A Constitution for an Indefinite and Expanding Future

Thomas Reed Powell

Follow this and additional works at: https://digitalcommons.law.uw.edu/wlr

Part of the Constitutional Law Commons

Recommended Citation
Available at: https://digitalcommons.law.uw.edu/wlr/vol14/iss2/3

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.
A CONSTITUTION FOR AN INDEFINITE AND EXPANDING FUTURE

THOMAS REED POWELL*

When request for the title of an address must be complied with months before its composition, it is the part of wisdom to pick a title so amorphous that the address may later roam as its inner spirit moves it. This wisdom has been mine. Another wisdom, however, has been denied me. It is well, when picking a quotation for a title, to make sure that the quotation is not violated in the process. This, I have not done. In my hurried proffer to your Secretary of the title "A Constitution for an Indefinite and Expanding Future," I assumed that I was quoting from some famous opinion of John Marshall. I now find that, instead, I was misquoting from a famous opinion of Mr. Justice Matthews in Hurtado v. California.1 "The Constitution of the United States," he says, "was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered, and to be gathered, from many nations and of many tongues."

It was my thought, when I mis-picked my title, to go with you back a hundred and fifty years to the framing and adoption of the Constitution and assess the wisdom of the Fathers in the light of what has since come to pass. In this thought there was the wisdom that in my barrel there were a number of unpublished papers that might be dusted off for the new occasion if pressure of other duties left no time for more than dusting. These various papers contained much local color that could find no counterpart in the State of Washington. Rhode Island can be given credit for furthering the framing and adoption of the Constitution because she was so pestiferous toward her sisters under the Articles of Confederation that they were the more ready to neglect her and form a new union to which economic necessity would make her submit. But the State of Washington did not make to the framing and adoption of the Constitution even the contribution of cussedness. Not even a shadow of hope of fifty-four-forty moved the welders of the new union. Compelled though I have been to take an oath that I will by precept and example promote respect for the flag and the institutions of the State of Washington, I cannot

*Professor of Law, Harvard Law School. Address delivered at the Washington State Bar Association Convention, July 30, 1938.

1110 U. S. 516 (1884).
give you any credit for initiating the institutions of government which have furnished the framework for a hundred and fifty years of national life.

Happily my legislatively-imposed duty to promote respect for the institutions of the State of Washington is not made an exclusive one. I am also permitted and even required to promote respect for the institutions of the United States. This offers me a welcome latitude. I may promote respect for the institution of a judiciary with members elected for defined terms. I may also promote respect for the institution of the judiciary with members appointed by the executive power and with tenure during good behavior. Presumably I might be permitted, though not required, to promote respect for some judicial institution that is a compromise between the system of the nation and the system of the State of Washington. In my native State of Vermont the judges are elected by the legislature for a term of two years. Formerly the term was one year. In fact re-election for life inevitably follows, and the judge longest in service becomes Chief Justice. This is the child of convention, not of statute or constitution. I observe that, according to the terms of your Constitution, your Chief Justice is the judge having the shortest term to serve. If I were not bound by my oath to promote respect for your institutions, I would suggest that this might be phrased more happily, so that it would look as though you picked as Chief Justice the judge of longest experience rather than the one whose incumbency is most likely to be brief.

Length of tenure is not necessarily to be determined by the language of a Constitution. When judges in Vermont were elected for a year, Chief Justice Shaw of Massachusetts in talking to Judge Poland of Vermont referred to the short judicial tenure in Vermont. “Short?” said Poland. “It’s longer than yours.” “How do you make that out?” retorted Shaw. “Why,” answered Poland, “we are elected for a year; and you are appointed just during good behavior.”

Washington’s generosity in recognizing the institutions of the United States as worthy of respect, if not of emulation, permits me further latitude for which I am grateful. I may promote respect for an institution under which “any judicial officer who shall absent himself from the state for more than sixty consecutive days shall be deemed to have forfeited his office.” I may promote respect for an institution under which the Chief Justice of the United States may have his summer home in Canada and under which his associates may spend the three summer months in Europe. I may promote respect for a device by which the electorate may
recall the executive before the expiration of his term. I may pro-
mote respect for a system under which the electorate must content
itself with cussing. We may respect the initiative and referendum
in the Constitution of Washington and the absence of the refer-
endum in the Constitution of the United States. We may respect
one Constitution because it limits the creation of public indebted-
ness, and the other Constitution because it does not. We may
respect one Constitution because heads of departments are chosen
by the electorate, and the other Constitution because they are
appointed by the Chief Executive subject to confirmation by the
Senate; one Constitution because formal amendment is fairly
feasible, and the other because it is hard to secure.

