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The Supreme Court and Responsible Government: 1864–1930

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I. INTRODUCTION

A just balance between the general and the local government is of the very essence of a federal polity. What is general and for the general government, and what is local and for the local government, must be distinguished clearly and maintained consistently. But what is general and what local is not always and everywhere indicated by an exactly drawn line and may vary from time to time or place to place, so that lines have to be redrawn in view of changes in economics, industry, and commerce.

Moreover, a federal polity calls for constitutional law. A constitution is not a mere body of constitutionally prescribed rules; rules prescribing mode of choice, terms of office, powers, remuneration, and causes and modes of removal of officials; nor of rules of policing, definition of offenses, such, for example, as treason, and fixing and imposing penalties. No less important, a constitution formulates principles—authoritative starting points for reasoning, for development of law, for application of experience developed by reason and tested by further experience, to the processes of government.

In the United States we must bear in mind Anglo-American reliance upon law, as compared with civilian (*i.e.* modern Roman, not classical Roman) reliance upon legislation, derived from medieval and eighteenth-century thinking of Roman law as enacted by Justinian and of the civil law as enacted in the codes of Frederick the Great, of the Austrian empire, and of Napoleon. Where the civilian thought of government carried on by a ruler who enacted law, Coke, using the phrase attributed to Bracton, spoke of the

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governing authority ruling under God and the law. As between legislative and executive or administrative making of laws—rules—and judicial finding of law—principles—our American polity has followed Coke.

Attacks upon the Supreme Court have been attacks upon constitutional law; attempts to put legislation above the constitution, to put constitutional limitations upon legislation at the mercy of a majority in Congress for the time being. They are attacks upon our characteristic American legal-judicial process of reasoned application and interpretation of law as a body of principles.

At the very beginning of the period we are considering this was brought out in the attempt of a partisan majority in Congress to put vengeful severe treatment of the states which had sought to secede, and of the people of those states, and of all persons who had taken part in the rebellion, out of the reach of protection by judicial application of provisions of the constitution. As the Supreme Court insisted upon the constitutional limitations in the Bill of Rights in application to the reconstruction legislation which put the states which had seceded under military government, Congress, as it was put, sought to "clip the wings of the court." Chiefly this was sought by insisting upon a doctrine that questions of application of the guarantees and limitations in the constitution to the reconstruction legislation were not judicial but were political.

Grant of judicial power by the Constitution expressly covers all cases arising under the Constitution and laws of the United States. Thus judicial scrutiny of the constitutionality of acts of Congress is assured. But there is no express devolution of the whole or ultimate exercise of judicial power upon the Supreme Court. That court is given original jurisdiction of cases affecting ambassadors, public ministers and consuls and those to which a state is a party, and its appellate jurisdiction is to extend to all cases committed to the judicial power "with such Exceptions and under such regulations as the Congress shall make."[1] Thus the appellate jurisdiction of the Supreme Court is vulnerable. But a system of "inferior courts" of final jurisdiction beyond reach of judicial correction is unthinkable. During the reconstruction controversies Congress did take away the jurisdiction of the Court to hear a particular pending proceeding. But the strongly pressed legislation declaring the Reconstruction Acts political and not subject to judicial scrutiny as to constitutionality was not enacted.

[1] U. S. CONST., art. 3, § 2.

Responsible government under a constitution judicially interpreted and operating as the supreme law of the land no less than as a political instrument was thus established thoroughly as against legislative absolutism.

It was of no less moment to establish it against executive absolutism. For legally unlimited power of the executive has ever been a favorite expedient of a government hard pressed by the exigencies of war or revolution. A masterful military leader may easily become a masterful political leader.

II. POST-CIVIL WAR PERIOD

The Civil War brought about danger of disappearance or relaxation of constitutional limitations upon the executive which tried the Supreme Court quite as much as did attempts to do away with or dangerously relax limitations upon the legislative.

Here we come to the great case of Ex parte *Milligan*.[2] This case has since come to be regarded, as Charles Warren put it, as "one of the bulwarks of American liberty." It is well worth while to recall the facts and holding in that case.

