DECISIONS OF THE SUPREME COURT NECESSITATING

A NEW TYPE OF POLICE POWER

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DECISIONS OF THE SUPREME COURT NECESSITATING

A NEW TYPE OF POLICE POWER

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CHAPTER I

INTRODUCTION

The Supreme Court, in its role of the ultimate interpreter of the written Constitution, has incidentally laid down rules, or policy on rules, as it has endeavored to decide the cases brought before it. A rule, or a policy of any government of people, must be accompanied by enforcement in order that it be made effective. It will be the purpose of this study to investigate historically and presently the instances in which the Supreme Court has made judgments which have entered into the broad field of policy-making, and to follow this historical thread to its present conclusion to discover if our present distribution of the police power is sufficient for effective enforcement under these circumstances.

At no time in the history of the American government has this high tribunal fallen under such severe criticism as it has at the present time. There are discussions proceeding in every section of the land concerning the powers of the Supreme Court, and what must be done about these powers. Some feel that the orders of the Court may be ignored; others feel that some measures must be taken through
legislative proceedings which will curb the powers of this body. Whatever remedies are offered, the fact remains that the public is taking notice of the actions of the Court, much more than it ever has, because the decisions of this tribunal are reaching ever-increasing numbers of individuals because of the scope of these decisions.

This question, or problem, borders closely upon a multitude of other important Constitutional questions, and at times is difficult to separate from them; however, an effort will be made to narrow the field to the pertinent information. In the process of "sorting out" the information, the voluminous accounts of the ever-present clash between local, or state and federal, search for power will have to be pointedly avoided; the role of the legislature in this duel will be avoided as well as the role of the executive, for in these questions there is ample information and interest for other studies. This study will remain with the role of the Supreme Court, and then only with its role in the character of interpretation as far as the necessitation of a new type of police power is concerned.

The government of the United States has no internal police force, per se, and the decisions of the federal courts, including those of the Supreme Court, must depend upon either Federal marshals or upon the body of state police forces for enforcement. It is this dependency upon the state police force on the part of the central
government, and the new tendency of the public to question the decisions of this government's judicial voice, which gives justification for a study of this type. De Tocqueville said of this lack of national, or central police power:

... But the central government is not represented by an individual whose business it is to publish police regulations and ordinances enforcing the execution of the laws; to keep up a regular communication with the officers of the township and the country; to inspect their conduct, to direct their actions, or to reprimand their faults. Their is no point which serves as a center to the radii of the administration.

It shall be necessary to delve into historical background in order to discover why the governmental system was thus established, and to see how the Supreme Court finds itself in the position in which this type of police power is now seriously questioned. The importance of historical background in a study of constitutional questions is often overlooked, or at best, made light of. Anderson sums up this importance:

A Constitution is not just a written document or a thing of today only. It is a body of ever-changing basic rules of government. It is an essential part of the historic development and traditions of the people. It is developed by the leaders and forces in society that are dominant at the time, in the light of the needs

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1 Alex de Tocqueville, Democracy in America; The Republic of the United States of America, and Its Political Institutions Reviewed and Examined (New York, no date given), pp. 73-75.
they feel, the ideas they hold and the intentions they express for improving the government.²

While realizing the importance of the historical background, an attempt will be made not to "bog" down in history and lose sight of the more recent developments in this field, and their importance to the study. It is within this scope and within these definitions that this study will be presented.

PART II

HISTORICAL BACKGROUND: THE CONSTITUTIONAL CONVENTION

A study of Constitutional history should begin with the Constitutional Convention of 1787, for it was there that the ideas which went into the formation of the document which serves as the basis for all governmental activity were discussed and presented.

The delegates to the Constitutional Convention had been selected to revise the original Articles of Confederation, which had proven too weak in nature to hold the new nation together. These men met with a seriousness of purpose which later proved fortunate. Early in the Convention it was decided by several factions of delegates that the best course for them was to draft a new Constitution, not revise the weak Articles. Of course, there was much dissent to this point of view, for several of the delegates felt that this course would be taking powers into their own hands which had not been given them by the people of their respective states. Kelly says of this decision on the part of the delegates:

The Convention had thus committed itself to a serious breach of its authority. Called to amend the Articles a majority of the delegates had boldly decided to disregard their instructions and instead to create an entirely new frame of
government. Only the tremendous prestige of many of the delegates and the common recognition of national danger could secure acceptance of their work.

Perhaps the greater of the two reasons given for the acceptance of the work of this Convention was that of the great prestige of the members of that meeting. These people consisted of heroes of the recent Revolution, leaders of the people who had won the respect of the people during a decade of trouble for the new nation. These men made up as distinguished and brilliant a body of statesmen as America could have brought together. Most of the delegates had had long experience in public office and were to give further service in the new government which they were about to create. George Washington, who had been persuaded, at great personal expense, to attend the Convention, was given the chair of the presiding officer, thus adding his great prestige to the proceedings at the meeting. He took little part in the proceedings themselves, but by his mere presence, aided the delegates in reaching compromises and attending their business.

The Convention consisted of basically two factions, the large state bloc, who were nationalistic in nature, and the small state bloc who were federalistic in nature. It was between these two factions that most of the arguments were originated concerning spheres of government which was

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one of the most important questions of the convention. The large state bloc embodied the delegations of Massachusetts, Pennsylvania, and Virginia, with support on occasions from the delegations of North Carolina, South Carolina, Georgia and Connecticut. The small state bloc was composed of the delegates of New Jersey, Delaware, Maryland and New York, with occasional assistance from Connecticut and Georgia.2

The first point of interest to this study, which came up during the Constitutional Convention, was the proposal of the Virginia Plan by Edmund Randolph on May 27, 1787. This was the first point of departure from their original duties of amending the Articles, for this plan provided for the creation of a legislative body of two chambers, the lower to be elected by the people of the respective states and the upper to be chosen by the lower house from nominations submitted by the state legislatures. Besides giving the members of Congress the powers which had been theirs under the Articles, they also gave them "the right to legislate in all cases in which the separate States are incompetent." A national judiciary was to be established, consisting of one or more supreme courts, and such inferior tribunals as the legislature might determine. Federal judicial authority was to extend to all cases involving piracies and felonies on the high seas, captures from an

2Kelly, op. cit., pp. 124, 125.
enemy, foreigners or citizens of different states, collection of the national revenue, impeachment of national officers and questions involving national peace and harmony.

The Virginia Plan contained "an exceedingly nationalistic solution for the problem created under the Articles of Confederation by the absence of any mechanism for defining the respective spheres of the central government and the states." The Articles had failed to provide some sort of an arrangement by which the central government and the state governments could each exercise their effective jurisdiction without intruding upon the functions entrusted to the other, and which would settle any disputes which might arise as to the extent of state and national power. This is the problem which has been long unsolved in our governmental system of dual federalism, and which still feeds the fires of arguments between the supporters of both types of governments, strong local and strong central.

The Virginia Plan employed several means of attempting to cure these evils. It gave Congress the power to negate state laws; it gave them a broad and indefinite grant of legislative authority in all cases where the states were "incompetent." Kelly says of this power:

It is not clear from the phraseology whether the plan intended to give Congress the power to alter

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3Kelly, op. cit., p. 122.
at will the extent of its authority and that of the states; at the very least, however, the plan proposed to solve the problem of federalism by giving Congress the power to define the extent of its own authority and that of the states.\footnote{Ibid., pp. 123, 124.}

Accompanying the disallowing provisions was a clause which gave Congress the power to coerce a state. Congress was authorized "To call forth the force of the Union against any member of the Union failing to fulfill its duty under the articles thereof." This provision immediately followed that which gave Congress the apparent authority to name its own limitations, and this seemingly gave it the authority to back up its own interpretations; however, there were those who felt that this was intended to mean that the national government merely had more power to exact a more conscientious performance from the states. The Virginia Plan went before the Committee of the whole house, and at that time, at the suggestion of delegate Randolph, a new resolution was substituted which stated: "that a national government ought to be established consisting of a supreme Legislative, Executive, and Judiciary."\footnote{James Brown Scott, James Madison's Notes of Debates in the Federal Convention of 1787 and their Relation to a More Perfect Society of Nations (New York, 1918), p. 29.} Several delegates from the small state bloc objected to this new resolution, insisting that with its acceptance state sovereignty was to be obliterated and replaced by this new and powerful
national government. The resolution was, nevertheless, passed, receiving the votes of all the delegations except that of Connecticut.

According to the Virginia Plan the new national government was to be truly national in its character because it would operate directly upon individuals, rather than upon the states, and it would possess its own agents, courts, attorneys, marshals, revenue officers and the like to carry out its functions and to impose its will. It was at this point that the framers thought of the idea that any effective government must have its will enforced, and it was here that they could have more clearly defined the spheres of powers of the two governments, state and national, but the spheres were merely suggested, and left actually undefined.

After this discussion on the new resolution, the Virginia Plan then went to the Committee of the Whole for discussion point by point, and while it was under discussion there, the nationalists were stronger in their victories. Just as the Committee was finishing its discussion on the Virginia Plan, and was preparing to report the revised draft to the Convention floor, the federalists counter-attacked with the New Jersey Plan.

This Plan proved to be merely a modification of the original Articles, but expanded the powers of Congress by adding the right to tax and the right to regulate commerce.
It would also have granted the federal government the right to coerce states. By far the most significant clause of the New Jersey Plan was the one which would have made all treaties and acts of Congress under the Confederation the supreme law of the respective states, enforceable in the state courts. The plan was argued on the floor and was then voted down seven states to three, and again the nationalists had won a point. However, the small state bloc felt that they had enough power to force a compromise, and they were determined to have it.

The Convention again took up the discussion of the revised Virginia Plan and it was discussed point by point on the floor. The largest battle came over the matter of proportionate representation in both houses. The large states bloc, or the nationalists, wanted proportionate representation in both the House of Representatives and the Senate, while the small state bloc was willing to concede the proportionate representation in the lower house, but insisted on equal representation in the upper house. They deadlocked on this issue on July 2, by a vote of five to five, and the necessity for some sort of a compromise presented itself. A committee of eleven, one representative from each of the state delegations, was appointed for the purpose of resolving this compromise. This committee worked toward settling the important question of representation and it recommended that in the lower house each state would be
allowed one member for every 40,000 inhabitants; that all bills for raising money originate in the lower house; that each state would have equal votes in the upper house. It was this plan of compromise, known as the "Great Compromise," which surely saved the convention the embarrassment of breaking up in failure, for the two factions were at the point of no return on their ideas, and this plan brought them together.

While this deadlock was broken and the Convention proceeded with the business before it, the Convention delegates intermittently returned to the two related problems that lay at the heart of the central government's difficulties under the Articles of Confederation; the use of the states as agencies of the central government and the issue of the respective spheres of the state and national governments. The delegates saw the importance of solving this problem; yet no one came forth with a clear, concise statement or resolution which would solve the problem and at the same time pacify both factions. The delegates were faced with this question: who was to define and safeguard the respective spheres of the states and the national government? The position of the nationalists on this question was conditioned by the fear that the states would gradually usurp the functions of the central government and reduce it to impotence, while the attitude of the states reflected the fear that the new government would supersede the states altogether and reduce
them to mere corporations. These respective fears lay at the base of the arguments throughout the Constitutional Convention.