There are, alas, some misguided persons who do not respect all
of the institutions of the State of Washington. The initiative and
referendum, the direct primary, and the recall are held in low
esteem in some quarters in the effete East. So good a man as Presi-
dent Taft so little respected the initiative and referendum that
he disapproved of admitting Arizona to statehood with that device
in her proposed Constitution. Before I came to Washington this
summer, I desired to know whether there were any opinions of
your courts or your attorneys general which would indicate in
some detail just how much respect I would have to promote for
each particular piece of your political mechanism. I was told that
no guidance had been given by these august authorities and that
I was free to be my own interpreter. As the King of Great Britain
is in Scotland a good Presbyterian and in England a good com-
 municant of the Church of England, so perhaps I can shift my
judgments as I cross state lines. It may be that Massachusetts has
such an abundance of solid and worthy citizens certain to fill the
seats of the mighty in the three departments of government that
there is no need for her to have the safety valve of the recall,
the initiative and referendum, and popular election of judges for
short terms. Perhaps the conditions in Washington are different.
You may have great need of those devices that imply lack of
confidence in public officials. If you have such need, then of course
I respect your striving to meet it.

Difference of opinion about government is no new thing. I have
been amusing myself in recent years by culling from Elliott’s
Debates all the awful things said in the state ratifying conventions
about the proposed Constitution that the Men of Philadelphia
submitted to them. There was objection to the creation of the
District of Columbia, because it would be a haven for criminals
free from state laws and likely to get pardons from a President
who would naturally wish to curry favor with them. There was
fear that the Vice-President would be a dangerous officer who would be in league with foreign powers. There was apprehension that the House and Senate would be so restricted in numbers that the sentiments of the country would not find expression and a small clique could perpetuate themselves in power. Hardly a provision in the new plan failed to find some detractor, and more silly things were said than could be imagined by one who does not page the debates. One good way to pay just tribute to the Fathers is to compare them with their contemporary critics. It is not easy to glow with pride over the speeches of those who opposed ratification. We can weigh their timid fears in just scales by noting that no one now proposes the restoration of the Articles of Confederation and no one makes us take an oath to promote respect for the institutions that failed to flourish under them.

The major objections leveled against the proposed Constitution sprang from parochialism and fear of government generally. Parochialism wished a government that parochialism could control. The debtor groups wished stay laws and paper money. They might control the local governments in some of the states, but the proposed new Constitution contained outlawry of the relief they might otherwise hope to secure. Great Britain as governor was still vivid in memory, and so there was insistence on restraints on criminal process and barriers against arbitrariness. Hence by agreement between the factions it was proposed to add the Bill of Rights which took form in the first ten amendments. The movement for these amendments came, not from the men of wealth and position, but from the poor and lowly. It is one of the curious paradoxes of constitutional development that the weapon forged by the poor and lowly has been of little service to them compared with its great ministrations to the powerful and wealthy. In recent years, at least until a short time ago, it was not the farmers and laborers who loved the due-process clauses and the courts and judicial review. In recent years, too, it has not been the farmers and laborers who have objected to the broad exercise of national power. It is the type of men who made us a nation and who for twelve years made the nation do a giant’s work which has wished the giant to confine itself to the role of a dwarf.

It is familiar history that the movement which resulted in the Constitution was led by the commercial and financial groups. It is also familiar history that these groups profited from the measures which Hamilton put through Congress in the days of his power. In so far as the profit came to individuals through the use of their inside knowledge of measures about to be enacted, there is just ground for condemnation. But I see no reason why
condemnation should go beyond this. The funding of the national debt and the enactment of tariff laws that restored the nation's credit were necessary measures to meet contractual obligations. The assumption of state debts incurred in support of the Revolution was a belated acceptance of what would have been an initial legal obligation had we been a nation when we broke from England. About the creation of the United States Bank, there may be more room for dispute. Of its contribution to national strength, there can be no doubt. Its own rewards may well be deemed to have been too great, and the favors that it bestowed may well have been distributed too narrowly. Some such instrument, however, was a national necessity at the time. All in all, Hamilton's co-operating measures seem to me to be an achievement of the highest statesmanship in their own time.

As we can get a just estimate of the friends of ratification by contrasting with them those who were opposed, so we can get a just appraisal of the national wisdom of Hamilton's measures by contrasting the state of the nation under his ministrations with the sad plight under the Articles of Confederation. Facts are more eloquent than any eloquence could be. Even the opposing Jeffersonians must have been impressed by the facts, for when they came to power they left most of Hamilton's achievements undisturbed. Jefferson's ideal of a nation of independent farmers, with shipping and manufacturing a monopoly of foreign powers, was hardly worthy of serious contemplation. One hesitates to imagine what would have been our early lot had Jefferson rather than Hamilton been the mentor of Washington and the initial guide of our national destiny. With no funding of the national debt, no assumption of state debts, no rehabilitation of the national credit, we might have been but little better off under the Constitution than we were under the Articles of Confederation. We were weak enough still, God knows, in the eyes of England and France and Spain, but what would have been our state without the new national government and without the early measures that it put into successful operation?