In 1863, when the Civil War was close to its height, an Act of Congress "relating to *habeas corpus* and regulating judicial proceedings in certain cases" authorized the President during the rebellion to suspend the writ of *habeas corpus* throughout the United States. Accordingly the President by proclamation suspended the writ as to persons held as "aiders and abettors of the enemy." Milligan was arrested by order of the military commandant of the District of Indiana, tried before a military commission, convicted of "affording aid and comfort to rebels against the authority of the United States," and sentenced to be hanged. The sentence was approved and by order of the Secretary of War he was ordered to be executed "without delay." The facts were that he had joined and between October, 1863, and August, 1864, aided at different times a secret society known as the Order of American Knights or Sons of Liberty organized for the purpose of overthrowing the government of the United States; holding communication with the enemy; conspiring to seize munitions of war, liberate prisoners and resist the draft, in a state within the military lines of the army of the United States, which was constantly threatened to be invaded by the enemy. He had been at no time in the military service of the United States or connected in any way with the land or naval force nor within the limits of any state engaged in rebellion. The

[2] 71 U.S. (4 Wall.) 2 (1866).

grand jury of the district, convened after his arrest, had not indicted him.

The judges of the United States Circuit Court, being divided in opinion, certified the case to the Supreme Court. That court unanimously held that the military commission authorized by the President was unlawful. A majority went further and held that Congress could not authorize such a commission except in the actual theater of war where the courts were not open. If it was of the highest moment to make every exertion and high sacrifice to save the Union; it was no less of moment to preserve the Constitution which made the Union worthwhile, and so to sacrifice something of expedient employment of direct and forcible methods of government to the preservation of fundamental constitutional limitations safeguarding individual life and liberty. Ex parte *Milligan* is an outstanding contribution of the Supreme Court to responsible government.

Moreover, social control as a means of maintaining order and justice could not be treated as having been wholly suspended in the Confederate States while in rebellion. The legal status of the Confederate States during the War and of the legislation of those states while in rebellion presented a question of constitutional law. State legislation in aid and furtherance of rebellion was obviously wholly invalid. But the Court held that legislation or acts of the several states during the War, so far as the acts did not "impair or tend to impair the supremacy of the National authority, or the just rights of citizens under the Constitution, are, in general, to be treated as valid and binding. The existence of a state of insurrection and war did not loosen the bonds of society, or do away with civil government. . . ."[3]

The Civil War had shown the need of constitutional guarantees of rights against unreasonable impairment by the states as well as against unreasonable impairment by the national government, which was all that the Bill of Rights contemporary with the Constitution provided for. The three constitutional amendments which followed the Civil War supplied this. They were in the right line of development of the Union. It did not need to be reconstructed. Continued construction was what was called for, not reconstruction. The three amendments applied the principles of the Bill of Rights to the states and afforded means of assured limitations upon impairment of individual rights by the states no less than by the nation. In the eyes of the law the states which had sought to secede

[3] Horn v. Lockhart, 84 U.S. (17 Wall.) 570, 580 (1873).

were never out of the Union. What they did in performance of their lawful functions during the years of attempted secession stood. At the close of the war they were to go on as states of the Union, not as outsiders, rebuilt and newly brought in.

Such is the theme of *Texas v. White*.[4] It was well put by Chief Justice Chase:

> When . . . Texas became one of the United States, she entered into an indissoluable relation. All the obligations of perpetual union, and all the guarantees of republican government in the Union, attached at once to the State. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through consent of the States.[5]

Thus at one of the critical periods in our national history, the Supreme Court proved equal to maintaining justice according to law in times which in other lands, without a tradition of ruling under God and the law and a tribunal set up to make that tradition an effective force for responsible government, have made for absolute oppressive dictatorships or anarchy.

Not the least task of responsible government is restraint of what Horace calls *civium ardor prava jubentium*. The absolute demos is like the absolute king. In practice an absolute temporary majority, led by politicians appealing to prejudice or mass cupidity, has characteristics of the absolute monarch in the hands of advisers who appeal to his personal wishes for the time being instead of to his best judgment.

III. SECURITY OF TRANSACTIONS

One of the most marked characteristics of the absolute monarch is disinclination to pay debts, and demos, both collectively and individually, displays the same trait. Debtors are, as a rule, in a strong and aggressive majority, and unlimited government by majority is disposed to go far in making laws adverse to creditors. Thus there is need of assured balance.

In an ordered society the social interest in the security of transactions must be held in balance with the social interest in individual conditions of life. In our polity a large part of the task of maintain-

[4] 74 U.S. (7 Wall.) 700 (1868).

[5] *Id.* at 726.

ing that balance is a function of the national government, to be performed through application of constitutional limitations and exercise of powers provided by the constitution. Here again government by absolute rule of majorities for the time being, moved by apparent individual interest at the moment, may impair the underlying social interests which governments are established to secure.

