Incidence of Judicial Control over Congress

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Justice Holmes said: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperilled if we could not make that declaration as to the laws of the several States." It may be necessary to national survival that some national tribunal have authority to decide that acts of state legislatures are inconsistent with the Federal Constitution. Judicial supremacy over national legislation rests on no such necessity. Whether to preserve, restrict, or abolish the power of courts to hold acts of Congress void is a pure question of policy, the answer to which should depend on the character of the results which the present system has produced and is, therefore, likely to produce. How and when the system originated, what were the attitudes of the founding fathers toward it, whether it is in some sense a usurpation are questions with which scholars have dealt. There has been much discussion of the relation in which particular constitutional decisions stand to other decisions and to the original Constitution and its amendments. Little serious attention has been paid to the practical question of the incidence of the courts' control over Congress, i.e., its effect or tendency, as between different social groups and interests. On that point there has been much summary assertion but little proof.

†This article was begun in 1922. It was practically completed in the summer of 1936, months before President Roosevelt made his Supreme Court proposal. As is obvious from its omission of all "New Deal" cases, it was written for no political purpose.

[The QUARTERLY publishes this article as a pioneer treatment of an important, though neglected, subject. The opinions and points of view expressed are the author's.—Ed.]

Holmes, Collected Legal Papers (1920) pp. 295, 296. It is, of course, true that many state statutes have been nullified on grounds and with effects quite unrelated to the supremacy of the nation.

Compare Professor Haines's title, The American Doctrine of Judicial Supremacy (2d ed. 1932).

A full treatment of this subject would deal with all reported cases in which any court has held an act of Congress void; the number and character of the acts which Congress has been deterred from enacting, or encouraged to enact,\(^4\) by the prospect of judicial review; the uncertainty which often exists between the passage of a law and the Supreme Court's disposition of it; the question whether the relative abstinence from political effort of American as compared to European intellectuals is due to the knowledge that desired legislation, even if its passage is secured, may not become "law."\(^5\) With most of this the present article will not deal. It will consider only the cases in which the Supreme Court has held an act, or part of an act, of Congress unconstitutional. Decisions of the same sort by other courts which were reversed or not passed on by the Supreme Court are too many to be treated in an article; moreover, they have been relatively local in their effects. The difficulty of dealing objectively at present with the Supreme Court's disposition of "New Deal" legislation, and the inherent uncertainty regarding the effects of much of it, seem sufficient reasons for not considering statutes passed after March 4, 1933. This article aims to consider briefly all the cases in which earlier acts of Congress have been annulled by the Supreme Court.

Congress does not contravene the black-and-white clauses of the Constitution, like that which allots two Senators to each State. The conflicts between Congress and the Court have related to the indefinite clauses, like those which deal with interstate commerce, due process, and executive power. It is familiar that the relation of a law to these broad clauses is not a matter of fact but a matter of opinion. Congress in all the cases to be considered, and members of the Court in many, differed in opinion from the majority of the Court. This paper is not concerned with the question whether the congressional or the judicial opinion seems, in general or in a given case, the more reasonable. In other words, it is not concerned with the soundness or propriety, from a technical point of view, of the decisions. It does not discuss the commerce clause or any other clause of the Constitution. Neither is it concerned with the backgrounds, beliefs, and desires that led Congress to pass the laws, or the Court to annul them. There is no question, in my mind, of the high motives of the Court. I am concerned only with the practical effects and tendencies of the nullifying decisions. What interests, individual or social, do they protect; and, conversely, whose ox is gored?

\(^{4}\)Doubt was felt as to the constitutionality of taxing the salaries of the President and of the federal judges, and the view was expressed in Congress that "this question ought to be raised by Congress, the only power that can raise it, in order that it may be tested in the Supreme Court, the only power that can decide it." It was raised accordingly. See 253 U. S. at 248 (1921).

\(^{5}\)See Laski in (1931) 163 Harper's p. 129.
Has judicial supremacy been, on the whole, neutral in its incidence; or has it tended to protect the interests of a relatively poor and unprivileged majority on the one hand, or of a relatively well-to-do minority on the other?

It is always difficult, and usually impossible, to determine how different things would be if they were not as they are. The effects of the decisions cannot be fully known. The possibilities in that direction cannot be exhausted in one article, or by one man. A vast amount of contemporary material would need to be studied. Treatises would have to be written, from a special angle, on all the topics with which the various decisions deal, including, for example, taxation and trial by jury. This paper is offered as an introduction to a neglected subject. It deals, for the most part, with direction rather than distance. If the tendencies of the decisions fit into a pattern, conclusions not too tentative can be drawn regarding their collective incidence.

This article gives no picture of the total effect or tendency, as between different social groups or interests, of the Supreme Court's exercise of its various powers. It makes no such attempt. It is not a study of the Court, but of one of its functions. How far other groups of cases, in which other functions were exercised, may have deviated from the pattern of the present group does not concern us here.

I. CASES SAID TO HAVE CHECKED CONGRESSIONAL VIOLATIONS OF THE BILL OF RIGHTS

Let us first examine the cases which are cited in support of the prevalent belief that the Court has defended the Bill of Rights against congressional attack.

A well-known defense of judicial supremacy is Congress, the Constitution, and the Supreme Court, by Mr. Charles Warren. Warren supports the Court's power over Congress chiefly on historical and theoretical grounds, but he also attributes to it two sorts of beneficence in practice: it restrains Congress from invading the functions of the states and from "infringements on personal liberty." "An enforceable Bill of Rights," he says, "is essential to the citizen's liberty." He proceeds: "... it is a solemn fact that, even in times of comparative freedom from emergency or excitement, Congress, or one of its branches, has violated the provisions of the Bill of Rights at least ten times since the year 1867; and at least ten times has the Supreme Court saved the individual against Congressional usurpation of power."

"1925, new edition 1935. References herein are to the new edition, which is practically identical with the first edition except that a chapter has been added. "The ablest defense of judicial review is that of Warren, C., Congress, the Constitution, and the Supreme Court." CUSHMAN, THE SUPREME COURT AND THE CONSTITUTION (1936) p. 36.

Pp. 154 ff.

P. 152.

P. 149.

P. 150. "By the most favorable interpretation, about ten cases are usually listed in
To call legislation a federal invasion of state functions tells us nothing about its social bearing. Trespassing governments may go to the right or to the left. To say that legislation invades "the citizen's liberty," or "violates the Bill of Rights," likewise tells us nothing. "Liberties" and "rights" are many and conflicting; it is necessary to know which are invaded. What is bad for the goose may be very good for the gander. It would be hard to devise, and impossible to pass, legislation injurious to all concerned.

Of Warren's ten cases of violation of the Bill of Rights, two, as he states, involved judicial disapproval of action by only one branch of Congress. As a single house cannot legislate, these cases are not pertinent to the subject of judicial supremacy over legislation. This leaves eight cases. Warren does not discuss them or the interests which they involve; he merely makes the brief assertions concerning them which I quote below. These cases are:

(1) *Boyd v. United States.* Congress has already tried to authorize illegal searches and seizure of private papers and has only been prevented by the action of the Supreme Court, in 1886. The facts are quite different from this picture. The statute authorized a court, in proceedings not criminal arising under the revenue laws, to serve "notice" on a defendant or claimant to produce papers which the prosecution believed would tend to prove any allegation made by the United States. The statute provided that failure to produce the papers in accordance with the notice should be equivalent to a confession of the allegation. In a proceeding to forfeit 35 cases of plate glass, as imported in violation of the revenue laws, the owners in response to such a notice produced certain invoices. Judgment of forfeiture was reversed by the Supreme Court. The court held the statute unconstitutional, as being within the spirit though not "within the literal terms" of both the 4th Amendment, forbidding "unreasonable searches and seizures," and the 5th, against compelling one "in a criminal case to be a witness against himself." That the statute and the action under it were not within which individual rights were protected by checking Congressional powers. But on close analysis several of these border on the kind of interpretation which Justice Holmes once remarked is designed to help criminals to escape just punishment; or, by meticulous or broad interpretation of certain provisions of the bill of rights, these cases have made it extremely difficult to secure the information necessary to prevent fraud and to enforce criminal penalties under federal laws. Other cases included in this list can scarcely be regarded as rendering protection to individual rights without a rather strained interpretation." Haines, The American Doctrine of Judicial Supremacy (2d ed. 1932) p. 541.

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11116 U.S. 616 (1886).
13He also abstracts them, along with the other cases in which the Supreme Court has overruled Congress, in chapter 10.
14As the ten citations are in a single footnote, and the statements are in the text, the reader is obliged to determine to which case a given statement refers.
15116 U. S. 616 (1886).
17116 U. S. at 633.
the letter of either amendment is clear. Neither search nor seizure, nor compulsory testimony, nor criminal prosecution was involved. The person served with the notice could decide for himself whether to produce the papers, or to permit an unfavorable inference to be drawn from his not producing them, though no doubt the inference might constitute a powerful motive in favor of production. The term "notice," rather than order, was well used in the statute, as the demand for the documents was not otherwise enforceable than by the drawing of an unfavorable inference. What the statute endangered and the decision protected, in the actual case, was the ownership of thirty-five cases of plate glass. In general, only actual violators of the revenue laws would have anything to lose by the fullest exposure of their papers; persons wrongly accused of violations would stand to gain in these proceedings, though they might sometimes be injured in other connections, by showing their documents. Accordingly, it may fairly be said that the decision protected practically nothing except the interests of smugglers in the profits of smuggling.

(2) Counselman v. Hitchcock.17 "Congress," says Warren, "has tried to authorize criminal prosecution of a man after compelling him to testify before a grand jury, and has only been prevented by the action of the Supreme Court, in 1892."18 Counselman v. Hitchcock is often, but incorrectly, included in lists19 of Supreme Court decisions holding acts of Congress unconstitutional. The case held nothing unconstitutional but the action of a federal District Court. A statute20 provided: "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture." In grand jury proceedings against railroads for violations of the Interstate Commerce Act, a witness refused to answer questions regarding his acceptance of rebates, on the ground that it might tend to incriminate him. A district judge committed him for contempt. The Supreme Court ordered his discharge on habeas corpus, on the ground that the action of the lower court violated the provision of the Fifth Amendment that "no person . . . shall be compelled in any criminal case to be a witness against himself." There was, the Supreme Court pointed out, nothing in the statute to prevent the testimony, which the lower

17142 U. S. 547 (1891).
20REV. STAT. § 860 (1875).
court wished to elicit from the witness, from being used "to search out other testimony to be used in evidence against him . . . in a criminal proceeding." Therefore, the Supreme Court decided, the lower court in requiring the man to testify violated his constitutional privilege. The Court held that "the protection of § 860 is not coextensive with the constitutional provision." But as the court observed, "It is to be noted of § 860 of the Revised Statutes that it does not undertake to compel self-criminating evidence." The attempted compulsion was wholly the work of the lower court, with no encouragement from Congress. True, the Supreme Court declared that "a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates"; meaning, obviously, to be a valid justification for compelling self-criminating evidence, which the statute in question, in the Court's words, "does not undertake" to do. The statute "tried to authorize" no criminal prosecution whatever; on the contrary, it imposed broad restrictions on the use, in criminal prosecutions, of extorted testimony. The Court's decision was simply that these restrictions were not so broad as to justify, within the Constitution, the action of a federal judge in seeking to extort testimony. There was no conflict between Congress and the Court. The violation of the Bill of Rights which the Court detected was the work of the judge.

(3) Justices v. Murray. "Congress has tried to authorize the re-trial in a Federal Court of facts already tried and settled in behalf of the plaintiff in a State Court, and was only prevented by the action of the Supreme Court, in 1870, in holding the statute unconstitutional." The scope of the statute was brief and narrow. It was passed during the Civil War, and was

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21 Id. at 564.
22 Id. at 565.
23 Id. at 585.
24 Id. at 586.
25 Shortly after the decision in Counselman v. Hitchcock, and evidently with the language of that case in mind, Congress passed a statute (27 Stat. 443, Feb. 11, 1893) which expressly conferred complete immunity upon witnesses with respect to matters concerning which they might testify in proceedings under the Interstate Commerce Act, and expressly deprived witnesses in such proceedings of the excuse of self-crimination. The statute in its latter aspect was upheld in Brown v. Walker, 161 U. S. 591 (1896). Rev. Stat. § 860 was repealed by an act of May 7, 1910, 36 Stat. 352.
26 The opinion is frequently expressed that the privilege against self-crimination hampers justice unnecessarily, and also encourages the third degree. Mr. Charles H. Tuttle, former United States Attorney for the Southern District of New York, has said that "no other obstacle in practice to the prosecution of crime has become more prostituted with abuses and more disastrous in its effects." Proceedings of the Governor's Conference on Crime, the Criminal and Society (Albany, 1935) p. 74. Mr. Ferdinand Pecora, former Acting District Attorney of New York County, has said that the privilege, "in every case where it is claimed in good faith, is a refuge for a wrongdoer and not for an innocent man." Proceedings of the Attorney General's Conference on Crime (Washington, 1934) p. 171.
27 9 Wall. 274 (U. S. 1870).
28 Warren, op. cit., p. 150.
expressly made applicable only "during the present rebellion." It permitted either party to remove to a federal court, for retrial, after final judgment in a state court, cases against federal officers and cases based on arrest or imprisonment under color of presidential authority. Although other language of the statute applied to criminal proceedings, the language involved in the Murray case related to civil proceedings and, therefore, involved no possibility of double jeopardy. Plaintiff had judgment for battery and false arrest, in a New York court, against a United States marshal and his deputy. The defendants sought to remove the case. The Court held the statute invalid under the 7th Amendment: "No fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the common law." The interest which the Court defended was that of a small class of persons, during a short time, in keeping a narrow class of controversies out of the federal courts in particular circumstances: viz., when the controversies had reached final judgment in a state court. We have no reason to believe that the federal courts, with the Supreme Court at their head, were so bad that the privilege of having a dispute settled elsewhere was of large importance; and as the Court upholds provisions for the removal of suits, during their earlier stages, to the federal courts, the support which the Court gave to the interest of parties in having certain suits settled where they were begun was very limited. On the other hand, the decision facilitated the final settlement of the controversies involved.

