PUBLIC INTEREST IN CONSTITUTIONAL INTERPRETATIONS

ADDRESS

by

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at

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There is an abiding friendliness between the people of my State, Kentucky, and those of Texas. Before the War between the States, Kentuckians flowed into the Texas plains to share the adventures and opportunities that were offered the intrepid spirits that settled your vast expanse. One came from my own Kentucky neighborhood, General Albert Sidney Johnston.[1] A West Pointer of early days, he resigned from the United States Army after Black Hawk's defeat cleared America East of the Mississippi of Indian depredations.

Somewhat of an adventurer, Sidney Johnston had known of Texas, then a part of Mexico and largely settled by American frontiersmen, through his brothers. In 1836, shortly after Sam Houston had won the Battle of San Jacinto avenging the Alamo, and Texas had separated from Mexico and had received recognition from the United States, Sidney Johnston arrived in the Republic of Texas which was then in need of trained military men. He became Adjutant General of your army and ultimately under President Houston its commander. After some years, he took part with Jefferson Davis, a West Point comrade of his, in receiving the capitulation of Monterey, was reappointed to the United States Army as Colonel of the Second Cavalry with Robert E. Lee as Lieutenant Colonel. Later he gave up his command to become the Western Confederate commander at Shiloh. There he died a soldier's death at the head of his troops. Jefferson Davis announced, "Our loss is irreparable." Sidney Johnston was interred finally in his adopted state at Houston with a funeral cortege of thousands. His life symbolizes the spirit of the early Texas. Those hardy souls became the source for the gallant Texas spirit that dazzles the nation today with its successes in the fields of business, finance, education and patriotism.

Why do I recall to you the memory of a great and gallant Texan? It is not because of the constitutional principle for which he fought—the right of a sovereign state to withdraw from the Union when dissatisfied with fed-

eral action. That theory ended with Appomattox. For better or for worse we are joined together. Robert E. Lee thought that even the great conflict over secession and slavery could have been settled without bloodshed. When testifying after the War before the Joint Committee on Reconstruction, he was asked concerning his view of the influences that brought on the strife. He said, "I did believe at the time that it was an unnecessary condition of affairs, and might have been avoided if forbearance and wisdom had been practiced on both sides."

I mention General Johnston to emphasize the tragic mistake of our national life when we were unable to settle through peaceful constitutional means—legislative, executive, judicial—fundamental disagreements as to national policy. In the other great social questions, it has been possible to satisfy the public interest in social and political changes through interpretations of the Constitution, "an impartial arbitrament based on the idea of right." [2]

In recent years a Texas incident gave renewed proof of the effectiveness of the adjustability of our constitutional system to meet social necessities. When the Tidelands Decision went against the general understanding as to states rights, the Congress promptly returned the littoral to the States.

Legal conclusions, whether expressed as decisions or dissertations, are not reached by formal logic. Hence the general acceptance of the Holmes' aphorism in The Common Law that the life of the law has not been logic but experience. If judges laid down major premises followed by minor, in syllogistic fashion, law would be as foreseeable as the conclusion in logic. It is not. The difficulty arises from the impossibility of stating adequate major premises for syllogistic reasoning. "All employers must pay compensation at common law for damages caused by their employees in the scope of their employment." Such a premise could be easily administered, but it would be unfair. In jurisprudence, the major premise does not have that generality. The uncertain term "negligence"

must be added; the fellow-servant, or the contributory negligence, or the assumption of risk rules appear. It took the Federal Tort Claims Act to make the United States liable. Because legal rules do not possess the preciseness of scientific classifications, experience—perhaps we should add, foresight—plays a major role in the development of the law. That is, a logician's indisputable conclusion is not necessary, but the determination may be in accordance with the exceptions to the words themselves that legal judgment from experience and precedent requires. That has been a legal doctrine since Plowden.

> "And the Law may be resembled to a Nut, which has a Shell and a Kernel within, the Letter of the Law represents the Shell, and the Sense of it the Kernel, and as you will be no better for the Nut if you make Use only of the Shell, so you will receive no Benefit by the Law, if you rely only upon the Letter, and as the Fruit and Profit of the Nut lies in the Kernel, and not in the Shell, so the Fruit and Profit of the Law consists in the Sense more than in the Letter." [3]

The search for the logically consistent legal system of Austin turns more toward the effect of law—social reality.

