U.S. at 381. He added a strong reason for the narrow interpretation of double jeopardy:

> If a State were to punish the manufacture, transportation and sale of intoxicating liquor by small or nominal fines, the race of offenders to the courts of that State to plead guilty and secure immunity from federal prosecution for such acts would not make for respect for the federal statute or for its deterrent effect.

Id. at 385.

286. 259 U.S. 80 (1922).

287. 262 U.S. 100 (1923).

288. *Grogan*, 259 U.S. at 80-90. *United States v. Gudger*, 249 U.S. 373, 375 (1919), had held shipment across a state not to be transportation “into any State or Territory” within the meaning of an earlier statute, but the eighteenth amendment used the broader term “transportation . . . within . . . the United States.” Cases giving a narrow interpretation to terms like “importation” for tariff
as well as invoking Grogan, answered the respectable argument that provisions should be presumed not to infringe international law by citing precedents that narrowly defined the traditional immunity of foreign vessels in American harbors.289

Most significant for future constitutional litigation, however, were three decisions of the Taft period giving a broad construction to Congress's authority under section 2 of the amendment “to enforce this article by appropriate legislation.” In 1924, without dissent, Justice Sanford wrote in James Everard's Breweries v. Day290 to uphold congressional authority to forbid the sale of malt liquors for medicinal purposes. The significant objection was that, like the fourteenth amendment, the eighteenth amendment gave Congress the power only to enforce its own provisions, and the amendment did not outlaw sales for medicinal use.

There were precedents that might appear to support this argument. The enforcement provisions of the fourteenth and fifteenth amendments, for instance, had rightly been held to authorize Congress to prohibit neither private racial discrimination nor the denial of the right to vote on grounds unrelated to race. As Justice Bradley had said in the Civil purposes, e.g., The Conqueror, 166 U.S. 110, 115 (1897), can be distinguished as based upon the distinct purposes of the tax laws. The argument for construing the amendment narrowly to avoid conflict with an earlier treaty was rejected by Holmes as a “makeweight[ ]” argument, insufficient to withstand the language and purpose of the new provision. Grogan, 259 U.S. at 88-89 (“The Eighteenth Amendment meant a great revolution in the policy of this country, and presumably and obviously meant to upset a good many things on as well as off the statute book.”). That the treaty really authorized what the amendment forbade was not even clear: In allowing the passage of goods through the country without payment of tariffs, it arguably gave only an exemption from the tax laws. 289. Cunard, 262 U.S. at 124-25 (citing The Exchange, 11 U.S. (7 Cranch) 116, 144 (1812) (holding a foreign warship immune from judicial process, but noting that merchant vessels would not be immune), and Wildenhus's Case, 120 U.S. 1, 11 (1887) (upholding punishment of a foreign seaman under American law for killing another foreigner on a foreign ship in American waters)). See also id. at 132-33 (Sutherland, J., dissenting). The respectability of Sutherland's premise—that longstanding traditions should be presumed not to have been overthrown—is confirmed by such cases as Hans v. Louisiana, 134 U.S. 1 (1890) (article III grant of judicial power implicitly subject to sovereign immunity), discussed in Fuller I, supra note 20, at 327-30; Collector v. Day, 78 U.S. (11 Wall.) 113 (1871) (state judge's salary implicitly immune from federal taxation), discussed in D. Currie, supra note 20, at 393 n.172. But cf. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (Congress not limited by sovereign immunity in legislating to enforce fourteenth amendment). Because the Court's precedents had shown that application of the amendment to foreign ships was consistent with the traditional rule that purely internal matters were governed by the law of the flag, its decision that the amendment applied to foreign ships in this country did not depend upon the further conclusion that the amendment's reference to “the United States and all territory subject to the jurisdiction thereof” displaced the traditional rule. It was the latter conclusion that led the Court to hold that the amendment did not apply to American ships on the high seas, Cunard, 262 U.S. at 123-24, which arguably were of greater concern to American policy than were foreign ships in New York harbor. Cf. Currie, Flags of Convenience, American Labor, and the Conflict of Laws, 1963 Sup. Ct. Rev. 34.

290. 265 U.S. 545 (1924).
Rights Cases, the fourteenth amendment limited only "state" action, and Congress's sole authority was "to adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts."291

Echoing McCulloch v. Maryland's292 broad test for determining whether a measure was "necessary and proper" to the exercise of specific federal powers, Justice Sanford found the prohibition of medicinal beer an appropriate means of preventing beverage use:

The opportunity to manufacture, sell and prescribe intoxicating malt liquors for "medicinal purposes," opens many doors to clandestine traffic in them as beverages under the guise of medicines; facilitates many frauds, subterfuges and artifices; aids evasion: and, thereby and to that extent, hampers and obstructs the enforcement of the Eighteenth Amendment.293

Though Sanford did not say so, this passage served both to distinguish the fourteenth and fifteenth amendment cases, where the invalidated measures had not served to prevent evasion of the constitutional mandate,294 and to make analogous the many decisions allowing Congress to regulate matters that were not themselves interstate commerce in order to further the constitutional purpose of keeping that commerce free.295 He added that the measure could not be said to be arbitrary, in view of the lack of evidence that malt liquor had any significant medicinal value.296

This decision seemed to make obvious the later holdings that Congress could both regulate the sale of denatured alcohol297 and limit the


293. Day, 265 U.S. at 561.

294. Cf Katzenbach v. Morgan, 384 U.S. 641 (1966) (upholding prohibition of English literacy test for voting, in part because of risk that such a requirement might be a cover for racial discrimination); United States v. Price, 383 U.S. 787 (1966) (allowing federal punishment of private persons "jointly engaged" with state officers in killing civil rights workers without due process). The passage in Day also served to show, in contrast to the Child Labor Tax Case, discussed supra text accompanying notes 248-56, that this prohibition was not a pretext for regulating the practice of medicine.

295. E.g., Houston, E. & W.T. Ry. v. United States, 234 U.S. 342 (1914) (the Shreveport Rate Case), discussed in White, supra note 20, at 1118-21. Along the same lines was the conclusion of an undivided Court in United States v. Alford, 274 U.S. 264, 267 (1927) (Holmes, J.) ("Congress may prohibit the [setting of fires] upon privately owned lands that imperil the publicly owned forests," apparently under its article IV authority to make "Rules and Regulations respecting the Territory or other Property belonging to the United States," U.S. CONST. art. IV, § 3, cl. 2).


297. Selzman v. United States, 268 U.S. 466, 469 (1925) (Taft, C.J.) ("It helps the main purpose of the Amendment . . . to hedge about the making and disposition of the denatured article every reasonable precaution and penalty to prevent the proper industrial use of it from being perverted to drinking it.").
amounts of wine and whiskey that doctors could prescribe.298 Interestingly, however, four Justices dissented in the latter case, distinguishing Day on the ground that whiskey and wine, unlike beer, had real medicinal value.299 Sanford had indeed mentioned the lack of medicinal value in the earlier case, but that other liquors had such value did not reduce the need to control them in order to avoid frustration of federal policy; no one had denied that the denatured alcohol Congress had unanimously been allowed to regulate had legitimate industrial uses.300

I am inclined to think that all the Prohibition decisions discussed in this section were rightly decided. In particular, the decisions respecting congressional power seem to have been substantially in accord with analogous commerce clause doctrine. It remains striking, however, that under the influence of the popular uprising that culminated in the adoption of the amendment, a Court so strict in its scrutiny of legislative means under the innocuous-looking due process clauses301 would assume such a relaxed attitude in determining the appropriateness of means to achieve limited congressional goals—especially since nothing in the opinions suggested that the Court’s principles of broad construction applied only to Prohibition cases.302

298. Lambert v. Yellowley, 272 U.S. 581, 589 (1926) (Brandeis, J.) (“That the limitation upon the amount of liquor which may be prescribed for medicinal purposes, is a provision adapted to promote the purpose of the amendment is clear.”).

299. Id. at 600-02 (Sutherland, J., dissenting, joined by McReynolds, Butler, and Stone, JJ.).

300. Sutherland attempted to distinguish between regulation and prohibition of intoxicants, id. at 604-05 (Sutherland, J., dissenting), but the distinction seems at best a poor substitute for the argument, rejected in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 315, 413-15 (1819), that Congress must use the least restrictive means. Moreover, it was not clear that Sutherland applied his own distinction correctly, for Congress had merely limited the amount that could be prescribed, not prohibited it altogether. Cf. Fuller I, supra note 20, at 354-56 (discussing The Lottery Case, 188 U.S. 321 (1903)). Hamer’s notion that the tenth amendment somehow limited the powers granted to Congress, echoes of which appear in the Lambert dissent, had been flatly rejected in Day: “If the act is within the power confided to Congress, the Tenth Amendment, by its very terms, has no application, since it only reserves to the States ‘powers not delegated to the United States by the Constitution.’” James Everard’s Breweries v. Day, 265 U.S. 545, 558 (1924).