(4) Monongahela Navigation Co. v. United States. “Congress has attempted to take property for public use without due and full compensation, and has only been prevented by the action of the Supreme Court, in 1893.” The "property" involved was peculiar. In connection with the completion by the government of dam No. 8 in the Monongahela River, Congress made provision for the purchase from the Monongahela Navigation Company, by condemnation if necessary, of lock and dam No. 7; with a proviso that "in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls shall not be considered." The lock and dam were to be thrown open, after their acquisition, to free navigation. In condemnation proceedings the trial court awarded the company $209,000 for its lock and dam, but, in compliance with the statute, expressly disregarded the value of the toll franchise. The Supreme Court granted a new trial, on the ground that condemnation without payment for the franchise was taking property for public use without just compensation, in violation of the Fifth Amendment.

A franchise is commonly a gift from the government. If the grantee is
permitted, during the continuance of the franchise, to charge for the use of its facilities no more than a reasonable return upon the cost of producing or of reproducing them, the franchise acquires no "value", whether in the sense of earning power or of exchange value. A franchise "value" is simply the capitalization of a privilege of charging rates which will produce some return on the public gift to the company. By insisting upon a franchise value, the Court in the Monongahela case in effect recognized such a privilege. The Court simultaneously created and defended against congressional attack the right and liberty of the few franchise holders to receive, and of the many consumers and taxpayers to pay, this return upon the public gift.

The case was decided before the era of regulation of public utility rates, and the Court did not discuss the question of allowing a franchise value as an element in valuation for the purposes of a rate base. Directly and indirectly, however, during a considerable time, the plain implications of the case led various courts and commissions, though by no means all, to decide the rate question in the company's favor. The Supreme Court itself, in Wilcox v. Consolidated Gas Company, decided that in view of certain special New York legislation, the company involved was entitled to insist on a franchise value as part of its rate base. The Monongahela case was cited and relied on. In more recent cases the Court has excluded franchise value from the rate base, and probably most courts and commissions now do the same, but in some instances it is hard to distinguish the "going concern value", which the Court allows, from a franchise value.

(5) Wong Wing v. United States. "Congress has attempted to authorize imprisonment of persons at hard labor without an indictment by a grand jury, and has only been prevented by the action of the Supreme Court, in 1890." The statute provided that a Chinese adjudged to be unlawfully in the United States should be imprisoned at hard labor for not more than one year, and that the adjudication might be by a United States Commissioner. A Chinese, sentenced to sixty days' imprisonment at hard labor in consequence of such an adjudication, was released by the Supreme Court on habeas corpus, on the grounds that the Sixth Amendment requires a judicial trial before a criminal sentence, and that the requirement in the Fifth Amend-

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8See early cases collected in Whitten, Valuation of Public Service Corporations (Supp. 1914) pp. 1298-1315.
8Id. at 44.
8163 U. S. 228 (1896).
8Warren, op. cit., p. 151. "1890" appears to be an error for "1896."
ment of indictment by a grand jury in cases of "infamous crime" applies to a crime punishable by imprisonment at hard labor. That Chinese stand a better chance with grand juries, trial juries, and judges than with United States Commissioners is not clear, but seems likely. If so, the interest in bodily freedom of one small group composed chiefly of poor persons was protected by the Court against congressional attack. The Court had held that Chinese immigrants might be deported without judicial proceedings, and the theory of the statute in the Wong Wing case was not that citizens might be deprived of indictment and jury trial in criminal cases, but that aliens might be deprived. The passage of the statute evinced no tendency on the part of Congress to deprive persons generally, or even immigrants generally, of those privileges. To the "rights" and "liberties" of the great mass of the population the statute in itself meant nothing. However, the court relied largely on the Wong Wing case in sustaining, in United States v. Moreland, a citizen's objection to a jury sentence to hard labor without indictment. The case was also relied on in Truax v. Raich, which held that aliens were deprived of the equal protection of the laws by a state statute requiring employers to employ four citizens to one alien.

(6) Kirby v. United States. "Congress has attempted to violate the provision of the Constitution requiring the defendant in a criminal prosecution to be confronted with the witnesses against him; the citizen's rights were preserved by the Court, in 1899."

To convict a man of receiving stolen goods, it must be proved that the goods received were, in fact, stolen. A statute provided that in prosecutions for knowingly receiving stolen property of the United States, the previous conviction, on a separate prosecution, of the thief should be conclusive evidence that the property was stolen. In a trial for receiving stolen postage stamps, the record of the thief's conviction was admitted. The defendant was convicted of receiving, and the Supreme Court, two justices dissenting, ordered a new trial on the ground that the statute violated the requirement of the Sixth Amendment that the accused in criminal prosecutions "be confronted with the witnesses against him." Probably such benefit as the decision conferred upon defendants was conferred chiefly upon poor men.

"It is quite a valuable right to a prisoner to be confronted upon his trial with the witnesses against him, so that he may cross-examine them and the jury see them and thus judge of their credibility." But neither the right

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29Intra note 70.
30239 U. S. 33 (1915).
31174 U. S. 47 (1899).
33Earl, J., in People v. Fish, 125 N. Y. 150 (1891), quoted in Wigmore, Evidence (2d ed. 1923) § 1395.
of cross-examination nor the right to have the court see and hear the witness is absolute. Every exception to the hearsay rule, e.g., the admission of dying declarations, is an exception to the right of confrontation. The further exception which the statute in the Kirby case undertook to set up is trifling and harmless. The statute required the government to establish, in addition to the previous theft of the goods, (1) that the defendant received the goods, (2) "with intent to convert to his own use or gain," and (3) "knowing the same to have been so embezzled, stolen or purloined." If one "knows" the goods are stolen, necessarily he believes they are stolen. Even if a receiver's belief that the goods are stolen is erroneous, his conduct in receiving them, believing them to be stolen, is so anti-social that it may well be penalized. No attack was made, in the Kirby case, upon the evidence which must have convinced the jury that the defendant believed the goods to have been stolen. If Congress had chosen, directly and expressly, to make it a crime to receive goods believing them to have been stolen, the defendant would have had no cause of complaint; because the guilt of the thief, which in the actual case was material but improperly established, would have been immaterial. It is arguable that Congress did in substance, although not directly and expressly, make receiving with belief a crime, since it added a requirement of actual theft and then supplied that requirement by a conclusive presumption. But I am not suggesting that the Court's decision is wrong. I am suggesting merely that it is unimportant. The only persons endangered by the statute or protected by the decision were persons proved by proper evidence to have received for their own profit goods which they believed to have been stolen. The only thing against which those persons were protected was circuity in the method by which Congress sought to penalize their conduct.

(7) United States v. Evans. Congress has attempted to allow an appeal by the Government in a criminal trial after the accused has been found not guilty by a jury, and was prevented by the Supreme Court, in 1909. This statement conveys the impression that the "appeal by the Government" which the Court prevented was an appeal in the ordinary sense, a proceeding which might lead to a reversal of the judgment of acquittal. The so-called "appeal" had no such character; this was, in fact, the very ground on

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44 Cf. Wigmore, op. cit., § 1397.
45 48 STAT. 479. The entire clause was repealed in 1909 by 35 STAT. 1155.
46 "It amounts to an attempt to receive stolen goods, People v. Jaffe, 185 N. Y. 497 (1906), to the contrary notwithstanding. Even if the curious reasoning of the Jaffe case were accepted, the somewhat anti-social character of the receiver's conduct would still be evident.
47 Except to the extent that the jury may be prejudiced, in regard to the defendant's belief, by being told that another person committed a crime.
which the Court held the statute invalid. The statute authorized “appeals” by the government, but it provided expressly that these proceedings were not to result in setting aside a verdict for the defendant. The only purpose and the only possible effect of the statutory “appeal” was the establishment of a precedent, a rule for future cases. The defendant was in no way interested in the result of the appeal. The Supreme Court decided nothing whatever with regard to the rights of defendants in criminal proceedings. It decided merely that a review of the proceedings in the lower court for the sole purpose of establishing a precedent for the future is not in its nature judicial, and that Congress has no authority to enlarge the Court’s jurisdiction to cover non-judicial proceedings. Any possible benefit from the decision was restricted to future defendants, and dependent on remote contingencies.

(8) Ex parte Garland. Congress has attempted to make a crime out of an act which was not a crime when it was committed, and by an ex post facto law to punish a man for committing such an act; it was prevented by the Supreme Court, in 1867. Warren cites the case, also, as one in which Congress violated the constitutional prohibition against bills of attainder. All this intimates that Congress undertook to subject persons to fine or imprisonment, without a judicial trial, for acts which were not punishable when performed. In fact, the statute imposed neither fine nor imprisonment, but merely exclusion from federal office and from practice in federal courts; and the acts of the petitioner, when performed, were punishable as treason. In 1862 Congress passed an act which required persons elected or appointed to office under the United States to take oath to a number of facts, including “that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted, nor attempted to exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States.” In January, 1865, the requirements of this act were extended to persons practicing in the courts of the United States. Garland, who had previously been admitted to the bar of the Supreme Court, served throughout the Civil

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50 In his digest of the case on page 322 Warren states its true character.
51 Wurz, THE LAW OF THE AMERICAN CONSTITUTION (1922) p. 134. If Congress should pass a statute allowing the government a real appeal in criminal cases, dicta of the majority of the Court in Kepner v. United States, 195 U. S. 100 (1904) indicate that it might be held unconstitutional.
52 Wurz, op. cit., p. 151.
53 Id. at 152.
54 12 STAT. 502.
55 13 STAT. 424.
War in the Confederate Congress. In July, 1865, Garland received a full pardon from the President. He then sought permission from the Court to resume his practice before it without taking the statutory oath. The Court, by a vote of five to four, granted his petition, on the grounds that the act of Congress, as applied to the petitioner, was (1) a bill of attainder, (2) an *ex post facto* law, and (3) an infringement of the pardoning power of the President. It is probably true, as the majority opinion asserts, that some of the clauses of the statutory oath might cover acts which did not constitute treason; but it seems obvious that the members of the Confederate Congress, as they made appropriations and other provisions for the conduct of the Civil War, were in the legal theory of the United States as much engaged in treason against the United States, "in levying war against them, or in adhering to their enemies, giving them aid and comfort," as the Confederate generals in the field.5 As Mr. Garland, apart from the pardon, might have been executed for treason, it seems odd that he might not be excluded from practice in United States courts. The "bill of attainder" idea is scarcely more tenable than the *ex post facto* idea. Neither is pertinent except where punishment is inflicted. The four dissenting justices confounded with force that the requirement of an oath to past loyalty as a condition precedent to practicing law is not a punishment, but simply a qualification, like good moral character, which Congress might prescribe as necessary to a lawyer.57 And if the oath requirement was a qualification and not a punishment, no presidential pardon could dispense with it.58

There is every likelihood that Congress would soon have repealed so much of the Act of 1865 as the Court annulled in the *Garland* case. In 1867, when the case was decided, the war fever had begun to subside. In July, 1868, Congress amended the Act of 1862 so as to permit ex-Con federates from whom disabilities had been removed by act of Congress to qualify for federal office by an oath which omitted all reference to their past conduct;60 and in February, 1871, the same privilege was extended to all ex-Con federates not ineligible to office by reason of the 14th Amendment.61 It is unlikely that the exclusion of such men from practice in United States courts would have been allowed to continue longer, if the Supreme Court had allowed it to continue so long. In the meantime the decision served the interests of office-holders and lawyers.

55 Cummings and McFarland, Federal Justice (1937), p. 195. After the war Jefferson Davis was indicted, but never tried. *Id.* at 207, 208.
54 Wall. at 396, 397.
56 *Id.* at 397.
57 15 Stat. 85.
58 16 Stat. 412.
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"Declamation," as Mr. Warren says in his preface, "must bow before history and actual cases." The cases he cites give small support to the theory that Congress has attacked, and judicial supremacy defended, "the citizen's liberty." But there are many other decisions in which the Supreme Court has overruled Congress. It remains to consider what interests those decisions protected. As was said at the outset, this paper is not concerned with the reasonableness or unreasonableness of the decisions in the light of the commerce clause or other clauses of the Constitution; it is concerned only with their effects and tendencies.

II. CASES IN WHICH JUDICIAL SUPREMACY PROTECTED THE GOVERNMENT AGAINST THE CITIZEN

While judicial supremacy frequently operates to protect some sort of citizen against some sort of governmental action, there are instances in which it protects the government against the citizen. The leading case of Marbury v. Madison, on its face, was of that sort. An act of Congress authorized the Supreme Court to issue writs of mandamus to persons holding federal office. At the beginning of March, 1801, in the last days of the Adams administration, commissions as Justice of the Peace in the District of Columbia had been signed by the President, sealed by John Marshall as Acting Secretary of State, and confirmed by the Senate. They had not been delivered when Jefferson became President, and he ordered Madison, his Secretary of State, to withhold them. Application was made to the Court for a writ, directed to the Secretary of State, to compel the issuance of the commissions. The Court considered that the appointments were complete, that the appropriate evidence was wrongfully withheld, and that a competent court could direct the Secretary of State to issue it; but relief was refused on the ground that the statute was an unconstitutional attempt to enlarge the original jurisdiction of the Supreme Court.

The enormous importance of the decision lies, of course, in its establishment of the doctrine that a court may declare an act of Congress unconstitutional. The circumstances of the case are not congenial to the view that judicial review of legislation protects "the rights and liberties of the individual". On the contrary; confronted by a situation in which the Court declared that the rights of an individual were being denied by the executive, the doctrine of judicial review served precisely as a justification for refusing to give to the individual the protection which Congress sought to provide. On its surface the decision denied protection both to the petitioner's private interests and to the social interests in security and orderly government, since it permitted the Secretary of State to persist in what the Court declared to be

*1 Cranch 137 (U. S. 1803).
his unlawful refusal to deliver to Marbury the commission to which he was entitled. Probably none of these things is, as a practical matter, chargeable to the decision, since an opposite decision, ordering the delivery of the commission, would have been flouted by Jefferson and his administration.62

The statute under which Marbury had been appointed, with the consent of the Senate, to be a Justice of the Peace in the District of Columbia, defined the term of office as five years and contained no provisions for removal. The opinion assumed, necessarily and explicitly, that such an officer was not removable at the will of the executive. Some 123 years later, in Myers v. United States,63 the court decided by a vote of six to three that a postmaster, appointed for four years with the consent of the Senate, was removable by the President, and that a statute which undertook to require the consent of the Senate to the removal was unconstitutional as an attempt to invade the President's "executive power". Similar statutes had been in unquestioned effect for many years. The net effect of the Myers doctrine on the interests of the public was probably favorable. It promoted discipline and harmony, and sacrificed independence, in the public service. But by putting the tenure of large classes of appointees at the mercy of the President, it evidently consecrated executive disregard of individual interests which the statute had sought to protect.