In a constitutional government a just securing of underlying social interests is sought to be secured by careful assignment of the general governmental powers recognized and by definition of the powers granted or assigned to the several departments and agencies set up. Likewise a constitution which, like our own, is framed on the lines of the common-law tradition of rule under law, assigns to a court the ultimate interpretation of these grants and assignments. This does not give the judiciary an untouchable power to set up an absolute judicial oligarchy since the legislative and executive wield control of the final apparatus of applying physical force. But under the Anglo-American tradition of rule under law the solemn decision of the appointed judicial tribunal has sufficed to maintain the desired balance.

This is brought out in a group of cases, decided in the Supreme Court between 1869 and 1884, which grew out of legislation during and after the Civil War making United States notes a legal tender. The Constitution forbade the states coining money, emitting bills of credit, or making anything but gold or silver coin legal tender in payment of debts. There is no express prohibition of making national currency legal tender. Congress is given power to borrow money on the credit of the United States, and was given full power to declare and prosecute war and suppress insurrections. Treasury notes issued for such borrowed money were made legal tender by an Act of 1862,[6] enacted during the Civil War, among other things to enable the government to raise money conveniently for prosecution of the War. The validity of the provision making these notes legal tender was passed upon in what are commonly called the Legal Tender Cases.

The first in order of time was *Hepburn v. Griswold.*[7] This was an action upon a promissory note which became due five days before passage of the act authorizing the government to issue one hundred and fifty million dollars of notes which were to be "lawful money and a legal tender in payment of all debts." The court, three

[6] Act of February 25, 1862, 12 Stat. 345. See also Act of March 17, 1862, 12 Stat. 370; Act of July 11, 1862, 12 Stat. 532.

[7] 75 U.S. (8 Wall.) 603 (1869).

justices dissenting, held the statute unconstitutional as to debts incurred prior to its enactment. In the majority opinion Chief Justice Chase considered it as settled that the words "all laws necessary and proper for carrying into execution" powers granted by the Constitution meant laws "consistent with the letter and spirit of the Constitution; laws really calculated to effect objects intrusted to the government." He considered it went too far to say "that whatever in any degree promotes an end within the scope of a general power, whether, in the correct sense of the word, appropriate or not, may be done in the exercise of an implied power."[8] But a year later the court upheld an act of Congress restraining by heavy taxation the circulation of state bank notes as currency. This was held an appropriate means of providing a national currency. Chief Justice Chase said it was not a direct tax and that Congress had the power to impose it, otherwise "attempts to secure a sound and uniform currency for the country must be futile."[9] It was held no objection that the tax was so excessive that it showed a real purpose to destroy the franchises of state banks.

As the first case had been decided by a divided court, in the second the Court was divided also, and the reasoning in the two was not wholly consistent; the Court ordered the whole matter to be re-argued upon two cases pending undisposed of, which was done in *Knox v. Lee*.[10] On the re-argument of the whole question the constitutionality of the Legal Tender Act was upheld, although again the court was divided. It was held to be "the prerogative of every government not restrained by its Constitution to anticipate its resources by the issue of exchequer bills, bills of credit, bonds, stock, or a banking apparatus. Whether those issues shall or shall not be receivable in payment of private debts is an incidental matter in the discretion of such government unless restrained by constitutional prohibition."[11]

Fourteen years later the question came before the Supreme Court once more upon a statute of 1878 making reissue, of the notes issued in 1862, legal tender. The statute was upheld as adapted to an end within the scope of the Constitution and consistent with its letter and spirit.[12]

From the beginning of this series of decisions the Supreme

[8] *Id.* at 615, 617.

[9] Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 549 (1869).

[10] Reported In Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1870).

[11] *Id.* at 560.

[12] Juilliard v. Greenman, 110 U.S. 421 (1884).

Court was attacked bitterly and no less vigorously defended in legislative assemblies, in political conventions, and political meetings, and by speakers and writers on politics and economics in the press, and in periodicals. Bills to remove this and like questions from the jurisdiction of the Court and commit them to Congress were urged and introduced. Later the final decision was attacked on a new ground as an example of a new and dangerous exaltation of nationalism threatening the balance of the local and the national. But what is of chief significance is that the Supreme Court was able to take up such questions of law and argue them upon settled legal principles, and that made its disposition of them a contribution to responsible government.

IV. BALANCE BETWEEN STATE AND NATION

In policing the village community of the rural pastoral or agricultural society of antiquity the task was one of a balance between the individual and his neighbor. Later came a task of adjusting relations between communities— between each particular community and its neighbor. Policing the village became the model for policing the group of associated neighboring villages. With the growth of political institutions and relations of neighborhood with neighborhood and region with region, there arises a need of balance between neighborhood and organized region. In a federal polity this becomes one of balance between state and nation, and in a constitutional federal polity it becomes a task of law.