A part of the New Jersey Plan ultimately appeared in the finished product of the Constitution as Article VI, Section 2, and at the time of its passage was considered to be a victory for the federalists. This provision was brought forth by Luther Martin as a part of his plan and was intended to solve the federal problem by making the federal law supreme but at the same time making the state courts agents by which both the states and federal governments would be kept within their respective spheres. This provision is known as the National Supremacy Clause. Article VI, Section 2, of our Constitution reads:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. 6

This provision was an apparent victory for the federalists, for while it gave the central government the supreme law of the land right, it, at the same time, lodged in an agency of the state governments (the courts) the power to make a preliminary determination of the extent of the power of the central government. This was the case until the

6 The Constitution of the United States, Article VI, Section 2.
Judiciary Act of 1789 turned this provision into a complete victory for the nationalists. The ultimate effect of this Act was that the power of interpretation of spheres of governmental power was then transferred from the hands of the state courts to those of the Supreme Court. This Act will be discussed more fully as the chapter progresses.

Much has been made of the intentions of the framers with respect to this Article, or provision. Some ask the question: Was it the intention of the federalists to give the national government this immense power by the provision? For an answer to this question, one must consider the writers of the provisions and of the New Jersey Plan, William Paterson and Luther Martin. Both of these men were strong states' righters in the Convention and apparently did not intend that this interpretation of their work be used. There is also the theory that the members of the Convention did not think of the right of appeals as establishing a general power in the federal judiciary to interpret the extent of state authority under the Constitution. Whatever the intentions of the authors, the interpretation, through the Judiciary Act of 1789, was clear and the finished Article was a victory for the nationalists.

While practically the entire time of the Convention was spent in the duel of the two factions previously mentioned,

7The Judiciary Act provided for the appeal from the state courts to the central judiciary.
and the settlement of the issue of the correct spheres of governmental authority was of prime importance, the Convention did not make a decisive stand on the locus of sovereignty in the new union. The central government was given many powers which were found lacking in the government under the Articles of Confederation; still it was limited by the Constitution and by implication. The states, whose delegates had struggled so diligently for their autonomy were left apparent powers by the Constitution and also, like the federal government, by inference, but there were several issues which were not met directly by the Convention delegates, and the answer to these issues were, at best, vague.

From this obscenity came the question of the state sovereignty. The delegates had apparently not fully answered the question of whether the states were still sovereign. They had also left indefinite the question of whether the national government was supreme within its limited sphere of powers, or if it was created to be a mere agency of the states. These were important questions which many felt were left unanswered by the Convention and through the process of failing to answer them, the delegates inadvertently left the impression that the states had the right or power to interpret the nature and extent of their powers under the Constitution.
In addition to the determination of the location of sovereignty there existed the problem of the determination of the role of the judiciary in relation to the Constitution. The delegates of the Convention had also left this field unclear, and it was then up to the Court to define its own powers, or at least for them to attempt to see their own limitations. The theory has been extended that it was far easier for the first members of the newly created government to get at the heart of the "intentions" of the framers, for the framers were still active in governmental circles. They had fresh in their memories the feelings of the delegations from each section on the important Constitutional questions; however, as the years passed, the question of interpretation became more and more difficult.

Several problems have been listed which were left vague, or unanswered, by the Convention, and these will be traced through the history of the Supreme Court in order that its role in the evolution of the answers to these serious constitutional questions may be found. The Convention gave partial answers to some of these questions, but certainly the role of the Supreme Court was not fully realized. Some of the members of the Convention obviously felt that the Court would have a strong voice in declaring the acts of Congress void, but they had no idea that the power of this tribunal would become synonymous with the power to interpret the nature of the Constitution itself.
With their task finished, the members of the Convention, with the exception of a few of the stronger states' rights supporters, on September 17, 1787, signed their work, and the fate of the Constitution was turned over to the hands of the ratifying conventions of each state.

The battle over ratification was a long, hard and bitter one, during which several difficult arguments were set forth for and against the document. The lack of a bill of rights was cited as a fault of the work of the delegates; the "necessary and proper" clause was frequently pointed out as an attempt to give the national government unlimited powers; the national supremacy clause in Article VI, Section 2, gave the federalists ample fear of usurpation by the national government. In the process of these arguments the appearance of The Federalists was made. These works were inspired by Alexander Hamilton, and he was assisted in their writing by James Madison and John Jay. Alexander Hamilton wrote the majority of these articles, which were designed for the purpose of examining the Constitution point by point, and to see how it would work under actual operation of the government. This was not an unbiased and objective work, for the authors were recognized nationalists who had in mind answering the ever-growing list of anti-federalist publications which were to be found during the fight for ratification. They were strong
in their fight for the doctrine of national supremacy, especially in their insistence on the necessity of appeals from state courts to the federal courts as being essential to a uniform interpretation of the Constitution and to the national unity. Kelly says of the importance of the Federalist:

It would be interesting to know to what extent the Federalist served as a guide book for the congressmen who wrote the Judiciary Act of 1789, and for the decisions of John Marshall.

The reasons for the success of the nationalists in ratification was due to several factors: one was the superiority of their arguments; another was that they had a positive program for the curing of the ills of the Confederation; they admitted that what they had created was not perfection, but that it was the best possible remedy to those ills yet devised; the anti-federalists could not produce sufficient answers to the possibilities which were evident if the Constitution were not ratified, and they could offer no remedy to the governmental system except for the calling of another Convention to readjust the Articles of Confederation.

During the fight for ratification, the idea of the sphere of jurisdiction of the judiciary appeared again and again, and Madison, in his Federalist, Number XXXIX, recognized and approved the idea that in jurisdictional

8 Kelly, op. cit., p. 155.
controversies between the national government and a state, the United States Supreme Court would decide, thus making the national judiciary supreme. 9

The next great step after ratification for the development of the role of the Supreme Court in the matter of interpretation came with the passage of the Judiciary Act of 1789. This act incorporated the principle of national supremacy into the federal judiciary system. Section 25 of this act provided, in certain instances, for the appeals from state courts to the federal judiciary. This was indeed a highly controversial provision, for it, in effect, meant that appeals would be taken in all cases where the state courts assertedly failed to give full recognition to the supremacy of the Constitution, or to the treaties and laws of the United States as provided by Article VI, Section 2, of the Constitution. 10

Thus the first step in the development of the role of the Supreme Court in interpreting the Constitution of the United States had been taken in the process of forming, writing and ratifying the work of the Constitutional Convention, and by ratifying Conventions of each state, and


with the passage, during the first administration, of the Judiciary Act of 1789.

The Court had been given several powers as a result of the Convention and the Judiciary Act; now some historical development must be established as the Supreme Court began to use these powers.
CHAPTER III

CASES INVOLVING INTERPRETATION OF GRANTED RIGHTS

Early in the history of the Supreme Court John Marshall saw the danger in overextending the authority of the Court to the point of embarrassment. In Marbury v. Madison, while proceeding to give a lengthy lecture on the duties and responsibilities of the executive department, Marshall decided the immediate issue in favor of the present administration, thus avoiding giving Madison and Jefferson an opportunity to defy the authority of the Court. Had he issued the writ of mandamus which had been requested, there is a good chance that Madison would have refused to comply with the order and the Court would have been placed in the position of looking ridiculous when its orders had been ignored. While he was deciding in favor of the administration, Marshall was at the same time busy setting up a policy of judicial review in "all cases arising under the Constitution." He asked:

Could it be the intention of those who gave this power to say that in using it the Constitution should not be looked into? That a case arising under the Constitution should be decided without

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1 Marbury v. Madison, 1 Cranch, 137 (1803).
examining the instrument under which it arises? This is too extravagant to be maintained. 2

This case is used as an example of the activities of the Supreme Court throughout its history to make some type of attempt to fill in the gap left by the Constitutional Convention delegates in precisely defining the powers of the Court. The history of this tribunal is filled with cases in which it has had to make its own path in the field of the power of interpretation of the Constitution of the United States.

Through the process of following this plan of describing its own powers and limitations, the Court has often entered into fields which have proven to be broad and which tend to lay down a policy to be followed.

This is not to say that the Court, from the beginning, was anxious to enter into any field of interpretation and to extend its authority in any direction, for there were several instances at the very start of their history in which it refused to project its views. 3

2 Ibid.

3 The federal courts in 1792 declared an act of Congress unconstitutional which provided that the circuit courts should pass upon certain claims of disabled veterans of the Revolutionary War because the other two departments could not constitutionally assign to the judiciary any duty other than judicial and to be performed in a judicial manner. Also in 1793 President Washington, through his Secretary of State, sent a letter to Chief Justice Jay asking the Court's advice on points of international law and neutrality. The Court, after due consideration, declined to give its opinion on the questions presented on the grounds that in the theory of separation of powers it was prevented from giving its opinion on extrajudicial questions.
Since this study will deal with the role of the Supreme Court and the police power, it will be well to define the term. The basis of the term must be sought in the Constitution. The phrases "police power" and "internal police" do not appear in the United States Constitution, and indeed, they appear only incidentally in a few of the state constitutions. The definition which is usually given is broad and suggests an almost indefinably broad power to regulate and restrict the conduct of individuals and their use of things in the interests of health, safety, morals and general welfare of the people. The important question or point in a discussion of this type is: to what extent is the state police power exclusive as against the powers granted, or delegated to the national government? Since there is no mention made of this broad and obscure power in the Constitution, then the evolution of its definition had to come from interpretation of implications in that document. Warren says of the police power of a state:

The police power of a state, so far as the Federal Constitution is concerned, ultimately means that degree of interference with individual freedom of action or with use of private property in the interest of the public welfare, which the Judiciary considers not to be arbitrary, or not to be unduly violative of National rights in commerce between the States, at any given time and in the light of prevailing conditions. ¹

This definition is, at best, difficult to limit or to trace, for it maintains that the states have a right of police power, as long as this power does not unconstitutionally interfere with the commerce power of the Federal government, and it also brings in the theory of the "light of prevailing conditions." This is evidence that the framers of the Constitution did not mean to create a document which would be in effect a "code" to be followed strictly, but made room for changing conditions of government in the future. This is probably one of the main reasons that the original Constitution has stood so long as the basic document of government with so few changes.

The police power was then left mainly to the states by virtue of the Tenth Amendment to the Constitution which reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This amendment is the very basis for the dual system of federalism, since it apparently creates two systems of government, each working within its own sphere. The central government was to derive its power from those granted or delegated from the Constitution of the United States; the states would obtain their powers from reserved or inherent powers. It was probably intended that these two forms of government would

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5 The Constitution of the United States, Article X.
work independently of each other, each within its own defined sphere of power. This, however, was not the case, for their territory and their activities overlapped frequently.

The reasons for leaving the police power in the hands of the state governments was that the central government was more qualified to handle the international affairs of the nation, due to its central location, and at the same time, the states, due to their close, everyday contact with the people, were more qualified to handle the everyday police affairs and general welfare of the people. Yet, as may be learned through Constitutional history, the states could exercise this broad power only as long as they did not interfere with the granted or delegated powers of the central government. This the point from which the clash in the dual system of government arises. Those who favor states' rights go back to the wording of the Tenth Amendment for the basis of their arguments, contending that the states were left all powers not delegated or granted to the central government. Those who favor a greater shift of power to the central government maintain that the wording of the amendment leaves room for interpretation, thus giving to the central government more power than is expressed.

The Constitution, then, as has been mentioned, was to be interpreted by the Supreme Court, and it was to be the duty of that tribunal to define a line between these two different
spheres of government activity. John Marshall had, in 1803, \(^6\) laid down the principle of judicial review concerning the other two departments of government, and now, in 1819, he went a step further in defining the delegated powers of the central government. In that year, in the case of *McCulloch v. Maryland*, he transferred to the central government not only those powers which are granted or delegated, but those which might be implied from those granted as long as this implication coincided with the letter and spirit of the Constitution.

\[\ldots\] Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.\(^7\)

This was an important case in the role of the Supreme Court in entering broad fields of policy-making, for this decision expanded the powers of the central government enormously. Now, it possessed not only delegated and granted powers, but it also possessed any powers as might be implied from the Constitution by those who were to interpret that document.