301. See supra text accompanying notes 40-80.

302. For the most part, the opponents of broad construction of the eighteenth amendment were the traditional enemies of government regulation: Sutherland, McReynolds, and Butler. They were joined in dissent in the medicinal wine case, however, by Stone, who, though normally tolerant of legislative intervention, was said to have been a collector of fine wines. See A. MASON, HARLAN FISKE STONE, supra note 2, at 726-33. Less out of line, perhaps, was the presence of Justice Van Devanter among those voting to uphold federal authority. Though a stubborn advocate of substantive due process, he had written some of the Court’s broadest commerce clause decisions in his first days on the Court. See White, supra note 20, at 1118-21. Whether either the latter cases or his Prohibition record were consistent with his opinions during the later New Deal days is a matter best discussed in a later part of this study.
III. SEPARATION OF POWERS

A. The Courts.

1. Cases and Controversies. Ever since the beginning, the Supreme Court had appeared to treat article III's vesting of "judicial" power to decide enumerated categories of "cases" and "controversies" in the federal courts as implicitly forbidding them to engage in other governmental functions. This conclusion had been resoundingly confirmed in 1913 in *Muskrat v. United States*. There, on a variety of unpersuasive grounds, the Court had struck down a statute authorizing suit to determine the constitutionality of a law as providing in essence for an advisory opinion. The Taft period afforded the Court several opportunities to expand on the definition of a case or controversy.

a. Parties and ripeness. One aspect of the case-or-controversy limitation on which the Court had relied in *Muskrat* was the elementary requirement that there be two adverse parties—in order, among other things, to help ensure that both sides of the argument may be vigorously presented in the interest of a sound decision. In *Muskrat*, the Court concluded that the United States, though expressly made a defendant by statute, was not a proper one because it had no interest adverse to that of the plaintiffs. In *Tutun v. United States*, on the other hand, the Court in 1926 suggested that the United States might be a proper defendant in a proceeding to which it had never been made a party.

The question in *Tutun* was whether a person seeking American citizenship could appeal the denial of his petition to a circuit court of appeals. The answer depended upon finding that the naturalization proceeding was a "case" within the meaning of the appeal statute; and that, Justice Brandeis concluded, turned on whether it was a "case" or "controversy" in the constitutional sense.

Practice, as Brandeis noted, yielded an affirmative answer: The federal courts had been passing upon naturalization petitions without objec-

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304. 219 U.S. 346, 361-63 (1911). See *White*, supra note 20, at 1113-17 (discussing *Muskrat*).

305. *Muskrat*, 219 U.S. at 361; see also *Baker v. Carr*, 369 U.S. 186, 204 (1962) ("Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing.").

306. 270 U.S. 568 (1926).

307. Id. at 574.

308. Id. at 576.
tion since 1790. The difficulty, however, was that naturalization was normally an ex parte proceeding. The applicant presented a petition, the court listened to his evidence, and it issued or denied a certificate. There was no requirement that anyone be named as a defendant or appear in opposition.

Justice Brandeis, pointing to a statutory provision permitting the United States to be heard in opposition to any naturalization petition, responded that “[t]he United States is always a possible adverse party.” He did not say that the United States had opposed the petition in *Tutun*, and he carefully refrained from limiting his decision to cases in which it had. He appeared to conclude that it was enough that the Government *might* oppose a petition if it chose to.

If the United States actually opposes a particular naturalization claim, as it did in *Tutun*, a controversy arises. It is difficult, however, to see how there can be any controversy until it does so. Only two years later the same Justice was to write for the Court in denying that a suit to remove a cloud from title presented a controversy because the allegedly adverse parties had not disputed the rights of the plaintiffs: “No defendant has wronged the plaintiff or has threatened to do so.” He did not explain how this conclusion could be reconciled with *Tutun*.

In both *Muskrat* and *Tutun*, the arguably missing party had been the defendant; in *Fairchild v. Hughes* and *Frothingham v. Mellon*, it

309. Id.
313. *Willing v. Chicago Auditorium Ass'n*, 277 U.S. 274, 288, 290 (1928) (Brandeis, J.); see also *Liberty Warehouse Co. v. Grannis*, 273 U.S. 70, 76 (1927) (Sanford, J.) (holding that a federal court had no jurisdiction to issue declaratory judgment). Indeed, along with Justice McReynolds, Brandeis was one of the Court's most vigorous exponents of the principle forbidding decision of unripe disputes. *See Pennsylvania v. West Virginia*, 262 U.S. 553, 603-23 (1923) (McReynolds, J., and Brandeis, J., dissenting in separate opinions); *Terrace v. Thompson*, 263 U.S. 197, 224 (McReynolds and Brandeis, J., dissenting) (1923). In both cases, Brandeis and McReynolds dissented from decisions finding suits to enjoin the enforcement of state laws ripe. In *Terrace*, the remaining Justices concluded with much force that the threat to enforce a criminal statute against the plaintiffs created a traditional equitable controversy: “They are not obliged to take the risk of prosecution, fines and imprisonment and loss of property in order to secure an adjudication of their rights.” *Terrace*, 263 U.S. at 216.
314. Nor did he draw the arguable conclusion that the long tradition of judicial naturalization proceedings showed that *Muskrat* had been wrong in holding adverse parties a requisite of a "case" or "controversy." *Cf. Davis, Standing: Taxpayers and Others*, 35 U. Chi. L. Rev. 601, 607 (1968) ("From the beginning, federal courts have performed many functions in addition to deciding 'questions presented in an adversary context.' Federal courts often decide questions of law and fact and discretion in absence of an adversary context, as they do when they . . . admit aliens to citizenship when no issue arises . . . ").
315. 258 U.S. 126 (1922).
316. 262 U.S. 447 (1923).
was the plaintiff. In *Fairchild*, Justice Brandeis rejected an ordinary citizen's challenge to the constitutionality of the procedure by which the nineteenth amendment was being ratified. The argument that a proclamation of the amendment's ratification would lead to invalid elections, said the Court, was not for the plaintiff to make:

Plaintiff has only the right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys be not wasted. Obviously this general right does not entitle a private citizen to institute in the federal courts a suit to secure by indirect a determination whether . . . a constitutional amendment about to be adopted, will be valid.\footnote{317}

In the second case, Justice Sutherland wrote to hold that neither a federal taxpayer nor a state had standing to challenge a federal law providing for grants to promote maternal health: The state could neither sue in its sovereign capacity nor represent its citizens' interests against the United States, while the taxpayer's interest "is shared with millions of others; [it] is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity."\footnote{318}

The notion that a plaintiff could sue only to redress an injury of his own was by no means new.\footnote{319} What may have been new, despite the quoted reference in *Frothingham* to "the preventive powers of a court of equity," was the attribution of this rule to the case-or-controversy requirement of article III. Justice Brandeis was unequivocal in *Fairchild*: "In form [this proceeding] is a bill in equity; but it is not a case within the meaning of § 2 of Article III of the Constitution . . . ."\footnote{320} In *Frothingham*, too, the Court explicitly invoked article III in holding that the state could not sue, and it ended its opinion with a passage that seemed to say that the Constitution controlled the taxpayer's suit as well: Because "the parties plaintiff" had not alleged "direct injury as the result of . . . enforcement" of the challenged measure, to grant them relief "would be not to decide a judicial controversy but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess."\footnote{321}

\footnote{317. *Fairchild*, 258 U.S. at 129-30. Since the plaintiff resided in a state whose constitution already provided for women's suffrage, and since presidential voting is conducted on a state-by-state basis, it would have been hard for him to argue that the amendment would dilute his voting power. See id. at 129.}

\footnote{318. *Frothingham*, 262 U.S. at 487.}

\footnote{319. See, e.g., Owings v. Norwood's Lessee, 9 U.S. (5 Cranch) 344, 348 (1809).}

\footnote{320. *Fairchild*, 258 U.S. at 129.}

\footnote{321. *Frothingham*, 262 U.S. at 480-85, 488-89.}
That article III should require an interested plaintiff follows from the same considerations of optimal decisionmaking that require an interested defendant. Justice Sutherland's closing comment, moreover, suggested that the standing limitation implicated separation-of-powers concerns as well. "We have no power per se," he had said earlier in the same opinion, "to review and annul acts of Congress on the ground that they are unconstitutional."322 Judicial review was only the power "of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right."323