That is not to say a judge is free to disregard precedent. None does, but changing conditions do change rules of law and the most careful judges have felt the necessity to make changes from the earliest days.[4] It has sometimes been suggested that a decision or an interpretation of the Supreme Court on a constitutional question ought to become a part of the Constitution, not to be changed without an amendment. But this rule would bring a rigidity into that document which is unrealistic in view of the generality of many of its clauses. The better rule must be that stated by Chief Justice Taney in the *Passenger Cases:*

> "After such opinions, judicially delivered, I had supposed that question to be settled, so far as any ques-

> tion upon the construction of the Constitution ought to be regarded as closed by the decision of this court. I do not, however, object to the revision of it, and am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported." [5]

Courts have no techniques for gathering facts to form an ultimate judgment as to values of social policy. The record contains the facts for the litigation. The judge must decide an issue of interpretation from that record, historical observation, and legal precedents in the light of current experience. Nor should a judge undertake the establishment of a public policy through his decisions. The exercise of arbitrary powers, for example, cannot be justified because deemed necessary for good government. That was not the basis of the *Japanese Curfew Case,* though that decision has been subjected to that criticism, for it was based on the Court's interpretation of the war power.[6] Arbitrariness must be judged in the circumstances of its alleged commitment. Nor can judges take decision off the plane of constitutional principle and put it on the plane of social welfare alone.

The sovereign has privileges in litigation because it is a sovereign—such as freedom from suit without consent and freedom from the necessity of producing evidence concerning affairs of state or security. But these are privileges that are opposed by the trend toward equality of rights as between the citizen and his government.[7]

This reasoning requires interpretation of constitutional language somewhat as one would construe other documents or a statute. It cannot be done, as was once suggested, solely by laying the statute by the Constitution and deciding whether the former squares with the latter.[8]

Let us take the First Amendment of the Constitution for an example. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; . . ." Keep in mind, too, that the principles of the First Amendment have been included in the command of the Fourteenth to the States.[9] Although some expressions in the Supreme Court opinions have indicated this language means that laws are not constitutional which affect religion, speech or press, generally the decisions are to the contrary and allow legislation that directly affects religion and speech or press.[10]

The Supreme Court has had continuous difficulty with the interpretation of the clause relating to the abridgment of the freedom of the "Press." There is universal agreement that an essential basis for those freedoms as guaranteed by the First Amendment is the existence of a press that is allowed to print and circulate criticism, suggestion and denunciation without censorship or punishment, limited only by the laws of libel to protect the individual and those for the proper security of the States.[11] It is the application of the accepted doctrine to the circumstances of a charged violation of those limits that continues the difficulties. The same words may be actionable at one time and not at another.[12]

First Amendment protections are sought by great organizations as well as petty political pamphleteers. When the National Labor Relations Board ordered the Associated Press to reinstate in its employment a rewrite man, one of a group of filing editors, who received, rewrote and filed for transmission, news coming into the AP's New York office, and who was discharged for continuing as a member of the American Newspaper Guild, a labor organization, the employer pleaded and argued that to compel such re-employment abridged the freedom of the press in violation of the First Amendment.[13] The argument was that to permit a federal agency to direct employment of

persons for writing was the same as to direct what they should write. It was called an "indirect limitation upon the press of the country."

Four dissenters in the Supreme Court upheld this view, saying:

> "If freedom of the press does not include the right to adopt and pursue a policy without governmental restriction, it is a misnomer to call it freedom. And we may as well deny at once the right of the press freely to adopt a policy and pursue it, as to concede that right and deny the liberty to exercise an uncensored judgment in respect of the employment and discharge of the agents through whom the policy is to be effectuated." P. 137.

The requirement, said the dissent, is imperative that "Congress shall make no law . . . abridging the freedom . . . of the press." The Court upheld the Labor Board, saying, p. 132:

> "The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. . . ."

This interpretation of the First Amendment accords with a judicial attitude of searching for the inner meaning of a constitutional command rather than being satisfied with the words alone.[14]

Absolute rights in the law are not universal. They sometimes conflict. Individual freedoms v. national security. Privacy v. Duty to Disclose. Perhaps Fairness is the only absolute the Law can recognize. Justice—all things considered. But, if not absolute, these rights of speech, religion and assembly are revered in our Democracy. We are reluctant to affect them even temporarily.