Some have defined the major cleavage of that early time as that between capitalism and agrarianism. I am not satisfied with the distinction. The agrarians were mostly capitalists, owning title to lands acquired on borrowed money and largely subject to foreclosure. The Southern agrarians were many of them capitalists for another reason. They were owners of human beings held in chattel slavery. They were in debt in large amounts to British factors, and they evaded payment of pre-Revolutionary debts until finally the national treasury had to make a settlement to fulfill
treaty obligations. Hamilton's restoration of the national credit was not a menace to these Southern agrarians. Nor were funding and assumption a menace to those who held depreciated state and national scrip or to those who had parted with their scrip in despair. The obligations ran to the new holders, and not to the old. If we may personify instruments of government, the loss to the initial holders was the fault of the Articles of Confederation, and not of the Constitution. To have paid the former holders rather than the present ones, would have been a form of repudiation. This does not mean, however, that it would not have been appropriate to make decent recompense to those who served the Revolution by their arms and by their credit and who were compelled to part with their scrip at a sacrifice because there was no solid government to keep it at par.

And the mortgaged farmers like those in Massachusetts who under the lead of Daniel Shays sought paper money and stay laws and the closing of the courts, what did the Constitution do to them? It preserved the legal security of debts. This was a hardship on existing debtors who had borrowed often at ruinous rates of interest and who faced ruinous rises in the value of money. Yet what of the future? Had repudiation been sanctified by law, who could become borrowers in the future? Without the legal security of debts, there might have been an end to lending to young men to start themselves in farming or in business, and the young men instead of becoming mortgaged owners with a chance of becoming independent proprietors, would have to remain employees and tenants. The concentration of wealth in our early days might have been much more devastating had we not operated under a credit economy with opportunities for the enterprising to put their enterprise to the test.

What the Constitution took from oppressed debtors, it gave back with amplitude to their children. Without the Constitution there would not have been the opportunities in shipping and manufacturing and merchandising, there would not have been the early opening of lands beyond the Alleghenies. The plight of debtors is a serious thing which always deserves the consideration of government. Sudden changes in values, extensive changes in foreign and domestic markets beyond the prevision or the control of the most gifted of entrepreneurs, cause serious dislocations that make amelioration a pressing problem of national welfare. About the wisdom of particular measures, there may always be room for debate; but there can be no debate about whether the national economy is a matter of national concern. The Constitution was the product of ministers to a sick national economy. To what
extent they were guided by self-interest, I do not know, nor would
statistics tell me. I do know the job they did, and I know of no
other job in history that in my judgment surpasses it. The job
can stand on its own merits, notwithstanding all its shortcomings
and notwithstanding the crass and myopic social outlook of many
who participated in the work.

The arrogance and narrow selfishness of many of the Federalist
leaders contributed not a little to their speedy political annihila-
tion. Their efforts to suppress dissent by enactment and enforce-
ment of the Alien and Sedition Laws came back upon them as a
boomerang that was justly merited. It is a recurring tragedy of
history that great constructive or conservative achievement so
often leaves the participants morally exhausted. The Federalists
who put the country on such superb foundations could not appre-
ciate that the superstructure should not be reserved primarily for
the builders and their ilk. The party of Lincoln that preserved
the nation was succeeded by the party of Thad Stevens and his
cohorts who by Reconstruction and its attendant proscriptions and
test oaths threw away the moral victory that Lincoln planned to
preserve. The Allies in the Great War followed their victory with
a treaty that exemplified the policy of encirclement that their
enemy had charged as a justification for starting the war. The
present situation in Europe is a monument to their folly, as the
long-continuing Solid South may be deemed a monument to the
folly of the Republicans who mistook the interest of their party
for the interest of the nation.

After twelve years the Framers and the Federalists passed from
the scene, but their good work has remained till today. Madison,
the greatest of the Framers, became the ally and the successor of
the astute political leader who created the party that threw the
Federalists from their seats. It is to the glory of the Framers
that they made possible, not only the work of Hamilton, but the
work of Jefferson as well. They harnessed the nation with power;
but they left the controls to be determined by the generations who
succeeded them. Though they were predominantly a group of
like-minded men with enough coherence to be regarded as a
political party, they created an instrument that an uncoerced
electorate could put in the hands of a different political party.
Though they did not establish a democracy, they left the way
open for democracy to develop. Though they could hardly foresee
our expansion to the Pacific, they left room for that expansion.
And so, a hundred and fifty years later, we can be celebrating
their achievement in a state, named for our greatest Captain, a
state only a third the age of the nation, but a state that is a full
and equal sister of those original thirteen which subordinated their parochialism enough to meet the demands of an undefined and expanding future.