The Myers case practically overruled Marbury v. Madison with regard to the President's power to remove an officer appointed for a fixed term with the consent of the Senate. Marbury v. Madison rested on the premise that the President had no such power, although Congress had not denied it to him; the Myers case decided that he had it even when Congress had sought to deprive him of it. It is a curious paradox that in each of the two contradictory cases the unconstitutionality of a statute was the Court's ground for denying relief to the ousted office-holder. With surprising versatility, judicial supremacy served to defeat him in both.64

In Gordon v. United States,65 a divided court briefly held unconstitutional a statute which gave it jurisdiction of appeals from the Court of Claims, and on that ground dismissed the claimant's appeal. The theory of the decision appears in a memorandum of Taney, C. J., printed many years later.66

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63 272 U. S. 52 (1926).
64 In Humphrey's Executor (Rathbun) v. United States, 295 U. S. 602 (1935), the Court upheld the power of Congress to impose reasonable restrictions on the President's authority to remove quasi-judicial and quasi-legislative officers. The doctrine of the Myers case now seems to be confined to purely executive officers. See Donovan and Irvine, The President's Power to Remove Members of Administrative Agencies (1936) 21 CORNELL L. Q. 215.
65 2 Wall. 561 (U. S. 1865). There is a slightly fuller report in 17 L. Ed. 921.
66 117 U. S. 697, appendix.
that as the sums which the Court of Claims found due were to be paid only in case the Secretary of the Treasury estimated an appropriation for their payment, the court's orders had not the finality of judicial acts. Its immediate effect was to support public or governmental interests at the expense of individual interests. Its total effect, however, was balanced, as its doctrine deprived the government as well as the claimants of the statutory appeal in future cases. Its effect was also brief. Congress soon repealed the requirement of an estimate, and the Supreme Court thereafter took full jurisdiction of appeals from the Court of Claims.

III. Cases in Which Judicial Supremacy Offered Apparent Protection, in a Limited Locality, Against Fine or Imprisonment

The Supreme Court has taken exception to the criminal procedure prescribed by Congress in two statutes local to the District of Columbia and one statute local to Alaska. Congress is both a national legislature and the local legislature of the several territories, and it was functioning in these instances not as a national but as a local legislature. These statutes and the decisions which annulled them cannot be counted as instances in which Congress attacked and the court defended the "liberty" of citizens generally. Moreover, in each instance the protection which the Court gave, even in the locality affected, was apparent rather than real.

Statutes permitted prosecutions based on information (as distinguished from indictment) in the District of Columbia for neglecting to provide for minor children. The punishment authorized was a fine of not more than $500, or imprisonment at hard labor in the workhouse of the District for not more than twelve months, or both. A defendant was convicted in the Juvenile Court of the District, and sentenced to six months' hard labor in the workhouse. In United States v. Moreland the Supreme Court, three justices dissenting, affirmed the action of the Court of Appeals in reversing the conviction. Although the workhouse in question had neither walls, bars, nor uniform, the majority held that the authorized punishment made the crime "infamous" and, therefore, brought it within the provision of the 5th Amendment that "no person shall be held to answer for a capital or otherwise infamous crime, unless on the presentment or indictment of a grand jury." The Court's action in requiring an indictment for a comparatively petty crime theoretically protected in some degree the personal liberty both of guilty persons and of such innocent persons as a district attorney

\[\text{Act of Mar. 17, 1866, 14 STAT. 9.}\]
\[\text{Rules, 3 Wall. viii; De Groot v. United States, 5 Wall. 419 (U. S. 1866); United States v. Klein, 13 Wall. 128, 144 (U. S. 1871).}\]
\[\text{34 STAT. 86; 34 STAT. 73; 37 STAT. 136.}\]
\[\text{258 U. S. 433 (1922).}\]
might wish to prosecute but be unable to indict. Yet the only persons who could be saved from punishment by the requirement of an indictment would be those against whom, as against the defendant in the Moreland case, there was enough evidence to convince a trial jury beyond a reasonable doubt that they were guilty of failing to provide for their minor children (or other crime similarly punishable). It is easier to indict than to convict. Many men are indicted who cannot be convicted; and, if a man can be convicted, the lesser preliminary hurdle of indictment is commonly an easy one for the prosecution to take. It follows that the protection which the decision gave was formal rather than substantial.

In Rasmussen v. United States plaintiff in error was convicted in Alaska of keeping a disorderly house. The Code for Alaska permitted trial for misdemeanor by a jury of six, and Rasmussen was convicted by such a jury. The Supreme Court granted a new trial. It held that a “jury”, in the Sixth Amendment’s guarantee of jury trial, meant twelve men. Here the defendant, after being duly indicted, was tried by a short jury, while in the Moreland case the defendant was not indicted but was tried by a full jury. The evidence convinced first a grand jury, and then a short trial jury, of Rasmussen’s guilt. To the extent of the likelihood, if any, that a man who will be indicted by a grand jury and condemned by a jury of six will not be condemned by a jury of twelve, the decision protected the interests of defendants. But a defendant’s chance is not necessarily better with a jury of twelve than with a jury of six. Each jurymen’s actual share of responsibility increases as the number of jurymen diminishes. His sense of responsibility, and his reluctance to convict, may increase in like or greater proportion. The Rasmussen case, then, like the Moreland case, gave a formal and not a substantial protection.

In Callan v. Wilson the statute provided that in the District of Columbia “prosecutions in the police court shall be by information under oath, without indictment by grand jury or trial by petit jury.” Appeals were permitted to the Supreme Court of the District, with a jury trial in that court. Callan, a member of a musicians’ union, was convicted in the police court, without indictment or jury trial, of “conspiracy”, for participating in the boycotting of fellow-members who failed to conform to the union’s requirements. On default in the payment of a fine of $25, he was sentenced to thirty days in jail. He did not exercise his right of appeal to the Supreme Court of the District. The United States Supreme Court ordered his discharge on habeas corpus, on the ground that the statute and the proceedings

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2197 U. S. 516 (1905).
23127 U. S. 540 (1888).
under it deprived him of his constitutional right to a jury trial of "all crimes, except in cases of impeachment." As the statute permitted appeals in all cases, with jury trial on appeal, the statutory denial of a jury was of a most attenuated sort. One who wished a jury trial could get it under the statutory scheme. As the opinion points out, numerous courts had held that jury trial is sufficiently allowed if it is allowed on appeal. While it happened that the petitioner was a union man and the complaint against him arose out of union activity, the statute, and so the effect of the decision, applied indifferently to all sorts of prosecutions in police court.

Neither indictment nor a petty jury is necessary to a fair trial, even in the case of serious crimes. Neither stands on any broader constitutional basis than the technical one that, in certain situations, it is specifically prescribed by federal or state constitution. The Supreme Court has recognized this. In Maxwell v. Dow, a man had been tried in a state court for robbery, by a jury of eight, and tried on information instead of indictment. He was sentenced to eighteen years' imprisonment. As the express requirements of the United States Constitution regarding indictment and juries are not applicable in state courts, the United States Supreme Court, in habeas corpus proceedings, sustained the conviction and sentence. It held that the absence of indictment and of the common-law jury constituted neither a denial of due process of law nor an abridgment of the privileges and immunities of citizens of the United States. Consistently with the 14th amendment, "trial by jury may be abolished."

If the Moreland, Rasmussen, and Callan cases were in fact measurably good for defendants, which seems very doubtful, it follows that they measurably defeated the social interest in the cheap and simple administration of justice and in the discouragement of criminal conduct. Guilt is never certain. No one who has read Professor Borchard's Convicting the Innocent can forget that the traditional system of grand jury and petty jury makes its mistakes. The probability of guilt is only a little less or a little greater in the case of men convicted as these defendants were convicted than in the case of men indicted and convicted in the traditional way.

The statutes involved in the Wong Wing case and the Kirby case were not limited to the District of Columbia; but the Wong Wing statute was limited to Chinese, and the Kirby statute was limited to receivers of stolen goods. The nature of those two statutes makes it likely that the majority of the potential beneficiaries of those decisions are poor persons. On the other

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75Art. III, § 2.
76U. S. 581 (1888).
77Snyder v. Massachusetts, 291 U. S. 97, 105 (1934).
78Supra note 36.
79Supra note 41.
hand, a defendant who can afford a good lawyer is more likely than another to derive advantage from any of these five decisions on criminal procedure, and only a small minority of persons of whatever social group ever find themselves in a position to be affected by them. Of these five cases, each annulled legislation confined either to Chinese, to receivers, to the District of Columbia, or to Alaska; and none of them, with the uncertain exception of the *Wong Wing* case, offered substantial protection to any one.

IV. CASES IN WHICH JUDICIAL SUPREMACY PROTECTED HARMFUL BUSINESS ACTIVITY, ETC.

In the large majority of the cases in which the Supreme Court, by annuling acts of Congress, has protected persons from fine or imprisonment, the statutes involved have been directed specifically against certain business activities, or other activities which cannot be carried on without money. In most of these cases, the court found no fault with the machinery provided by Congress for determining guilt. Necessarily, the persons chiefly benefited by these decisions have been the owners of businesses, though in some instances, no doubt, benefits have extended to employees.

*Newberry v. United States* dealt with a statute which forbade the expenditure of more than $5000 by a candidate for Representative, or of more than $10,000 by a candidate for Senator, or of any sum forbidden by State law, "in any campaign for his nomination and election". Mr. Newberry and others were convicted of conspiracy to violate this statute by spending $100,000 "in procuring his nomination and election ... at said primary and general elections". The Supreme Court reversed the conviction. Four of the justices thought the legislation constitutional. Five held that it was unconstitutional, on the ground that Article I, Section 4, of the Constitution, which gives Congress control over "the times, places and manner of holding elections for Senators and Representatives," does not cover nominations. The statute was passed before the Seventeenth Amendment which provided for popular election of Senators; and of the five concurring justices one expressly reserved judgment on the question whether a like statute passed after the Amendment would be valid. The decision protected, in some degree, the interest of wealthy persons in buying nominations. Although it did not foreclose the question of the power of Congress under the Amendment, Congress expressly made the Corrupt Practices Act of 1925 inapplicable to "primary" elections or conventions.

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78 The *Boyd case*, *supra* note 14, falls into the present category.
79 256 U. S. 232 (1921).
81 43 Stat. 1070.
In a considerable series of cases the conduct which judicial supremacy protected against penalties consisted in the operation of a harmful business. In Keller v. United States, as in the Rasmussen case, judicial supremacy protected an exploiter of prostitutes. The defendants were indicted and convicted under a statute which made it a felony to keep any alien woman or girl, for purposes of prostitution, within three years after her entry into the United States. A divided court reversed the conviction on the ground that the matter was within the general police power, which had not been conferred upon the federal government. Justice Holmes, for the minority, took the view that authority to exclude aliens carries with it, as incidental, the power not only to deport a woman who practices prostitution soon after entry but also to punish those who cooperate with her in so doing.

The statute involved in United States v. Dewitt prohibited the sale of illuminating petroleum inflammable at a lower temperature than 110 degrees; also of naphtha and illuminating oils in combination. The defendant was indicted for violation of this act. The Supreme Court held the act invalid, within the limits of a state, as being a police regulation, not incidental to any power granted to Congress. The social and individual interests in the physical safety of persons and property were denied the protection which Congress had tried to give them. The interest which was protected was the economic interest of the defendant and others in carrying on with impunity an anti-social traffic.

Three of the cases protected the liquor trade. In Matter of Heff, a statute prohibited selling liquor to Indians, including those whose allotment of land had been made and was being held in trust for them by the government. Another statute made such Indians citizens. Heff was convicted of selling liquor to such an Indian. The Supreme Court, Justice Holmes dissenting, released Heff on habeas corpus, on the ground that an Indian upon whom citizenship had been conferred was not a member of an Indian tribe within the meaning of the clause of the Constitution which permits Congress to regulate commerce "with the Indian tribes". There is a widespread belief that liquor is bad for Indians. The decision protected indirectly the interest of Indians in getting liquor, and directly the interest of dealers in selling them liquor; it denied protection to the supposed social interest
in preventing the transaction. Eleven years later in *United States v. Nice*, the decision was expressly overruled and an indictment sustained, on the ground that "Citizenship is not incompatible with tribal existence or continued guardianship," *Lipke v. Lederer* was decided in the time of the Eighteenth Amendment. The National Prohibition Act imposed upon the illegal manufacture or sale of liquor a "tax . . . in double the amount now provided by law, with an additional penalty of $500 on retail dealers". An alleged illegal dealer, while under indictment, was threatened by the Collector of Internal Revenue with the seizure and sale of property to collect $45.83 tax, $500 "penalty" under this section, and a small "penalty" under another section. The Supreme Court, two justices dissenting, granted the dealer an injunction which restrained the threatened collection, on the ground that the statute deprived him of due process because it made no provision for a hearing. The decision apparently protected against administrative attack under congressional authority the economic interests of illicit liquor dealers, and correspondingly denied protection to the social interest, which was then officially supposed to exist, in suppressing the trade. The third case involving the liquor trade is *United States v. Constantine*.

In a number of instances the Supreme Court's review of federal legislation has protected anti-social methods in connection with otherwise legitimate business. In *United States v. Fox*, a statute undertook to punish with imprisonment any person respecting whom bankruptcy proceedings were commenced, who, within three months before their commencement, "under the false color and pretense of carrying on business and dealing in the ordinary course of trade, obtains on credit from any person any goods or chattels with intent to defraud." The defendant filed a voluntary petition in bankruptcy, and was thereupon indicted under this section. The court held it unconstitutional. It was not confined to acts in contemplation of bankruptcy, and the Court took the position that an act which, when done, had no relation to bankruptcy or any other matter of federal jurisdiction, could not be turned into a federal crime by the subsequent occurrence of bankruptcy. The interest served by the decision is that of individual bankrupts in immunity from federal criminal responsibility for obtaining goods by false pretenses. The social interest in discouraging persons on the verge of bankruptcy from obtaining goods by false pretenses, and the individual interests of those from whom goods are so obtained, were served by the statute and thwarted by the decision.