To this point the study has been concerned with the original thoughts of the framers of the Constitution as they were doing their work in the Convention, their feelings in

\(^6\) *Marbury v. Madison*, 1 Cranch, 137 (1803).

\(^7\) *McCulloch v. Maryland*, 4 Wheaton, 316 (1819).
relation to the powers of the two governments and their attempts to make the necessary corrections. Also the study has been concerned with the early role of the Court in the relationship of these two governmental systems, and with the expansion of its own powers of interpretation of the written Constitution. Now it is for this study to follow the history of the Court, to trace the expansion of this tribunal into various fields of constitutional government. These fields are numerous indeed, and none are unimportant, but since space will not permit a thorough investigation of all of these fields, an attempt will be made to trace only those which pertain to the role of the Supreme Court as it deals with the police power. The process of following this role necessitates a categorization into approximately four broad fields:

The first two fields will be discussed in this chapter, the remaining two will be dealt with in the fourth chapter. The first which will be considered is the constitutional development in the field of interstate commerce. Much power has been given the central government from implications of its granted power to regulate interstate commerce, and it will be of interest to this study to find the reasoning of the Supreme Court in expanding this power.

The second field to be investigated will coincide with the first mentioned since it deals with the interpretations of the taxation powers of the central government, and the
effects of these interpretations on the relative police
powers of the state and national governments.

Our Constitution reads:

The Congress shall have power to lay and collect
taxes, duties, imposts and excises, to pay the
debts and provide for the common defense and
general welfare of the United States. . . to
regulate commerce with foreign nations and
among the several states, and with the Indian
tribes.

This article served as the basis for John Marshall's
famous opinion in the case of McCulloch v. Maryland\(^9\) in
1819 because it was here that he found the granted, or
delegated power of Congress to regulate commerce among the
states, and he went on from there to provide the theory of
"implied" powers, even though the Constitution did not
mention the word "bank." This granted power which is
listed in Article I of the Constitution of the United States,
linked with Marshall's decision just mentioned, has served
as a stepping stone for the Court to expand the idea of a po-
lice power of the national government to a point where it
would not be recognized by the original framers of the Con-
stitution.

Five years after the McCulloch decision, Marshall was
called upon, with the rest of the Court, to make an attempt
to define the nature and scope of the power of Congress to

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\(^8\)The Constitution of the United States, Article I,
Sections 1 and 2.

\(^9\)Wheaton, 316.
regulate interstate commerce. This opportunity for a definition came with the case of *Gibbons v. Ogden* (1824) in which the Chief Justice restricted himself to deciding four main points, or questions: (1) the definition of the word commerce, (2) the extent of congressional regulatory power within the several states, (3) exclusive or concurrent powers of regulation of interstate commerce, and (4) broad or narrow construction of the commerce power.

In settling the first of these questions, Marshall defined commerce. "Commerce," he said, "undoubtedly is traffic, but it is something more; it is intercourse... The mind can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation."\(^{10}\)

In answering the second question of the case, Marshall left the completely internal commerce of a state to be reserved for that state itself, but "Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior."\(^{11}\) Here the Chief Justice made it quite clear that Congress had the power to exercise its granted and delegated powers to their utmost, without limitation except those prescribed in the Constitution.

On the third question of the case, that of exclusive or concurrent powers to regulate commerce, Marshall did not take

\(^{10}\) *Gibbons v. Ogden*, 9 Wheaton, 1 (1824).

\(^{11}\) *Ibid.*
such a nationalistic stand. Perhaps he could see that the regulation of commerce was then, and as the nation grew, most certainly would become an enormous power, and an equally enormous problem. He left the implication that the states would have power to regulate commerce, because he did not say that the central government would have "exclusive" control over that area.

The Chief Justice made up for his unclear decision of the third question by his emphatic words in answering the fourth. He maintained that a narrow construction of the Constitution on this point would cripple the government and render it unequal to the objects for which it was declared to be instituted, and to which the powers given, as fairly understood, render it competent.

While Marshall was deciding this case in favor of the central government, he touched upon a slight definition of the police power of the states. Here cognizance was taken of the existence in the States of an "immense mass" of legislative power to be used for the protection of their welfare and the promotion of local interests. Three years later in Brown v. Maryland this power that he first mentioned was christened "the police power." Corwin says of this term,

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12 Brown v. Maryland, 12 Wheaton, 419 (1827).
"... a name which has since come to supply one of the great titles of Constitutional law."\textsuperscript{13}

In this case can be found the fallacy in the theory that there could be created two systems of government, each with its own powers, and each to operate within the sphere of its own powers, independently of the other, for these two governments were bound to clash in the carrying out of their duties. It can be further found from this case that the national government was to be supreme when these two did clash, for Marshall made much of the National Supremacy clause in this decision.

The decision in Gibbons v. Ogden was made at a critical moment in the popularity of the Supreme Court. At that time the Court had fallen under severe criticism in regard to its then extreme nationalistic decisions and in many quarters that tribunal was looked upon with less than admiration. The Gibbons decision, without that intention, took the light off the Supreme Court because of the intense dislike, at that time, for monopolies, and the decision had killed a steamboat monopoly. The nationalistic nature of the decision was overlooked at that time in the light of the more popular aspects of the opinion. Kelly maintains that this decision by Marshall was his last great one; however, it

\begin{footnotesize}
\end{footnotesize}
would seem that his decision in Brown v. Maryland had a certain degree of greatness in that it laid down the "original package" theory, thus giving such a broad implication to this theory that it would apply to interstate commerce as well as to foreign commerce. 14

The cases which have been mentioned to this point concerning commerce and the expansion of the central government's power in that field have been decisions by the John Marshall Court, and, as has been mentioned, these decisions fell under great criticism from the public at that time. The Court was just then feeling out its own power. The states had their laws invalidated almost at every turn during Marshall's stay as Chief Justice, and since the Constitutional Convention, nor their finished product, never did specifically give the Supreme Court the power to perform this function, it was certainly to meet bitter opposition in following this course. Kelly said of this opposition:

The chief arguments in Congress against the Court were the same ones used by state agents and legislatures: the absence of any specific constitutional authority on the part of the Court to invalidate state statutes or judicial decisions; the Court's lack of responsibility to the people, its natural policy of upholding federal authority at the expense of the state; and the threat of such a powerful body to the "sovereignty" of the states and the liberties of the people. 15

14 Kelly, op. cit., p. 296.
15 Ibid., p. 298.
These terms of argument are most certainly not new to those who are interested in current events of today!

Before leaving the Marshall Court a pertinent point concerning enforcement should be made. In 1827 the Cherokee Indians within the state of Georgia proclaimed themselves an independent state and drew up their own Constitution, thus causing the legislature of that state to place state law over the Indian Territory. Shortly after this action on the part of the state of Georgia, an Indian named Corn Tassel was tried and convicted of murder. The Supreme Court granted him a writ of error, which the state promptly refused to honor. Governor Troup, with the support of the Georgia legislature, declared that he would resist all interference from whatever quarter with the state's courts, and thereupon proceeded to execute Corn Tassel in the face of the writ of error from a Federal court. In 1831, in the case of Cherokee Nation v. Georgia, Marshall maintained that the Indians were domestic dependent nations and that they had a right to the lands they occupied until title should be extinguished by voluntary cession to the United States. The following year, in the case of Worcester v. Georgia, the state came out in the open and flaunted the decision of the Supreme Court in refusing to appear either at the bar of the Court or to order the release of Worcester as the Court had
ordered. The Chief Justice implied that it was the duty of the President to uphold the order given by the Supreme Court, to which Jackson is said to have replied: "John Marshall has made his decision, now let him enforce it." It is here that there is not only a state making a very ominous example of state nullification of a Federal court order, but also the executive refusing to support the judiciary. This could have been a problem much more serious than it turned out to be with the exception that the removal of the Indians from Georgia at that time was a popular issue, and the public as a whole agreed with the decision of the state. This sort of thing makes for extremely bad constitutional law, for the public must never be led to believe that under this system of constitutional government they may take the issues up independently, decide whether they like or dislike the manner in which the courts have handled them, and then, according to their popularity, abide by, or ignore the orders of the courts. This is dangerous in the American system of government, and, as has been mentioned, this could have led to a very serious national dispute. The closeness with which this issue in 1832 relates to the one existing in the nation today as a result of Warren's Brown v. Board of

Education of Topeka is amazing and frightening. It is well to remember what the role of the Supreme Court is when it hands down a decision. This was very aptly put by Marshall in McCulloch v. Maryland in 1819: "...In considering this question, ...we must never forget that it is a constitution we are expounding." This question of the popularity of issues in relation to the decisions of the Supreme Court will be discussed later in the study; suffice it to say at this point that the issues did arise in the early 1800's, and that it was a serious threat to the continuance of our constitutional system, to the Supreme Court of the United States, and to the doctrine of the separation of powers.

Following John Marshall as Chief Justice of the Court came Taney. With him came a new philosophy of the Court, in that it recognized a move for decentralization of power, and toward dual federalism. The first important case under this Court was New York v. Miln, in which a New York law requiring data on all passengers from the masters bringing them into New York, was attacked as interfering illegally and unconstitutionally with the power of the central government to regulate foreign commerce. The Court decided in favor of the state, saying that the law, unlike the one in Gibbons v. Ogden, which had been decided by Marshall, in no way came

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19 McCulloch v. Maryland, op. cit.
into conflict with the powers of the national government to regulate commerce in any way. The Court went further in saying:

That a state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States... That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that consequently, in relation to these, the authority of the State is complete, unqualified, and exclusive.20

This language was a far cry from the more nationalist jargon used by Marshall a short while before. This obviously hinted that the states could, in themselves, have some voice in the regulation of commerce, and that they definitely had a police power, or "internal police" functions. Also the Court gave the theory that the grant to Congress of a power did not form a prohibition against a state exercising that power until Congress assumed to exercise it. Surrounding this question there has been a term invented. Corwin said:

The difficulty of drawing the line between permissible protection of the public welfare by the State and unlawful encroachment on the Nation's power to regulate commerce has been recognized by the invention of the popular phrase as the twilight zone.21


21Warren, op. cit., p. 739.
This was brought out further in the License Cases, in 1847, in which the justices agreed generally that because a state tax law which was levied for internal police purposes had an incidental effect upon interstate commerce, it does not thereby make the law invalid.\textsuperscript{22} Taney, in the License Cases, maintained that the states ought to have the power to make regulations for commerce for the good of the state as long as these laws do not come into conflict with a law of Congress. He admitted the validity of the original package theory which had been brought forth in \textit{Brown v. Maryland}, but said that this case did not involve a direct conflict between a state act and a congressional law regulating foreign commerce.