No duty so awesome confronts a judge as the responsibility to finally interpret the constitutionality of a statute

or an occurrence about which that complaint is made. The past experience may be contradictory or obscure, and surely the future effect of a constitutional ruling is not always certain. Some clauses—for example, the Contract Clause—are not absolute so as "to be read with literal exactness." The phrase is taken from *Home Building and Loan Association* v. *Blaisdell,* a case holding constitutional a state moratorium statute that deferred, under court administration, the dispossession of a delinquent mortgagor, despite the contrary terms of a prior mortgage. Fundamental interests of the State may be affected.

> "If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation." [15]

That case came in early 1934 when the destructive force of the Great Depression was wrecking men's lives, debtors were desperate, and foreclosures often required police for enforcement. There were four dissents. The case cushioned disaster and gave strength to recovery.

From the beginnings of our Nation, constitutional interpretations have played a large part in our economic and political life. The working out of proper relationships between men is the permanent interest of all mankind and all nations. The United States was created to bind its sovereign States into a union with strength for defense, with opportunity for development and with the purpose of guaranteeing liberty and justice to every man. The Constitution specified the structure of our Federal Government, granted it certain powers, expressed the limits on their exercise, and forbade certain rights to the sovereign States. Therefore political and judicial interpretations of the Constitution have had large effect on

our changing economy. When one compares our polity with that of contemporary states, it surely is not alone patriotic fervor that tells us we may be well satisfied that we did not adopt the rules of absolutism or unrestrained improvisation for the conduct of our affairs. The interpretations of our Constitution that were at their announcement of the greatest interest have covered different clauses and policies. Sometimes the decisions' effect on our society seemed small, but it may be progressive.

The first of the great constitutional issues that arose was one that has continued through the years and probably will continue to the end of time—the various forms of conflict between federal and state power. An early manifestation was the adoption of the Tenth Amendment that powers not delegated to the Nation are reserved to the States or the People. In a few years differing opinions as to its meaning created the nation-wide controversy over the Alien and Sedition Laws. The Annals of Congress summarize the arguments pro and con but perhaps the strongest statements of its opponents appear in the Virginia and Kentucky Resolutions.

Today there are doubtless few who would assert that power to deport dangerous aliens or to punish incitements to overthrow the Government were beyond the power of Congress. *Dennis* v. *United States*,[16] *Pennsylvania* v. *Nelson*[17] and *Shaughnessy* v. *Mezei*[18] were decided on the contrary assumption.

The adoption of the Tenth Amendment made it clear that the United States had only delegated powers. Since these powers came from the ratification of the Constitution by the several States, it was quite natural that they should feel that their courts had equal authority with the federal courts to determine the constitutionality of Acts under the Federal Constitution. So in the early nineteenth century, when Chief Justice Marshall's Court had before it the struggle of some States to preserve for their courts determination of the constitutionality of the use of federal power in federal matters affecting both govern-

ments, great decisions were handed down which welded the Nation into a unit for matters of national concern and preserved to the States matters essentially local in character. *Calder* v. *Bull* [19] had adumbrated the conclusions later announced in *Marbury* v. *Madison* and *Cohens* v. *Virginia* [20] that the Supremacy Clause made the decisions of the national courts controlling as to the meaning and application of federal law.

M'Culloch v. *Maryland* established national power upon an effective basis when the Court announced that when the end is legitimate, all appropriate means adapted to that end may be employed. This ruling, necessary for the exercise of national sovereignty, was rested on the Necessary and Proper Clause.[21] Upon it has been built the national banking and federal reserve system, as well as the great network of subsidiary financial agencies that made credit available to farmers, home builders, and loan associations, and protected the savings of the people.

As we look back upon that dispute now, we can realize the intensity of conviction that strengthened the Nullification Doctrine and urged the finality of state adjudication in federal constitutional issues. A national government that could not finally decide for itself such problems would have been too weak to survive. Different decisions by individual States would have effectually hamstrung all national progress.