If we think of law as experience developed by reason and in its application corrected by further experience, we must bear in mind that the application by reason takes the form of reasoning and that reasoning is carried on by analogy, by comparison of new situations with those of the past, the not understood with the understood or supposedly understood. But it frequently happens that new situations instead of deriving light from the old actually throw light upon them so that the process of development of law by reasoning may be a slow and painful one. This is brought out particularly in legal adjustment of the balance between state and nation.

Circumstances which have affected this balance in the immediate past and increasingly affect it today are economic unification and industrial development through multiplied and continually more effective and available means of transportation and communication. This process began at the very outset of our national polity, and as its consequences became more and more manifest, brought about the constitutional controversies as to "states' rights" which vexed the beginnings of our national existence. Friction in main-

taining the balance has been constantly in evidence. The role of the Supreme Court in those controversies has been set forth in the preceding article.[13] In that period we may remind ourselves that bills to take away jurisdiction from the Supreme Court were urged in 1825-1826, in 1830-1833, and in 1858-1859. In the period we are now considering such measures were urged in connection with judicial passing upon constitutionality of the legal tender legislation. But the balance of state and nation was especially involved in the *Slaughter-House Cases.*[14]

At the time of adoption of the Constitution there was general fear of strong central government on the model of the Eastern Roman Empire such as grew up on the Continent in the seventeenth and eighteenth centuries. The Bill of Rights in the first nine amendments responded to this fear. No one feared that the local governments, immediately responding to every-day needs and claims and under the control of the body of the local citizenry, would need more than the few fundamental restrictions of their powers provided by the setting up of a national government. The exigencies of civil war and of emancipation of the slaves called for checks upon arbitrary action of the local state governments growing out of local antagonisms and sharp and bitter division of local opinion. In consequence the Fourteenth Amendment provided a bill of rights imposing restrictions upon the states in local legislation affecting its own citizens. That Amendment was in theory required to make a rational scheme of adjustment between the general government and the local governments in a federal polity. But the balance between general and local was gradually yet profoundly changing because of industrial and commercial progress in the expansion from a fringe of states along the Atlantic coast to a continental domain and the growth of international commercial and financial relations in the beginnings of a unified world.

Interpretation and application of the Fourteenth Amendment was the crucial task of the Court during the greater part of this period. Was that Amendment to change radically the balance of state and nation or were their respective provinces to be kept distinct and in a working relation one to the other, giving due weight to each? This was the question presented to the Supreme Court in the *Slaughter-House Cases.*

A Louisiana statute gave the Crescent City Live Stock Landing and Slaughterhouse Company, a domestic corporation, sole and ex-

[13] See Swisher, *The United States Supreme Court and the Forging of Federalism: 1789-1864,* 40 NEB. L. REV. 3 (1960).

[14] 83 U.S. (16 Wall.) 36 (1872).

clusive right for twenty-five years to maintain in three named parishes a place for slaughtering animals to be sold for meat and to have slaughtered therein all animals the meat of which was to be sold in two of the named parishes. The company was to build suitable slaughter-houses and stock landings to accommodate all butchers. It was authorized to charge certain fees for use of the slaughter-houses and stock landings. The animals were to be slaughtered under state inspection. The named parishes had a population between 300,000 and 400,000, and the business of some 1,000 persons was affected. In a number of test suits, the state courts having upheld the statute, on error brought to the Supreme Court of the United States it was attacked as contrary to the Fourteenth Amendment on three grounds: As abridging the privileges and immunities of citizens of the United States; as denying to the plaintiffs the equal protection of the laws; and as depriving the plaintiffs of property without due process of law. The Court affirmed the judgments of the state courts, four judges dissenting.

In effect it was held if there is a right not to be subjected to monopoly it is not a privilege or immunity of a citizen of the United States as distinguished from a citizen of a state; that a definition of a citizen of the United States in the Fourteenth Amendment added no further powers and immunities to those which inhered in them before its adoption; that it is only rights owing their existence to the federal government or the national character or its Constitution or laws that were put under the special care of the national government, and that the Fourteenth Amendment did not put the entire domain of civil rights theretofore belonging exclusively to the states within the power of Congress. As it was put, the Supreme Court is not made "a perpetual censor upon all legislation of the States on the civil rights of their own citizens." This last proposition could be given too wide a meaning. But the general proposition, that local affairs as such were for state, not national control, was essential to a federal polity.