The answers to these cases, and to the question left unanswered in \textit{Gibbons v. Ogden} in 1824, were to be met in the case arising in 1852 in \textit{Cooley v. The Board of Wardens of the Port of Philadelphia}. It will be remembered that in the Gibbons decision, the question of whether the power of Congress to regulate foreign and interstate commerce was exclusive, or whether, in the absence of the exercise of this power by the national government, the states had a right of concurrent powers in this field. This question had gone practically unanswered for over a quarter of a century. Mr. Justice Curtis delivered the opinion of the

\textsuperscript{22}\textit{License Cases}, 5 Howard, 504 (1847).
Court in this case, and said that the Court had found that there were some areas of regulation of commerce in which the Federal government held exclusive control, and that there were other areas in which the state had a right to control. "The grant of commercial power to Congress does not contain any terms which expressly exclude the states from exercising an authority over its subject matter."23

He said further:

Now the power to regulate commerce embraces a vast field containing not only many but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule operating equally on the commerce of the United States in every port; and some... which alone can meet the local necessities of navigation.24

This language by the Supreme Court brought forth the theory of "selective exclusiveness" by that tribunal, and did not mean that it had completely reversed the Marshall decision of broad national power in the regulation of commerce in Gibbons v. Ogden. The result of these later cases decided by the Taney Court was that the broad aspects of the Gibbons decision were watered down to a certain degree, but the door was still left open for more judicial interpretation.

The circumstances surrounding the Civil War, and the result of that conflict changed things considerably in

23Cooley v. The Board of Wardens of the Port of Philadelphia, 12 Howard, 299.
24Ibid.
constitutional law. Up until that time the powers of each of the branches of the national government had been seriously challenged on several occasions. These circumstances brought about changes in the basic structure of the written Constitution in the form of amendments which are still being used by the Court in dealing with the individual. These amendments will be discussed in a later chapter of this study as they deal with the Court and its relation to the individual through implied powers, not the commerce power.

Whatever may be said of the decisions which had already been handed down by the Court in regard to the commerce power, they made an indication that the body had, on the whole, intended to uphold the ideal of a State police power and the ideal of dual federalism. There had been, through these decisions, an indication of an increasing shift of power to the central government, while, at the same time, the powers of the States had not been ignored. In the year 1903, however, the Court opened up an entirely new field of control which literally established an area of Federal police power under the commerce clause of the Constitution.

Congress, in 1895, had passed a law which forbade the movement in interstate commerce of lottery tickets, and this law was brought to a test in the Court in 1903 in the case of Champion v. Ames.25 The Court held that lottery

tickets were articles of commerce, and that Congress had the power to check the widespread use of these tickets by preventing their movement through the mails or through interstate commerce, areas in which the central government had undisputed control. Now, here was a law which had been held as constitutional by the Supreme Court of the United States, the purpose of which was the control and prohibition of gambling, not the regulation of commerce. This regulation constitutes the use, by the national government, of one of their granted powers to enact a law which proves to be a prohibition, which according to most definitions constitutes a police regulation. The Court, however, was not unanimous in this decision, the vote being five to four. Justice Harlan delivered the opinion of the majority. His reasoning in this case is interesting. He went into detail explaining the immense power of Congress to regulate in the field of interstate commerce, and then said of items being passed through this commerce:

If the lottery traffic carried on through interstate commerce, is a matter of which Congress may take cognizance and over which its power may be exerted, can it be possible that it must tolerate the traffic and simply regulate the manner in which it may be carried on?  

Justice Harlan believed further that the right to regulate commerce meant the right to prohibit it entirely, thus giving the central government a vast new field of power which had been previously left to the states.

26 Ibid.
Mr. Justice Fuller, in his dissent in this famous case, saw this line of thinking on the commerce power of the national government as making possible the wiping out of the state lines and the further centralization of the government. He saw the possibilities of the decision as did three other justices of the Court who concurred with his dissent. The case, to say the least, took a great step in the creation of an area of Federal police power. As Mr. Hardwick said of this decision:

This case was undoubtedly the Pandora's box from which burst forth with amazing speed and ever-increasing velocity the tendency to federalize and centralize, beyond the dreams of Alexander Hamilton, a government whose centripetal forces had already been too greatly strengthened as a result of the Civil War. It was the beginning of that steady, unending, unceasing movement in Congress to stretch far beyond its real meaning and far beyond what any fair construction, however liberal, warranted the Commerce Clause of the Constitution. This movement has progressed so steadily, has been pressed so persistently, and has gone so far that it threatens to utterly annihilate our dual system of government, to utterly destroy the police powers of the several states. . . . 27

This statement by Mr. Hardwick was made in 1917, after Congress had hurriedly passed through the gap left open by the Court in that decision. Indeed, Congress took full advantage of this new field opened up to it, and

27 Thomas W. Hardwick, American Bar Association Representative, The Regulation of Commerce Between the States (1917).
began, in the early 1900's, to pass a multitude of laws intending to cure social ills of the nation.28

A year following the Champion decision, the Court further expanded the power of the national government in the field of economic regulations by refusing to declare unconstitutional a law which placed an excise of ten cents per pound on colored oleomargarine, while the tax on uncolored oleomargarine was one-fourth cent per pound. The national government was obviously using the power to tax to suppress the manufacture and sale of artificially colored oleomargarine, but the Court, in the test case of McCray v. United States29 refused to look into the intent of Congress in these matters and said that if a constitutional justification for the law presented itself, then the job of the Supreme Court had been done in finding that justification and that any further investigation into the intentions of Congress when passing the bill, or the result of the bill after its going into effect would constitute

28 The laws will be named here, and the manner in which the Court dealt with them will be discussed as the chapter progresses: 1903, the Animal Contagion Disease Act; 1905, the Animal Quarantine Acts; 1906, the Pure Foods Act; 1905 and 1906, the Metals Hallmark Acts; 1905, 1912, 1915 and 1917, the Plant Quarantine Acts; 1909 and 1914, the Narcotics Acts; 1910, the White Slave Traffic Act; 1910, the Insecticide Act; 1912, the Apple Grading Act and the Altered-Seed Act; 1913, the Serums and Toxins Act, and 1916, the Child Labor Act.

undue judicial interference with the right of Congress to pass the law in the first place. This decision, of course, gave Congress a seemingly endless power to control social faults through the power of taxation.  

It was while these broad decisions were coming from the Court in regards to the social legislation of the times that Justice Brewer, in the case of South Carolina v. United States made another attempt to define the duty of the court in the role of defining intergovernmental relations. He said:

We have in this Republic, a dual system of government, National and State, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control and no action in the States can interfere therewith, and there are others in which the State is supreme, and in respect to them the National Government is powerless. To preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts . . .

While Justice Brewer was giving this comment on the related spheres of government, he decided that South Carolina, while operating in the business of selling liquor, was not carrying out a governmental function, and therefore would have to pay a federal excise on this action. It is difficult to understand why Mr. Brewer made the statement that the two

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30 Ibid.

governments, National and State, worked in the same territory and upon the same persons without collision, for this collision was in evidence at every turn, on the court docket, in the press, in Congress and in the conversation of the public. It was even quite evident in the case upon which Mr. Justice Brewer was delivering the opinion of the Court.

In the test case of the White Slave Traffic Act of 1907, the Court declared the act as being unconstitutional on the grounds that it invaded the police power of the states. This appeared in the case of Keller v. United States in 1909, and gave the indication that the Court was going to be conservative in dealing with this matter of police power.\(^{32}\)

The Pure Food and Drug Act, enacted in June, 1906, came before the Court in 1911 in the case of Hipolite Egg Co. v. United States, in which the Court handed down an unanimous decision declaring the act constitutional. Justice McKenna, in delivering the opinion of the Court often referred to the power of Congress to regulate commerce as being broad and "complete in itself."\(^{33}\) He further maintained that there was no trade which could be carried on between the states to which this power of national regulation did not extend. This decision quickly erased the idea that the Court intended to deal with these social laws on a conservative basis.


\(^{33}\)Hipolite Egg Co. v. United States, 220 U. S., 45 (1911).
The White Slave Act once again came before the Court in 1913 in the form of the Mann Act. The Act had been passed in 1910 after the original bill had been declared unconstitutional by the Court in *Keller v. United States* in 1909. The new case was *Hoke v. United States* in which the Court upheld the constitutionality of the act of Congress, and once again Justice McKenna delivered the opinion of the majority of the Court. This decision seemed to indicate that the Court felt that the national government could almost define its own powers when they were using the commerce power to promote the general welfare. It also transferred from the States that portion of the police regulation which deals with the general welfare of the people, and placed it in the hands of the national government.

In 1918, Mr. Justice Day, in the case of *Hammer v. Dagenhart* led the Court back to a more conservative trend than that which had been started by Justice McKenna. This was the test case for the Child Labor Law, in which Justice Day said that the law was unconstitutional in that it was not a regulation of commerce, but an outright prohibition. He reconciled this with the earlier decisions by saying that in the earlier cases the thing which had been prohibited from interstate commerce was in itself, harmful, and thereby should have fallen under the control of the national government. In this case, however, the products of child labor

[^34]: *Hoke v. United States*, 227 U. S., 308 (1913).
were harmless in themselves and offered no danger of contam-
ination of interstate commerce.\textsuperscript{35} It was while Mr. Justice Day was trying to revive the ideals of the Tenth Amendment in his discussion in this case that he misquoted the amendment by saying:

\begin{quote}
In interpreting the Constitution, it must never be forgotten that the nation is made up of states, to which are entrusted the powers of local govern-
ment. And to them and to the people the powers not expressly delegated to the national government are reserved.\textsuperscript{36}
\end{quote}

This mistake in misquoting the Tenth Amendment is not the mistake of Justice Day alone, for others, in their eagerness to defend the rights of the states in our dual system of government have unfortunately made the same mistake.\textsuperscript{37} The last quoted decision was not compatible with the theories expressed in the earlier cases of social control, nor was it compatible with the theory of constitutional law, for it attempted to make a distinction between things which were in themselves harmful, and things which merely produced a harmful result. This distinction is impossible, or at best, extremely difficult to find.


\textsuperscript{36}\textit{Ibid.}

\textsuperscript{37}George C. S. Benson, \textit{The New Centralization, A Study of Intergovernmental Relationships in the United States} (New York, 1941). On page 22, Mr. Benson says: "It will be re-called that under the Tenth Amendment of the Constitution all powers not expressly granted to the federal government are reserved to the states." (The underline is the author's.)
The conservative tendency in the *Hammer v. Dagenhart* decision, however, seems only to have been an isolated instance, for the Court did not follow this trend a few weeks later in deciding the constitutionality of the Meat Inspection Act. Justice Day delivered this opinion for the Court in the case of *Pittsburgh Melting Co. v. Totten* in which he said that Congress had the power to pass the law to prevent the shipment in interstate commerce of impure or adulterated meat-food products.\(^{38}\)

The following year the Court accepted the Narcotics Act, in a decision in which Justice Day again delivered the opinion of the Court. In *United States v. Doremus*\(^{39}\) the law was upheld which allowed Congress to levy a one dollar a year tax subject to many regulations; the intention of Congress was ignored by Justice Day. "The act may not be declared unconstitutional," said Day, "because its effect may be to accomplish another purpose as well as the raising of revenue."\(^{40}\) Here, although the Court had upheld the national government in its regulatory powers, Justice Day had rendered himself incompatible with his earlier decision in *Hammer v. Dagenhart*, for it could be plainly seem that a tax of one dollar was certainly not devised for the purpose

\(^{38}\) *Pittsburgh Melting Co. v. Totten*, 248 U. S., 1 (1918).


\(^{40}\) Ibid., 94.
of raising revenue, but for the purpose of regulation of a thing believed to be harmful. Kelly said of this, "Why purpose was irrelevant here and not in the child labor case, Day did not explain. . ." 41 This passage of this group of social legislations by Congress in the early 1900's and its acceptance by the Supreme Court brings up some interesting points which are pertinent to this study.