I have thus far omitted reference to the political organization devised by the Framers. I do not think that the particular plan was of great importance except as it secured agreement in the Convention and facilitated ratification in the states. Election of Senators by state legislatures has gone by the board. Choice of the President by a small independent body of electors soon became a myth. Election by the House of Representatives voting by states has been resorted to but twice. Lame ducks have lost most of their hang-over tenure. Equality of states in the Senate has operated to the disadvantage of the very states which insisted upon it. It gives to agricultural and mining states an over-weight of representation relative to their population. The device of overlapping terms in the Senate is of dubious efficacy from the standpoint of the purpose which animated it. Few states have adopted it. Re-eligibility of the President has been limited by convention. An executive outside the legislature has become an important partner in legislation. Many officers are in fact appointed by individual Senators, subject to confirmation by the President. National parties and nation-wide campaigns are of far-reaching importance, although the Framers never thought of them.

Not only did the Framers make a Constitution for an undefined and expanding future, but they bequeathed to the future a somewhat undefined and expanding Constitution. The Civil War bequeathed to us an important new Constitution which has subordinated the states to the national judicial power in ways quite undreamed of by the Congress and the state legislatures concerned primarily with affording protection to the colored freedmen of the states lately out of their normal relation to the Union. Judicial review generally has by creep-mouse crawl-mouse stages developed into an essentially policy-determining function to a degree which the Framers could never have anticipated. The notion that we have a rigid Constitution is wide of the mark. It is untrue, not only of those parts of the Constitution that are open to political development, but also of those parts that are the subject of judicial pronouncements. Though some judges are fond of saying that the meaning of the Constitution never changes, we all know that this is true only in some Pickwickian sense. I propose to devote the remainder of my time to the support of the thesis that in many particulars the Constitution has no meaning until meaning is given to it by political practice or by judicial decree, and that the meanings thus given to it vary greatly in tone and color from time to time.
I do not mean to insult your intelligence by assuming that in your minds the thesis needs any support. My main reason for continuing is that my paper has not yet reached the traditional length for occasions of this kind. However, there are still some men who need to be told that constitutional interpretation depends chiefly upon the outlook and the temper of the official interpreters. Mr. Justice Roberts in a now famous passage has told us that the Supreme Court never assumes a power to overrule or control the action of the people's representatives. The Court neither approves nor condemns any legislative policy. All it does is "to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former." So in the *Tipaldo* case\(^2\) he laid the words "due process of law" beside a minimum-wage statute and found that the latter did not square with the former. A little later in the *Parrish* case\(^8\) from your State of Washington he laid the same words beside a more drastic minimum wage statute and found that the squaring was perfect. Since judges profess to give great weight to the judgment of the legislature, it is a compliment to Washington legislators of two decades ago that they were deemed to be so much wiser than the New York legislators of more recent date.

When Roosevelt the First advocated the recall of judicial decisions in 1912, we heard learned lawyers reiterate that all the courts do in constitutional interpretation is to discover the will of the people as expressed in the fundamental law and that the judicial decisions necessarily embody this fundamental will as mere legislation so often fails to do. Happily there was relatively little of this nonsense talked in the recent controversy over the behavior of a persistent majority of the Justices of the Supreme Court. The most effective opponents of the President's proposal were those who conceded that the behavior had been regrettable and that it was the regrettable behavior of the individual Justices who had behaved that way and was not to be attributed to the will of the people who framed and adopted the Constitution and its amendments. The less said about the mythical will of a mythical people as expressed in the fundamental law, the better. Some leading spirits had a will to create an instrument of government, but the general run of folks on the Eastern seaboard a century and a half ago had no will or notion about the infinite details of twentieth-century problems. It is as wrong to invoke that will

\(^1\)Morehead v. New York ex rel Tipaldo, 298 U. S. 587 (1936).
\(^2\)West Coast Hotel Co. v. Parrish, 300 U. S. 379 (1937).
If we are to maintain a constitutional federal system, we have to have judicial umpiring between the states and the nation. The Fathers built the framework on such broad lines that in most important respects they left future generations pretty much unfettered. It would be hard to find constitutional warrant for a national divorce law, even by invoking a combination of the war power and the bankruptcy power, but it would not be hard to find constitutional warrant under the commerce power to put an end to the cash and carry divorces that are welcome to the transcontinental railroads. If the journey of Mr. Caminetti and his friend across a state line might be penalized by national law, so might other journeys with other intents. Concededly, however, we might conceive of some national statutes that no one with intellectual discernment and intellectual honesty could by any stretch possibly regard as warranted by the Constitution. Yet I have not the imagination to conceive of any such statutes that would be of any significant importance. In so far as we have been denied any national power that we really need, the denial has come from the Supreme Court rather than from the Fathers. And those judicial denials can be themselves judicially denied in a very short space of time.