At the time and since, the decision in the *Slaughter-House Cases* has been severely criticised and the Court has been much abused for not giving the Fourteenth Amendment the full effect which was intended by those who drew it. But, as Mr. Justice Moody pointed out a generation later, "it is easy to see how far the authority and independence of the States would have been diminished, by subjecting all their legislative and judicial acts to correction by the legislative and review by the judicial branch of the National Government."[15] This is something to bear in mind in the era of the

[15] Twining v. New Jersey, 211 U.S. 78, 96 (1908).

social service state of today in which there is a tendency to think of the general government as an omnicompetent benevolent superstate. In its upholding of the federal principle of local autonomy with respect to local affairs the Court continued to contribute to responsible government.

Attaining and maintaining a just balance of state and nation was raised in a new connection in the *Granger* Cases.[16] One result was a new approach to the problem which has acquired the name of the police power. Reason, in the idea that law is reason, requires reasoning from principles or starting points given by experience. It is given direction by analogy. In the *Slaughter-House Cases* Mr. Justice Miller made effective use of the historical power of creating monopolies as a useful means of promoting important public purposes, as, for example, in the case of patents for invention. But monopolies in themselves, apart from useful ends they may serve in particular cases, are generally regarded as highly objectionable. If under some conditions they may be used to advance social purposes, without conditions tending toward such purposes, they may be indefensible checks upon individual freedom. But while this is true of government-created monopolies, individual free self-assertion may result in virtual monopolies. In the nineteenth century, individual free self-assertion was looked on as the highest good. Justice was said to be the liberty of each limited only by the like liberties of all. The only justifiable limitation upon free action of the individual man was held to be the assurance of equal free self-assertion by his fellow men. Free organization of individuals in economic activities through incorporation, creating legal persons, began in an era of expanding commerce and industry, to create economic units with virtual monopolies and these became highly oppressive. How to reconcile full individual freedom and full freedom to enter into and carry on such organizations became both an economic-political and a legal problem.

The way out was found through the doctrine of the police power—as Chief Justice Taney had put it a generation before, the power to "promote the happiness and prosperity of the community by which it is established."[17] This now well-established phrase is unfortunate because it suggests the analogy of the first forms of political activity—the policing, *i.e.*, keeping the peace as against street fights and private war in a primitive village in a pastoral or rural society in antiquity. But balance of the general and the local

[16] Munn v. Illinois, 94 U.S. 113 (1876).

[17] Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. (11 Pet.) 420, 457 (1837).

happiness and prosperity is as necessary as it is difficult. Ascertaining and promoting them was not furthered by the police analogy.

Judicial employment of the doctrine of the police power got its impetus from the *Granger* Cases.[18] After the Civil War, occupation of the public domain in the West and development of agriculture beyond the mere supplying of meat and grain to the farmer's household and a local village or small-town market led to providing for world markets and made a complete change in the economy of transportation of farm products and activities involved in or dependent upon it. The greater part of the grain raised in the Northwest, which was the principal source of wealth in states increasing in population and in political importance, had to be carried by rail to ports on the Great Lakes or to the large cities on the Atlantic coast, and was dependent upon the facilities operated and controlled by corporations which had a virtual monopoly of the means by which the local farmers could reach the markets. Those corporations claimed the constitutionally guaranteed freedom of individuals and protection of individual liberty and property as against state legislation regulating rates and charges and affording equal and adequate facilities to all. Not unnaturally, since railroad companies were able to dominate the economy of many communities, local legislation often went to extremes in attempts to enforce laws fixing rates and details of service, impose severe fines, and allow sometimes as much as five-fold damages and attorney's fees in actions brought under them. The transportation companies and elevator companies sought protection under the Fourteenth Amendment against all regulatory legislation asserting the deprivation of liberty and property without due process of law, which, according to Lord Coke, the oracle of the common law, meant contrary to common right and reason.

In the ordering of potential conflict between incorporated systems invoking the Fourteenth Amendment and state legislation seeking to impose duties of providing adequate service, without discrimination, and at reasonable rates, the Supreme Court in the *Munn* Case turned to a long-recognized doctrine of the common law and applied the principle of duty of public service correlative to state-granted or virtual monopoly in callings or activities involving anything of public necessity or high public importance. Where a person exercises such a calling or activity and has an advantage because of legal or natural or virtual monopoly, he has a legal duty to the public and so to individuals, as beneficiaries of public duties,

[18] Munn v. Illinois, 94 U.S. 113 (1876).

to make adequate performance without discrimination and for reasonable compensation.