The first of these is the argument set forth by writers and scholars of constitutional law at that time, maintaining that these laws and the decisions upholding them were so far removed from the "intent" of the framers of the Constitution as to be unrecognizable by them. This is a good point with two exceptions. The framers obviously left room for future interpretations by those who would use the Constitution as the history of the nation progressed. The second exception to this argument set forth is that of the changing and prevailing conditions at the time of these decisions. To be sure, the framers had never visualized the conditions at the time these decisions were made. The nation, at the time of the making of the Constitution, was more adept to local conditions, for the modes of transportation and communications were primitive, uncertain, slow and almost non-existent. The big question on this point is: Should the Constitution be interpreted differently in the light of prevailing conditions? By the very nature of the document itself, it must almost necessarily be so.

41 Kelley, op. cit., pp. 590-591.
The second interesting point brought up by the emergence of the social legislation is the theory which will be referred to here as the "popularity" theory. That is, when there are conditions of social sickness obviously proceeding unhampered through the nation, and which lack proper police correction by the states, there begins to show itself a desire for the national government to take effective measure to stamp out this sickness. This desire presents itself in many different fashions. One is the pressure groups who go to the national capitol with the intention of influencing their representatives that the condition is grave enough for federal action to be taken. A good example of this is the vast number of temperance societies formed for the purpose of influencing national legislation which later resulted in the passage of the Eighteenth Amendment to the Constitution.\(^{42}\) Another presentation of this desire is the writers in the popular magazines and newspapers. Every one of the pieces of social legislation which were passed in the early 1900's and which have been discussed here were the result of widespread publicity through one of the previously mentioned means. The result of this publicity was the raising of sufficient support to have the piece of legislation passed by the national government, thus pushing that government into fields which had heretofore been left entirely to the states.

\(^{42}\text{Kelley, op. cit., p. 670.}\)
The large majority of these bills were tested in the Supreme Court, thus placing on that body the responsibility of making decisions in the areas of granted and expressed powers which would in effect take some of the need for a police power from the states and transfer it to the central government. Many writers attribute this situation to the effects of the tremendous reform movements which swept the nation in the latter part of the nineteenth century. Whatever the causes for the situation, the result is clear. The Supreme Court, during the course of these decisions, abandoned its previous policy of generally upholding the idea that the States possessed their own police power, and that the central government should not interfere in this activity.

The effects of the Hammer decision were completely abandoned in 1941 in the case of United States v. Darby, in which Mr. Justice Stone delivered the opinion of the Court. In this case, Justice Stone maintained that the principles set down over a century before in the Gibbons v. Ogden decision should have been well known, and had been used by the Court extensively, but that since the Hammer decision had been handed down only twenty-two years previously there would be need for a review of the facts. He said further, "In that case it was held by a bare majority

43United States v. Darby, 312 U. S., 100 (1941).
of the Court . . . that Congress was without power to exclude the products of child labor from interstate commerce . . . The reasoning and conclusion of the Court's opinion there cannot be reconciled with the conclusions that we have reached. 44

The Court then proceeded to point out that the decision in Hammer v. Dagenhart was "a departure from the principles" of the interpretation of the commerce clause both before and after that decision and that it should now be overruled. 45

In thus breaking with the decision of the Hammer case, the Court proceeded to uphold the constitutionality of the Fair Labor Standards Act which involved a federal prosecution to enforce minimum wage standards upon industry. The Court went one step further in maintaining that Congress could regulate intrastate activities where they had a substantial effect on interstate commerce. In other words, Congress could regulate and control the most intricate intrastate activity, as long as the Congress of the United States suspected that these activities had or would have some effect on the workings of interstate commerce. These are strong words, with much stronger implications. Former Justice of the Court, Owen J. Roberts, said of this decision:

... The effect of sustaining the Fair Labor Standards Act was to place the whole matter of wages and hours of persons employed throughout the United States v. Darby, 312 U. S., 100 (1941). 44

Ibid. 45
States, with slight exceptions, under a single federal regulatory scheme and in this way, completely to supersede states' exercise of the police power in this field.\textsuperscript{46}

The cases which have been recently listed and discussed deal with the power of Congress not only to regulate commerce among the states, but also to "prohibit" such commerce. The Court had found cause to uphold this theory during the era of prohibition laws. During that time Congress, in an attempt to lend aid to states which forbade the use of intoxicating liquors, had passed the Webb-Kenyon Act in 1913 which made it a violation of law to ship intoxicating beverages into any state or territory when such liquors were to be used or sold in violation of the laws of that state or territory. The interesting part of this law was that it provided for no penalty. The Webb-Kenyon Act was held to be constitutional in the case of Clark Distilling Company \textit{v.} Western Maryland Railway Company.\textsuperscript{47}

Congress went one step further in 1919 by adding the "Bone Dry" amendment which forbade, with a federal penalty, the shipment of intoxicating liquor, even for personal use into any state which forbade its manufacture and sale. This bill was upheld by the Court in United States \textit{v.} Hill.\textsuperscript{48}

\textsuperscript{46} Owen J. Roberts, \textit{The Court and the Constitution} (New York, 1955).

\textsuperscript{47} Clark Distilling Co. \textit{v.} Western Maryland Railway Co., 242 U. S., 311.

\textsuperscript{48} United States \textit{v.} Hill, 248 U. S., 420 (1919).
The result of the two cases mentioned is that if Congress has the power to regulate commerce, then it has the power to prohibit the use of interstate commerce when that use will be in violation of valid laws of the state in question.

As a result of the Court's stand in the two cases mentioned above, Congress passed the Ashurst-Summers Act in 1935, which brought the shipment of the products of convict labor under the scope of this line of reasoning, and this law was brought to a test in the case of Kentucky Whip & Collar Co. v. Illinois Central Railroad Company in 1937. Mr. Justice Hughes delivered the opinion of the Court in which petitioners maintained that Congress had no constitutional authority of prohibiting from interstate commerce the movement of useful and harmless articles produced by convict labor, and that Congress had no power to exclude from interstate commerce goods made from convict labor which were not labeled as such. Hughes made a full review of the cases which led up to this situation and drew a parallel between this act and the Webb-Kenyon Act which had already been declared constitutional. He maintained that Congress has not stepped out of its authority given it by the Constitution in effecting this regulation. Mr. Hughes said:

... Nor has Congress attempted to delegate its authority to the States. The Congress has not sought

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to exercise a power not granted or to usurp the police powers of the states. . . The Congress has exercised its plenary power which is subject to no limitation other than that which is found in the Constitution itself.

The cases cited in this chapter have dealt with the Supreme Court's role in interpreting acts and powers of Congress in their relation with powers "granted" to them by the Constitution of the United States, mainly the powers of regulation of commerce between the states and powers of taxation.

The history of the disposition of cases arising under these granted powers of Congress by the Court has been one of competition between the states and the central government with the obvious shift of power in the direction of the central government. The reasons for this shift have been questioned often, but the fact remains that the Court, in handing down these decisions, has had a firm foundation on which to stand—the specifically granted powers of Congress to regulate in these fields, and, as has been traced, the powers of the Court to expand on these granted powers through its power to interpret the written Constitution. Some writers hold a belief that it is in this field of interpretation that the national government has made its greatest expansion and has made its greatest move to transfer the area of police regulation of the states to the national government. Perhaps this was true through the first quarter of

\[50\text{Ibid.}\]
the twentieth century. After that time the Court began to deal in the more intangible aspects of constitutional law, those of "implied" powers of Congress in dealing with the individual. It is in this field that the greatest steps have been taken in this competitive attitude of the two forms of government.
CHAPTER IV

AREAS IN WHICH THE SUPREME COURT DEALS WITH IMPLIED POWERS

As has been mentioned, the Civil War and its consequences brought about a great many changes in the form of constitutional law. Up to that point the individual found his protection in the Bill of Rights, and in them found his protection against the national government. Of course each individual was also protected from his state government by the bill of rights in his state constitution. Due to the circumstances surrounding the Civil War, there came the belief that the rights of the individual should be strengthened, especially against the possibility of invasion from the states. There had been attempts to extend the protection of the Bill of Rights to include the states, but each time unsuccessfully.

Out of this belief in the rights of the individual there came the passage of the "War Amendments," the Thirteenth, Fourteenth, and Fifteenth, which took the emphasis off of states rights and placed it on the rights of the individual as protected from actions by a state. These amendments were

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1 See page 38.
designed to assist one particular individual against the actions of a state, the newly freed Negro. It is out of these amendments, the Fourteenth especially, that the Supreme Court has gone far in extending the police power areas of the national government into fields previously left to the states.

At the risk of being repetitious, it will be remembered that the national government has no police force, and that the power of "internal" police matters was thus left, by omission from granted powers to the national government, to the states. This power, which is referred to as the police power here, is, as previously defined—the extent of restriction by a state upon an individual as concerns the public health, safety, morals and general welfare.

Of the "War Amendments," the Fourteenth will be the most frequently discussed here, since it represents the greatest force of the move which is pertinent to this study. The War Amendments were aimed at the southern states, and intended to coerce them into allowing the Negro his full civil liberties within the protection of the national government. Under the protection of the Fourteenth Amendment, the newly freed Negro need no longer look to his state government for the assurance that he would have his civil liberties protected, but would look to Washington and the Federal courts for this protection.2

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A closer look at the wording of the amendment will be necessary before beginning the Court's disposition of it. Section I of the amendment provides:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens... nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.\(^3\)

This is the section of the amendment with which the study shall be concerned here. It is short in its statement, yet in all the annals of constitutional history, nowhere can there be found so few words which will mean so much. Congress was also given the power to enforce the provisions of the amendment through appropriate legislation.

The first part of the amendment to come under the scrutiny of the Supreme Court was the "privileges and immunities" clause. In the Slaughterhouse Cases\(^4\) the clause was first timidly invoked by a group of butchers who challenged the validity of a Louisiana statute which conferred upon one corporation the exclusive privilege of butchering cattle in New Orleans. This had nothing to do with freedom of citizens, as the amendments had been

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\(^3\) The Constitution of the United States, Article XIV, Section 2.

\(^4\) The Slaughterhouse Cases, 16 Wallace, 36 (1873).
intended. In this case the Court made an early showing of their reluctance to enter into the broad fields of inter-
pretation which the terms of the amendment made possible.
It had been intended by those seeking new powers for the na-
tional government that this particular clause would transfer those civil liberties which had heretofore been protected by the states over to the protection of the national government as abridging the privileges and immunities of the citizens of the nation. This, however, was not the case, for the privileges and immunities clause of the amendment enjoys the distinction of having been rendered a practical nullity in the first case in which it appeared before the Supreme Court—the Slaughterhouse Cases. The Court refused to take the bait offered, and preferred to remain out of this field of interpretation, for they refused to "federalize" the civil rights of a citizen. Thus the members of the Court seemingly left the protection of civil liberties and privi-
leges and immunities to the states, and provided the na-
tional government no constitutional authority for a positive program of protection of civil rights.\footnote{Ibid.}

Thus, in 1873, an apparent reluctance on the part of the Court to transfer the protection of civil liberties from the state to the national government can be seen, a re-
luctance which hardly presents itself today. It would be
well to follow the line of thinking of the Court as it
broadened its conservative view on this subject.