We have recently had a striking illustration of the value, yes, the necessity, of one final judicial authority on federal matters. Florida had held unconstitutional as violative of the Privileges and Immunities Clause a Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings, an Act drawn by the National Conference of Commissioners on Uniform State Laws and adopted in over forty States. The Supreme Court reversed the decision on the above-stated constitutional clause. This action enables States to force needed witnesses to appear to testify in criminal cases in a foreign jurisdiction, free from restriction of the Privi-

leges and Immunities Clause.[22] This is the basic effect of the decision. Due process difficulties may arise in its administration, such as the showing of necessity for taking a man from Florida to California, whether the desired witness must travel in custody, how much is he to be paid. Such are readily solvable problems when the basic power of a State to secure necessary witnesses for prosecution is settled.

Recently the Supreme Court heard argument in *Farmers Union* v. *WDAY*. The Union sued the radio station for admitted libel under North Dakota law. The defense, upheld by the State Supreme Court, was that federal law required publication of a candidate's script without censorship. Fundamentally the issue is the power of the United States to regulate interstate broadcasting exclusive of the State. Just this month *Bartkus* v. *Illinois* came down, holding that a federal conviction did not bar a state trial for the same offense. That was a striking example of the duality of our government.

The Fourteenth Amendment capped the unified national structure. It made citizenship sure. While the adoption of the Fourteenth Amendment did not bring all the guarantees of the Bill of Rights to the States—for example, those of indictment by a grand jury,[23] or trial by a twelve-man jury [24]—it did bring to everyone in every situation that is ruled by law those protections that are "implicit in the concept of ordered liberty." [25] The Fourteenth Amendment did not limit due process to the guarantees of the Bill of Rights.[26] Had it been so construed it would have left the Constitution, without amendment, helpless to protect the liberties of the citizen except as to the guarantees listed under the situation existing in the eighteenth century. Surely those who held such a limited view of constitutional adaptability would have insisted that construction of general phrases must be decided according to the viewpoint of that era.

When disorder is state-wide or insurrectionary in character, the Governor may take charge and call out troops,

The necessity for federal determination rather than state determination was again resoundingly emphasized Monday, April 20, in San Diego Building Trades Council when the Supreme Court, unanimously on this point, held that states are without power to exercise jurisdiction over matters, other than violence, covered by N. L. R. B. authority even though the National Board has "declined to exercise its jurisdiction." This position has been taken to avoid "the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal and the other state."

as he did in *Moyer* v. *Peabody*,[27] arrest the leaders, and hold them not for punishment but by way of precaution. As was there said, he may be called upon to justify such use of the executive power and this was actually done in *Sterling* v. *Constantin*.[28] There an interlocutory injunction restrained the Governor of Texas and its national guard from enforcing orders to close certain oil wells in face of a federal injunction allowing the flow. In 1932 the Supreme Court, unanimously, Chief Justice Hughes writing the opinion, upheld the authority of the injunction in the face of the contention that the power of the Governor was supreme. He said:

> "If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the State may at any time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity. Under our system of government, such a conclusion is obviously untenable. There is no such avenue of escape from the paramount authority of the Federal Constitution. When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression." [29]

This has recently been reaffirmed in *Cooper* v. *Aaron*, 358 U. S. 1. Without such federal authority the United States would be only a Common Market, not a Nation.

With the adoption of the last of the War Amendments, the Fifteenth, on the right to vote, the Nation turned from the major questions concerning national *vis-a-vis* state

sovereignty to the problems arising from the growing industrialism, burgeoning corporations, conflicting governmental regulations. Principles of private rights were combatted by discontents with the world as it was; new social responsibilities pressed for solution. The cases involved constitutional matters concerning taxes and railroads of minor interest now.

A determination that had far-reaching results soon came down—*Santa Clara County, California* v. *Southern Pacific Railroad* [30]—deciding that the word "person" in Section I of the Fourteenth Amendment included corporations under equal protection.

Attention should be called, however, to the Supreme Court's determination in that period that the Federal Commerce Clause permitted regulation of acts that affected commerce, as well as that commerce itself. This laid foundations for elaborate structures of national economic and social policy. This determination was made in the *Shreveport* case, 1913, where the Court's opinion by the then Mr. Justice Hughes upheld I. C. C. power over intrastate railroad rates. He said:

> "While these decisions sustaining the Federal power relate to measures adopted in the interest of the safety of persons and property, they illustrate the principle that Congress in the exercise of its paramount power may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce. This is not to say that Congress possesses the authority to regulate the internal commerce of a State, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled." [31]

Thus, in 1913, there was the genesis of the theory of federal legislative power over local activities affecting commerce "among the States." The recognition that federal power over commerce when exercised could control more than the actual incident of transportation was a weighty factor in enabling the Nation to adjust to the economic problems arising from the depression of the thirties. The National Labor Relations Act, the Securities and Exchange Act, and the Wage and Hour Act used "power over matters affecting commerce" as the constitutional basis for their enactment. They were upheld. A narrower interpretation of the Commerce Clause might well have required a constitutional amendment to accomplish the economic readjustments that enabled the United States to pass through the change from a conception of government as a policeman to maintain order to the idea of it as a public spirited enterprise to aid in those matters that the States cannot adequately accomplish for themselves.