This doctrine had been worked out by one of the great exponents of the common law in the seventeenth century from the medieval duties of the carrier with his pack-train of mules, the innkeeper, and the ferryman with his boat. But in the era of insistence upon duties arising from consent of those who undertook them, the law as to duties of public service in matters of public necessity or high public convenience became obscured by theoretically attributing the obligation to implied contract. Resurrection and restatement of it as it really was and using it to meet the conditions confronting the court in the *Granger* Cases, was not the least of the achievements of the Supreme Court. A legal means was found of maintaining the effective relation of state and nation, allowing the one reasonable scope of providing for local needs and yet assuring that this was done by law on a rational principle, tried and defined in legal history and so subject to intelligent scrutiny as to the manner of doing it.

It is noteworthy that the court was vigorously denounced at the time by many who believed that the doctrine of the *Munn* Case endangered all investment in public utilities and put capital at the mercy of local partisan politics. But the event has shown that making rational adjustment of the demands of state and nation respectively as to local claims to reach out-of-state and world markets by means of nation-wide agencies of transportation, could be brought about by the court without the extreme and often destructive measures employed by politics.

V. CIVIL RIGHTS CASES

During the period we are considering the balance between state and nation, between the local and the general in a federal polity, was involved also in a series of cases growing out of federal legislation during the reconstruction era after the Civil War which sought to secure, under the Fourteenth Amendment and the Fifteenth Amendment, full and equal civil rights to emancipated Negroes in what had been the slave states.

Readjustment of a society which had grown up under a system of Negro slavery, in which the Negro had no rights or status as a legal person, to a system of fully established legal personality and full legal rights, could not be an easy process. Readjustment of local legislation in what had been slave states to the three post-war constitutional amendments and federal legislation thereunder involved questions of interpretation and application of radically

new principles to what had been settled political and economic ideas of eleven of the states. Such readjustment of relations of state and nation in one third of the political units of the time, was not to be achieved by political methods alone. The situation called for rational determination by the judicial process. Satisfactory readjustment was to be brought about under the Constitution by interpretation of the supreme law of the land by the Supreme Court.

At the time of adoption of the post-war amendments political feeling in the states which prevailed was bitter and vengeful. There was strong feeling that the states which had been in rebellion and the people of those states should be punished. The reconstruction legislation was thought of as not merely enacted to secure the newly freed slaves in legal rights as persons but as a means of humiliating and punishing the citizens of those states by subjecting them politically to their former slaves. This was something that could find no place in judicial interpretation and application of the constitutional amendments.

The Civil Rights Enforcement Act of 1870 came first before the Court in *United States v. Reese.*[19] That was a prosecution under two sections of the Act which imposed penalties upon state inspectors of election for refusing to receive and count votes or obstruct any citizen who sought to vote. The court held that the statute as drawn extended to all discriminations and obstructions. It did not limit its purview to discrimination or obstruction because of race, color, or previous condition of servitude. It was involved also in *United States v. Cruikshank,*[20] in which there were indictments under another section for conspiring to prevent citizens from enjoyment of their right to assemble peaceably with others, to petition for redress of grievances, of their right to bear arms, and of their right to vote at elections, and also for conspiring to falsely imprison and murder citizens and so deprive them of life and liberty without due process of law. The Court held that the rights involved were not rights derived from or secured by the federal Constitution or guaranteed by it, so that the acts charged did not come within the purview of the statute. As to the charge of conspiracy to deprive citizens of the right to vote by discrimination, the Fifteenth Amendment only covered discrimination on the ground of race, color or previous condition of servitude, which was not specifically covered. The indictments presupposed a purview of the Amendments beyond what could be a reasonable interpretation under a federal polity.

[19] 92 U.S. 214 (1876).

[20] 92 U.S. 542 (1876).

A later statute, the Civil Rights Act of 1875, was held unconstitutional in the *Civil Rights Cases*.[21] The Court laid down that the legislation authorized by the Fourteenth Amendment "was not general legislation upon the rights of the citizen but corrective legislation." General rules as to discrimination and regulation of private rights were not authorized.