It seems clear enough that the case-or-controversy limitation has something to do with separation of powers, and that it serves, among other things, to avoid the decision of unnecessary constitutional questions. It is also true that in describing judicial review as merely the inevitable consequence of deciding cases and controversies, Sutherland was echoing something that Marshall had said in justifying the doctrine in Marbury v. Madison.324 Sutherland exhibited no awareness, however, of Marbury's equally prominent insistence that judicial review had to be inferred in order that constitutional limitations on Congress be respected: Judicial review was no mere incident but an essential element in a system of checks and balances.325

In this light, far from reinforcing the result in Frothingham, Marbury gives rise to an argument that the case was wrongly decided: If no one has standing to challenge a federal spending program, there is no way to prevent unconstitutional spending. Of course, this argument cannot justify judicial action in the absence of the case or controversy the Constitution requires, but it may help in determining just what a case or controversy is.326

322. Id. at 488.
323. Id.
324. 5 U.S. (1 Cranch) 137, 177-78 (1803) ("Those who apply the rule to particular cases, must of necessity expound and interpret the rule. . . . So, if a law be in opposition to the constitution; . . . the court must determine which of these conflicting rules governs the case . . . .").
325. Marbury, 5 U.S. (1 Cranch) at 178 (to require the courts to "close their eyes on the constitution . . . would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict these powers within narrow limits"). See D. Currie, supra note 20, at 66-74 (discussing Marbury).
326. See J. Paschal, supra note 2, at 149. 
"[P]erhaps no other single decision in the Court's history has been fraught with such destructive implications for the idea of limited government," id., an idea for which Sutherland fought continually in his opinions on the merits. Compare the question whether the critical function of judicial review places implicit limits on Congress's express article III authority to make "exceptions" to the Supreme Court's appellate jurisdiction. See D. Currie, supra note 20, at 304-07 (discussing Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869)).
That a state could not sue to protect merely sovereign interests was not at all obvious. Not only would such a proceeding assure judicial review of actions that might otherwise go unreviewed, but the state seems a logical defender of the position that state rights have been invaded by federal legislation—and that was the claim in *Frothingham*. Unfortunately for Massachusetts, however, the lack of standing on this basis had been established in two major nineteenth-century decisions; despite the striking contrast of an intervening Holmes opinion, it was not surprising that the Court elected to follow them.

The Court's argument with respect to the state's representative claim was shakier. Although the state had been permitted to speak for its citizens in suing other states, said Sutherland, "it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae* . . . ." Neither authority nor argument was offered to support this conclusion, and it seems no less appropriate for the state to represent its citizens against the United States than against anyone else. Nevertheless, Sutherland seems to have reached the right result, even if on the wrong ground: Since the state's alleged right to sue was based upon representation of its citizens, it could sue only to enforce their rights, and no one had identified any citizen whose rights the federal law infringed.

Most interesting and influential was the final conclusion that *Frothingham*, the taxpayer, also lacked standing to sue. Her argument was

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328. *See Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1868), cited in *Frothingham*, 262 U.S. at 483-84; *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *see also D. Currie*, supra note 20, at 122-26, 302-04; *accord*, New Jersey v. Sargent, 269 U.S. 328 (1926) (Van Devanter, J.). Shortly before *Frothingham*, however, in upholding the standing of a state to challenge a federal treaty, the Court had declined to rest its decision solely upon the Government's concession that the state had standing as owner of the migratory birds affected by the treaty. Rather, the Court had emphasized that "it is enough that the bill is a reasonable and proper means to assert the alleged quasi-sovereign rights of a State." *Missouri v. Holland*, 252 U.S. 416, 431 (1920). *See Corwin*, *Constitutional Law in 1919-1920*, 15 AM. POL. SCI. REV. 52, 54-55 n.52 (1921) (arguing that this decision seemed to undermine *Stanton*). The references to "political" questions in *Frothingham*, 262 U.S. at 484-85, like those in *Stanton*, 73 U.S. (6 Wall) at 50, 56, seem to mean that the "rights" asserted by the state were political, not that the issue on the merits was beyond judicial competence. *See D. Currie*, supra note 20, at 302-04.
329. *Frothingham*, 262 U.S. at 485-86. For the state's authority in interstate suits, the Court correctly cited *Missouri v. Illinois*, 180 U.S. 208, 241 (1901) (suit to abate water pollution), which was reaffirmed immediately after *Frothingham* in *Pennsylvania v. West Virginia*, 262 U.S. 553, 592 (1923) (Van Devanter, J.) (alternative holding). Even in this context, however, the Court tended to be somewhat chary, lest limitations on its original jurisdiction be circumvented. *See e.g.*, New Hampshire v. Louisiana, 108 U.S. 76, 81 (1883), *discussed in D. Currie*, supra note 20, at 420 n.122, *reaff'd* in *North Dakota v. Minnesota*, 263 U.S. 365, 372-76 (1923) (Taft, C.J.) (allowing state on behalf of its citizens to seek injunction but not damages).
straightforward: If the contested payments were made, "this plaintiff... will be subjected to taxation to pay her proportionate share of such unauthorized payments." Sutherland's reply, already quoted, seemed to make three points: The interest of a federal taxpayer was "shared by millions of others"; it was "minute and indeterminable"; and the effect of payment on future taxation was "remote, fluctuating and uncertain." In all these respects, said Sutherland, Frothingham differed from municipal taxpayers, who had been held to have standing to challenge expenditures.

All of this has been severely criticized. Although Brandeis had noted in Fairchild that the right asserted by the plaintiff was one "possessed by every citizen," he had not said why that mattered. Contrary to Sutherland's suggestion that a flood of lawsuits in such circumstances would be undesirable, one might think it all the more important that the government not get away with violating everybody's rights: One would not expect to find standing to challenge an unreasonable search denied on the ground that the government had unreasonably searched everyone in the country. Sutherland offered no evidence to support his suggestion that the federal tax burden was smaller even in 1923 than the municipal one, and trespass cases were but one indication that the law had long permitted suit by persons suffering trivial harm. More serious was the apparent suggestion that it was not clear whether enjoining the contested payments would reduce the plaintiff's taxes: Congress might have collected the money anyway and put it to some constitutional use. Of course, this does not distinguish the municipal taxpayer, who the Court conceded had standing. Nor is it clear why the mere possibility

330. Frothingham, 262 U.S. at 477.
331. Id. at 487 (quoted supra text accompanying note 318).
332. Id. at 486-87 (citing Crampton v. Zabriskie, 101 U.S. 601, 609 (1879)). In Williams v. Riley, 280 U.S. 78, 80 (1929) (MoReynolds, J.), a divided Court applied the Frothingham principle, without discussion, to preclude a taxpayer from challenging a state law. More surprisingly, it did so in a case in which the taxpayer appeared to challenge not an expenditure, but the collection of the tax itself. Id. at 79. However doubtful it may be that enjoining an expenditure will reduce the plaintiff's tax bill, there seems no doubt that enjoining collection of the tax will reduce the amount the plaintiff pays. The Court had entertained numerous suits to enjoin tax collection in the past and would continue to do so. E.g., Educational Films Corp. v. Ward, 282 U.S. 379 (1931); Allen v. Baltimore & O.R.R., 114 U.S. 311 (1884).
333. See Fairchild, 258 U.S. at 129.
334. Frothingham, 262 U.S. at 487.
335. See United States v. SCRAP, 412 U.S. 669, 688 (1973) ("To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion."). The widespread nature of the harm would provide a political check not present when a narrow class or individual is alone damaged; but that would not defeat standing in the search case posed in the text.
336. See id. at 685-90 (giving other examples).
that the plaintiff may not benefit from a decision that reduces the government’s need for tax money should be held to destroy the adverse interest needed for sound decisionmaking—especially since the consequence seems to have been that no one could challenge most federal expenditures.