As we need judicial umpiring between the states and the nation, so I believe that we need some judicial umpiring between the several states. I doubt our need for a Fourteenth Amendment that gives a national court a chance to tell Oregon that she cannot suppress private schools or to tell Pennsylvania that she cannot forbid the use of shoddy in mattresses and comfortables. I doubt how much good in the long run will come from having a national court tell the states that they cannot put a suppressive tax on newspapers or forbid the scattering of circulars or have outrageous applications of criminal procedure. Many so-called liberals opposed the move against the Supreme Court on the ground that an absolutely independent judiciary is essential to the preservation of civil and religious liberty. Many others who joined with them professedly on this ground had not previously been greatly concerned with the maintenance of civil liberty and freedom of thought and of utterance. If we are really so vicious that we can be saved only by nine or by five men in silk gowns in the District of Columbia, I fear that we are likely to continue in a bad way whatever the five or nine may do. Zeal for civil liberty must be more widespead to be satisfactorily effective.

The question whether we need a national court to curb the states in matters wholly of local concern is not the question
whether we need to have state legislatures subject to judicial control. Aside from my selfish and pecuniary interest in the manufacture of constitutional law, I believe that a state court can often do a worth while job in saying "tut tut" to a state legislature. Most of our states have such facile ways of proposing and adopting amendments to their state constitutions that a misguided and recalcitrant state court cannot block important proposals for very long. Judges with short elective terms can be brought to book at sufficiently frequent intervals if they are inclined to emulate the various Supreme Court Justices whose continued conduct provoked the attack on judicial independence. Those of us who are enjoined by precept to promote respect for the institutions of the State of Washington must of necessity refrain from saying anything harsh against a proposal to amend the Constitution of the United States to make Supreme Court Justices face every few years a fresh hurdle to their continuance in office. I doubt, however, if I shall favor any such proposal after my Washington oath is no longer binding. More, I cannot say at the moment, except to repeat that judicial application of a state constitution is very different from judicial application of the Fourteenth Amendment.

The Supreme Court of the United States as a third chamber of every state legislature and every municipal council is an anomaly in government. The Supreme Court told the states that they may not limit the hours of labor in bakeries to ten a day, that they may not outlaw yellow dog contracts, that they may not have minimum-wage laws for women. On these matters, the Supreme Court has changed its collective or its majority mind. What Justices Van Devanter, McReynolds, Sutherland and Butler would have told the states they could not do, had they been five instead of four and had they been certain of their continued control, it would be hard to say, though their votes on many matters would give an inkling. There have been minorities against zoning, against workmen’s compensation, against abandoning the condemnation of ten-hour laws and against not a little legislation that is now woven into the fabric of our institutional life. To get a series of amendments to the Federal Constitution to permit states in purely local matters to do what judges of a certain cast of thought would forbid them to do, would be inconceivable. The only amendments in this field which we have thus far had have come from the judges and not from the formal amending machinery.

This practical situation of a formal amending process that could never function as a third house of each state legislature affords the strongest reason why the Supreme Court should move with
the utmost caution and consideration before applying the Fourteenth Amendment against the policy of any state legislature that is confined to clearly internal state concerns. The Court should be certain, not only that the legislative policy is pernicious, but that the issue is so important that its determination should be withdrawn from the final authority of state courts. I would never vote for the suppression of private schools under any conditions that I can as yet imagine, but if Oregon can get a majority on an initiative and referendum measure to do this, I am far from sure that I think it wise to have private schools saved by the Supreme Court,—even though I helped write the brief in the case in which the judicial saving was done. In such an issue there is nothing on which lawyers have any special expertness because they have studied and practiced law. If on such an issue Oregon cannot trust her own electorate and her own state court, Oregon should be ashamed of herself. I cannot doubt that she would soon have repented if the Supreme Court had not done her repenting for her.

There are, however, many ways in which state legislation may trespass upon interests of sister states. While the commerce clause is available for condemning much of such legislation, it does not apply to the whole area of possible evil. Insurance and manufacturing are not commerce, and states have sought to subject them to taxation and regulation that have invoked the umpiring of the Supreme Court to choose between contradictory regulation of two or more states and to condemn multi-state cumulative exactions. When states have sought to reap where they have not sown, they have merited the restraint imposed by an external authority. Were I not on vacation, I would go to the books and enumerate examples. For not a little of this judicial work, the full-faith-and-credit clause has been extended and applied. Where this has not been available, a handle has been found in the due process clause of the Fourteenth Amendment. I do not mean to praise all the decisions which have been rendered in these realms, but I insist that work of this kind is appropriate for a national court. If future Supreme Court excesses ever stimulate a movement to amend and narrow the Fourteenth Amendment, there will be need for the best legal expertness in marking out the field which should be preserved for domination by the Supreme Court of the nation.