But a much needed distinction as to application of the Fourteenth Amendment was made in *Strauder v. West Virginia*.[22] A state statute provided that "all white male persons who are twenty-one years of age and who are citizens of this state shall be liable to serve as jurors." The court said that although the Amendment was in terms prohibitory, it conferred by necessary implication an exemption from discriminations imposed by public authority which imply legal inferiority in civil society, lessen the security of their rights, and tend to reduce them to a subject race. In *Neal v. Delaware*,[23] it was held that the Fifteenth Amendment made inoperative a provision of a state constitution which restricted the right of suffrage to the white race. Hence exclusion because of their race and color of citizens of African descent from the grand jury that found and upon the petit jury summoned to try an indictment, made by jury commissioners, was a violation of the rights of the accused under the Constitution of the United States. In Ex parte *Yarborough*,[24] the Court had to qualify to some extent what was said in the *Reese* case. While the Fifteenth Amendment gave the Negro no affirmative right to vote, it annulled the discriminating word "white" in all cases where states had not removed the word from their constitutional provisions defining the right to vote or prescribing white citizens as voters.

Compared with the arbitrary course taken by Congressional legislation on one side and state legislation on the other, the rational course taken in judicial interpretation and application of the amendments speaks for itself. But the Court was bitterly denounced on both sides. Looking back over the decisions upon exercise of the police power, it is manifest that the Court has consistently adhered to a principle that balance between local laws and exercise of local governmental powers to secure them, on the one hand, and general social interests and exercise of powers of the general government to secure them, on the other hand, is to be developed and maintained in correspondence to continually changing con-

[21] 109 U.S. 3 (1883).
[22] 100 U.S. 303 (1879).
[23] 103 U.S. 370 (1880).
[24] 110 U.S. 651 (1884).

ditions of times and places. In progressively recognizing and applying this principle the Court has done a great service to responsible government.

VI. THE GENERAL POLICE POWER UNDER THE COMMERCE CLAUSE

Use of the conferred power over interstate and foreign commerce to sustain what becomes in effect a general police power, a power to act for the security, morality, and general welfare of the community which had established it, was increasingly carried very far in the last quarter of the nineteenth century. Police power is so intrinsically involved in the very idea of government that it is natural to think of it as on a par with the expressly granted powers, so that, for example, Mr. Justice Miller could speak of "a peace of the United States" as involved in existence of the national government instead of derived from granted powers of suppressing insurrection and prosecuting offences against the national government. In the case in which he made this statement the question was not whether the national government could protect its officials in what they did while acting as such, but whether it could do so against state officials in the national instead of the state courts.[25]

With increasing momentum in the latter part of the last and in the present century the national aspect of local interests and of what is done locally has become of more general interest than the local aspect of general interests which had seemed paramount in the beginning. Development of industry, which had theretofore been local, upon a national and increasingly even international scale, and consequent increasing economic unification, making much which had been purely local decisively of national import, has steadily given weight to or demand for a general police power not granted as such in the Constitution. The demand has been met effectively through judicial development of the power defined in section 8 of article I of the Constitution as one "To regulate commerce with foreign nations and among the several states."

This was pointed out by Mr. Justice, then Professor Frankfurter, in 1916.[26] It has since become even more marked. Indeed adjustment of the undoubted police power of each state and the police power necessary in government, which is exercised by the

[25] *In re* Neagle, 135 U.S. 1, 69 (1889).

[26] Frankfurter, *The Constitutional Opinions of Justice Holmes,* 29 HARV. L. REV. 683, 684-90 (1916).

federal government under the power to regulate interstate and foreign commerce, has itself become a problem. This is brought out in connection with labor law. State attempts to employ police power in dealing with local strikes and interruption of public service encounter federal legislative and administrative regulation based sometimes on very broad interpretation of "commerce," as when the operation of a laundry, washing the overalls of workers in a roundhouse of a railroad engaged both in local and in interstate transportation, was held to be governed by the provisions of federal labor law. Lines here are difficult to draw and must be drawn by development of experience by reason and correction by further experience. That process is still going on today and the ultimate adjustment belongs to the present rather than the period we are considering.

The effective check upon exercise of a general police power, under the Commerce Clause, by Congress or through scrutiny of state legislation, is provided in the Fifth Amendment, providing that "no person . . . shall be deprived of life, liberty or property without due process of law." The phrase "due process of law" has had a settled meaning in the common-law world since it was expounded by Coke in the seventeenth century. Powers of government are not to be exercised arbitrarily and unreasonably.

For a long time it was possible to reason about the relation of state and nation in our federal polity in terms of the relation of one human individual to another — in terms of John Doe and Richard Roe. But increasingly after the third quarter of the nineteenth century that analogy ceased to be applicable. More and more the conflicts of interests with which the court had to deal were no longer one to one conflicts. Conflicts involved the claims of great combinations of labor and capital, given legal personality by law: groups of individual workers coming to be highly organized and given increasingly, by legislation, attributes of legal persons; claims of both with respect to unorganized individual workers; and of the latter against both; and above all, the interest of the public which might depend upon the united but independently directed efforts of all three or of the two first to provide essential or at least highly needed services.