Four years after the Slaughterhouse decision, the Court
was still reluctant to enter into this field of inter-
pretation, for, in *Munn v. Illinois*, it refused to interpret
the due process clause of the amendment as invalidating
state legislation which regulated the rates charged for the
transportation and warehousing of grain.\(^6\) Chief Justice
Waite spoke in this decision of the source of protection
such as was sought here. He said: "For protection against
abuses by legislatures, the people must resort to the polls;
not to the courts."\(^7\) In other words, when the people had
been abused by a state law, they must not go to the courts
for that protection, but to the voting polls; that this
amendment must not be the source for national nullification
of state laws which were supposedly abusive. Perhaps Jus-
tice Waite saw here that the people must never have a body
of government deciding such things as their civil liberties
when that body was outside the scope of the only three tools
the people possess for influencing their government: the po-
litical as found in the vote and the lobby, and the legis as
found in the state constitution. None of these influence
the Supreme Court. Whatever his ideas on this subject were,

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\(^6\) *Munn v. Illinois*, 94 U. S., 113 (1877).

\(^7\) *Ibid.*
the result remains that a good point of constitutional law
was made in this decision which was later to be forgotten by
his successors.

The Court apparently intended to approach very cau-
tiously the interpretation of the due process clause of the
amendment, for in the decision in Davidson v. New Orleans in
1878 it once again refused to expand the powers of the due
process clause. Miller delivered the opinion of the Court
in this case, and made some interesting observations con-
cerning the attempts to transfer the civil liberties to the
Federal government by this clause:

It is not a little remarkable that while this pro-
vision has been in the Constitution of the United
States, as a restraint upon the authority of the
Federal Government, for nearly a century, and while,
during all that time, the manner in which the powers
of that government have been exercised has been
watched with jealousy . . . this special limitation
. . . has rarely been invoked . . . But while it has
been part of the Constitution, as a restraint upon
the power of the States, only a very few years, the
docket of this Court is crowded with cases in which
we are asked to hold that the state courts and state
legislatures have deprived their own citizens of
life, liberty or property without due process of
law.\footnote{Davidson v. New Orleans, 96 U. S., 97 (1878).}

He further maintained that there must have been some miscon-
ception of that clause of the amendment which caused the
dockets of the Court to become so crowded with cases. He
said that if it were possible to define what was a

\footnote{Tbid., pp. 103, 104.}
deprivation of life, liberty, or property by the state, and this definition would cover "every exercise of power thus forbidden to a State, and exclude those which are not," then there would be no room left for useful construction of the amendment in the future. Here Justice Miller had left the door open for future interpretation of the amendment, especially the due process clause, and at the same time, did not take his Court into that broad field of interpretation.

The Court was thus upholding the power of the state to exercise its police power, and almost steadily refused to transfer any of this power to the national government through the due process clause of the Fourteenth Amendment. In 1884 the members of the Court once again decided in favor of upholding the state law in the case of Hurtado v. California. But as it was thus upholding the state law, the Court gave notice that in the future all state legislation would be put to the scrutiny of the Supreme Court whether on procedural or substantive rights.10 Justice Matthews, in this decision, said that the phrase "due process" in the amendment was intended only to secure "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."11 This was more than the Court had ventured thus far on the interpretation of the clause,

10Hurtado v. California, 110 U. S., 516 (1884).
11Ibid.
and while it did not specify which actions by the states might deprive the individual of those fundamental principles of liberty and justice, it had left the door ajar for further Supreme Court scrutiny.

Corwin said that the main reason for the inducement of the Court to dismiss its fears of upsetting the balance of the distribution of powers under the Federal system, which it had so carefully protected in the last few listed cases, came from the appeals addressed to it for adequate protection of property rights against the remedial social legislation which had been increasingly enacted by the states in the wake of industrial expansion.\textsuperscript{12}

It was during the process of answering these appeals that the Court began to make up for its earlier nullification of the privileges and immunities clause.\textsuperscript{13} The transformation of the ideals of the Court from its decisions in \textit{Munn v. Illinois} and the Slaughterhouse Cases took approximately twenty years, during which time the scope of the police power of a state had narrowed considerably, each time using the text of the due process clause of the Fourteenth Amendment. The narrowing of this scope of the state police power came in 1887 in the case of \textit{Mugler v. Kansas} where the Court upheld a radical prohibition

\textsuperscript{12}Corwin, \textit{op. cit.}, p. 974.

\textsuperscript{13}See the \textit{Slaughterhouse Cases}, 16 Wallace, 36 (1873).
law, but in doing so, used definite terms concerning the scope of the police power of any state. "Statutes," the Court said, "which were passed to foster the purposes of public health, morals and safety would be upheld by the court, but that the states could employ only such means as would not unreasonably interfere with the fundamental natural rights of liberty and property." 14

It was in this case that the Court declared the theory of "judicial notice" which was to have a great effect on its decisions in the future. This theory, brought forth while deciding the constitutionality of a state anti-liquor law, maintains that the effects of state-wide distribution of intoxicants was sufficiently notorious for the Court to be able to take notice of them. In other words, the judiciary could review the conditions which necessitated the enactment of the legislation in the first place. This is a different view than the Court had taken previously, for in the past it had looked at the law, and the manner in which it related to the Constitution of the United States, and then declared upon its constitutionality. This is referred to as the "presumed validity" theory of the Court. Justice Brewer, in 1892, said of the protection of the individual:

The paternal theory of government is to me odious. The utmost possible liberty to the individual, and

the fullest possible protection to him and his property, is both the limitation and duty of government.

With this case came the theory of laissez faire of economic regulation by the national government.

In a multitude of cases after 1890 the federal and state judiciaries developed a complex new law of substantive due process controlling the state police power and the federal legislative capacity. The meaning of due process and its contents underwent constant changes by the judicial tribunals. The Court constantly refused, as has been shown, to bring forth an all-inclusive basic set of rules by which the violation of due process could be seen and defined. The meaning of due process was, broadly, the limitation upon the police power of a state, and any state statute which imposed any kind of limitation upon the right of private property or free contract immediately raised the due process question. The transformation consists of this: What constituted an exercise of police power of a state now became a judicial question, not merely a legislative one. The Court now reserved the power to consider the whole question of whether the statute in question constituted a valid exercise of the police power. The will of the legislature was still held in high regard, for the Court often took their reasons into consideration while deciding upon the constitutionality of the state statutes. Kelly said of this concept of judicial review:

If the purpose for which the statute had been enacted was a reasonable one, if the act employed reasonable means to achieve its ends, if the means employed bore a reasonable and substantial relationship to the purposes of the act, and if the law imposed no unreasonable limitations upon freedom of contract or private vested right, then the Court would accept the law as a legitimate exercise of the police power.

In this statement the word "reasonable" is found several times. If this word was to be used so extensively by the courts in handing down their decisions, it can be plainly seen that the concept of further judicial review in each instance coming before the courts must be provided for, because what might appear to be "reasonable" to one person, or judge, might not appear so to another. This fairly well outlines the difficulty in tracing the concept of the theory of due process of law, for the line seems to vary from one court to another because of this wording.

In 1898 the Court handed down a decision concerning a state regulation of working hours in mines in Utah. This decision appeared in the case of Holden v. Hardy in which Justice Brown provided for the flexibility of the exercise of the state police power. This decision upheld the state statute which prohibited the employment of working men in mines, smelters, or ore refineries for more than eight hours in any one day. This decision seemingly gets away from the freedom of contract theory, but, as has been mentioned, Justice Brown

16 Kelly, op. cit., p. 522.
was attempting to provide some flexibility in dealing with the exercise of the state police power. He said:

... the Constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the states of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land. 17

This case, however, did not set a precedent in the Court's dealing with limitations on hours of labor. In 1905 a different view was taken in deciding the case of Lochner v. New York which declared unconstitutional a New York statute limiting hours of labor in bakeries to sixty hours in one week, or ten hours in one day. Justice Peckman discussed the freedom of contract here and said that there were limits to the valid exercise of state police power; otherwise the Fourteenth Amendment would have no meaning. He said further:

Not only the hours of employees, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength of the state be impaired. 18

The conditions would prevail if he upheld the constitutionality of the New York statute, emphasized Brown. Justice Holmes gave a vigorous dissent on the decision of the majority in this case because he felt that they were injecting

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laissez faire social theory into the content of constitutional law and were substituting the Court's judgment upon public policy for that of the legislature. This once again brings up the point of the Court placing itself outside the three tools of the public in influencing legislation, the voting poll, the lobby and the state constitutions. It also shows the tendency of the Court to begin entering into these broad fields of interpretation by using the clauses of the Fourteenth Amendment, with its broad implications, to adjust the social legislations of the growing nation.

The Lochner case was overruled three years later in the case of Muller v. Oregon (1908) in which an Oregon statute prohibiting the employment of women in mechanical establishments, factories, and laundries for more than ten hours in any one day was held to be constitutional by the Court. The influence of the dissent by Holmes in the Lochner case is not certain in the Court's reaching of this decision, but it is suspected to have been great because of the unanimous decision by the Court. 19

Here the Court had relied heavily upon the aspect of women working in justifying their decision, but nine years later, in Bunting v. Oregon it upheld a statute of Oregon which provided the limits of ten hours to men as well as women, and regulated wages in that it provided for the

limits of overtime working, and provided for the payment of
time and one half for each hour of overtime worked.\footnote{20}

The due process clause was not only being used for the
regulation of labor as concerns hours worked, but during
this period of intense social legislation it was also serving
as a basis for the new role of the Court in interpretation
that field. In 1905 a law was upheld which provided for
compulsory vaccination,\footnote{21} in 1908 an act was held to be un-
constitutional which made it a misdemeanor for an employer
to require membership in a labor union as a condition of
employment,\footnote{22} in 1917 the New York Workmen's Compensation
Act was held to be constitutional,\footnote{23} and in 1917 the Wash-
ington counterpart of the New York law was held to be con-
stitutional.\footnote{24}

These decisions brought the Court into many fields of
interpretation concerning industry and labor relations.
The reluctance to use the Fourteenth Amendment which had
been theirs previously had apparently been abandoned by the
members of the Supreme Court in the face of public demands
for social legislation, and their acceptance, or rejection,


\footnote{22}\textit{Adair v. United States}, 208 U. S., 161 (1908).

\footnote{23}\textit{New York Central Railroad Co. v. White}, 243 U. S.,
188 (1917).

\footnote{24}\textit{Mountain Timber Co. v. Washington}, 243 U. S., 291
(1917).
of the state statutes under the amendment now apparently depended upon the social philosophy of the justices.

It can easily be seen that the process of interpreting the Fourteenth Amendment involves considerable law-making in itself. Corwin said of this power:

... it clearly appears that the Court's interpretation of the Constitution has involved throughout considerable law-making, but in no other instance has its lawmaking been more evident than in its interpretation of the due process clause, and in no other instance have the state judiciaries contributed so much to the final result. The modern concept of substantive due process is not the achievement of any one American high court; it is the joint achievement of several—in the end, all. 25

The cases thus far discussed in this chapter have dealt with the Court's role of interpreting the due process clause as it relates to the word "property." Shortly after the First World War, however, that tribunal began to expand the meaning of the word "liberty" in the clause. In their dealings with the meanings of this word, the members of the Court, since that time, have done much to expand the area for a need of federal police power into many more fields.

In 1925 the Court proceeded to include the protections of the First Amendment into the protection of the federal

25 Corwin, op. cit., p. xxii.
government under the Fourteenth Amendment. This occurred in the case of Gitlow v. State of New York, in which Gitlow, convicted of circulating communist literature, urged on the Court that the New York Statute (New York Criminal Anarchy Act of 1902) deprived him of liberty by unduly restricting the freedom of the press. The Court affirmed the conviction for violation of the New York statute, however, it declared that:

For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth amendment from impairment by the States.