241 U. S. 591, 598 (1916).
259 U. S. 557 (1922).
41 Stat. 305, Title 2, § 35.
Infra note 257.
95 U. S. 670 (1878).
Another statute punished by fine and imprisonment the fraudulent use, sale, and counterfeiting of trade-marks, registered in pursuance of another United States statute, the operation of which was not confined to interstate commerce. In prosecutions under the criminal statute, the court held both unconstitutional because they were not within the commerce power or any other other federal power. The decision protected those who use pirated trade-marks in connection with businesses which they operate, to the prejudice of the buying public who are deceived and the true owners of the trade-marks who are fraudulently deprived of sales. In 1881, Congress passed an act which was expressly limited to trade-marks used “in commerce with foreign nations, or with the Indian tribes”. Interstate commerce was included in 1905.

In United States v. E. C. Knight Co., the Supreme Court, Justice Harlan dissenting, held that a combination of 98 per cent of the sugar refining industry of the country could not be attacked under the Sherman Anti-Trust Law, on the ground that the combination was in manufacture and did not sufficiently affect interstate commerce to be within the power of Congress and so within the act. A bill in equity to dissolve the combination was held demurrable. Although the case was not strictly a criminal one, its doctrine necessarily served to protect the same and similar combinations against the criminal as well as the civil penalties of the act. The decision is not commonly counted among those which overruled acts of Congress; but Professor Corwin is fully justified in saying that it “did to all intents and purposes nullify the Sherman Act, and kept it nullified during the most critical period in our industrial history, when most of the great trusts were formed, and it did this in consequence of the Court's constitutional theories.”

There was no serious suggestion that Congress was not interested in reaching the Sugar Trust. William Howard Taft declared that “The effect of the decision in the Knight case upon the popular mind, and indeed upon Congress as well, was to discourage hope that the statute could be used to accomplish its manifest purpose and curb the great industrial trusts... So strong was the impression made by the Knight case that both Mr. Olney and Mr. Cleveland concluded that the evil must be controlled through State legislation, and not through a national statute, and they said so in their communications to Congress.” The decision “inhibited practically all prosecutions of in-

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8519 Stat. 141.
9Trade Mark Cases, 100 U. S. 82 (1879).
97a33 Stat. 724.
95156 U. S. 1 (1895).
95(1926) 12 A. B. A. J. 171.
9Taft, The Anti-Trust Act and the Supreme Court (1914) p. 60.
dustrial combinations during nearly all the remainder of the first decade after the statute. Indeed, Attorney General Harmon, in his annual report to the President in 1896, stated that in view of the Knight decision it was practically impossible to enforce the Sherman Act against industrials...101 As was said some years ago, although "the case has never been overruled... subsequent cases beginning with Addyston Pipe and Steel Company v. United States102... have gone very far to restrict its authority."103 But there can be little doubt that the immunity which the case conferred contributed, during many years, to the development of the economic and political power of the great trusts.

In an effort to control profiteering during and after the World War, Congress passed the Lever Food Control Act which forbade, among other things, unjust or unreasonable rates or charges in handling or dealing in any necessaries.105 The defendant in United States v. Cohen Grocery Co.106 demurred to an indictment which accused it of making an unreasonable charge of $19.50 for 100 pounds of sugar. The Supreme Court sustained its demurrer, on the ground that the statute failed to fix an ascertainable standard of guilt and did not sufficiently inform accused persons of the nature and cause of the accusation. The decision protected profiteering in necessaries, to the disadvantage of the consumer. It was immediately followed by decisions in which the court enjoined the prosecution of clothing,107 milk,108 and sugar dealers, quashed the indictment of a potato dealer,110 and reversed convictions for selling sugar at excessive prices,111 and for conspiring to exact excessive prices for clothing.112 In A. B. Small v. American Sugar Refining Co.,113 the same section of the Lever Act was held unconstitutional, on the same ground of indefiniteness, when offered as a defense to a refiner's suit against a wholesaler for breach of contract to buy sugar.

V. Cases in Which Judicial Supremacy Deprived Negroes of Protection

In a number of cases, congressional efforts to protect Negroes were de-
feated by judicial supremacy. The sufferers from these decisions were a very large class of poor persons. The first in this series of cases defended property in slaves, and had consequences which were not limited to the relations between the races.

Dred Scott had been taken by his master from slave Missouri to free Illinois, and then to Fort Snelling, in territory in which Congress by the Missouri Compromise had prohibited slavery. He was afterward taken back to Missouri, and sued there in a federal court to assert his freedom. The Supreme Court's decision adverse to him was supported on various grounds in the opinions of the justices who made up the majority, and it is tenable that the point actually decided was not the unconstitutionality of the Missouri Compromise but merely that "A slave taken by his master into a State or Territory where slavery is prohibited by law, and afterwards returning with his master into a slave State, and acquiring a residence there, if deemed by the highest court of that State, after his return, to be a slave, must be deemed a slave by the courts of the United States, and therefore not entitled to sue in one of those courts as a citizen of that state." But the case contains numerous declarations, not felt as dicta by the judges who made them, that the congressional prohibition of slavery in a territory was unconstitutional, and it is commonly regarded as so holding.

Dred Scott himself was set free, in Missouri, within three months after the Supreme Court had decided that he was a slave. How many other Negroes were adversely affected by the decision, in any direct way, is a matter of conjecture; probably not many. "Before the case was docketed . . . Congress had passed the Kansas-Nebraska Act, on May 30, 1854, repealing the Missouri Compromise Act . . . But by the time when it was reached for its second argument, in December, 1856, the immense effect which a court decision upon the power of Congress might have, in connection with future legislation as to slavery in the Territories, was thoroughly realized."

It has become familiar that the constitutional doctrine which the Court laid down had great consequences. To quote from James Bryce: "This judgment, since the language used in it seemed to cut off the hope of a settlement by the authority of Congress of the then (1857) pending disputes

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115 JOHN LOWELL AND HORACE GRAY (later Judge Lowell of the United States Circuit Court for Massachusetts and Mr. Justice Gray of the United States Supreme Court), A LEGAL REVIEW OF THE CASE OF DRED SCOTT (1857) quoted in THAYER, CASES ON CONSTITUTIONAL LAW (1895) p. 496.
117 WARREN, SUPREME COURT IN UNITED STATES HISTORY, 24, n.
118 Id. at 3, 7.
over slavery and its extension, did much to precipitate the Civil War.\textsuperscript{119} Opinions to like effect might be multiplied. The Republican platform on which Lincoln was elected in 1860 declared that "the new dogma that the Constitution of its own force carries slavery into any or all territories of the United States is a dangerous political heresy, at variance with the explicit provisions of the instrument itself, with contemporaneous exposition, and with legislative and judicial precedent; is revolutionary in its tendency, and subversive of the peace and harmony of the country."\textsuperscript{120} Warren concedes that "The attitude of the Court on questions arising out of the slavery issue was closely connected with the outbreak of the Civil War."\textsuperscript{121} His treatment of the subject illustrates the optimism of some advocates of judicial review. The Dred Scott case, he tells us, is among those which "can be easily passed over" in considering the "effect on our country" of judicial review, since "it was cured by the result of the Civil War."\textsuperscript{122}

The first two sections of a statute of May 31, 1870,\textsuperscript{123} required that all citizens entitled to do so be allowed to qualify and to vote, "without distinction of race, color, or previous condition of servitude," and made interference with qualifying a misdemeanor. The third and fourth sections made it a misdemeanor to refuse to receive the vote of "any citizen" who had been wrongly prevented from qualifying, or to prevent "any citizen" from qualifying or from voting. Inspectors of election in Kentucky were indicted, under the third and fourth sections, for refusing to receive, in a municipal election, the vote of a citizen of the United States of African descent. In \textit{United States v. Reese},\textsuperscript{124} a divided court held that, although the defendant's refusal was on account of race, the indictment was invalid because sections three and four of the statute were not limited to refusals on account of race, but were general, and therefore exceeded the authority given to Congress by the Fifteenth Amendment. Whether Congress intended to legislate in favor of Negroes only, or, as the Court thought, in favor of persons generally, it is obvious that Congress sought to protect large numbers of poor and un-influential persons in their right to vote; that the complaining witness was among the persons intended to be protected; and that the Court's decision denied him and his kind the intended protection. The legislation sought to

\textsuperscript{119} BRYCE, \textit{AMERICAN COMMONWEALTH} (1st ed.) 257, quoted by Thayer, \textit{op. cit. supra} note 115, p. 496.

\textsuperscript{120} STANWOOD, \textit{HISTORY OF THE PRESIDENCY} (1898) p. 293; quoted by HAINES, \textit{AMERICAN DOCTRINE OF JUDICIAL SUPREMACY} (2d ed. 1932) 374.


\textsuperscript{122} 16 STAT. 140.

\textsuperscript{123} 92 U. S. 214 (1876).
enforce rights to vote which, in theory, existed already by virtue of the Fifteenth Amendment. So far the statute served, and the decision contravened, the social interest in order. Although there were some educated Negroes among those whose disfranchisement the court protected, and many ignorant whites among those who were not disfranchised, the decision undoubtedly tended to raise the average literacy, as well as the average prosperity, of the electorate. It also tended to preserve literacy and prosperity as monopolies in the hands of the white people of the south, who were measurably protected in the exclusive privilege of electing the men who make the laws which regulate the distribution of education and wealth. It tended to make Negroes less prosperous and less free.

A later case protected, against another clause of the same statute, a different sort of interference with Negro suffrage. The statute sought to punish bribery and intimidation, in any election, of voters whose right to vote is guaranteed by the Fifteenth Amendment. In James v. Boeing the defendants were indicted for bribing colored men not to vote in a congressional election in Kentucky. They were released by a divided Supreme Court on habeas corpus, on the ground that the legislation was not authorized by the Fifteenth Amendment, because that amendment applies only to action by a state or by the United States, and because no discrimination on account of race was charged; nor by the congressional power over federal elections, because the statute undertook to deal with all elections.

The statute involved in United States v. Harris sought to punish any two or more persons who should “conspire . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws . . . or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving . . . to all persons . . . equal protection of laws.” Twenty men were indicted for conspiring with others to deprive four individuals of the equal protection of the laws, and for beating all and killing one of the four, while they were in the custody of a state officer on criminal charges in Crockett County, Tennessee. The Court held the statute unconstitutional as not within the Fourteenth Amendment, since no state action was involved, nor the Thirteenth, since the statute was not confined to the protection of former slaves. The opinion does not state the color of the mob or its victims, but it contains implications in accordance with the probability that the mob was white and the victims Negroes. However that may be, the Court is clearly right in drawing an analogy with United States v. Reese. Here, as there, Congress had sought to protect unprivileged and

126 190 U. S. 127 (1903).
127 106 U. S. 629 (1883).
129 Supra note 124.
relatively helpless persons, chiefly Negroes, against abuses which were
plainly illegal, but against which state laws and state courts gave inadequate
protection. Here, as there, the decision denied the protection which Con-
gress had tried to give. The doctrine of United States v. Harris was re-
affirmed in Baldwin v. Franks. Baldwin was arrested, under the same
statute, on a charge of conspiring with others to deprive certain Chinese
aliens of the equal protection of the laws, by kidnapping them and driving
them from their homes. In habeas corpus proceedings, the Court again held
the statute unconstitutional.

Again in Hodges v. United States judicial supremacy denied to Negroes
the protection against mob violence which Congress had attempted to give
them. Statutes undertook to give to all persons within the jurisdiction of
the United States the same rights to make contracts and to the equal pro-
tection of the laws, as white citizens, and forbade the intimidation of any
citizens in the free exercise of rights and privileges secured by the consti-
tution or laws of the United States. The defendants were convicted of in-
timidating colored citizens in Arkansas, because of their color, into aband-
oning work. The Supreme Court, two justices dissenting, reversed the con-
viction. It held that the Fourteenth and Fifteenth Amendments did not jus-
tify it, since their restrictions relate only to state action, which was not
involved in the case; nor the Thirteenth, since the case did not involve
slavery or involuntary servitude.

In cases of a third type, involving neither voting nor violence, judicial
supremacy resulted in the denial to Negroes of “civil rights” which Congress
had sought to give them. The “Civil Rights Act” of 1875 provided that “all persons within the jurisdiction of the United States shall be en-
titled to the full and equal enjoyment” of inns, public conveyances, and
places of public amusement; “subject only to conditions and limitations .
applicable alike to citizens of every race and color, regardless of any previous
condition of servitude.” A money penalty was imposed, to be recovered
by the person aggrieved, and violation of the statute was made a misde-
meanor. The Civil Rights Cases involved an indictment for denying hotel
accommodations to colored persons; an information for refusing a colored
person a seat in a theatre; an indictment for denying to a person, whose col-
or was not stated, the full enjoyment of theatre accommodations; and an
action to recover the statutory penalty for refusal, because of color, to admit
a woman to a “ladies’ car” on a railroad train. The Court, Justice Harlan
dissenting, held the statute unconstitutional, as not covered by the Fourteenth

120 U. S. 678 (1887).
121 203 U. S. 1 (1906).
124109 U. S. 3 (1883).
Amendment because no state action was in issue, nor by the Thirteenth because no servitude was inflicted. Interests both of personality and substance were involved. Not only are the discriminations in question humiliating, not only is one deprived of immediate enjoyment if he is not allowed to travel or go to a hotel on the same terms as another; but whatever makes it difficult or uncomfortable for one to travel injures him economically, by interfering with his development of economic capacity and his access to economic opportunity. The interest which the decision protected was that of a dominant race in excluding a depressed race from opportunity and comfort.

The Civil Rights Act of 1875 made another appearance before the Supreme Court in 1913, in *Butts v. Merchants Transportation Co.* A colored woman sued for discriminations to which she had been subjected on shipboard between Boston and Norfolk. The Court took the position that as the statute had already been held invalid within a state, and had not been intended to apply specifically outside the states, it was impossible to separate a constitutional part from the unconstitutional part, and the whole act was invalid.

It is often assumed that the Supreme Court protects "civil rights" or "civil liberties" against congressional attack. Here is a considerable group of cases in which Congress provided protection, and the Court withdrew it. If the suffrage, violence, and civil rights cases had all been decided the other way, many Negroes would still have been disfranchised, excluded from hotels, and lynched. In large areas prosecutors, judges, and juries would have given the statutes no substantial enforcement even if the Supreme Court had declared them constitutional. But it seems clear that in borderline situations or communities, at least, the actual treatment of Negroes would have been affected if the federal statutes had been upheld.