In short, Justice Sutherland seems right that an interested plaintiff was an element of the constitutional case-or-controversy requirement, but he did not satisfactorily explain why a federal taxpayer did not meet that description.

b. Finality and legislative functions. Apart from its arguably misplaced concern for a lack of proper parties, the Court in *Muskrat* had expressed concern about the nature of the remedy provided by the challenged jurisdictional provisions: A mere declaration of rights would not bind private parties.\(^3\)\(^3\)\(^7\) On the facts of the case, this argument also seems to have been misplaced: There was no evident reason to doubt that the lower court’s decision would be entitled to normal res judicata effect. In *Postum Cereal Co. v. California Fig Nut Co.*,\(^3\)\(^3\)\(^8\) however, the Court found an instance in which *Muskrat*’s concern was apt. The Commissioner of Patents had rejected a request to cancel the registration of a trademark, and the District of Columbia Court of Appeals had refused review. Chief Justice Taft concluded that because the statute provided that a decision in such a proceeding would not “preclude any person interested from the right to contest the validity” of the trademark, the Supreme Court had no jurisdiction over the appeal: “The decision of the Court of Appeals... is not a judicial judgment.... In the exercise of such [administrative] function it does not enter a judgment binding parties in a case as the term case is used in the third article of the Constitution.”\(^3\)\(^3\)\(^9\)

With this decision it is hard to quarrel; a judicial pronouncement that would not bind the parties would literally be an advisory opinion. The difficulty was that in *Tutun v. United States*, decided just the previous year, the Court had held explicitly that the ability of the government to file a later suit to cancel naturalization did not destroy the justiciability of a naturalization proceeding.\(^3\)\(^4\)\(^0\) Perhaps the decisions are reconcilable on the ground that the denaturalization provision went no further than

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traditional provisions for relief from illegal judgments, but Taft did not seek to distinguish Tutun.

Four years before Postum, in Keller v. Potomac Electric Power Co., the Court had refused to review a decision of the District of Columbia appellate court setting aside an administrative order determining the value of utility property for rate purposes. Despite the superficial similarity of the two cases, however, it was not the advisory character of nonbinding decisions that dictated the result in Keller. Indeed the statute appeared to make the local court's decision immune from collateral review. Chief Justice Taft called upon a still more fundamental dimension of the case-or-controversy requirement: An article III court may decide only judicial cases or controversies. The statute in question, Taft concluded, went beyond conferring on the courts the ordinary power to determine the legality of administrative action; in authorizing the court to "revise the legislative discretion of the Commission by . . . entering the order it deems the Commission ought to have made," Congress had attempted to confer the "legislative" power of "laying down new rules, to change present conditions and to guide future action," not the judicial power of "definition and protection of existing rights." As the case itself illustrated, drawing the line between judicial and legislative functions was not going to be easy, but the principle that the courts could do only judicial business was certainly sound.

341. See Tutun, 270 U.S. at 579 ("The remedy afforded the Government by [the cancellation provision] is narrower in scope than the review commonly afforded by appellate courts.").
343. See Keller, 261 U.S. at 439-40 ("Paragraph 65 limits the time within which such a proceeding . . . may be begun to 120 days, and thereafter the right to appeal or of recourse to the courts shall terminate absolutely.").
344. Id. at 440, 442 (citing Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908)). In Prentis, the Court had drawn a similar distinction for the different purpose of determining whether a federal challenge to a state rate order pending state court review was barred either by the ban on enjoining state court proceedings or by the doctrine of exhaustion of administrative remedies. As to exhaustion of remedies, the dominant consideration should be whether the state court's decision would be preclusive, for if the court's decision is entitled to res judicata effect, a doctrine designed only to postpone federal litigation will preclude it altogether. See Bacon v. Rutland R.R., 232 U.S. 134, 137 (1914); D. CURRIE, FEDERAL COURTS: CASES AND MATERIALS 662-63 (3d ed. 1982) (citing H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 101 (1973)).
345. Although, in Keller, the Court held that article III forbade substitution of a court's judgment for that of an administrative agency, see supra notes 342-43 and accompanying text, in Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 291 (1920), discussed in White, supra note 20, at 1138 n.140, and in Ng Fung Ho v. White, 259 U.S. 276, 284-85 (1922), the Court had held that due process required it. Thus it can hardly have been de novo review, as such, that made the court's function in Keller legislative rather than judicial, but rather the nature of the issue the court was to consider. In Ng Fung Ho, the question was whether to deport a person claiming to be a citizen, Ng Fung Ho, 259 U.S. at 282; in Ben Avon it was whether to set aside a utility rate as confiscatory, Ben Avon, 253 U.S. at 287-88. In both, in Keller's terms, the courts had been asked merely to determine existing rights, not to lay down a new rule to govern future controversies.
c. Declaratory judgments. In connection with its conclusion that the judgment Congress had sought to authorize would not bind the parties, the Court in Muskrat had added that “in a legal sense” such a judgment “could not be executed.” Against the background of Chief Justice Taney’s dictum in Gordon v. United States that “[t]he award of execution is ... an essential part of every judgment passed by a court exercising judicial power,” this language could be read to suggest that no action seeking only a declaration of the rights of the litigants could be a case or controversy because such a judgment would not order anyone to do or refrain from doing anything. Two decisions of the Taft period seemed to lend additional force to this position.

The first was Liberty Warehouse Co. v. Grannis, in which the Court unanimously affirmed a federal trial court’s refusal to entertain a suit seeking a declaration that a state statute regulating the plaintiffs’ tobacco business was unconstitutional. Without saying exactly why, Justice Sanford concluded that the case was governed by Muskrat. In listing the elements of an article III case or controversy, he noted that there had to be “real parties,” a “real case,” and the possibility of “pronouncing and carrying into effect a judgment,” and in summing up the facts he observed that “no relief of any kind is prayed” against the state officer who had been sued. The second case was Willing v. Chicago Auditorium Association. There, in holding that article III precluded a federal court from removing an alleged “cloud” on a lessee’s right to replace a building, Justice Brandeis stated flatly that what the plaintiff sought was “simply a declaratory judgment” and that to “grant that relief is beyond the power conferred upon the federal judiciary.”

Concurring in the result in Willing on the ground that the suit was not “within the equity jurisdiction conferred” by statute, Justice Stone politely tweaked Brandeis for deciding more than was necessary: “There is certainly no ‘case or controversy’ before us requiring an opinion on the power of Congress to incorporate the declaratory remedy into our federal  

346. Muskrat, 219 U.S. at 362; see also id. at 361 (“The object is not to assert a property right as against the Government, or to demand compensation for alleged wrongs . . . .”).

347. 117 U.S. 697, 702 (draft opinion). The case had been decided without opinion, 69 U.S. (2 Wall.) 561 (1867), after Taney’s death, and there is no evidence that the Court had approved his reasoning. Nor was the passage referred to necessary to the result; even Taney based his conclusion on the statutory provision for executive review of the court’s decision. Gordon, 117 U.S. at 702-03.

348. 273 U.S. 70 (1927).

349. Id. at 73-74.

350. 277 U.S. 274 (1928).

351. Willing, 277 U.S. at 289 (citing Grannis, 273 U.S. at 74). Brandeis may have meant only that no statute authorized such relief. See Borchard, The Constitutionality of Declaratory Judgments, 31 COLUM. L. REV. 561, 600 (1931).
Indeed, apart from Stone's statutory argument, Brandeis's own opinion reveals a narrower ground for his holding: "No defendant has wronged the plaintiff or has threatened to do so." The same was true in
Grannis, where Justice Sanford had emphasized the absence of any allegation "that the plaintiffs have done or contemplate doing any of the things forbidden by the Act before being advised by the court as to their rights, [or] . . . that the [defendant] has threatened to take or contemplates taking any action against them." Under these circumstances, there might well have been in Sanford's terms no "real case" and no "real parties" in either
Grannis or Willing, even if coercive relief had been sought; neither case need be taken to establish that a declaratory judgment is unavailable in an actual dispute between adverse parties.

Just the year before Willing, in fact, Justice Stone had written an opinion for the Court that appeared to conclude, in no uncertain terms, that in such circumstances declaratory relief would be entirely consistent with article III. The question was whether a state court decision in a suit by a city to determine the validity of a tax assessment was entitled to res judicata effect; and that depended, according to Stone, on whether the state proceeding had satisfied the case-or-controversy requirement.

352. Willing, 277 U.S. at 290-91. The Conformity Act, which required federal courts to follow state procedural rules and might have been thought to embrace state-created remedies, applied only to actions at law, and Willing was a suit in equity. In equity cases, Congress had, by negative implication, prescribed adherence to federal equity practice. Conformity Act of 1872, ch. 255, § 5, 17 Stat. 196 (1873). See also
Grannis, 273 U.S. at 76 (rejecting the argument that Conformity Act justified federal use of Kentucky declaratory judgment statute: former act "relates only to 'practice, pleadings, and forms and modes of procedure'; and neither purports to nor can extend the jurisdiction of the district courts beyond the constitutional limitations").