One of the first cases to bring a new concept of constitutional interpretation into the law was *Adkins* v. *Children's Hospital,* albeit in the dissent of Chief Justice Taft. The case involved a statute fixing minimum wages for women and children in the District of Columbia. It was held unconstitutional as a denial of due process through a denial of the liberty to make a contract. The beneficiaries of the legislation thus were guaranteed a freedom to work for the least amount they were willing to accept although below the "minimum requirement of health and right living," dissent, p. 570. There appeared what was called a "Brandeis Brief," one that used economic facts as well as legal precedents to convince the Court.

It was fourteen years later in March, 1937, before that constitutional decision was overruled in *West Coast Hotel Co. v. Parrish,* Mr. Chief Justice Hughes writing on the ground that liberty of contract can be impaired under the Due Process Clause if reasonable and if adopted in the interests of the community.

Other Federal Acts intended to aid economic recovery were found constitutional under other grants of power. For example, the 1935 Social Security Act gained approval for its taxation features under the provision of Art. I, § 8, of the Constitution, authorizing excise taxes, and for federal contributions under the authority of the Federal Government to provide for the general welfare.[32] Fortunately an earlier decision, declaring unconstitutional the Agricultural Adjustment Act, had decided that expenditure under the General Welfare Clause "for public purposes is not limited by the direct grants of legislative power found in the Constitution." [33]

The resources of the Constitution for legislation are multiform. After the A. A. A. of 1933 was declared unconstitutional in the *Butler* case, as a plan to control agricultural production, the Court upheld the A. A. A. of 1938 as a regulation of commerce.[34] A similar situation developed as to the Bituminous Coal Conservation Act of 1935. It was held in *Carter* v. *Carter Coal Co.* that the labor "relation of employer and employee is a local relation" beyond federal power.

> "And the controversies and evils, which it is the object of the act to regulate and minimize, are local controversies and evils affecting local work undertaken to accomplish that local result." [35]

But the Court a few years later upheld a tax plan for price regulation of coal under the Commerce Clause, which accomplished the result sought by the earlier legislation.[36]

The cases upholding these New Deal statutes are examples of the continuous adjustment of the law through the three branches of government to human needs. The law adapts itself to changing social forces. "At the present time as well as at any other time, the centre of gravity of legal development lies not in legislation nor juristic science, nor in judicial decision, but in society itself." [37] The law must be related to the spirit of the

time.[38] Conditions necessarily change theories of proper legal steps though principles of justice remain fast.[39]

The depression legislation has now been generally accepted as conforming to the Constitution. With the exception of the constitutional decisions which welded the Confederacy into a united Nation, no series of Supreme Court judgments have had such an effect on our national life. They have made possible a modern constitutional government.

Interest in legal development turns toward other social needs, particularly the protection afforded by the Constitution to the individual in relation to investigation, regulation, and criminal prosecution by the Government. Of course there is no disagreement in the decisions upon the principle that every man must be protected against the abuse of governmental power, whether of force, the third degree,[40] denial of counsel,[41] mob intimidation,[42] denial of opportunity for review,[43] or other unfair methods of trial.

To emphasize the impact of the drive to protect the individual against arbitrary or oppressive action of government or governmental officials, reference is made to the decisions concerning the right to travel,[44] those requiring legislative bodies to carefully and clearly advise witnesses of the scope and purpose of inquiries into their actions or associations,[45] the right of an association as a party to the suit to vindicate constitutional rights of its members when they were affected by the litigation,[46] the right of confrontation,[47] and the right to counsel.[48]

The civil rights interpretations of the Constitution are also important in their denial of claimed rights when claimants abuse rights granted them by the Constitution. A striking example is found in the decision on charges of advocating the overthrow of the Government by force and violence without an overt act. There, notwithstanding the plea of the First Amendment, conviction was sustained.[49] Again when labor unions have gone beyond the limits of persuasion and employed violence to

accomplish their ends, the Supreme Court has held repeatedly that the right of organization or of speech did not protect their actions.[50]

When with these decisions one considers the growth of the use of habeas corpus to correct alleged violations of civil rights in the prosecution of crime, one cannot doubt the deep impression these civil rights decisions have made on our national life.