VI. CASES IN WHICH JUDICIAL SUPREMACY PROTECTED BUSINESS INTERESTS IN CONFLICT WITH LABOR INTERESTS

In a striking series of cases decided between 1908 and 1923, the Supreme Court nullified a variety of efforts on the part of Congress to benefit the working class. These decisions dealt, in a manner uniformly adverse to the interests of labor and favorable to the actual or apparent interests of busi-
ness, with unionization, employer's liability, workmen's compensation, child labor, and a minimum wage for women.

An act of 1898137 made it a misdemeanor for an interstate carrier to threaten an employee with loss of employment, or to discriminate unjustly against an employee, because of membership in any labor organization. In Adair v. United States138 the defendant was indicted and convicted for discharging a locomotive fireman because he belonged to a union. The Supreme court reversed the conviction, chiefly on the ground that the statute deprived the defendant of liberty and property without due process of law. Obviously the decision deprived railroad labor of an aid to unionization which Congress had sought to give it, and thereby served the economic interests of ownership and management at the expense of those of labor. Theoretically, railroad rates are so regulated that the cost of any improvements in hours, wages, and conditions that unions obtain is passed along to the public in the form of higher rates; but it is, of course, frequently impossible in practice to force the public to absorb an increase in costs, either because the carrier cannot show that the margin between the new costs and the old rates is less than a fair return, or because the traffic will not bear an increase in rates. Moreover, though the statute before the court in the Adair case related only to interstate carriers, the doctrine of the case is not confined to carriers or to interstate commerce. Edwin E. Witte thus summarized the law in 1932: "The right of employers to discriminate against union men is undoubted. Twenty-two states at one time had laws which made it a criminal offense for employers to discharge or refuse to employ a workman for membership in any labor union, and the federal government included a similar provision applicable to the railroads of the country in the Erdman Act of 1898. Some of these laws are still to be found in the statute books, but all of them have been rendered valueless by decisions of the Supreme Courts of the United States and nearly a dozen states holding such legislation to be unconstitutional."139

As the statute had never been observed, its annulment apparently made little change in the practical situation.139a It does not follow that the adverse decision was unimportant; a favorable decision would probably have been followed by some degree of enforcement. Among outgrowths of the case were Coppage v. Kansas,140 which held unconstitutional a state statute imposing criminal penalties on the exaction of a yellow dog contract, and Hitchman Coal Co. v. Mitchell,141 which upheld the contract by an injunction against attempts

13730 Stat. 424, 428.
138208 U. S. 161 (1908).
139WITTE, THE GOVERNMENT IN LABOR DISPUTES (1932) p. 212.
141236 U. S. 1 (1915).
14245 U. S. 229 (1917).
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of third persons to unionize the plant. Laws like the one involved in the Coppage case had been on the books in some fourteen states, but had been likewise, so generally ignored that labor was not dismayed at their annulment. Concern has been expressed lest the Court carry the doctrines of these cases to the point of outlawing the Norris-LaGuardia Act and recent state legislation, which, without making yellow dog contracts criminal, undertake to make them wholly or partly unenforceable. "New Deal" legislation is outside the scope of this article.

In 1906 Congress passed an act which undertook to eliminate the fellow-servant doctrine, and in large degree the defenses of contributory negligence and assumption of risk, in actions brought by injured employees or their representatives against any "common carrier engaged in trade or commerce" among the states. Suits were brought against railroads by the representatives of two firemen who had been killed in operating interstate trains. The majority of the Supreme Court held, in the Employers Liability Cases, that the act was unconstitutional because not confined to the interstate activities of the interstate carriers. The case was decided on January 6, 1908. On April 22, 1908, Congress passed a second liability act the burden of which was limited to railroads "while engaging" in interstate commerce, and the benefit of which was limited to employees "suffering injury while . . . employed . . . in such commerce." This act was upheld by the Court in the Second Employers Liability Cases. The earlier case, accordingly, did not long wholly deprive of protection employees who were themselves "employed in" the interstate commerce of the carriers. For this reason, it has been said that the first decision "was cured by Congress itself by passing a properly worded new law." This overlooks the fact that other employees of interstate carriers remained without the protection which the earlier act had apparently sought to give them, and the more serious fact that it became

144 Seidman, supra note 139a.
146 Cf. Frankfurter and Greene, The Labor Injunction (1930) pp. 212-214; Osmond K. Fraenkel, Recent Statutes Affecting Labor Injunctions and Yellow-Dog Contracts (1936) 30 Ill. L. Rev. 854. "There are many who believe that by Texas & N. O. R. Co. v. Brotherhood of Ry. and S. S. Clerks, 281 U. S. 548 (1930) both the Adair and the Coppage cases were overruled. It is clear, however, that the Court at the time did not intend to overrule them. For Chief Justice Hughes expressly pointed out that the law then under consideration was not aimed at the employer's right to select or discharge his employees, 'but at the interference with the right of employees to have representatives of their own choosing.' Nevertheless, the judgment which was affirmed in that case punished the carrier for contempt by reason of its refusal to reinstate employees discharged on account of their union membership." Fraenkel, supra, pp. 862, 863.
147 34 Stat. 232.
148 207 U. S. 463 (1908).
149 35 Stat. 65 (1912).
150 223 U. S. 1 (1912).
152 Four members of the Court, dissenting, in the First Employer's Liability Cases, 207 U. S. 463, held that the act should be interpreted as limited to interstate activities.
necessary to decide, in an unending series of cases, a logically unanswer-
able question: When is an employee of a railroad "employed in" interstate commerce, so as to be governed by the act, and when is he not so employed, so that he must rely on state laws? A fireman who has prepared his engine for an interstate trip, and is crossing a track to his home shortly before starting the trip, is employed in interstate commerce; so is an employee engaged in the duty of noting the numbers on interstate cars in a freight train standing in the yards; but an employee hoisting coal into a chute from which it is to be taken "by, and for the use of, locomotive engines principally employed in the movement of interstate freight" is not employed in inter-
state commerce. In reaching that conclusion, the Court expressly over-
ruled cases in which it had held that a man providing water, or sand, for the use of locomotives engaged in both interstate and intrastate commerce was engaged in interstate commerce. In an exhaustive study of Workmen's Compensation on Interstate Railways, published in 1934, Messrs. Schoene and Watson found that the Supreme Court itself had devoted 43 opinions to an effort to determine what constitutes interstate employment, and that the number of cases involving the distinction, during the second eight years of the operation of the Act, was more than double the number for the first eight years. "When it is borne in mind that each case involved an activity whose status was uncertain after nearly two decades of litigation, the futility of attempting to achieve predictability along these lines becomes manifest . . . Infinite harm must arise out of this legal bisection of the transportation industry." "In terms of actual results, it would seem that any additional chance of recovery which the Act purported to give the workman in 1908 has been much more than offset by the amount it costs him to determine in court whether he comes within its terms." "The switchman, the hostler, the mechanic, the conductor, the engineer, and the brakeman as well as the flagman, the coal heaver, and the camp cook . . . . receive as compensation for injuries, not cash with which to pay the doctor and the grocer, but an opportunity to wager on the outcome of a legal tournament." If the earlier and broader statute had been upheld, these difficulties would have been almost wholly obviated.

Judicial supremacy has produced a like confusion in the situation of mar-

151 Pecos & Northern Ry. v. Rosenbloom, 240 U. S. 439 (1916).
156 (1934) 47 HARV. L. REV. 389.
157 Id. at 398.
158 Id. at 407.
159 Id. at 408.
160 Id. at 398. The authors conclude, after examining state legislation, that the federal law should be repealed (p. 424).
time workers with respect to compensation. *Southern Pacific Co. v. Jensen*\(^{160}\) involved the death of a longshoreman who was killed at work unloading a ship in New York Harbor. The New York State Workmen's Compensation Act was, by its terms, applicable, but because of the maritime character of the injury the Supreme Court held that an award under the state act was invalid. Congress subsequently made two efforts to confer upon maritime workers, or some of them, the benefit of State compensation acts. Both these efforts were blocked, on constitutional grounds, by the Supreme Court. Shortly after the Jensen decision, the statute relating to cases of admiralty and maritime jurisdiction was amended so as to save claimants "the rights and remedies under the workmen's compensation law of any state."\(^{161}\) A bargeman doing work of a maritime nature fell into the Hudson and was drowned. In *Knickerbocker Ice Co. v. Stewart*\(^{162}\) the Court, by a vote of five to four, upset an award of compensation under the state act to the man's widow. The majority took the position that the federal act was invalid because of the provision of Article III, Section 3, of the Constitution that "The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction." Congress, the court held, was attempting to delegate its legislative power to the states, and was also destroying the uniformity in maritime matters which the Constitution contemplated. Congress later amended the statute by expressly excepting masters and members of crews from the provision saving to claimants their rights under state compensation acts.\(^{163}\) In *State of Washington v. Dawson and Co., and Industrial Accident Commission v. James Rolph Co.*\(^{164}\) two cases heard together, the Court decided, Justice Brandeis dissenting, that the exception did not save the statute. It accordingly held that a stevedoring corporation whose men worked on ships in Puget Sound could not be compelled to contribute to the Washington compensation fund, and that the representatives of a man killed at maritime work on a vessel in San Francisco could not recover under the California act.

In *Western Fuel Co. v. Garcia*\(^{165}\) the Court had treated a state death act as applicable to the negligent killing of a stevedore at work on a vessel in San Francisco. The subject, the Court said, was "maritime and local in character." Later decisions have permitted the application even of state compensation acts to injuries on admiralty waters, provided the victim's work is "local" and has no "direct relation to navigation or commerce". The inevitable cloudiness of such a distinction is evinced by the decisions which apply it. The Court has held local compensation acts applicable in the case of a

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\(^{160}\)244 U. S. 205 (1917).
\(^{161}\)10140 STAT. 395 (Oct. 6, 1917).
\(^{162}\)253 U. S. 149 (1920).
\(^{163}\)252 STAT. 634 (June 10, 1922).
\(^{164}\)264 U. S. 219 (1924).
\(^{165}\)257 U. S. 233 (1921).
diver suffocated while removing an obstruction to navigation, and of workers who put together, towed, and took apart log booms in navigable waters. The Court has held local compensation acts not applicable in the cases of a painter working on a ship lying at Philadelphia and a boiler-maker injured while repairing a ship’s smoke-stack. Since 1927, a federal compensation act has been in force for such maritime workers as fall into the class of “longshoremen and harbor workers”; but, as this act applies only when recovery “through workmen’s compensation proceedings may not validly be provided by state law,” it does not end the puzzling question what work is so “local,” within the judicial concept, that state compensation acts may apply and the federal act does not. Seamen are still left to their 1920 Act, which is not a compensation act. Thus, the Jensen case and the Knickerbocker case have led to prolonged confusion, and have frequently prevented compensation for the injuries of poor men.

The two cases in which the Court prevented Congress from restricting child labor are familiar. Both statutes were aimed at the employment of children under 16 (a) in mines and quarries, or (b) over eight hours a day or six days a week, or at night, in factories; and the employment of children under 14 in factories. The first statute prohibited interstate shipment of the products of concerns which employed child labor. By a vote of five to four, the Court held this unconstitutional in Hammer v. Dagenhart, on the ground that it interfered with domestic concerns of the states. Congress then passed an act which laid a tax of ten per cent on the net profits of concerns which employed child labor. This tax was held invalid, over the dissent of Justice Clarke, on the ground that “its prohibitory and regulatory effect and purpose are palpable.” Congress may exclude lottery tickets

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173 For the foregoing bit of maritime history, I have drawn on an unpublished paper by Professor G. H. Robinson of the Cornell Law School, who now writes the following comment: “The Court was saying that if Congress passed legislation governing the maritime field, Congress should so frame it that it would operate uniformly. When Congress did pass such a statute in the Longshoremen’s and Harborworkers’ Compensation Act the Court held it constitutional. ‘The general authority of Congress,’ it said, ‘to alter or revise the maritime law which shall prevail throughout the country is beyond dispute. Score a credit to the Court for insisting upon legislation thoroughgoing in form and national in scope rather than the patchwork which Congress first offered.’”
174 19 STAT. 675 (1916).
175 247 U. S. 251 (1918).
176 40 STAT. 1138 (Feb. 24, 1919).
from interstate commerce, although "the real purpose of the act was to discourage a type of business or enterprise of which Congress disapproved, but over which, within the States, it had no direct powers of regulation"; and Congress may impose a prohibitive tax of ten cents per pound (100 per cent, more or less, of the profit) on colored oleomargarine, with the obvious purpose of preventing its sale; but Congress may deal in neither of these ways with child labor. Few decisions have had more serious consequences. "Available data indicate that the employment of children increased markedly after this law was invalidated." The effects of child labor in mechanical industries on children, on the wage level, and on society generally, and the impossibility of dealing effectively with the matter by states, are only too well known. Its chief burden falls, obviously, on the poor; it pays dividends to some of the well-to-do.