353. Willing, 277 U.S. at 290. See also id. at 288 (explaining that the lessors, although made defendants, had not taken a firm position denying the right the plaintiff claimed).

354. Grannis, 273 U.S. at 73. Professor Borchard was sharply critical of this reasoning. See Borchard, supra note 351, at 585-89. He noted that the defendant had gone so far as to prepare an indictment against the plaintiff, citing the Euclid and Pierce cases, see supra text accompanying notes 79, 91, in which the Court had enjoined the enforcement of statutes, as evidence that the Court had not generally required a threat of enforcement, and he persuasively argued that "no civilized legal system operating under a constitution" should in effect inform "the prospective victim that the only way to determine whether the suspect is a mushroom or a toadstool is to eat it." Keenly sensitive to the dangers of deciding premature constitutional issues, Justice Brandeis several times dissented from constitutional decisions of this period on the ground that there was an insufficient threat of harm to justify judicial intervention under article III even when traditional coercive relief was requested. See supra note 313. Holmes, however, appeared to think that the invalidity of the declaratory procedure had been settled by
Grannis and that Willing reaffirmed it: "I do not care to join in the criticism of his [Brandeis's] opinion," he wrote on his copy of Stone's concurrence [in Willing], "but I also regret his conclusion that we cannot render declaratory judgments—which, however, I thought had been stated heretofore." A. Mason, Stone, supra note 2, at 246.


357. Id. at 130-31.
The Court held that it had, although it had resulted only in a declaration that the taxpayers were liable: "While ordinarily a case or controversy results in a judgment requiring award of process of execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function." Commendably cited for this conclusion were "suits . . . for the construction of a will," "bills to quiet title," and *Tutun v. United States*, written by Brandeis himself, which had upheld judicial power to issue a certificate of naturalization. The year after *Willing*, this language was repeated approvingly in an opinion for the Court by Chief Justice Taft.

In short, as the result of decisions during the Taft period, the contours of the case-or-controversy limitation seemed to be shaping up pretty clearly. Aside from the embarrassing problem of naturalization, there had to be interested parties on both sides; there had to be actual harm or threat of harm; the determination must be of a judicial rather than legislative nature and must be binding on the parties. Despite unnecessarily broad statements in *Muskrat, Grannis*, and *Willing*, the stage seemed to be set for the Court to entertain requests for declaratory judgments that would finally settle a ripe and concrete dispute between adverse parties.

2. Judicial Independence. In the *Keller* and *Postum* cases, the Supreme Court had held it could not review the decision of a District of Columbia court in a nonjudicial proceeding. At the same time, however, it had confirmed the authority of the local courts over the same proceedings. Not all limitations that restricted congressional power to legislate within the states, Taft explained, were applicable to the District. There, by virtue of article I's grant of authority "[t]o exercise exclusive legisla-

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338. *Id.* at 132.

339. *Id.* Also on point were bills to remove existing clouds from titles, which Brandeis had seemed to concede in *Willing* were traditionally cognizable by the courts. *Willing*, 277 U.S. at 288. Unlike Stone's other examples, the naturalization proceeding resulted not simply in a declaration of existing rights, but in a change of status. See Borchard, *The Declaratory Judgment—A Needed Procedural Reform*, 28 YALE L.J. 1, 4-5 (1918) (arguing for broader remedy). It was, however, convincing evidence that the existence of a case or controversy did not depend upon the availability of coercive relief.

340. Old Colony Trust Co. v. Commissioner, 279 U.S. 716, 725 (1929) (alternative holding) (upholding judicial authority to review decision of Board of Tax Appeals approving deficiency assessment). "[I]t is not necessary, in order to constitute a judicial judgment that there should be . . . power to issue formal execution to carry the judgment into effect . . . ." *Id.* Though this statement was qualified by the argument that "[a] judgment is sometimes regarded as properly enforceable through the executive departments instead of through an award of execution by the Court, where the effect of the judgment is to establish the duty of the department to enforce it," the Court went on to cite *Swope* for the more general proposition that "the award of execution is not an indispensable element." *Id.*
tion in all cases whatsoever," Congress had all the powers of a state legislature: "Subject to the guaranties of personal liberty in the amendments and in the original Constitution, Congress has as much power to vest courts of the District with a variety of jurisdiction and powers as a state legislature has in conferring jurisdiction on its courts."  

It was obvious enough from the text that article I was meant to give Congress the power to regulate matters of local concern in the District; federalism concerns have no place in territory over which Congress has exclusive jurisdiction. It did not necessarily follow, however, that the District of Columbia provision also did away with limitations, such as the case-or-controversy requirement, that reflected the distinct philosophy of separation of powers. Taft conceded that Congress's power over the District was limited by constitutional "guaranties of personal liberty"; he needed to explain why it was not limited by article III's case-or-controversy requirement as well.

His sole effort to do so was the suggestion in *Postum* that courts of the District were not courts "established under Article III." The implication seemed to be that, under its power to legislate for the District of Columbia, Congress could establish courts that met none of the requirements of article III: neither the limitation to disputes of national significance listed in section 2, nor the case-or-controversy limitation, nor the requirements of tenure and irreducible compensation in section 1.

Like the case-or-controversy limitation, the tenure and salary provisions serve the separation of powers: They assure the litigant the protection of an independent judge. There was no reason as an original matter to think judicial independence less important in the District than elsewhere. The Court had held in Marshall's time, however, that courts could be created in the territories without reference to the requirements for establishing courts within the states. If this was true of the territories, it might also be true of the District, which was in a similarly anomalous position; although the transitoriness of the territories meant that

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363. U.S. CONST. art. III, §§ 1, 2.

364. See e.g., THE FEDERALIST No. 78, at 529 (A. Hamilton) (J. Cooke ed. 1961) ("That inflexible and uniform adherence to the rights of the constitution and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission."); THE FEDERALIST No. 79, at 531 (A. Hamilton) (J. Cooke ed. 1961) ("And we can never hope to see realised in practice the complete separation of the judicial from the legislative power, in any system, which leaves the former dependent for pecuniary resources on the occasional grants of the latter.").

application of the tenure requirement there would have created a problem of surplus judges inapplicable to the District, that had not been Marshall's reason for decision.366

None of this was said in Keller or in Postum. Justice Van Devanter said it, however, in Ex parte Bakelite Corp. 367 in 1929, upholding the authority of the Court of Customs Appeals to render what appeared to be an advisory opinion. Keller, Postum, and the territorial cases, he announced, had "settled that Article III does not express the full authority of Congress to create courts, and that other Articles invest Congress with powers in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying those powers into execution."368 Because the Court of Customs Appeals had not been created pursuant to article III, it was not subject to article III's limitations. It was thus unnecessary to decide whether the business at hand constituted a case or controversy. And in unmistakable dictum, the Court added that the judges of the Court of Customs Appeals held office only "for such term as Congress prescribes."369

In so concluding, the Court took a giant step beyond the precedents. Both the territorial and District of Columbia cases had expressly relied on the special status of those areas. It was one thing to hold article III inapplicable to areas outside the states. It was quite another to hold article III could be evaded within the states themselves. Marshall had flatly said in the first territorial case that the latter could not be done: Although the territories were subject to a different rule, "admiralty jurisdiction can be exercised in the states in those Courts, only, which are established in pursuance of the third article of the Constitution."370 This dictum had been resoundingly confirmed when the Court overturned the court-martial conviction of a civilian in Ex parte Milligan: "One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior."371

367. 279 U.S. 438 (1929). The statute in question empowered the President to impose sanctions on importers whom he found guilty of unfair practices. The Court of Customs Appeals was authorized to review administrative determinations that were merely recommendations to the President. Id. at 446-47. Cf. D. CURRIE, supra note 20, at 6 (discussing Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792)).
368. Bakelite, 279 U.S. at 449.
369. Id. at 449-50, 460-61.
371. 71 U.S. (4 Wall.) 2, 122 (1867) (alternative holding). See D. CURRIE, supra note 20, at 288. Milligan conceded that article III did not forbid the court-martial of military personnel for service-connected crimes, as had been acknowledged in Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1858)
Apparently alert to the danger that the *Bakelite* decision posed to article III's goal of an independent judiciary, Justice Van Devanter took steps to limit the extent of the damage: "Legislative" courts not enjoying article III protections could be created not in all cases but only—apart from special geographical areas—"to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it." This formulation was taken from the 1856 decision in *Murray's Lessee v. Hoboken Land & Improvement Co.*, which had held that article III did not forbid the government to collect its debts by seizing the debtor's property. Customs duties, Van Devanter concluded, could be collected in the same way; and thus the collection of customs could be entrusted to a court whose judges lacked the tenure guaranteed by article III.