The justices went further in transferring these protections of the First Amendment by moving the freedom of religion, freedom of the press, and the right of peaceable assembly over to the protection under the Fourteenth Amendment.

An interesting case just cited is Near v. Minnesota which was the first case in which a state statute was held, by virtue of its general character, to deprive persons of

27 Ibid.
liberty without due process of law because it unreasonably restricted freedom of speech and press. The result of the case was to "nationalize" these two civil liberties.\textsuperscript{31}

The Court felt called upon further to outline the provisions of the Bill of Rights in relation to the Fourteenth Amendment in 1937 in the case of \textit{Palko v. Connecticut}\textsuperscript{32} in which it maintained that all of the protections in the Bill of Rights do not necessarily fall under the scope of the Fourteenth Amendment; however, it went into some detail in opening new areas. The Court had also, in \textit{Powell v. Alabama} (1932), held that a state may not deny the accused in a criminal case the right of counsel as guaranteed by the Sixth Amendment.\textsuperscript{33}

It was shortly after making these decision concerning some of the protections of the Bill of Rights that the national government took a great step in creating a means of positive action on the matter of civil rights. In 1939 there was created in the Criminal Division of the United States Department of Justice a Civil Rights section. This section was purely administrative, and no legislative action had been taken to justify it or to give it life. It found its power and justification in the revised Civil Rights Act

\textsuperscript{31} \textit{Near v. Minnesota}, op. cit.


of 1909, which became sections 19 and 20 of the Criminal Code. Section 19 provides for punishment of two or more persons conspiring to take away the rights and privileges of a citizen of the United States secured to him by the Constitution of the United States. Section 20 is more individual in that it provides for punishment for "any person" taking away these rights and privileges, and it protects any inhabitant, citizen or not.

Section 19 of the Criminal Code had already been upheld as to its constitutionality by the Court in *Ex parte Yarbrough* (1884). Yarbrough and others were members of the Ku Klux Klan, and were convicted by the Federal government for conspiring to influence the right to vote of a Negro for a Congressman. The law they had broken was the Enforcement Act of 1870, which gave power to the Fourteenth Amendment and which is the main idea of Section 19 under discussion here. The Court, for which Justice Miller was speaking, upheld Yarbrough's conviction and upheld the Federal law in a decision which made it clear that the right to vote for representatives in Congress is a right which one obtains from the Constitution of the United States of America, even though the qualifications of this right may be fixed by the several states. Congress has full authority under the doctrine of implied powers to protect this privilege of national citizenship against individual or state aggression.\(^{34}\)

\(^{34}\) *Ex parte Yarbrough*, 110 U. S., 651 (1884).
In 1931 the newly created Civil Rights Section was upheld in the case of *United States v. Classic*, in which Classic, a New Orleans politician, was convicted under this new code for frauds in elections. It was held here that a primary election was an election within the meaning of the Constitution and the statutes under question.  

These sections were really put to the test in 1945 in the Screws Case. Screws, a sheriff in Georgia, with the assistance of a deputy and a policeman, arrested Hall, a Negro, one night for alleged theft of a tire. Hall was handcuffed, taken to the courthouse and beaten to death. There had been evidence that Screws had a grudge against Hall and had threatened to "get him." The state authorities failed to prosecute Screws, and he was thereupon convicted under the Federal law. He was indited on the grounds that he and the other two officers had deprived Hall, under the color of the law of Georgia, the rights guaranteed him by the Fourteenth Amendment; the rights not to be deprived of life without due process of law, and to be tried on the charges on which he was arrested and if found guilty, punished in accordance with the laws of that state. The action taken by the Supreme Court in this case is interesting, for the majority of the justices voted for a new trial on the

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grounds that the jury had not been instructed properly on the matter of willful deprivation of the constitutional rights of Hall. The dissenting justices, Roberts, Frankfurter and Jackson dissented on the grounds that Section 20 was vague and not definable. Justice Murphy dissented on the grounds that he felt that the conviction should stand.

The Federal law was held to be constitutional by the Court, but a new trial was ordered on the grounds that have been mentioned, and in the next trial the defendants were acquitted.

The cases listed go a long way in creating an area of national police power which had never existed before, and which are tremendously broad upon closer inspection. It does not ascertain just how far the Federal government can go in protecting a citizen in exercising his right to vote, and in other broad fields.

The Screws case went a long way toward protecting the citizen in the exercise of his rights under the due process clause of the Fourteenth Amendment against not only the actions of a state, but of an officer. The broad possibilities of the opinions of the Supreme Court in this case have been realized; however, since 1945 there have been even broader interpretations delivered on the "equal protection" clause of the amendment.

The last section of the Fourteenth Amendment to be discussed here deals with the equal protection of the law
as to the right of a citizen to attend public school. There
is ample material on this subject alone for many studies of
this nature; however, an attempt will be made to trace the
Court's opinion while entering into this broad field of
interpretation in relation to the need for a new area of
police power.

Justice Holmes once called the "equal protection" clause
the "usual last refuge of constitutional arguments." The
main area for protection under this clause comes under the
classification of discrimination because of race or nation-
ality. With the exception of these two, few police regu-
lations of a state have been declared unconstitutional on
the grounds that they do not secure equal protection of the
law. To say the least, this is a broad wording in the Con-
stitution, and, as has been said, it is usually used in the
field of discrimination, and will be mainly examined here as
it deals with discrimination in the field of education.

In 1896 the Court set up a theory of constitutional law
concerning this clause which was followed until 1954. This
theory was the "separate but equal" idea brought forth in
the case of Plessy v. Ferguson in which the Court held that
a statute of Louisiana which required the railroads operating
in that state to provide equal but separate facilities for
both white and colored passengers was constitutional and did

not deny the colored passengers the equal protection of the law as provided for in the Fourteenth Amendment of the United States Constitution.\textsuperscript{38} The Court held here that such a law by a state was the proper exercise of the police power of that state. It will be noted that this decision, while modified considerably through constitutional history, was not actually reversed until four short years ago. The contention was, in this case, that to enforce separation of races on these transportation facilities was to stamp the colored race as "inferior." The Court answered thus, "If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."\textsuperscript{39} So the theory was thus set up which maintained that facilities, whether they be transportation, schools, housing or a multitude of other things, could be separate and equal. To what degree must the word "equality" be defined? Common usage of the word is that things are either equal or they are not equal, however, the Supreme Court deals not in this sort of equality, but in substantial equality.

The definitions of the term "equality" can be looked upon with loose or strict construction. In 1899 the Court chose the former, in the case of \textit{Cumming v. County Board}

\textsuperscript{38}\textit{Plessy v. Ferguson}, 163 U. S., 537 (1896).

\textsuperscript{39}\textit{Ibid}.
of Education, where it found that there was no loss of "equal protection" because the county of a southern state failed to provide a high school for some sixty Negro children while it maintained a high school for the white children. The Court accepted the contention that the county did not have sufficient funds to build a high school for Negroes. To term this construction of "equality" as being loose is to be liberal indeed!

The Court went further, in 1927, in maintaining that a Chinese citizen was not denied equal protection of law when she was assigned to a public school which had been provided for colored children, and which was farther from her home than was the school for white children.

In the case of Missouri ex rel. Gaines v. Canada the Court changed its policy somewhat in that it declared that the state was denying equal protection of law in that it did not have a law school for Negroes within the state. The state had set up a law school for white people, and intended to set up one for Negro students when, in their opinion, it should be necessary and practical to do so. While there existed no law school for Negroes, the state made arrangements to pay for the legal education of the Negroes at schools in other states. Petitioner was Lloyd Gaines, a Negro who had,

\[40\] Cummings v. County Board of Education, 175 U. S., 528 (1899).

\[41\] Gong Lum v. Rice, 275 U. S., 78 (1927).
according to his record, been found qualified for admission to the Missouri University School of Law. He was refused admission on the ground that Section 9622 of the Revised Statutes of Missouri (1929) provided that he might arrange for attendance at a university of any adjacent state with his tuition fees paid. The state court had stressed the advantages of the law schools of the adjacent states, Kansas, Nebraska, Iowa and Illinois, but the Supreme Court, in its decision, maintained:

We think that these matters are beside the point. The basic consideration is not as to what sort of opportunities other states provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to Negroes solely upon the ground of color. 42

The position of the court was thus made clear. To get back to the separate but equal idea, the Court went further:

Here, petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the state was bound to furnish him within its borders facilities for legal education substantially equal to those which the state there afforded for persons of the white race, whether or not other Negroes sought the same opportunity. 43

The Court merely demanded that the state provide an education of law within the state which was substantially equal to that

43 Ibid.
offered white students, which stays with the theory of separate but equal. The Court once again held to this position in 1948 in the case of *Sipuel v. University of Oklahoma* in which it maintained that the state must offer the Negro woman the same education which was offered to the white students, and at the same time that it was offered to the white students. 44

Two years later, however, the "separate but equal" theory was modified in the case of *Sweatt v. Painter* (1950) in which the State of Texas had a law school for Negroes within the state, and claimed that this law school was equal to that provided for the white students. The Court here brought in the idea of objective measures in saying that the law school provided for the white students "possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school." 45 These intangible measurements discussed include the association with other law students who will practice law in the state, and others who will become officials of law in that state. These things, the Court maintained, would not be offered to the student in the Negro school of law, therefore it was not equal. This case strongly suggests that no Negro law school can be "equal."


In the same year, in *McLaurin v. Oklahoma State Regents*, it was decided that although the state allowed a Negro graduate student to attend the same college as the students, the Negro was not being given the equal protection of the laws in that he was required to sit on a special row for Negroes.

If ever an area of interpretation involved broad policy-making, this one did, for here was an area in which the police power of a state to maintain its own school system was slowly being transferred to the national government through interpretation of the Fourteenth Amendment by the Supreme Court. The far-reaching effects of these broad interpretations are obvious, for there simply are no communities, no matter how small, which do not have some sort of school system.

The cases discussed thus far have dealt with the equal protection of the law as far as education on a higher level is concerned, and thus the decisions actually reached a very small segment of the public. This was to change, however, in 1954 when the Court made a decision which has caused it to fall under the most severe criticism of its history, and which was to open areas of constitutional law heretofore unimagined.

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In the fall of 1952 the Supreme Court had on its docket cases from four states, Kansas, South Carolina, Virginia and Delaware and from the District of Columbia challenging the constitutionality of racial segregation in public education. These cases had nothing to do with the "equal but separate" theory, for in each case the physical facilities were, or were being made, equal as far as physical plant, curricula and all other "tangible" factors were concerned. There was no obvious way for the Court to escape this difficult position, for the question was squarely put before it: Was segregation in public schools constitutional? Time had caught up with the Court and it was offered no choice but to affirm or reverse which had been handed down nearly sixty years before in *Plessy v. Ferguson*.\(^{47}\) The five cases were argued together in December, 1952 and, as Cushman said, "the country waited with tense interest for the Court's decision."\(^{48}\) The test case was titled *Brown v. Board of Education of Topeka*.\(^{49}\) The Court did not hand down its decision from the primary arguments, but re-scheduled it for another appearance in the fall of 1953, asking for elaborations at that time upon, (1) the show of historical evidence concerning the intentions of the

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\(^{47}\) *Plessy v. Ferguson*, op. cit.

\(^{48}\) Cushman, op. cit., p. 432.

framers of the Fourteenth Amendment with respect to the impact of that amendment upon racial segregation in the public schools, and (2) if the Court should find that racial segregation violates the Fourteenth Amendment, what sort of decree should be issued to bring an end to it?