These views about desirable constitutional and judicial policy, which in accordance with custom on such occasions as this I have been asserting without undue diffidence, are of course the product of various preferences of my own, conscious and unconscious. It would be hard to attribute them to any objective, expert, scientific
judgment. At the moment we are all expert enough to know that if judges get too bossy, they are likely to receive a political spank-
ing. Whether one wishes judges to be wise and moderate so that they may continue to exercise a restraining influence on the de-
velopment of political institutions or one would welcome judicial excesses that would bring about curtailment of judicial power,—
these are choices to be made finally on other considerations than those known only to legal technicians. Often I hear the statement "I prefer the judgment of judges to the judgment of politicians." I can easily understand such a preference. There are, however, large groups who do not share it. Such groups are a fact to be reckoned with in what we proudly or with concealed sadness hail as a democracy. It is obvious that those who do prefer the judg-
ment of judges to the judgment of politicians would prefer to have the judges do their judging with such judgment as will help them to maintain their seats in the judicial saddle.

How varied may be the viewpoints of different men on issues of constitutional policy may be illustrated by noting the isolations of Mr. Justice Black during the past term of court. Mere statistics tell little about the importance or the variety of issues on which judges differ, but statistics have the advantage that they may be compiled by a secretary, and so I present them for what they are worth. In ten cases Mr. Justice Black was the solitary dissentient. In ten other cases he alone confined his concurrence to the result. In three of these ten case of solitary concurrence in result, there was dissent from Justices McReynolds and Butler. Thus in twenty cases Mr. Justice Black was dissatisfied with either the theories or the conclusions of those who have now become the dominant members of the Court, and in none of them was he joined by the Chief Justice or by Justices Brandeis, Stone, Cardozo, Roberts or Reed. In qualification it should be noted in most of these cases Mr. Justice Cardozo did not sit, and in many of them Mr. Justice Reed was disqualified by reason of having been Solicitor General when the litigation was in process.

This same qualification should be borne in mind in enumerating the statistics of cases in which Mr. Justice Black had companions in dissent from conclusions or from the grounds on which they were premised. There were five cases in which he dissented with others, and three cases in which others shared his objections to the majority opinion though not to the conclusion. In one of these dissents he was joined by Justices Brandeis, Stone and Cardozo; and in another by Justices Stone and Cardozo. In one, Mr. Justice Stone was a companion; and in another, Mr. Justice Reed. In the fifth case, in which the Court sustained a tax in part and con-
demned it in another part, Mr. Justice McReynolds objected to what was sustained and Mr. Justice Black objected to what was condemned.

In the three cases in which Mr. Justice Black was not alone in confining concurrence to the result, he had two companions in only one. Justices Stone and Reed shared his objection to permitting an injunction to raise the issue of the constitutionality of a federal tax on football tickets sold by a state university, but Mr. Justice Black was alone in objecting to the narrowness of the ground on which the tax was approved. Justices Butler and McReynolds objected to the decision sustaining the tax, and insisted that "it is hard to understand how the collection by the State of fees for the privilege of attendance brings, even for the purpose of federal taxation, its work of education to the level of selling intoxicating liquor, . . . operating a railroad, . . . or conducting any other commercial activity." By the majority, however, running a football show was readily raised to the high level of selling liquor.4

The other two cases dealt with matters less exciting. One involved the interstate transportation of filled milk.5 Mr. Justice Butler thought that Mr. Justice Stone for the majority should have put in a stronger caveat against accepting the legislative judgment as to the menace of filled milk, and Mr. Justice Black thought that he should have put in a weaker one or none at all. Mr. Justice McReynolds dissented in toto. In the third case,6 which involved a call for the redemption of Liberty gold-clause bonds with consequent termination of the running of interest, Mr. Justice Black concurred fully in the majority opinion which avoided any constitutional issue, and objected to Mr. Justice Stone's separate affirmation of constitutional power as unnecessary. Justices McReynolds, Sutherland and Butler dissented.

Thus it appears that my secretarial statistics, which show Mr. Justice Black as having companions in dissents or in special concurrences, should not be taken in all cases to mean that these companions were joining with him in a tender intellectual embrace. Mr. Justice Black was even more idiosyncratic than the bare statistics affirm. Most, if not all, of his idiosyncrasies were in the direction of judicial self-abnegation and in favor of sustaining exercises of state or national legislative power. His deference was less toward his colleagues than toward Congress and state legislatures. None of his positions could be securely said to be in

A CONSTITUTION FOR THE FUTURE

flat contradiction of anything in the Constitution. None of them
could be securely said to be violative of oft-repeated judicial
canons that great weight will be accorded to the judgment of the
legislature and that a statute will not be adjudged unconstitutional
unless its unconstitutionality is free from reasonable doubt, though
this latter assertion must exclude from the criteria of unconstitu-
tionality some firmly established lines of judicial decision. How-
ever, so must many a decision which overrules previous decisions
or avoids them by flimsy and tenuous distinctions.