The *non sequitur* was glaring. *Murray's Lessee* held only that article III did not require that courts always be used. When courts are used, however, article III leaves no doubt about the tenure or salary of their judges.

**B. The Executive and Congress.**

1. Myers v. United States. In 1789, Congress had carefully amended a bill establishing the Department of Foreign Affairs to pro-

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373. 59 U.S. (18 How.) 272, 284 (1856) ("[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."). See *Currie, Bankruptcy Judges and the Independent Judiciary*, 16 CREIGHTON L. REV. 441, 449 (1983).

374. *Bakelite*, 279 U.S. at 458. That due process really permitted taxes to be collected without even a subsequent opportunity for hearing on the question whether they were due seems doubtful in light of *Ward v. Love County*, 253 U.S. 17, 24 (1920): "To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law." For a valiant effort to explore the limits of the principle that matters not "inherently" judicial could be entrusted to legislative tribunals, see *Katz, Federal Legislative Courts*, 43 HARV. L. REV. 894 (1930). See also *Bakelite*, 279 U.S. at 452-55 (concluding that Court of Claims was legislative court because government debts had long been paid by legislative or executive action and because government's creditors had no "right to sue . . . unless Congress consents").

375. Moreover, as the second Justice Harlan pointed out many years later, the fact that Congress might have had power to create a legislative court did not prove it had done so. *Glidden Co. v. Zdanok*, 370 U.S. 530, 549-51 (1962) (plurality opinion). The premise of *Murray's Lessee*, on which the *Bakelite* Court relied, had been that Congress had a choice whether or not to entrust to a court government matters not inherently judicial.
vide, not that the Secretary would be "removable by the President," but that his subordinate would assume certain functions "whenever the said principal officer shall be removed from office by the President of the United States"—in order, the sponsor of the amendment said, to avoid any implication that the power of removal was for Congress to give or withhold.376 In 1867, President Johnson was impeached, but not convicted, for discharging the Secretary of War in violation of an 1867 statute effectively requiring Senate consent for his removal.377 In 1926, in Myers v. United States,378 a divided Court held that Congress could not constitutionally require Senate consent for the discharge of a postmaster who had been appointed by the President with the consent of the Senate.

Myers was a battle royal. In sharp contrast with most constitutional decisions of the period, the various opinions cover nearly two hundred pages. The depth of historical research on both sides was impressive. Relying heavily on the 1789 incident and dismissing the 1867 statute as an aberration reflecting the excesses of the Reconstruction Congress in a time of crisis, ex-President Taft produced his most prodigious opinion in a case that was obviously close to his heart. The power to remove executive officers, he argued, was an element of the "executive Power" conferred on the President by article II and "an incident of the power to appoint them," which the same article conferred. Moreover, article II also directed the President to "take Care that the Laws be faithfully executed." This he could do only "by the assistance of subordinates"; and it would be unreasonable to conclude that Congress could "fasten[ ] upon him, as subordinate executive officers, men who by their inefficient service under him, by their lack of loyalty to the service, or by their different view of policy, might make his taking care that the laws be faithfully executed most difficult or impossible."379

In separate dissents, McReynolds and Brandeis offered an alternative view of history and an alternative interpretation of the constitutional provisions. Removal itself might be an executive act, but determining the conditions for removal was a legislative function committed to Congress under the necessary and proper clause. The executive power vested in the President was only that which was expressly enumerated. The Reconstruction Congress was not alone in enacting restrictions on removal; the Court had upheld one in United States v. Perkins in 1886.

377. See Myers, 272 U.S. at 166; Act of March 2, 1867, ch. 154, 14 Stat. 430 (providing that officers appointed with Senate consent hold office until approval of their successors).
378. 272 U.S. 52 (1926).
379. Id. at 117, 131, 161, 175-76. For Justice Stone's substantial role in the reworking of Taft's opinion, see A. Mason, Harlan Fiske Stone, supra note 2, at 225-32.
The 1789 incident was ambiguous, and nobody doubted that Congress could inhibit Presidential control of his subordinates by rejecting his nominees or by prescribing qualifications for office.\textsuperscript{380}

As a purely textual matter, a variety of conclusions would have been plausible. At one extreme, the provision for removal upon impeachment for high crimes and misdemeanors\textsuperscript{381} might have been taken to imply that otherwise officers were not removable at all. Alternatively, Taft’s argument that the power of removal implicitly went along with that of appointment might have led to the conclusion that Senate approval was always required to remove officers whose appointments were subject to Senate consent—whether Congress wanted it that way or not.\textsuperscript{382} Finally, there were the contrasting positions embraced by the various Justices: that the manner of removal had been left to Congress by the necessary and proper clause, and that Congress’s power was limited by the grants of executive authority in article II.\textsuperscript{383}

Taken together, the opinions suggest that history, while rich in relevant materials, yields no clear understanding of the correct interpretation.\textsuperscript{384} If that is so, the central question boils down to whether—judicial precedents for the moment to one side—one interpretation or another is more consistent with the general purposes of the framers. On that issue the Chief Justice seems to have had a strong argument: Presidents cannot effectively carry out their constitutional obligation to see that the laws are faithfully executed if they cannot control their subordinates, and they cannot control them without authority to remove. Senate power to block appointments, specifically provided in article II, seems to represent the extent to which the framers were willing to compromise the President’s authority, and it does not require the President to work with those who would contradict his orders.\textsuperscript{385} Finally, as the Chief Justice argued,

\textsuperscript{380} See \textit{Myers}, 272 U.S. at 178-295. Holmes added a brief dissent, \textit{id.} at 177, essentially on the ground that it was up to Congress to decide whether or not to create the office of postmaster.

\textsuperscript{381} U.S. \textsc{Const.} art. II, § 4.

\textsuperscript{382} See \textit{The Federalist}, No. 77, at 515 (A. Hamilton) (J. Cooke ed. 1961) (“The consent of that body would be necessary to displace as well as to appoint.”). Taft rejected this conclusion on the ground that the consent requirement had been based upon the need to assure small states a voice on the staffing of offices, not on “any desire to limit removals.” \textit{Myers}, 272 U.S. at 119-20, 164.

\textsuperscript{383} Compare the similarly knotty question whether the President alone may terminate a treaty made with Senate consent under article II, section 2. See \textit{Goldwater v. Carter}, 444 U.S. 996 (1979) (where majority found suit attempting to raise question nonjusticiable).

\textsuperscript{384} See \textit{Corwin}, \textit{Tenure of Office and the Removal Power under the Constitution}, 27 \textsc{Colum. L. Rev.} 353 (1927) (painstakingly attacking Taft’s view of history).

\textsuperscript{385} The latter consideration also serves to distinguish the power of Congress to prescribe qualifications for office, so stressed by Brandeis in dissent. See \textit{Myers}, 272 U.S. at 264-74. For the position that Taft’s argument for presidential control was of less force with respect to officials below the Cabinet level, see \textit{Corwin}, \textit{supra} note 384, at 394-95; Van Alstyne, \textit{The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Hori-
the creation of a unified executive had been one of the prime purposes of the Constitution.\textsuperscript{386}

Precedent, invoked by the dissenters, was not really to the contrary, though Taft did not distinguish it as successfully as he might have. \textit{Marbury v. Madison}, in what Taft with technical accuracy characterized as dictum, had stated without qualification that the President could not in effect dismiss a justice of the peace appointed for a term of years;\textsuperscript{387} but control of judicial officers, even where not prohibited by article III,\textsuperscript{388} is hardly necessary to the unified exercise of executive power. More nearly in point was \textit{United States v. Perkins},\textsuperscript{389} which had upheld Congress's power to place limitations on the removal of inferior officers appointed by heads of departments. As Taft noted, the Court in reaching this decision had said that the power to provide for such appointments implied the power of limiting removal,\textsuperscript{390} but this conclusion seems inconsistent with the Court's argument for executive control in \textit{Myers}.\textsuperscript{391}

More to the point was the Chief Justice's further observation that \textit{Perkins} had not held that Congress could "draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power."\textsuperscript{392} The statute in \textit{Perkins} had not required Senate consent; it had provided for a court martial. Presumably disobedience of...
Presidential orders would be a ground for court martial; like the Civil Service laws so loudly invoked by the dissent in *Myers*, the *Perkins* law left the President with ample authority to enforce his policies through discharge of obstructive subordinates.

2. *Other Cases.* In *Myers v. United States*, thanks in part to the influence of ex-President Taft, the Court came down firmly on the side of executive over legislative power. Similarly, the Court made maximum use of an unusual constellation of other cases to establish additional executive prerogatives during the Taft years.