In order "to protect the women and minors of the District from conditions detrimental to their health and morals, resulting from wages which are inadequate to maintain decent standards of living," Congress adopted a minimum wage law for women and children in the District of Columbia. A board was authorized to hold hearings and to prohibit the payment of wages found to be inadequate to maintain the health and morals of women workers in given occupations. A special license might be issued for the employment at sub-standard wages of a woman of impaired earning capacity. The board had been functioning for some time, and reports of general good results from the operation of the statute were before the Court when it enjoined enforcement as unconstitutional. The vote was five to three, and Justice Brandeis took no part. "Freedom of contract," according to the majority of the Court, "is the general rule and restraint the exception"; and the Court found no justification for an exception. It can hardly be dis-

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179 WILLOUGHBY, CONSTITUTIONAL LAW, p. 977.
180 McCray v. United States, 195 U. S. 27 (1904).
182 A constitutional amendment authorizing Congress to "limit, regulate, and prohibit the labor of persons under eighteen years of age" was proposed by Congress in 1924; 43 Stat. 670. In 13 years, only 28 states out of the necessary 36 have ratified. New York Times, Mar. 21, 1937.
Gainfully employed children between 10 and 15 years old, according to the Census, numbered 1,060,838 in 1920 and 667,118 in 1930. Of these, 185,652 in 1920 and 68,266 in 1930 were reported engaged in manufacturing and mechanical industries; 7,191 in 1920 and 1,184 in 1930 as engaged in mining. U. S. CENSUS REPORTS, FIFTEENTH CENSUS (1930), Vol. V, c. 6, Tables 1 and 5. The Census ignores employment before the age of 10. The effect of the depression upon the volume of child labor is a matter of much debate.
183 23, 40 Stat. 964.
184 40 Stat. 960 (September 19, 1918).
185 Adkins v. Children's Hospital, 261 U. S. 525 (1923).
186 261 U. S. at p. 546. "No such doctrine is stated in the Constitution . . . it comes from Mr. Justice Sutherland" (who wrote the opinion). Powell, The Judiciality of Minimum Wage Legislation (1924) 37 Harv. L. Rev. 545, 555.
puted that starvation wages for women, when economically avoidable, are bad for the immediate victims, for the general wage level, and for the community. Like child labor, the burden falls directly and chiefly upon the poorest, while the profits of some enterprises are increased. As Professor Powell pointed out, "the theoretical possibility of injurious effects" from a statutory minimum wage "on the interests of the laboring class is not to be taken too seriously in view of the line of cleavage between those who favor and those who oppose minimum wage legislation. Its proponents are those who are not callous toward the interest of the employees whom it affects and who are not unfamiliar with the experience under the minimum wage laws in operation." 186

The statute which the Court annulled was a local one, but the effect of the decision was not local. It appeared to mean that all minimum wage laws, state or federal, were unconstitutional. In 1923, when the case was decided, some 13 states had minimum wage laws. An equally divided court had sustained the Oregon law in 1917; 186a and that law and some others continued in effect, in one degree or another, after the Adkins decision; but many of the state laws were ignored or repealed. In 1925 and 1927, on the authority of the Adkins case, the Supreme Court annulled the laws of Arizona and Arkansas. 186b Eight or nine new state laws were passed between 1931 and 1936. 186c In 1936, by a vote of five to four, the Supreme Court annulled the New York law of 1933. 186d Finally, on March 29, 1937, again by a vote of five to four, the Court upheld the Washington law of 1913, which "throughout this entire period . . . has been in force", and expressly overruled Adkins v. Children's Hospital. 186e

VII. Cases in Which Judicial Supremacy Protected Business from Taxation

In a considerable number of instances judicial supremacy has protected a business against a tax. It seems a safe generalization that the owners of the business are commonly the principal beneficiaries of such decisions, although in some instances, no doubt, the benefit extends to employees.

186 (1924) 37 Harv. L. Rev. at 568. "Among the better-established results of minimum wage legislation . . . may be mentioned (1) that it has raised wages; (2) that minimum wage rates do not in general tend to become maximum rates; (3) that it does not necessarily force workers out of industry; (4) that it does not unduly handicap employers; (5) that it does not undermine trade union organization; and (6) that it does not decrease efficiency." Commons and Andrews, Principles of Labor Legislation (1927) p. 224, (1936) p. 74. Cf. Elizabeth Brandeis, Labor Legislation (1935) p. 534.

186a Stettler v. O'Hara, 243 U. S. 629 (1917).


186c 26 Am. Lab. Leg. Rev. 84; (1936) 42 Monthly Labor Rev. 658.


A number of cases were decided on the ground that the tax burdened states or their agencies, cities. The Court has argued that "If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed, if any interference is permitted." Mr. Justice Holmes has countered, "The power to tax is not the power to destroy while this court sits." Immunity is not merely unnecessary, it is also not far from useless to the states. Its apparent advantage to them is usually absorbed, in fact, by private persons, and moreover is offset by the reciprocal immunity of the federal government from state taxation. As Mr. Justice Stone has said, "the practical effect of enlargement" of the immunity "is commonly to relieve individuals from a tax, at the expense of the government imposing it, without substantial benefit to the government for whose theoretical advantage the immunity is invoked . . . It is significant that neither the federal nor any state government has appeared by intervention or otherwise to support this claim of immunity in cases in which the taxpayer has urged it upon us."

A statute laid a tax of 5 per cent upon interest payable by railroads and certain similar companies, and authorized the companies to deduct the amount of the tax from the interest. In United States v. Baltimore and Ohio Railroad Co., the Court, two justices dissenting, held that the United States could not collect from the company the tax on those of its bonds which were held by the city of Baltimore, as such tax was in effect one upon the city. The immediate effect of the decision was to protect the economic interests of cities which had already bought railroad bonds, in the receipt of the promised return without deduction, to the detriment of the interest of the federal government in collecting the tax. But the decision necessarily had the further effect of increasing the attractiveness of railroad bonds to state agencies, in whose hands they became, by the decision, tax-free. As buyers will pay more for a tax-free bond than for one which is subject to taxation, some of the benefit of the decision probably found its way to the railroad companies and their stockholders.

In Indian Motorcycle Co. v. United States, the Motocycle Company was allowed to recover a 5 per cent tax it had paid on a cycle which it had sold to the city of Westfield, Massachusetts, for use in its police department. The tax was levied on articles "sold or leased by the manufacturer, producer, or

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188Dissent in Panhandle Oil Co. v. Knox, 277 U. S. 218 (1928).
189Dissent in Indian Motocycle Co. v. United States, 283 U. S. 570, 582 (1931).
19017 Wall. 322 (U. S. 1873).
191It is safe to say that no benefit reached the public in the form of a reduction in railroad rates, since the amount involved was small, railroad rates were practically unregulated at the time, and the courts have even yet refused to treat the amount of the capital charge as the measure of a reasonable return.
192283 U. S. 570 (1931).
importer." With Justices Stone and Brandeis dissenting, the court held that this was a sales tax and unconstitutional as a burden on Massachusetts in the exercise of a governmental function. A tax which is payable on many or most sales is commonly included in the regular price of the product. There is no reason to assume that the seller of motorcycles allowed cities a deduction from its regular price when sales to cities became tax-free. The opposition of manufacturers and dealers to sales taxes is not irrational. There is always a chance that they may not be able to pass on the entire burden; and the tax, even if passed on, reduces the volume of sales. The fact that, in the Motorcycle case itself, the manufacturer fought the case through the courts is ground for thinking that the decision he won protected him from future burdens. The future burden, if any, from which it protected cities, was not only uncertain and contingent but small.

Congress granted certain lands to Oklahoma for the benefit of schools. The Oklahoma legislature leased some of these lands, and directed payment of the proceeds into the school fund. The Coronado Company, a lessee, paid to the state, as rent, specified percentages of the gross production of oil and gas. In Burnet v. Coronado Oil and Gas Co. the question was whether the company was liable for income and excess-profits taxes upon its net income from the leased lands. By a vote of five to four, the Supreme Court decided that it was not liable, on the ground that "the lease to the respondent was an instrumentality of the State for the purpose of carrying out her duty in respect of public schools. To tax the income of the lessee arising therefrom would amount to an imposition upon the lease itself." The only direct and certain effect of the decision was to protect the holders of leases from federal taxation. Lessees were not called upon to share with the state the money which the Court permitted them to retain or recover. In respect to subsequent leases, some fraction of the money which the decision saved to lessees might find its way to the state treasury in the form of higher rental. But it is most unlikely that the state would be able to fix the rents, in future leases, so high as to absorb the entire saving; and since the holders of existing leases necessarily retain the entire saving, it is evident that, as between business interests and the general public, a clear net advantage from the decision remains on the side of business.

193REVENUE ACT OF 1924, 43 STAT. 253, 322, § 600.
194If that burden were great enough to call for the tax immunity which the court granted, the burden imposed upon a state by federal taxation of its liquor business would more clearly call for immunity; yet the Court has continued to permit the application of the liquor tax to states, on the ground that no governmental function is involved. Ohio v. Helvering, 292 U. S. 360 (1934).
195285 U. S. 393 (1932).
196Id. at 400, 401.
197The year after the Coronada case, Burnet v. A. T. Jergins Trust, 288 U. S. 508 (1933), "upheld a federal income tax on a lessee of city oil lands as to income from the sale of oil there produced. The Gillespie and Coronado cases were distinguished on the
The Revenue Act of 1921\textsuperscript{198} laid a tax upon life insurance companies based on their gross income from interest, dividends, and rents, less certain deductions. In effect a deduction was allowed of (1) interest on tax-exempt securities together with (2) enough more so that the sum of (1) and (2) should equal 4 per cent of the company's mean insurance reserve. This amounted, as Justice Brandeis pointed out in his dissent in \textit{National Life Insurance Co. v. United States};\textsuperscript{199} to a provision for deducting from gross income either the interest from tax-exempt bonds or an amount equal to 4 per cent of the reserve, whichever sum was the greater. It had seemed to Congress, and it seemed to Justices Holmes, Brandeis, and Stone, that the two deductions need not be cumulated; that immunity of state and municipal bonds from taxation was fully protected by making the deduction never less than the amount of the income from such bonds. Evidently the legislation did not injure life insurance companies in general, as most of them had approved it when it was under consideration in Congress,\textsuperscript{200} and in the \textit{National Life} case itself, the Metropolitan Life, the Mutual Benefit Life, and the Prudential, as \textit{amici curiae}, filed a brief through Mr. Charles Evans Hughes in support of the legislation. But the Court decided that the legislation was unconstitutional, as in effect imposing a tax on state bonds, and that the complaining company was entitled to deduct from its gross income the \textit{sum} of its tax-exempt interest and 4 per cent of its reserve. The practical effect of the decision would seem to consist in increasing slightly the demand for, and the value of, tax-exempt securities, and in shifting a certain amount of tax burden from insurance companies to other taxpayers. As the majority of the population hold neither tax-exempt securities nor insurance company stock, and carry either little life insurance or none at all, they derived no substantial benefit from the decision. Its beneficiaries were the stockholders and perhaps in the long run the policyholders of certain life insurance companies, together with the issuers and owners of tax-exempt securities.

Four cases of small importance protected export trade against trifling ground that there the sovereign was acting as trustee of an express trust of the lands leased, a distinction without economic basis. . . . Apparently, immunity of lessees of government land is now to be the isolated exception, confined to facts so similar to those disclosed in the Gillespie and Coronado cases that judicial ingenuity cannot devise a verbal distinction." \textit{Developments in the Law: Taxation} (1934) \textit{47} Harv. L. Rev. 1209, 1213. \textit{Cf.} \textit{Constitutional Law: Taxation: Exemption of Governmental Instrumentalities} (1932) \textit{18} CORNELL L. Q. 77; \textit{Taxation—Constitutional Law—Test for Validity of Taxes on Governmental Instrumentalities} (1933) \textit{33} Col. L. Rev. 1075.

"In its application of the rule . . . that the instrumentality of one sovereign must be immune from taxation by the other, the Supreme Court has varied between a doctrinal approach which tends to condemn the tax falling in any degree upon a government instrumentality, and an economic analysis which may condone the tax whose burden upon the function is slight." \textit{47} Harv. L. Rev. 1209.

\textsuperscript{198}\textsuperscript{243-245, 42 Stat. 227, 261.}

\textsuperscript{199}277 U. S. 508, 524 (1928).

\textsuperscript{200}277 U. S. at 523.
burdens which the Court thought violated Section 9 of Article I of the Constitution: "No tax or duty shall be laid on articles exported from any state." In *Fairbank v. United States*, by a vote of five to four, this provision was held to invalidate a tax on export bills of lading, and a conviction and fine for issuing an export bill without the prescribed revenue stamp were reversed. As the tax was ten cents, regardless of the value of the export, it is obvious that few consignments could have been prevented or made unprofitable by its enforcement. In *United States v. Hoosler*, a tax of $3 to $10, according to the tonnage of the vessel, upon charter parties and similar documents, was held invalid with respect to the carriage of cargoes from American to foreign ports, and the taxpayer was allowed to recover back the amount he had paid. A War Revenue Act of 1917 taxed at two or three per cent various articles "sold by the manufacturer, producer, or importer." In *Spalding and Brother v. Edwards*, it was held unconstitutional to collect a 3 per cent tax on baseball bats which the manufacturer delivered to a carrier in New York, marked with the name of a customer in Venezuela. The sale was a "step in exportation." In *Thames and Mersey Insurance Company v. United States*, the Court annulled a tax of one-half of 1 per cent on insurance policies covering exports, and allowed the insurance company which had paid the tax to recover it. Evidently all these taxes were too small to have any substantial effect on the volume of the export trade. The decisions made that trade slightly more profitable to those who held stock in the companies concerned.

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201 U. S. 283 (1901).
202 U. S. 1 (1915).
203 § 600, 40 STAT. 300, 316.
204 262 U. S. 66 (1923).
205 262 U. S. at 68.
207 THE FUTURE TRADING ACT of August 24, 1921, 42 STAT. 187, imposed a tax of twenty cents per bushel on contracts for the sale of grain for future delivery, not made by owners, etc., unless made on boards of trade approved by the Secretary of Agriculture. In *Hill v. Wallace*, 259 U. S. 44 (May 15, 1922) the Supreme Court, in a suit brought by members of the Chicago Board of Trade, enjoined enforcement of the act as not within the taxing power because its purpose was "to compel boards of trade to comply with regulations, many of which can have no relevancy to the collection of the tax," and not within the commerce power because sales of futures were not commerce and it did not appear that they interfered directly with interstate commerce.

Shortly after that decision, Congress passed a GRAIN FUTURES ACT, 42 STAT. 998 (Sept. 21, 1922), which restricted transactions in futures to approved boards of trade, and subjected them to regulations very similar to those of the FUTURE TRADING ACT, with the important exception that the new statute imposed no tax. It contained an express declaration that "speculation, manipulation and control" in the futures market were producing "sudden and unreasonable fluctuations" in prices, and were "an obstruction to and burden upon interstate commerce." In *Board of Trade v. Olsen*, 262 U. S. 1 (1923), the Court, relying largely upon that congressional assertion, upheld this act and denied the Chicago Board of Trade an injunction to restrain its enforcement. In *Trusler v. Crooks*, 269 U. S. 475 (1926), the Court thereafter held unconstitutional the collection of the tax imposed by the earlier act on an unauthorized option contract for the sale of wheat for future delivery. The consideration paid for the option was $1 per
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VIII. CASES IN WHICH JUDICIAL SUPREMACY PROTECTED PRIVATE INCOMES, GIFTS, AND INHERITANCES AGAINST TAXATION

(a) Income Tax Cases.

A Massachusetts probate judge paid, under protest, the federal income tax upon his salary, under the laws of 1864 to 1867. He sued to recover the tax. In Collector v. Day\(^{208}\) the Court, Justice Bradley dissenting, affirmed a judgment in his favor, on the ground that a federal tax upon the salary of a state officer is an unwarranted interference with the State government.