The Court did not take this case lightly, for it could be plainly seen that this was to be one of the "great" cases in constitutional history influencing the relations of state police power and Federal control to a great degree.

The Court moved with deliberation on this case, for the decision was not handed down until May 17, 1954, almost two years after having first appeared on the docket of the Supreme Court. Cushman said of the wisdom of the Court in the manner in which they handed down this decision:

Three things in the present case indicate the high sense of responsibility felt by the justices of the Supreme Court in deciding a case of such vital national importance. First, the Court was unanimous. Second, one opinion was written, not half a dozen. Third, the Court set for argument in the fall of 1954 the problem of the nature of the decree by which its decision that segregation is invalid may best be given effect.50

The Court acted wisely when handing down its decision, for if there had been a five to four split, as has so many controversial decisions handed down by that body, there would have been much more room for argument on the part of those who did not like the decision.

50 Cushman, op. cit., p. 433.
Chief Justice Warren, delivering the opinion for the Court, sent along with the review the history of the Fourteenth Amendment which had been given in the arguments before the Court and then termed them "inconclusive." He then proceeded to review the history of the Court's handling of the cases involving segregation and maintained that there was no opportunity here to look at the "tangible" aspects of equal protection as they are related to education, but that "our decision, therefore, cannot turn merely on a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education." 51

He then turned directly to the source of the "separate but equal" theory, the Plessy decision: "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Therefore, we hold that the plaintiffs and others . . . are . . . deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment." 52

In another case handed down on the same day, the Court dealt with the segregation in the District of Columbia which falls under the jurisdiction of Congress. This appeared in the case of Bolling v. Sharpe, in which it was held that the

52 Ibid.
due process clause of the Fifth Amendment forbade racial segregation by the Federal government.\textsuperscript{53}

In the Brown decision which was first handed down the Court undertook many duties which are normally left to other bodies of government, and in so doing have created a need for a new type of police power. In quoting a lower court, Mr. Warren said: "Segregation of white and colored children in public schools has a detrimental effect upon the colored children."\textsuperscript{54} This is an obviously broad statement, made by a body of government which is outside the influence of the people. Such functions of government are usually left to the legislative body of government who represent the people and who are influenced by them. This statement, with its broad effect upon a segment of the people, thus is issued by a branch of the government which is itself outside the realm of direct influence by the people.

The case came up again in October of 1954 concerning the manner of decree which would be issued concerning the invalidity of segregation. In several respects this case is more interesting than the first, for it provides for the carrying out of the decision of the first. Chief Justice Warren began by reviewing the first case enough to ascertain


\textsuperscript{54}Brown v. Board of Education of Topeka, op. cit.
that they had come to the conclusion that racial discrimi-
nation in public education was unconstitutional and that: "all provisions of federal, state, or local law requiring or
permitting such discrimination must yield to this prin-
ciple."\(^{55}\) He then proceeded to place the responsibility for
solving the local problems squarely upon the shoulders of
the local administrators:

Full implementation of these constitutional prin-
ciples may require solution of varied local school
problems. School authorities have the primary re-
sponsibility for elucidating, assessing, and
solving these problems; courts will have to con-
sider whether the action of school authorities con-
stitutes good faith implementation of the governing
constitutional principles.\(^{56}\)

In the light of recent developments as a result of this de-
cision, which will be discussed later in the chapter, it is
apparent that Mr. Warren did not realize the extent of these
"local" school problems which would require a solution!

In going on with his October decision of the Brown case,
Chief Justice Warren used many terms which may be interpreted
in several different ways. He said: "While giving weight to
these public and private considerations, the courts will re-
quire that the defendants make a prompt and reasonable start
toward full compliance with our May 17, 1954, ruling."

\(^{55}\) Brown v. Board of Education of Topeka, 349 U. S., 294
(1954),

\(^{56}\) Ibid.

\(^{57}\) Ibid.
The word "prompt" is not too difficult to define, for it must mean quick, or soon, but what would constitute a "reasonable" start toward compliance could mean anything to different school authorities all over the nation. Senator Eastland said upon hearing of this use of the word "reasonable" that he thought about a hundred years would constitute a reasonable start.  

After this "start" was made, said Warren, then the school authorities could be given some additional time to carry out the ruling in an effective manner. Perhaps the Court saw the danger in such a broad policy as this, which would affect every community in the nation, for here it is allowing for "additional" time. At the present time, almost four years later, the school authorities are still using this additional time. Warren said: "The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date." Again he used a term which escapes a conclusive definition.

Warren then remanded the cases before him to the lower courts to take such proceedings and enter such orders and decrees consistent with the opinion as might be necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these

cases. Here again is found an ambiguous term, "deliberate speed." Does the Court mean for the District Courts to take their time in hurrying up these decrees, or did it mean for them to hurry up taking their time? This may seem a question on the extreme, but the question, according to the wording used, presents itself.

Now the gate had been swung wide open, and the Court was now into the broadest field of interpretation of its history, which brings up several questions of great importance concerning the police power in relation to this decision. Who was to enforce the decrees of the District Courts? What would happen if these decrees were simply ignored? What means would be taken if the states lagged behind in their program for carrying out these orders? These are questions that gravely need an answer, for they are with the nation today and no practical solution has been produced.

Obviously the Federal marshals cannot enforce this court order, simply because there are not enough of them to do so; and the Federal marshals were the only national force which had the power to carry them out. The courts, then, must depend upon the acceptance of their orders in each individual state, with the use of the internal police forces of that state if necessary in carrying out the orders of the Federal court.
Mr. Chief Justice Warren had said in the later Brown decision that in fashioning the decrees for integration the Court would be guided by "equitable principles."\(^59\) Apparently he meant that the Court would not be guided by the force of law, or would not fall back upon the "law" for the enforcement of this policy which was necessarily laid down by the decision. This wording, then, brings about an interesting situation. Could the Court depend upon "principles" in handing down such a broad decision, which would strike at the very roots of a large segment of the society of the nation? Would the existing state police forces go along with the order which was based upon "equitable principles?" Late developments answer this question.

In early September, 1957, according to the decree passed down in the later Brown decision, the Central High School of Little Rock, Arkansas proceeded to integrate its school. This came as a result of the approval, in 1956, of their plan of gradual integration which would meet the requirement of the "reasonable" start which was required in the Brown decision.

Nine Negro children were to attend the high school, those being in the upper grades, but when they arrived at the high school on opening day they were met by a force of Arkansas National Guard who refused them entrance into

\(^{59}\)Ibid.
the school. These units had been called out by Governor
Faubus with the alleged "intention" of preventing violence.

Here was the most serious flaunting of the orders of
the Supreme Court in its history, for the real purpose of
the state troops at Little Rock Central High School was
obvious; it was to prevent the enrollment of Negro children
into the school—a direct violation of the orders of the
Court. It must be remembered, there was no law broken here
at Little Rock, only the decree of the Supreme Court, but
it threatened the very basic system of the government.

A conference was called for between the Governor and
the President of the United States in which Faubus ap-
parently agreed to obey the court order. He failed to do
so, and the state militia stayed on at Little Rock.

Several of the Negro clergymen of the city appealed
that the laws of Arkansas allowing segregation in its
public schools were unconstitutional, and action was post-
poned on these appeals.

Judge Davies then directed Faubus to stop using the
troops to obstruct the enrollment of the Negro children in
the high school in a court hearing the which the Governor
had refused to appear. After this order by a Federal judge,
the Arkansas militia was pulled out from the high school,
and general rioting broke out when the children attempted
to enroll. The result of this rioting is famous, for the
President then called out the 101st Airborne Paratroop
Division which was dispatched to the high school to ensure the end of the rioting and the enrollment of the Negro children. On the day that the federal troops were ordered into Little Rock, the President went on nation-wide radio and television to explain that in such extraordinary circumstances, the executive department must use its powers and authority to uphold Federal courts.

This case is the crux of a discussion of this type. Here Federal troops are called into a state and city, to uphold an order of a Federal court which regulated the running of the schools of that state and city; an exercise of power which had always been left to the states heretofore. This situation brings to a point all of the interpretations by the Supreme Court in which they entered into the field of police power, and proceeded to transfer it over to the Federal government.

Peace was restored to Little Rock, through the use of the Federal troops, and the children were enrolled and attended the high school. In June of 1958, however, a Federal court, in a decision handed down by Judge Lemely, decided that it would be best to postpone the entrance of Negro children into the public schools of Little Rock for two and one half years. This case is now under appeal to a higher court, and once again, the nation awaits anxiously the decision.
CHAPTER V

CONCLUSION

Through its performance of its duty as the interpreter of the Constitution of the United States, the Supreme Court has brought the scope of constitutional law into many fields of police power, or enforcement which necessitates a new type of police power.

The main means of the Court in entering into these fields have been: (1) the national supremacy clause of the Sixth Article, (2) the use of interpretation of the powers which are granted to the national government and expansion of them, and (3) the interpretation of the Fourteenth Amendment with its many different clauses which have proven broad enough in their scope to allow flexibility in interpretation.

Through the use of these facilities offered it, the Court has leaned toward the utmost protection of the individual and human rights against the governments, a duty which it should perform. In protecting the individual, however, the Court has often overlooked several points of constitutional law which should not have been ignored. In ignoring these points of constitutional law, the Court has, through its history, brought itself under severe criticism,

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had its orders ignored, and had attempts made by the other branches of government to alter its powers in laying down broad and general policies.

Some of these points of constitutional law which have been ignored are: (1) The legislative body of government, not the judicial, should be the body to look into the conditions supporting the passage of legislation. The legislative body represents the people, and is supposed to make their wishes known through appropriate legislation. The Court has set itself up as a body to pass on the wisdom of legislation, and then declare on its constitutionality; (2) The judiciary has proceeded to pass its decision down upon the constitutionality of practices, such as segregation, thereby laying down a tremendously broad policy for the whole nation to follow. These broad policies have created a multitude of problems of enforcement in the operation of our dual system of government; (3) The judiciary, in protecting the individual has, on several occasions, proceeded to overlook the wishes of a group who are formed to influence legislation. In doing this, the Court has placed itself outside the normal checks that the citizen has on his government; (4) In handing down broad policy-making decisions, the Court has overlooked its dependency on the internal police forces of the states for enforcement of its decisions, thereby creating a serious problem in police power areas.
It is with this last point that this study is most concerned. If there is to be an enforced integration policy, as the later cases involving this problem indicate, then there must accompany this order some manner of enforcement other than those already existing.

The nation cannot depend upon the military force of the country to carry out the orders of the courts, for these forces are at the hands of the executive, thus placing them virtually outside the influence of the public.

The only answer which presents itself is a national police force created by the legislative body of the government, which is subject to the influence of the public, thereby making that enforcement body somewhat subject to the voting poll. This would erase the problem of the Court's placing itself in the position of having its orders completely ignored by the state enforcement bodies; it would certainly erase the problem of having the national military forces enter into a state and city to enforce the orders of a federal court, and at the same time would create a body of enforcement which would enforce the orders of the courts; yet an area of control over that body would still exist.

Of course the creation of such a national enforcement body would create a multitude of problems because of the many changes it would bring about in the basic form of the
American government. They would create a turmoil over this point just as they have done over the decision of the Supreme Court and probably with good reason for, as has been mentioned, this would drastically change our system of dual federalism.

These are problems which are present today, and which are going through the process of the courts at this very moment. There is a definite need of some sort of revision in the police forces in order that the individual may obtain protection against government, and at the same time, the group may have its rights protected.
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