*J.W. Hampton, Jr., & Co. v. United States* was a relatively easy decision. There, relying on precedent, the Chief Justice wrote to hold that a law authorizing the President to increase tariffs to make up for lower foreign production costs did not unconstitutionally delegate legislative power, because it merely called upon the President to execute "an intelligible principle" laid down by Congress. More novel was the conclusion in *Springer v. Philippine Islands* that provisions of the Philippine Organic Act vesting legislative power in the legislature and executive power in the Governor General forbade legislative participation in selecting the directors of public corporations. Relying in part on *Myers*, Justice Sutherland concluded that the appointment of nonlegislative officers was an executive rather than a legislative function, and therefore it could not be entrusted to members of the legislature.

Since the provisions on which the Court relied had counterparts in the Constitution, there was reason to think the same fate would have befallen a similar act of Congress. Indeed, the case for a similar conclusion is far stronger in the case of the federal government. Article II specifically provides for the appointment of most officers by the President (with or without Senate consent), by the heads of departments, or by the courts. As for the Philippines, not only did Holmes and Brandeis protest rather abstractly that separation of powers was not an absolute con-

393. *Id.* at 262-64 (Brandeis, J., dissenting).
395. 276 U.S. 394 (1928).
396. *Id.* at 409-11 (1928) (citing Field v. Clark, 143 U.S. 649 (1892) (upholding grant of authority to retaliate for "unreasonable" foreign tariffs)). *See Fuller I, supra* note 20, at 339-43. Unlike *Myers*, this case did not present a conflict between the President and Congress, for Congress had sought to grant the President the authority he sought to exercise.
397. 277 U.S. 189 (1928).
398. *Id.* at 204-06.
399. *Id.* at 205.
cept, there were enough states in which legislatures had been given appointment powers to make questionable the Court's easy conclusion that the appointment of officers was not a legislative task.

More interesting still was the Pocket Veto Case, decided in 1929. Nine days after presenting a bill to the President for his signature, the sixty-ninth Congress adjourned its first session sine die. The President had taken no action on the bill, and the question was whether it had become a law.

To Justice Sanford, writing for a unanimous Court, the question was answered by the text of article I. Section 7 of that article provides that a bill shall become law if it "shall not be returned by the President within ten Days" "to that House in which it shall have originated," "unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law." "Ten days," said the Court, meant calendar (not legislative) days excluding Sundays, the "House" meant the body in session and not its clerk, and "Adjournment" was not limited to the final dispersal before the convening of a new Congress. Thus, because Congress's adjournment had prevented the President from returning the bill to the House within ten days, it had not become a law.

Apart from reliance on impressive evidence of longstanding legislative and executive understanding, the Court's reasoning was largely textual: The explicit exclusion of Sundays from the ten-day period confirmed the presumption that the words of that provision were "to be taken in their natural and obvious sense"; the "House" to which the bill was to be returned was the same that was to "proceed to reconsider it"; section 5 of the same article provided that a number less than a quorum could "adjourn from day to day" and that neither House should "adjourn for more than three days" without the other's consent.

402. See Corwin, supra note 384, at 387 & n.88 ("The power of appointment is not an inherent executive power but a specific power. This has always been the controlling principle in the state constitutions; and by accepted canons of construction it is likewise the view of the United States Constitution."). In reaching the additional conclusion that appointment was an executive function, the Court unnecessarily implied that it could not be entrusted to an independent agency either; but in so holding, the Court had the backing of the policy of unified executive control that had also underlain Myers.
403. 279 U.S. 655 (1929).
404. Id. at 672.
405. Id. at 679-83.
406. See id. at 683-91.
407. Id. at 679.
408. Id. at 681.
409. Id. at 680.
Little consideration was given to the question whether such a literal reading was compatible with the purposes of the provisions being construed. The basic principle of the section is to give the President not an absolute veto but one subject to override by a two-thirds vote of both Houses.\textsuperscript{410} The requirement that the President return a bill within ten days prevents him from converting a suspensive veto into an absolute one by inaction. The exception for cases in which adjournment prevents timely return of the bill keeps Congress from destroying the veto power altogether by disbanding. To hold that every absence of Congress on the tenth day is an “adjournment” that prevents return of a bill, however, would allow a President to take advantage of every brief recess to circumvent the legislative right to override his veto.\textsuperscript{411}

This argument was noted, but rejected, in the Court’s opinion. Sanford concluded that since the Constitution deliberately gave the President a full ten days in which to consider the merits of a bill, it was improper to blame the death of a bill not returned before adjournment on a presidential plot to avoid override: It was “attributable solely to the action of Congress in adjourning before the time allowed the President for returning the bill had expired.”\textsuperscript{412}

As the Court suggested, Congress can protect its right to override presidential objections by remaining in session continuously for ten days after passing each bill. The burden of its doing so, however, seems unnecessarily wasteful. As the losing party argued, the relative rights of both the President and Congress could be equally served at lower cost by holding that a return to the agent of an absent House sufficed to keep a bill from immediately becoming law. Congress, if it chose, could then repass the bill when it reconvened, and the basic principle of a suspensive veto would be preserved.\textsuperscript{413}

Unfortunately, this argument seems to mean that the provision for the death of a bill that cannot be returned was unnecessary, while the

\textsuperscript{410} If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections [of the President], to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.

U.S. Const. art. I, § 7, cl. 2. For insistence that the veto should not be absolute, see 1 M. Farrand, supra note 282, at 98-104 (Convention debate and vote rejecting absolute veto); The Federalist No. 73, at 494-99 (A. Hamilton) (J. Cooke ed. 1961).

\textsuperscript{411} See Wright v. United States, 302 U.S. 583, 596-97 (1938) (Hughes, C.J.). That a simple majority of Congress could pass a new bill to the same effect as the vetoed one seems not to disparage this conclusion. After a pocket veto, the measure may have to be repassed not once but twice, since it, being a new bill, is subject to another veto. Moreover, Congress’s ability to pass the new measure twice is dependent upon the absence of a second pocket veto.

\textsuperscript{412} The Pocket Veto Case, 279 U.S. at 676-79.

\textsuperscript{413} See id. at 679 n.6.
framers clearly contemplated cases in which return would be impossible. Perhaps they merely thought there might be times when not even a congressional clerk could be found, such as after final adjournment. Or perhaps, as Sanford argued, they contemplated that a returned bill would receive immediate reconsideration, rather than lingering "in a state of suspended animation." 414

The holding was only that the final adjournment of one session of Congress "prevent[ed]" the subsequent return of bills. The Court's textual arguments, however, seemed equally applicable to brief adjournments in the course of a session. In that context, as suggested by Sanford's own concern about "suspended animation," the Court's literal approach would appear to enhance presidential power without serving any legitimate countervailing purpose. 415

In McGrain v. Daugherty, 416 where the executive power was not at risk, the Taft Court gave a boost to legislative authority. 417 There the Court resoundingly affirmed a broad implicit congressional power to investigate matters pertinent to possible legislation, 418 a power that had been placed under a cloud by the hostility displayed in Kilbourn v. Thompson some forty years before. 419 Nevertheless, in conflicts between

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414. Id. at 684-85.
415. Some of the implications of the opinion were repudiated in Wright v. United States, 302 U.S. 583 (1938), in which, over the protest of Justice Stone, the Court held that an adjournment of a single House for not more than three days, as permitted by article I, section 5, was not an adjournment of "Congress" that would stop the running of the ten-day period for returning a bill under section 7. In order to avoid the conclusion that such a recess deprived the President of his veto power entirely, it was necessary to retract Justice Sanford's emphatic conclusion that a return to a clerical employee could never constitute a return to the originating House, for otherwise the President would have no way of returning the bill even though Congress had not adjourned. Stone got around this unacceptable result by construing the reference to an adjournment of "Congress" to mean, in light of its purpose, that of the originating House. Id. at 605-09 (concurring opinion). The trouble with that solution was, as suggested in the text, that it unnecessarily gave the President an absolute veto during every brief recess. In holding that delivery to an authorized agent sufficed, Hughes emphasized this problem, thereby raising doubts whether even an adjournment of both Houses that was brief enough not to place a bill in "suspended animation" would be held to "prevent" return within the meaning of section 7. See id. at 596-97; Kennedy v. Sampson, 511 F.2d 430, 437 (D.C. Cir. 1974) (holding that no intrasession adjournment "prevented" return); see also Barnes v. Kline, 759 F.2d 21, 35-38 (D.C. Cir. 1985) (holding the Pocket Veto Case no longer applicable to "modern intersession adjournment" because of decreased length of absences and explicit provision by House for acceptance of return by clerk).
417. See Barry v. United States ex rel. Cunningham, 279 U.S. 597 (1929) (upholding Senate power to investigate Senate elections and to compel the appearance of witnesses at hearings during such investigations); Sinclair v. United States, 279 U.S. 263 (1929) (Butler, J.) (upholding the Teapot Dome investigation).
419. 103 U.S. 168 (1881). Kilbourn had not denied the power to investigate for legislative purposes, but had appeared to take a dim view of congressional investigations generally and had found no legitimate legislative purpose for the one in question. See D. Currie, supra note 20, at 437-38.
executive and legislative power, the former invariably prevailed while ex-President Taft was at the helm.