The decision confers a special privilege upon state officers and employees. To the extent that this privilege strengthens the bargaining position of states in competing for services, and leads persons to prefer state employment to other employment at the same salary, it promotes the interests of state governments, at the expense of the federal government; but this tendency is obviously slight and, except in rare instances, without actual effect. Under the present federal income tax law, for example, a married man with two children pays no tax on the first $3300 of his income; and it follows that most state salaries would not be taxed substantially, or at all, if the Court permitted the government to tax them. It is highly improbable that the judge who recovered $61.50 in the Day case would have preferred alternative employment and resigned his judgeship if he had been compelled to pay the tax of about $16 a year from which the decision relieved him, and which he would have had to pay if he had derived the same income from the practice of law or other private employment. The notion that the economical and efficient administration of state governments would have been prevented if the federal government had been permitted to continue treating state employment, for tax purposes, like other employment is as baseless as it would be to suggest that the Standard Oil Company cannot be operated economically and efficiently because its employees pay the same tax on their salaries that is paid by other employees. No doubt a special tax upon state employees would put the state at a disadvantage, but no special tax was attempted. Moreover, when the Court decided, in the Day case, that the United States could not impose a tax upon the income from a state office, it had already laid down the converse proposition that a state cannot tax the holding of a federal office.\(^{209}\) Taking the two doctrines as a unit, whatever trifling benefit they may confer upon either government, state or federal, as

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\(^{208}\) 11 Wall. 113 (U. S. 1870).

\(^{209}\) Dobbins v. Commr. of Erie County, 16 Pet. 435, 448 (U. S. 1842).
employer, is more than offset by the restrictions which they impose upon the
same government as a taxing power. The only beneficent effect, then, of the
doctrine of Collector v. Day is to confer an economic privilege upon a few of
the best-paid office holders.

A case of the greatest importance is Pollock v. Farmers Loan & Trust
Co.\textsuperscript{210} The statute imposed a 2 per cent tax upon incomes, from whatever
source derived, with certain exceptions and a $4000 exemption. A stock-
holder in the defendant trust company sued to restrain the company from
paying the tax. On the original hearing, the Supreme Court decided that
the tax was unconstitutional with respect to the income from real estate,
as being “direct” and not apportioned among the states according to popula-
tion;\textsuperscript{211} and also with respect to the income from municipal bonds, as being
an interference with the power of states to borrow money. On rehearing,
the Court held that the tax on income from personal property was also unconsti-
tutional, because “direct” and not apportioned, and that the entire income
tax law was therefore invalid. The Court was sharply divided in both cases.
Income taxes had previously been in force for many years, and had been
upheld by a unanimous court in \textit{Springer v. United States}.\textsuperscript{212}

The incidence of income taxes, in general, and of the one involved in
the \textit{Pollock} case in particular, is not a matter of doubt. That tax fell, as
any income tax falls, upon the comparatively well-to-do and the rich. Ana-
tole France observed that the law is no respecter of persons, since it forbids
rich and poor alike to beg their bread or sleep under the bridges. The social
philosophy which he satirized was gravely expressed in Mr. Justice Field’s
concurring opinion. The income tax “discriminates,” he said, “between those
who receive an income of $4000 and those who do not. It thus vitiates, in
my judgment, by this arbitrary discrimination, the whole legislation.”\textsuperscript{213}
He did not realize that a given exaction from a man barely able to keep him-
self alive is a heavier burden than an exaction many times as great from a
man in easy circumstances. The Court lagged behind Congress, as legisla-
tures lag behind students of society, in recognizing that all men are not
created equal, and that when two people do the same thing, it is not the
same thing.

The advantage to the rich, and the baneful effect upon the poor, of \textit{Pollock
v. Farmers Loan and Trust Company}\textsuperscript{214} are evident from the change in the
federal tax structure which followed the recall of the decision, eighteen years
later, by the Income Tax Amendment. The sixteenth Amendment was ratified

\textsuperscript{210}157 U. S. 429, 158 U. S. 601 (1895).
\textsuperscript{211}1U. S. Const., Art. I, § 2.
\textsuperscript{212}102 U. S. 586 (1880).
\textsuperscript{213}157 U. S. at 596.
\textsuperscript{214}Warren lists the Pollock case among those the effect of which upon the country “can
be easily passed over” on the ground that it “was cured by the 16th Amendment”. CON-
in 1913. "In 1913 . . . taxes on commodities in the country or at its ports yielded 94.6 per cent of all federal tax revenues. In 1930, taxes on personal and corporation incomes yielded 66.5 per cent of all federal revenues. Taxes on commodities provided only 29.5 per cent."216 It is elementary that, as compared to the income tax, commodity taxes fall heavily on the relatively poor. Although not all commodity taxes are wholly passed on to the consumer, the tax is usually passed on. Although a poor man buys fewer commodities than a rich man, he does buy commodities. The poor man, on the other hand, escapes the income tax.

Only a small proportion of the people of the country are in the income-tax class. In 1929, according to the Brookings Institution, "Nearly 6 million families, or more than 21 per cent of the total, had incomes less than $1000. About 12 million families, or more than 42 per cent, had incomes less than $1500. Nearly 20 million families, or 71 per cent, had incomes less than $2500. Only a little over 2 million families, or 8 per cent, had incomes in excess of $5000. About 600,000 families, or 2.3 per cent, had incomes in excess of $10,000."218 In 1929, the number of individuals who filed income tax returns was 4,044,327, and of these only 2,458,049 were taxable.217 In 1932, 3,877,430 filed returns and 1,936,095 were taxable.218 The burden of the income tax, then, falls wholly on a small and relatively well-to-do minority. From that burden the Pollock case defended that minority for many years.

Moreover, the Pollock case conferred its greatest benefit upon the most prosperous, as it is upon them that the income tax imposes its greatest burden. The concentration of income in the higher brackets, which are subject to mounting surtaxes, is great. In 1929 "the 11,653,000 families with incomes of less than $1500 received a total of about 10 billion dollars. At the other extreme, the 36,000 families having incomes in excess of $75,000 possessed an aggregate income of 9.8 billion dollars. Thus it appears that 0.1 per cent of the families at the top received practically as much as 42 per cent of the families at the bottom of the scale."219 The 42 per cent at the bottom paid practically no income tax. The 0.1 per cent at the top paid a great deal of income tax. Of the many millions of individuals whose incomes were less than $2000 in 1929, only 487,642 paid any federal income tax.

216Kendrick, Taxation Issues (1933) p. 25.
218For this quotation, the statistics which follow, and other valuable suggestions, I am indebted to Professor M. Slade Kendrick of the Department of Economics in Cornell University.
221America's Capacity to Consume, supra note 216, p. 56.
whatever. Their total tax was $570,726, their average tax a little over one dollar, and together they paid .07 per cent of the total income tax. The 20,224 individuals who reported incomes above $80,000 paid a total tax of $707,765,592; their average tax was about $35,000, and together they paid 70.62 per cent of the total income tax.220

The sixteenth Amendment authorized Congress to "lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States . . . " The expectation that Congress could thereafter tax everything within the popular understanding of "income" was disappointed. The Income Tax Act of 1916221 provided that a stock dividend, made out of the earnings or profits of a corporation, "shall be considered income, to the amount of its cash value." The Standard Oil Company of California, with a capital of some $50,000,000, distributed out of its earned surplus and undivided profits a stock dividend of 50 per cent. In Eisner v. Macomber,222 the Court held that the Constitution forbade taxing this dividend to the recipients, and a taxpayer recovered from the Collector of Internal Revenue the $19,877 which she had paid. It was a direct tax; it was not apportioned among the states; and, according to the Court, it was not a tax on income. Four justices dissented. Mr. Justice Brandeis thought that the decision enabled "the owners of the most successful businesses in America . . . to escape taxation on a large part of what is actually their income."223 Probably "so far as Eisner v. Macomber turns on economic issues, the majority has much the better of the argument";224 economists do not regard stock dividends as income. Yet "no type of what is ordinarily considered as income can be exempted from taxation without creating a sense of injustice in the community. In common Wall Street parlance a stock dividend is spoken of as 'cutting a melon'."225 Obviously the decision saved the well-to-do minority, in the long run, from a large amount of taxation. One of its remote consequences is perhaps the recent federal legislation subjecting undistributed corporate surpluses to taxation.226 Yet Eisner v. Macomber has been gradually limited somewhat closely to its facts. It does not prohibit the taxation as income of shares of a new company received in connection with a reorganization;227 nor, it has recently been declared, of shares

220 Based on Statistics of Income for 1929, supra note 217, pp. 61, 65.
221 39 Stat. 756, 757.
222 252 U. S. 189 (1920).
223 252 U. S. at 237.
224 Powell, Stock Dividends, Direct Taxes, and the Sixteenth Amendment (1920) 20 Col. L. Rev. 536, 548.
225 Seligman, Implications and Effects of the Stock Dividend Decision, (1921) 21 Col. L. Rev. 313, 331.
of common voting stock received as a dividend on non-voting cumulative preferred stock. "Where a stock dividend gives the stockholder an interest different from that which his former stockholdings represented he receives income."\(^2\)\(^2\)

In *Evans v. Gore*,\(^2\)\(^2\) a United States district judge sued to recover money paid under protest as an income tax. Article III, Section 1, of the Constitution provides that "the judges, both of the supreme and inferior courts" shall receive "a compensation, which shall not be diminished during their continuance in office". Although the sixteenth Amendment expressly authorizes the taxation of "incomes, from whatever source derived," the majority of the court held in effect that the earlier constitutional provision governed the later; income derived by a United States judge as compensation from the United States could not be taxed, as it would interfere with the independence of the judiciary. Justice Holmes, in a dissent in which Justice Brandeis joined, observed that "to require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge."\(^2\)\(^3\)\(^0\) To tax judicial salaries at a higher rate than other income might conceivably have such an effect; but no such proposal was in issue. It seems clear that the only interests which the decision served were those of judges of the United States Courts, including the Supreme Court, in escaping taxation. The salaries of these judges range from $10,000 to $20,500.

The decision in *Evans v. Gore* "would seem to have no application to judges appointed after the law taxing their income was first enacted."\(^2\)\(^3\)\(^1\) But in *Miles v. Graham*\(^2\)\(^3\) the Court held that the Constitution exempted from income tax the salary of a Court of Claims judge who was appointed after the passage of the tax law. Justice Brandeis dissented. So far only as the Court of Claims itself it concerned, the case is in effect overruled by *Williams v. United States*,\(^2\)\(^3\)\(^3\) which decided that that court is not con-

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\(^{223}\)Koshland v. Helvering, 298 U. S. 441 (1936). The decision was that the dividend did not constitute a partial return of capital to the shareholder, so as to reduce the cost to him of his preferred shares and increase his profit on a sale of those shares.

\(^{224}\)For many years the Revenue Acts provided that "A stock dividend shall not be subject to tax." 42 Stat. 227, 228 (1921); 48 Stat. 712 (1934) § 115 (f). Immediately after the Koshland case the Revenue Act of 1936 substituted a provision which reads in part [§ 115 (f)]: "(1) General Rule. A distribution made by a corporation to its shareholders in its stock or in rights to acquire its stock shall not be treated as a dividend to the extent that it does not constitute income to the shareholder within the meaning of the Sixteenth Amendment to the Constitution." 49 Stat. 1687, 26 U. S. C. A. (Supp. 1936) § 115 (f).

\(^{225}\)253 U. S. 245 (1920).

\(^{226}\)Id. at 265.


\(^{228}\)268 U. S. 501 (1925). For an account of subsequent statutory effort, probably ineffectual, to obviate this decision, see *Provisions of Federal Law Held Unconstitutional by the Supreme Court of the United States* (Library of Congress, 1936) p. 57.

\(^{229}\)289 U. S. 553 (1933).
stipulated under Article III, Section 1, of the Constitution and that it members are, therefore, not covered by the ban against salary reductions.254

Two income tax cases are discussed in the previous section of this article, because of their relation to business enterprises.235

(b) Inheritance and Gift Taxes

On June 27, 1907, Massachusetts adopted an inheritance tax statute,236 to become effective on September 1, 1907. On July 29, 1907, a wealthy Massachusetts couple transferred property worth several hundred thousand dollars to trustees, without consideration. The trustees agreed to pay the income to the settlors and the survivor, and then to distribute the fund among the settlors’ five children or their representatives. In addition to the motive of parental affection and the financial necessities of some of the children, “there was also a recognition of the fact that under the provisions of chapter 573 [563] of the Acts of 1907 the Massachusetts Legislature had provided for a direct inheritance tax, which . . . would become effective on September 1, 1907,” and the settlors “were advised that gifts made to their children previous to that date would not fall within the scope of the Act.”237 After the death of one of the settlors in 1921, the question arose whether the amount then in the trust fund, some $432,000, was subject to a federal estate tax under the Revenue Act of February 24, 1919,238 which directed the inclusion in gross estate of the value of all property “to the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in a case of a bona fide sale for a fair consideration in money or money’s worth.” The Supreme Court held that the trust property

254Booth v. United States, 291 U. S. 339 (Feb. 5, 1934), is technically outside the limits of this article because of the date (June 6, 1933) of the attempt of Congress, which the Court thwarted in that case, to reduce the salaries of “retired” United States judges. As the Court pointed out, although the judges in question were nominally retired, they could be and were called upon from time to time for judicial services.

236O'Donoghue v. United States, 289 U. S. 516 (1933), which is included in Warren's list of cases overruling acts of Congress, overruled only an interpretation by the Comptroller General. The statute, in making a general reduction of government salaries, expressly excepted “judges whose compensation may not under the Constitution be diminished during their continuance in office.” The Comptroller General was held to be wrong in applying the reduction to the salaries of judges of the Court of Appeals, and of the Supreme Court, of the District of Columbia.


238C. 563.


238C. 18, § 402e, 40 Stat. 1097.
was conveyed to the trustees “before the enactment in entire good faith and without contemplation of death,” and that the statute as applied to the property in question was, therefore, “so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment.” As inheritance taxes are levied only upon death, it would seem that one who contemplates avoiding a state inheritance tax, as the settlors did, by hypothesis contemplates death. It may be said in the Supreme Court’s favor that it perhaps did not have before it the admission of the settlors in Coolidge v. Loring, quoted above, that one of their motives was the avoidance of the Massachusetts inheritance tax. It is none the less true that the only interests which were actually and immediately protected by the decision in Nichols v. Coolidge were the interests of a wealthy family in achieving, free of death tax, a transfer undertaken in contemplation of death.