If Mr. Justice Black were to be adjudged not a competent law-
ner for the reason that he so often fails to recognize the law when
a majority of his colleagues show it to him, he has had many com-
panions in this shortcoming. I once made a similar point at a
dinner of the Columbia Law Review which former Dean Stone
attended after his first year of judicial service. I pointed out that
constitutional law is such a variegated and varying product that
it is not surprising that we who do not participate in its manu-
facture should often be unable to tell in advance what it is going
to be. No such excuse was available to Mr. Justice Stone. He
had had during the preceding term full opportunity to observe
and participate in the manufacture of constitutional law, and yet
in sixteen cases after it had been duly made, he showed by his
dissents that he was totally unaware of it. Justices Holmes, Clarke,
Brandeis and Cardozo were long notably deficient in the same
way. Now in this past term of court Justices McReynolds and
Butler in 22 cases together failed to recognize the law when it was
told to them, and Mr. Justice McReynolds had six additional fail-
ures to his credit.

The most striking solitary dissent of Mr. Justice Black was in
Connecticut General Life Insurance Co. v. Johnson.7 The result
reached by the majority was unnecessarily technical and a travesty
of justice in the particular instance, though the injustice can easily
be remedied for the future by a change in the California statute.
The tax on premiums on policies issued within the state permitted
the deduction of premiums paid for reinsurance in companies
authorized to do business in the state. Thus the company which
first issued a policy did not pay a tax on the premiums to the extent
that it took out reinsurance in another company authorized to do
business in the state. Under the decision of the state court, a tax
was due instead from the company which issued the reinsurance.
This substitute tax was held unconstitutional by the Supreme
Court when the reinsurance was issued outside the state and was
payable outside the state. For all that appears the first insurer

7303 U. S. 77 (1938).
in California took the deduction and California got no tax on these premiums. California can now withdraw the deduction and can be as well off as if its first arrangement had met with judicial approval.

This is the type of situation in which I believe it wise to subject the states to the control of a national court, even though I may dissent from the kind of control sometimes imposed. Had Mr. Justice Black’s dissent confined itself to the particularities of the situation at bar, it would not have been especially noteworthy. On some of the particularities, he dissents more than was necessary to condemn the result, but in this he had earlier decisions with him though these earlier decisions had been eroded by intervening ones. There is, however, still something left of the law of unconstitutional conditions, and Justices Brandeis and Stone might well have been expected to hold that permission to do business within the state could be made the basis of an obligation to pay taxes on these reinsurance premiums when the company, if the original insurer instead of the reinsurer, would have been free from tax. One must be curious as to what went on inside the court during the process of coming to a conclusion about the opinion and the decision. This, however, is holy ground, upon which the profane must not tread. The way some of the profane do their treading when they peddle surmises and back-stairs gossip is enough to console some of the rest of us for our unsatisfied curiosity.

The part of Mr. Justice Black’s dissent which resounded throughout the legal land was his denial that the word “person” in the Fourteenth Amendment was meant to include and protect corporations. This contention the majority opinion does not answer except by assertion and invocation of prior supporting cases. In the first case in which it was held that a corporation is a person within the meaning of the amendment, the Court declined to hear argument on the point and asserted briefly that “we are all of the opinion” that the word person includes corporation. So far as I know, there is no reasoned and scholarly answer in the reports to Mr. Justice Black’s contrary position. A recent scholarly study has made clear that in the debates in Congress and state legislatures when proposing and considering ratification of the Fourteenth Amendment the entire emphasis was put upon the protection of the freedmen and of natural persons. In other clauses of the

---


Amendment, where the word "person" is used in connection with life and race and color, corporations cannot be included. Mr. Justice Black's narrow interpretation has much to be said for it in history and in a natural interpretation of language.

I do not mean to imply that the word "person" does not often appropriately include corporations. I mean that when, in a single brief document, the word "person" is used in several connections where it cannot include a corporation, it is natural to assume that it has the same sense whenever used, except when a different or broader sense is clearly indicated. Be this as it may, much judicial water has run under the bridge since 1886 when what Mr. Justice Black objects to was first decided. It is a little late to try to turn the stream in the other direction. Yet the early career of the Fourteenth Amendment when the majority of the Supreme Court confined it narrowly was succeeded by a later career when it became a catch-all for every conceivable kind of complaint against governmental action. For the past two terms the Amendment has not been as vicious toward the states as it was during the preceding decade. Mr. Justice Black may be an apostle of a new future, or he may not. The outcome will not depend upon the Fathers or upon the proposers and ratifiers of the Fourteenth Amendment. It will depend upon the point of view of the persons who become Justices of the Supreme Court of the United States.