Perhaps I have belaboured the obvious in commenting upon the effect of constitutional decisions upon the American way of life. I realize the courts did not create affirmatively the governmental framework under which we now live. That was done by public men in conventions, as legislators and as executives, aided by a knowledge of legal history and contributions of ideas from other minds with a background of law. Much of our Constitution was the result of experience, but the power of the judiciary to declare governmental actions unconstitutional was an American contribution. No where explicitly granted in the Constitution, early events demonstrated its usefullness as a means of determining the validity of action in all departments of government. Other constitutional governments have adopted specifically a comparable method for such determination. Notably France has done so in her new constitution. Although today's economy differs greatly from that of the Confederation, through these decisions the Country has been held to have power to deal with national issues, the States have been maintained as sovereigns to deal with essentially local matters, and the inhabitants have been confirmed in their civil rights.

Growing population, transportation, communications, labor and welfare organizations have forced government into wider activities to maintain healthy human relations among our people. This calls for especial care for the individual. Each generation must protect its own from the loss of their liberty. So far as words can do so, the Constitution protects our liberties but each generation

must stand firm to hold the proven gains of the past. To paraphrase an idea of Woodrow Wilson, perhaps the coming generation, to further its ends, needs to depend less on checks and balances, and more on our "coordinated powers." The intention of the Framers of the Constitution as a body upon particular phrases of the Constitution may be hard to determine.[51] But we know their purpose was to establish here a land of equality and opportunity for all. The constitutional interpretations of the past have been designed to further that purpose. None of us who is familiar with the capacity and ambition of the younger men of the law has any doubt that you will carry forward that purpose.

FOOTNOTES

[1] Born Mason County, Kentucky, February 2, 1802.

[2] Legal Essays and Addresses (1939), Lord Wright of Durley, 188.

[3] *Eyston* v. *Studd,* 2 Plowden, at 465. Cf. *Green* v. *United States,* 356 U. S., at 195; *Gompers* v. *United States,* 233 U. S. 604, 610.

[4] *Washington* v. *Dawson & Co.,* 264 U. S., at 238, note 21; *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S., at 406; Douglas, J., Cardozo Lecture, April 12, 1949, Association of the Bar of the City of New York. Cf. *Hawkins* v. *United States.* No. 20, 1958 Term, November 24, 1958; *Aubrey* v. *United States,* 103 U. S. App. D. C. 65.

[5] 7 How. 283, 470.

[6] *Hirabayashi* v. *United States,* 320 U. S. 81, 102; cf. *Korematsu* v. *United States,* 323 U. S. 214, 223. Cf. *Ex parte Endo,* 323 U. S. 283, 300–304.

[7] See *United States* v. *Reynolds,* 345 U. S. 1, and *Kaiser Aluminum* v. *United States,* — Ct. Cl. —, Jan. 15, 1958, 157 F. Supp. 939, compared with *Jencks* v. *United States,* 353 U. S. 657, 670. See *National Bank* v. *Republic of China,* 348 U. S. 356.

[8] *United States* v. *Butler,* 297 U. S. 1, 62.

[9] *Gitlow* v. *New York,* 268 U. S. 652, 666, 672; *Near* v. *Minnesota,* 283 U. S. 697, 707; *Pennekamp* v. *Florida,* 328 U. S. 331, 335.

[10] Compare, Religion, *McCollum* v. *Board of Education,* 333 U. S. 203, with *Zorach* v. *Clauson,* 343 U. S. 306, and *Davis* v. *Beason,* 133 U. S. 333, 342; Free Speech, *Roth* v. *United States,* 354 U. S. 476; *Dennis* v. *United States,* 341 U. S. 494, and *Yates* v. *United States,* 354 U. S. 298, opinions of the Court with the dissents.