From the beginning a source of difficulty lay in conceiving constitutionally guaranteed liberty solely in terms of the relation of the free individual man to personified society. The guarantee of liberty raises much more complex problems.

One of the last echoes of the controversy over states' rights, which agitated the beginnings of our federal polity, was heard in an argument made on behalf of West Virginia in the case of

Virginia v. West Virginia.[27] Mr. Justice Hughes said: "Nor can it be deemed in derogation of the sovereignty of the State that she should be charged with interest if her agreement properly construed so provides. The fundamental question is, What does the contract mean?" This statement has significance for the hope of a law of the world. What has stood in the way of such a hope has been the idea of law as an aggregate of laws enacted by a sovereign political authority. There may be a world law, not enacted by a world superstate but recognized, respected, and administered by local judicial authority without enactment by a Parliament of Man or formulation and promulgation by an omnicompetent superstate. A duty of abiding by a contract may arise from law without requiring a law.

But while the Court was able to make a prophetic pronouncement toward a law of the world, it was for a time obstructing development and application of the idea of due process of law. For a time all legislative restriction upon freedom of contract was taken to be of itself an arbitrary and unreasonable deprivation of liberty and so to contravene the Fourteenth Amendment. The phrase "liberty of contract" was first heard of in this connection in the law reports in *Godcharles Co. v. Wigeman,*[28] in which a state statute as to payment of wages to workers in "coal mines and manufactories of iron and steel" was held unconstitutional. The court said: "He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges."[29] The Supreme Court of Massachusetts had long before[30] held a statute forbidding imposition of fines upon or withholding of wages from employees in cotton mills under provisions of contracts of employment, an unconstitutional infringement of guaranteed liberty of contract. The example set by Massachusetts and Pennsylvania had been followed in Arkansas, California, Illinois, Kansas, Missouri, Nebraska, New York, and Washington, when in 1904 the Supreme Court was first called upon to pass upon application of the Fourteenth Amendment to modern labor legislation. The ideas upon which the social legislation of today proceed seemed not merely novel but socially dangerous to a generation to which Spencer's formula of justice[31] stood for advanced liberal thought. Legislation

[27] 238 U.S. 202, 234 (1915).
[28] 113 Pa. 431 (1886).
[29] *Id.* at 437.
[30] Commonwealth v. Perry, 115 Mass. (9 Kellen) 117 (1891).
[31] SPENCER, THE DATA OF ETHICS pt. iv. (1891).

in excess of the liberal could not be reasonable. Such was the situation when the Supreme Court of the United States, four justices dissenting, held that a statute providing that no employee should be required or permitted to work in a bakery more than sixty hours in a week or ten hours in a day was an arbitrary interference with liberty of contract and so not due process of law.[32] That this holding could obtain only a bare majority at a time when the courts generally had been and continued taking that view speaks much for the court. A like result was reached later in *Adair v. United States*,[33] Mr. Justice Holmes dissenting.

But the beginnings of a way out may be seen in *McLean v. Arkansas*,[34] and a majority of the court was, at the end of the period I am considering, well on the way to a doctrine in accord with social and economic understanding of what is reasonable in the complex society of today.

VII. CONCLUSION

We had ceased to be a simple, still in large part pioneer, agricultural society, with simple man to man relations. Industry on a continually increasing scale was introducing new public relations and expectations beyond those which had been understood and provided for in the juristic and political thinking of the eighteenth and nineteenth centuries. That it took the majority of the Supreme Court nearly two decades to become fully aware of this, before the strongest state courts had seen it, speaks for the wisdom of our providing a great national tribunal speaking for a law of the land as a whole.

What is reasonable is not something defined by rules drawn to strict lines for all times, places and men. The limiting of national authority in the First Amendment and of state authority in the Fourteenth, is not to be interpreted like a section of a penal code providing a fixed penalty for a precisely defined offence.

It is not easy to maintain reasonable adjustments of relations and ordering of conduct in the face of human tendency to act violently on the impulse of the moment and to seek to restrain impulse by rigid fixed rules. If by responsible government we mean responsible to reason, rather than to unreasoned will of the moment, the Supreme Court stood well for responsible government during the whole period.

[32] Lochner v. New York, 198 U.S. 45 (1905).
[33] 208 U.S. 161 (1908).
[34] 211 U.S. 539 (1909).