From the beginning there has been a pretty question whether any part of the Fourteenth Amendment is constitutional. States lately in rebellion were told that they could not re-enter normal relations with the Union until they ratified; and under military coercion they ratified before they had been restored to normal relations to the Union. The existence of the Fourteenth Amendment as well as the inclusion of corporations in its embrace are illustrations of institutional evolution that could hardly claim legitimacy by the stricter canons that apply to a chain of title to real estate. The adoption of the Constitution itself did not follow the rules laid down in the Articles of Confederation. We evolute as we evolute, and strict legality is far from the only factor in the process. This has been the way of our national life, whether you like it or not. Whether you like any particular result or not may depend more upon the result than upon the authenticity of its legal lineage. At any rate, you must by this time wish that I had contented myself with asserting rather than going on to elaborate my thesis that in many particulars the Constitution has no meaning until meaning is given to it by political practice or by judicial decree, and that the meanings thus given vary greatly in tone and color from time to time.
With one more illustration I am done. This is *Erie Railroad v. Tompkins* in which last April Mr. Justice Brandeis took the lead in violating many of the canons of constitutional adjudication upon which he has often strongly insisted. In this case, he and five colleagues overruled the ninety-six-year-old decision of Mr. Justice Story in *Swift v. Tyson*, and he and four colleagues now declare for the first time that it is unconstitutional for federal judges when exercising diversity jurisdiction to refuse to follow the decisions of state courts on issues of state law. Mr. Justice Brandeis says that, if the matter were merely one of statutory construction, he would be loath to reverse an ancient adjudication. He says that he is not declaring the statute unconstitutional but is merely declaring unconstitutional the ninety-six years of Supreme Court action in misconstruing the statute. Thereby he saves himself from calling in the Attorney General to argue in behalf of the statute, as a recent Act of Congress commands when constitutionality is in issue. Mr. Alfred J. Schweppe of your Washington Bar has favored me with a memorandum which completely satisfies me that in a technical sense Mr. Justice Story's interpretation of the Judiciary Act of 1789 in his decision in *Swift v. Tyson* has been enacted into statutory law by Congress in Section 721 of the Revised Statutes of 1873. Mr. Justice Reed must have his doubts on this point, for he refrains from calling *Swift v. Tyson* unconstitutional and contents himself with calling it erroneous statutory construction. This is enough to reach the evidently desired result, and it would leave Congress free to come to the court with something more explicit if it so desired. It would not raise serious and troublesome doubts about many more particular directions that Congress has given and may wish to give to the federal courts. What about the Norris-LaGuardia Act in which Congress suggested what any one not a lawyer would regard as substantive rules of decision about yellow dog contracts? What about many difficult problems arising out of the distinction between substance and procedure? Even if Mr. Justice Brandeis thought he was refraining from declaring an Act of Congress unconstitutional, he was unnecessarily declaring what Congress may not constitutionally do, and he was skating over thin intellectual ice when he said that he did not do more.

The Supreme Court not only avoided the entrance of the Attorney General into the controversy, but they decided an issue

---

1116 PET. (U. S.) 1 (1842).

16 PET. (U. S.) 1 (1842).


not raised as a constitutional one by the pleadings, the record, the briefs or by oral argument. They discovered all on their own that Mr. Justice Story and his successors had been constitutional usurpers for nearly a century, and this all on their own without any command from Congress. Moreover, the newly discovered history which Mr. Justice Brandeis invoked went not to any constitutional issue but only to the design of Congress. Of all the canons of constitutional adjudication that he violated, Mr. Justice Brandeis has been the most fervent supporter when his colleagues were reaching results of which he disapproved. Mr. Justice Butler in dissent seems to be writing the customary Brandeis dissent on the question of judicial manners. Had Mr. Justice Brandeis been inclined to defend himself, he might have found excellent support in earlier conduct of Mr. Justice Butler. All in all it was a pretty turn and turn about. This abrupt discovery of age-old error in Mr. Justice Story must make the discoverers feel tolerant toward Mr. Justice Black for doing a little constitutional interpretation on his own without too meticulous regard for what his predecessors have done on their own.

The future of the *Tompkins* case bids fair to be fascinating. From now on, federal courts instead of being able to neglect state decisions, will have to examine them. They may find that in many states the law on many points is uncertain or contradictory. They may find that later state decisions that have professed to distinguish earlier ones have really overruled them. They may find that the opinion does not support the conclusion and have to choose between them. They will doubtless find that many points are novel points and that nothing in state decisions really covers them. This certainly was true in Story's time, and it is true today, as is clear to every two contending advocates each of whom thinks the state law is or will be on his side. We shall have new material on which to conduct the old debate whether judges really make law or merely find it. Which did Mr. Justice Brandeis and his colleagues do in the *Tompkins* case? I leave the answer to your considered judgment.