[11] The views of Alexander Hamilton, speaking as an advocate as to jury determination of free speech issues, are summarized in *People* v. *Croswell,* 3 Johnson's Cases 337, 360. Cf. *Dennis* v. *United States,* 341 U. S. 494, 511, subdivision IV.

[12] *Schenck* v. *United States,* 249 U. S. 47.

[13] Transcript of Record, No. 365, October Term, 1936, Supreme Court of the United States, p. 20; brief for petitioner, p. 96; *Associated Press* v. *Labor Board,* 301 U. S. 103, 116.

[14] Cf. *Lewis Publishing Co.* v. *Morgan,* 229 U. S. 288, 313–316; *Torre* v. *Garland,* 259 F. 2d 545, 358 U. S. 910.

[15] *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 428, 442.

[16] 341 U. S. 494.

[17] 350 U. S. 497.

[18] 345 U. S. 206, 222.

[19] 3 Dall. 386.

[20] 1 Cranch 137; 6 Wheat. 264.

[21] *M'Culloch* v. *Maryland,* 4 Wheat. 316, 411.

[22] *New York* v. *O'Neill,* No. 53, 1958 Term.

[23] *Hurtado* v. *California,* 110 U. S. 516.

[24] *Maxwell* v. *Dow*, 176 U. S. 581.

[25] *Palko* v. *Connecticut*, 302 U. S. 319, 325; *Adamson* v. *California*, 332 U. S. 46, 52, dissent, 87; *Wolf* v. *Colorado*, 338 U. S. 25.

[26] *Adamson* v. *California*, 332 U. S. 46, dissent, 91, 124.

[27] 212 U. S. 78, 85.

[28] 287 U. S. 378.

[29] *Id.*, at 397–398.

[30] 118 U. S. 394 (1886).

[31] 234 U. S., at 353.

[32] *Steward Machine Co.* v. *Davis*, 301 U. S. 548; *Helvering* v. *Davis*, 301 U. S. 619.

[33] *United States* v. *Butler*, 297 U. S. 1, 66.

[34] *Mulford* v. *Smith*, 307 U. S. 38, 48, dissent, 52.

[35] 298 U. S., at 308–309.

[36] *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381.

[37] Eugene Ehrlich, as quoted approvingly in Sir Carleton Allen, Law in the Making (1958), Oxford Clarendon Press. Cf. Sumner, Folkways.

[38] Laski, A Grammar of Politics, p. 377.

[39] Cf. Wolfgang Friedman, Legal Theory, c. 29; Julius Stone, The Province and Function of Law (1950), p. 142, § 6; *A. F. of L.* v. *American Sash Co.*, 335 U. S. 538; *Lincoln Union* v. *Northwestern Co.*, 335 U. S. 525.

[40] *Ashcraft* v. *Tennessee*, 322 U. S. 143.

[41] *Scottsboro Cases*, 287 U. S. 45.

[42] *Moore* v. *Dempsey*, 261 U. S. 86.

[43] *Griffin* v. *Illinois*, 351 U. S. 12; *Johnson* v. *United States*, 352 U. S. 565.

[44] *Kent* v. *Dulles*, 357 U. S. 116; *Dayton* v. *Dulles*, 254 F. 2d 71, 73. Freedom to Travel, Report of Special Com. to Study Passport Procedures, Assn. of the Bar of the City of New York (1958), c. 5.

[45] *Watkins* v. *United States*, 354 U. S. 178; *Sweezy* v. *New Hampshire*, 354 U. S. 234; *Flaxer* v. *United States*, 358 U. S. 147; cf. *Miller* v. *United States*, 357 U. S. 301.

[46] *NAACP* v. *Alabama*, 357 U. S. 449, 459.

[47] *Roviaro* v. *United States*, 353 U. S. 53. See Brown, Loyalty and Security, 394.

[48] *Crooker* v. *California*, 357 U. S. 433; *Cash* v. *Culver*, No. 91, 1958 Term, decided Feb. 24, 1959.

[49] *Dennis* v. *United States*, 341 U. S. 494.

[50] *United Auto Workers* v. *Wisconsin Employment Relations Board*, 351 U. S. 266, and cases cited. Cf. *Hotel Employees Union* v. *Sax Enterprises*, Nos. 5 and 6, 1958 Term, decided January 12, 1959.

[51] William Anderson, The Intention of the Framers, 49 Amer. Political Science Rev. 340.