IV. CONCLUSION

Chief Justice Taft was a strong leader. Like several of his predecessors, he wrote far more constitutional decisions than did any of his colleagues. He kept for himself not only the Wagnerian separation-of-powers struggle of *Myers v. United States*, but also the bulk of the great issues of federalism in such cases as the *Child Labor Tax Case*, *Brooks v. United States*, *Stafford v. Wallace*, and *Olsen v. Board of Trade*. In these matters he set the tone of the period: by no means grudging in interpretation of Congress's enumerated powers, but alert to prevent their misuse to usurp authority not granted.

Though he wrote relatively little in the field of substantive due process, Taft set the tone here, too, by his strikingly aggressive opinion in *Truax v. Corrigan*, and by his silent concurrences in most of the great due process decisions of the time. It was in this area, however, that he wrote his sole dissenting opinion in a constitutional case, protesting the invalidation of the minimum wage law in *Adkins v. Children's Hospital*. It was not simply that he, like Fuller, generally chose not to highlight his disagreements by writing opinions. Rather, unless he routinely declined even to acknowledge disagreement, he seems to have been in remarkable accord with the decisions of his colleagues; for in nine terms he recorded a dissenting vote in only a handful of constitutional cases. Taft truly appeared to embody the spirit of the Court over which he presided.

Spokesmen for the Court in the pivotal due process and equal protection cases were Butler, McReynolds, and, above all, Sutherland, author of *Adkins* and of the three decisions striking down price regulation...
as well as of the limiting opinion upholding zoning in *Village of Euclid v. Ambler Realty Co.* Butler tended to be somewhat less tolerant of state regulation than his colleagues, Sutherland less tolerant of federal regulation, and McReynolds less tolerant of either.\textsuperscript{422} Apart from his virtual monopoly on maritime cases and his prodigious dissent in *Myers v. United States*, McReynolds made his mark principally by a strident judicial activism. That activism led him not only to write the famous and much-admired "liberal" decisions in favor of academic freedom in *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, but also to dissent more frequently in constitutional cases than anyone but Holmes and Brandeis, usually because the Court had upheld some state or federal regulation.\textsuperscript{423}

Van Devanter and Sanford, who wrote relatively little,\textsuperscript{424} almost never wrote dissenting opinions. Both generally agreed with the majority, though Van Devanter seemed somewhat more, and Sanford somewhat less, willing than most to invalidate state legislation.\textsuperscript{425} Van Devanter wrote most significantly on such exotic questions as legislative investigations and judicial independence, while Sanford is known principally for his narrow views of free speech in *Gitlow* and *Whitney*.\textsuperscript{426}

\textsuperscript{422} Butler dissented in both *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926), and *Buck v. Bell*, 274 U.S. 200 (1927), Sutherland in *Lambert v. Yellowley*, 272 U.S. 581, 597 (1926), and *Chicago Bd. of Trade v. Olsen*, 262 U.S. 1, 43 (1923) (as well as, uncharacteristically, in *Meyer v. Nebraska*, 262 U.S. 390, 413 (1923)). McReynolds dissented in *Lambert*, 272 U.S. at 605, *Stafford v. Wallace*, 258 U.S. 495, 528 (1922), *Olsen*, 262 U.S. at 43, and *Euclid*, 272 U.S. at 397. Professor Paschal gives Sutherland much of the credit for the resurgence of laissez-faire constitutionalism in the 1920's and 1930's, see J. PASCHAL, supra note 2, at 153, adding that Sutherland "stands apart from his conservative colleagues primarily because he was a man of ideas" who had a well-developed theory of the proper functions of government, \textit{id.} at 241.

\textsuperscript{423} Against this background it is interesting that McReynolds also tended to join his substantive adversary Brandeis in protesting what they considered premature judicial intervention. See supra note 313 (discussing *Pennsylvania v. West Virginia* and *Terrace v. Thompson*). Apart from *Myers*, McReynolds's opinions tended to be cursory. See A. BICKEL \& B. SCHMIDT, supra note 24, at 341-57 (describing the difficulties of working with McReynolds and adding that he gave little attention to his opinions); A. MASON, WILLIAM HOWARD TAFT, \textit{supra} note 2, at 195 (quoting Taft's remark that McReynolds was "always trying to escape work").

\textsuperscript{424} See A. MASON, WILLIAM HOWARD TAFT, \textit{supra} note 2, at 195, 209 (describing Van Devanter as strong in conference but "opinion-shy" and "the slowest member" at writing opinions); 2 H. PRINGLE, \textit{supra} note 2, at 971 (quoting Letter from Taft to Horace Taft, Dec. 26, 1924) (Van Devanter was "[m]y mainstay in the court").


\textsuperscript{426} Clarke, Day, Pitney, and McKenna left the Court without making noteworthy contributions to the constitutional jurisprudence of the Taft period. See A. MASON, WILLIAM HOWARD TAFT, \textit{supra} note 2, at 161, 213-15 (noting Clarke's boredom, Day's advanced age, Pitney's nervous breakdown, and McKenna's senility and the fact that, after his brethren had agreed not to decide any case in which his vote was crucial, McKenna finally retired at Taft's urging).
Fundamentally not in sympathy with the prevailing judicial philosophy, Holmes, Brandeis, and Stone made their names during the Twenties very largely in dissent. For the Court, Holmes and Brandeis scored liberal gains in the procedural area by writing against mob-dominated trials and for de novo review of citizenship claims respectively. Holmes struck an extreme blow for judicial restraint by upholding involuntary sterilization in *Buck v. Bell*, and Brandeis exercised similar restraint in his disparagement of declaratory relief in *Willing v. Chicago Auditorium Association*. Judicial restraint was the dominant theme of the numerous dissents of all three Justices, especially in substantive due process and equal protection cases. Yet it was Holmes who wrote for the Court to strike down a regulation as a taking in *Pennsylvania Coal Co. v. Mahon*, and all three Justices were more interventionist than the majority in the wiretapping case of *Olmstead*. Strikingly, Stone parted company from Holmes and Brandeis in their most notable departure from judicial restraint by joining the majority in allowing limitations on speech in *Gitlow* and *Whitney*.

When Taft and Sanford died in 1930, the Court was left with four aggressive advocates of substantive due process and three articulate apostles of judicial restraint. As the Depression deepened, it was evident that President Hoover’s choices to fill the two vacancies would be of the utmost importance.

427. Just as before Taft’s appointment, Brandeis’s dissents tended to be learned treatises on the history and background of the provisions in question—designed, like his earlier briefs, to demonstrate, as they so often did, the reasonableness of the laws. For examples, see his dissents in Frost v. Corporation Comm’n, 278 U.S. 515 (1929) (cooperatives), discussed supra text accompanying note 32; Jay Burns Baking Co. v. Bryan, 264 U.S. 504 (1924) (bread-weight provisions), discussed supra text accompanying note 75; Missouri ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm’n, 262 U.S. 276 (1923) (rate regulation); Truax v. Corrigan, 257 U.S. 312 (1921) (labor legislation), discussed supra text accompanying notes 25-30; Frankfurter, *Mr. Justice Brandeis and the Constitution*, 45 Harv. L. Rev. 33, 60 (1931). For additional displays of Brandeis’s awesome wizardry in dealing with complex financial matters, see his majority opinions in *Farmers & Merchants Bank v. Federal Reserve Bank*, 262 U.S. 649 (1923) (banking); *Atlantic Coast Line R.R. v. Daughton*, 262 U.S. 413 (1923) (income taxation). Holmes, as usual, tended to be pithy. For an illuminating contrast of the styles of these two allies, see A. Mason, *Brandeis, supra* note 2, at 570-81 (concluding that “Holmes is the enlightened skeptic; Brandeis, the militant crusader”).