In February, 1924, a proposal to tax gifts was presented in Congress. A conference report on the bill went to the Senate on May 22, 1924. On May 23, one Untermeyer made a gift. By May 25, the tax bill had finally passed both houses. The President approved it on June 2. In Untermeyer v. Anderson, the Supreme Court, three justices dissenting, held that, as the gift was made before the bill became a law, the tax as applied to the gift was “arbitrary” and therefore invalid under the due process clause of the fifth Amendment. The retroactive features of income taxes, on the other hand, have been repeatedly upheld. As Justice Brandeis pointed out in his dissent, “For more than half a century, it has been settled that a law of Congress imposing a tax may be retroactive in its operation . . . Each of the fifteen income tax acts adopted from time to time during the last sixty-seven years has been retroactive, in that it applied to income earned, prior to the passage of the act, during the calendar year . . . Some of the acts have taxed income earned in an earlier year.” Solicitous as the Court has been to protect income, which may or may not be earned, in the Untermeyer case it showed a greater solicitude for gifts, which are by definition unearned. The well-to-do persons who give or receive large gifts became the beneficiaries of a new principle. They not only may not be taxed on gifts, as one may upon income, made before the tax is proposed; they may not even be taxed upon gifts made during the last stages of the passage of the tax law. The case would doubtless be followed so as to permit increases in the gift tax to be similarly evaded.

The Court again protected gifts in Heiner v. Donnan. The Revenue

240276 U. S. 440 (1928).
241276 U. S. at 447, 448.
242285 U. S. 312 (1932). Handy v. Delaware Trust Co., 285 U. S. 352 (1932) is to the same effect.
Act of 1926 provided that gifts, beyond the first $5000 to any one person, made within two years prior to the death of the giver, should be "deemed and held to have been made in contemplation of death," and should be included in the decedent's gross estate subject to the death transfer tax. This provision was held to violate the due process clause of the Fifth Amendment. As an estate tax, the Court thought, it denied to the taxpayer the right to prove facts, and as a gift tax it was unreasonably arbitrary. Justices Stone and Brandeis dissented. They said, "The fact that such gifts, made shortly before death, regardless of motive, chiefly contribute to the withdrawal of property from the estate tax, is enough to support the selections, even though they are not conscious evasions of the estate tax, and opprobrious epithets cannot certainly be applied to them." They cited many instances in which wealthy persons had died shortly after making large gifts, and the government had been unable to prove that the gifts were made in contemplation of death. By the legislation which the court annulled in *Heiner v. Donnan*, Congress had attempted to reach such gifts. "The fiscal necessities of the government and the taxing temper of Congress are such that *Heiner v. Donnan* must appear to be the ill-timed posing of a riddle as to how an admittedly legitimate object of taxation may be taxed."

IX. ADDITIONAL CASES IN WHICH JUDICIAL SUPREMACY PROTECTED PROPERTY INTERESTS

The two cases now to be discussed constitute, together with *Jones v. Meehan* and *Choate v. Trapp*, a small unclassified residue of instances in which the action of the Supreme Court in overruling Congress protected the interests of property owners.

In 1860, Hepburn made a note payable on February 20, 1862, to Griswold. On February 25, 1862, during the Civil War, Congress passed the Legal Tender Acts, which made United States notes legal tender in payment of debts. In 1864 Hepburn tendered principal and interest in United States notes, which were greatly depreciated in terms of specie. In 1870, in *Hepburn v. Griswold*, the majority of the Court held that, as applied to

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243 § 302a, 44 Stat. 9, 70.
244 285 U. S. at 340.
246 *Infra* note 257.
247 224 U. S. 665 (1912). Because of the 5th Amendment and special status of Indians, the Court held that Congress, after conferring upon lands allotted to Choctaws and Chickasaws an immunity from taxation while the title remained in the original allottees, could not withdraw the immunity so as to subject the lands in the hands of the allottees to State taxation.
248 33, § 1, 12 Stat. 345.
249 8 Wall. 603 (U. S. 1870).
debts created before its passage, the statute was not within the power "to coin money, regulate the value thereof," and was unconstitutional. The decision obviously was a great boon to creditors, and deprived borrowers, i.e., the enterprising and the propertyless classes, of the protection which Congress had sought to give them. It was welcomed by The Nation, at that time an organ of conservative opinion. On February 17, 1870, The Nation said: "Those who have read the opposing opinions of Chief Justice Chase and Judge Miller on the legal tender case, must have felt that whatever the defects in the reasoning of the former, or the awkwardness of his position in having to condemn on the bench what he had actually done and tried to justify as Secretary of the Treasury, the moral right was on his side . . . men ought to be made to pay what they agreed and expected to have to pay." The direct effect of Hepburn v. Griswold was limited to a little more than a year. It was decided by a vote of five to three. Soon after, one member of the majority of the Court resigned and two new judges were appointed; and a few months later, in the Legal Tender Cases, a divided court overruled Hepburn v. Griswold.

A statute passed in 1863 required claimants of captured or abandoned property in the hands of the United States to make proof of their consistent loyalty to the United States during the Civil War. A statute of 1870 provided that no pardon or amnesty should be admissible to establish such a claimant's right to sue, but that, on the contrary, the acceptance, without protest, of a pardon which recited previous participation in the "rebellion" should conclusively disqualify a claimant both in the Court of Claims and on appeal. One Wilson, after supporting the Confederacy, had come within the terms of a presidential amnesty; and the Court of Claims, before the passage of the Act of 1870, had given judgment in favor of his administrator for the price of certain cotton abandoned to the United States during the war. In United States v. Klein, the Supreme Court affirmed this judgment, and held that the provisions of the Act of 1870 were unconstitutional interferences with judicial power, as prescribing the decision of cases, and with the executive power as limiting the force of pardons. The claim upon which the plaintiff recovered was for $125,300. It is obvious that persons who had claims against the government large enough to be worth suit, together with the means to sue, had been more prosperous than the average; but many of the beneficiaries of United States v. Klein had lost their property in

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12 Wall. 457, 528, 553 (U.S. 1870).
16 Stat. 235.
13 Wall. 128 (U.S. 1871).
12 Stat. 820.
In the Legal Tender Cases, 110 U.S. 421 (1884), it was decided that Congress might pass a valid legal tender act even in time of peace.
the Civil War. This decision, together with *Ex parte Garland*,\textsuperscript{525} *Justices v. Murray*,\textsuperscript{266} and the cases which annulled pro-Negro legislation make up a group which tended somewhat to cushion the shock of the war and reconstruction in the South.

**CONCLUSION**

To repeat, with motives, and with the relative reasonableness of conflicting congressional and judicial views on vague standards like interstate commerce and due process, this paper is not concerned. It is concerned only with the practical effects and tendencies of judicial supremacy. The discussion might be expanded by considering acts of Congress which the Supreme Court has upheld against attack. But apart from the period of uncertainty which precedes the decision, judicial supremacy produces, in connection with a statute which is upheld, no effect whatever, since the statute would necessarily be upheld if there were no such thing as judicial supremacy. Some of the cases in which the Supreme Court has annulled state legislation have had more effect than many in which it has annulled acts of Congress. But cases involving state legislation, besides being too many to be treated in an article, are foreign to the subject of this one. The supremacy of courts over state legislatures and the supremacy of courts over Congress stand on different ground. If the one sort of control is a practical necessity, it does not follow that the other is; and if the one sort has protected certain interests it does not follow that the other has protected like interests. In the control of state legislation there have been deviations, including certain free speech cases, from the pattern of the federal cases. What should be done about the one sort of control and what should be done about the other are different questions.

Exhaustive investigation would reveal more than this brief inquiry about the effects of many of the decisions. It might modify the views expressed here regarding some of them. It is unlikely that it would seriously qualify the conclusions which follow.

Of the pre-New Deal cases in which the Supreme Court annulled acts of Congress,\textsuperscript{287} one group protected mistreatment of colored people; another

\textsuperscript{252} Supra note 52.
\textsuperscript{266} Supra note 26.
\textsuperscript{287} In general, it has been assumed that Warren's list of these decisions [CONGRESS, THE CONSTITUTION AND THE SUPREME COURT (1935) pp. 304 ff.] is complete. All the cases involving pre-New Deal statutes which he cites, plus the Knight case, 156 U. S. 1, have been considered, except the following unimportant cases:

\begin{enumerate}
\item Reichart v. Felps, 6 Wall. 160 (U. S. 1868).
\end{enumerate}

A statute of 1812, 2 STAT. 677, authorized a board to re-examine land titles which had been confirmed pursuant to an earlier statute. The board made a report adverse to a patentee, and "the government by its proper officers" sold the land at public sale. The new purchaser brought ejectment against the successor of the patentee. The
group protected businesses or business methods hurtful to the majority; another, comprising employers' liability, workmen's compensation, minimum wage, child labor, and union membership cases, protected owners of business at the direct expense of labor; another protected owners of business against taxation; another protected the recipients of substantial incomes, gifts, and inheritances against taxation; and other cases protected the interests of property owners in other ways. Not many cases of any importance fall outside these categories. A few decisions were approximately

Supreme Court affirmed a judgment for the defendant. As the statute had directed, not the nullification of titles, but merely an inquiry and report concerning them, the court's statement that Congress had no power to nullify them was dictum. Obviously its tendency was favorable to the protected group.

(2) The Alicia, 7 Wall. 571 (U. S. 1868).

An application was made by all the parties in interest, in a prize case pending in a Circuit Court, for its transfer to the Supreme Court. The Court held that the statute permitting transfer under such circumstances, 13 Stat. 311 (1864), was unconstitutional, on the ground that the Constitution allows the Supreme Court in prize cases appellate jurisdiction only.


"Congress conferred on named Indians the privilege of suing in the Court of Claims to determine the constitutionality of a prior Act of Congress. There was no evidence that the Indians named had any personal interest in the matter, that any property of theirs could be affected by the decision, or that any party or officer had any adverse interest. The elements of an adversary proceeding involving plaintiffs' or defendants' interests were lacking." Borchard, Declaratory Judgments (1934) p. 279. The Court held that no "case" or "controversy" was involved, and directed the Court of Claims to dismiss. In Liberty Warehouse v. Grannis, 273 U. S. 70 (1927), the Court relied in part on the Muskrat case in refusing to render a declaratory judgment pursuant to a Kentucky statute. Professor Borchard points out that the Muskrat case is entirely distinguishable from actions for a declaratory judgment.

(4) Coyle v. Oklahoma, 221 U. S. 559 (1911).

The Enabling Act under which Oklahoma was admitted as a state forbade removal of the state capital before 1913. The state legislature moved the capital prematurely. Taxpayers who owned property at the old site sought to prevent the removal. The court held that Oklahoma would not be a "State", or admitted to the union, if unable to move its capital, and that its admission therefore invalidated the restriction. While property owners at the old site were denied protection, those at the new site received protection.

(5) Keller v. Potomac Electric Power Co., 261 U. S. 428 (1923). A statute (37 Stat. 938, 988, c. 150, § 8) authorizes appeal from the Court of Appeals of the District of Columbia to the United States Supreme Court in valuation and rate proceedings which originated in the local Public Utilities Commission. The court held that the statute attempted to confer upon the court legislative or administrative jurisdiction and was therefore invalid.

The list recently published by the Library of Congress, Provisions of Federal Law Held Unconstitutional by the Supreme Court of the United States (1936), includes the following two non-New Deal cases which are not in Warren's list (one of which is too recent). Jones v. Meehan, 175 U. S. 1 (1899). Congress by joint resolution (28 Stat. 1018, 1894) sought to validate a lease of land to A, made by an Indian who had previously leased it to B. In a suit between the two lessees, brought to quiet title, the court held that Oklahoma would not be a "State", or admitted to the union, if unable to move its capital, and that its admission therefore invalidated the restriction. While property owners at the old site were denied protection, those at the new site received protection.

United States v. Constantine, 296 U. S. 287 (1935). The Revenue Act of 1926 (44 Stat. 95 § 701) imposed a "special excise tax of $1000" on liquor dealers carrying on business in violation of State or municipal laws and a "penalty" of $1000 for carrying on the business without paying the tax. The Court, three Justices dissenting, held that the "penalty" could not be enforced after the repeal of the 18th Amendment. Although this case was decided in 1935, it is within the limits of this article because the statute was passed before 1933.
neutral in their incidence as between different social groups. Rich and poor were given theoretically equal assurance that for various offenses they must be indicted before they are tried, and must be tried by a jury of twelve. But few persons ever find themselves in a position to be affected by such decisions, and any benefit which they may confer is uncertain, slight, and probably less equal in practice than in theory. Moreover, the statutes which those decisions annulled were limited to Chinese, to Alaska, or to the District of Columbia, and there is no reason to assume that their principle would have been extended, as the principle of the minimum wage would obviously have been extended, if its local application had been upheld. There is not a case in the entire series which protected the "civil liberties" of freedom of speech, press, and assembly; on the contrary, over the protest of Holmes and Brandeis, the Espionage Act was not merely upheld but extended by the Court. There is not one which protected the right to vote; on the contrary, congressional attempts to protect the voting rights of Negroes were defeated by the Court. There is not one which protected the vital interests of the working majority of the population in organizing or in wages; on the contrary, congressional efforts to protect those interests were frustrated by the Court.

So much is objective, more or less. Subjectively, according to one's social philosophy, it may follow that judicial supremacy over Congress is good, bad, or indifferent. The cult of "the Constitution", which contemplates chiefly this power of the courts, illustrates the connection between conventional standards and the interests of dominant groups. In one who identifies the country with the well-to-do minority of its population, enthusiasm for judicial control over Congress is as logical as enthusiasm can be. It is hard to see why, apart from convention, one who does not make that identification should share that enthusiasm. When a legal scholar says, "I am for continuance of the Supreme Court's power of review. I think that it has proved its worth . . . . I think that over the long haul the Court has done a superb job," I wonder what cases seem to him so valuable as to outweigh the Dred Scott case, which helped to entrench slavery; the Civil Rights and related cases, which protected the oppression of Negroes; the employers' liability and workmen's compensation cases, which denied relief to injured workmen; the child labor and minimum wage cases, which protected the hiring of women and children at starvation wages; the income tax cases, which prevented the shifting of tax burdens from the poor to the rich; and the many minor instances in which the Court's review has done harm to common men.

259 Llewellyn, Proposed Amendment (Feb. 1937), SURVEY GRAPHIC p. 89. The quoted statements refer to the Court's review of all legislation, state and federal. Llewellyn would, however, forbid annulment by less than two-thirds of the Court's members.