CONSTITUTIONAL LAW IN 1920–1921. I

THE CONSTITUTIONAL DECISIONS OF THE SUPREME COURT OF THE UNITED STATES IN THE OCTOBER TERM, 1920

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The work of the court last term is chiefly notable for its amplification of certain important results of the preceding term. Thus, the final objection to the validity of the Eighteenth Amendment was refuted; the last great question touching the meaning of the word "income" in the Sixteenth Amendment was answered; the emergency powers of government in war time were brought into contact with more usual sources of public authority—this in the rent law cases; and some minor phases of the problem of freedom of speech and press were disposed of. However, in two cases, both of much interest to the political scientist, somewhat novel questions of national power were raised; and in neither was a certainly final solution offered. Questions of state power were again of decidedly subordinate significance and interest.

A. QUESTIONS OF NATIONAL POWER

I. REGULATION OF SENATORIAL AND CONGRESSIONAL ELECTIONS.

One of the two cases referred to above as of special interest to the political scientist was that of Newberry v. United States,[1] in which the court set aside the conviction of Newberry, at present United States Senator from Michigan, and a hundred and thirty-four other defendants, for violation of section 8 of the federal Corrupt Practices Act of June 25, 1910. The act in question forbade any candidate for representative in congress or senator of the United States to give or cause to be given any sums in excess of certain designated amounts "in procuring his nomination and election." Five of the justices decided that the act, so far as it applied to the processes of nomination to office, exceeded the power of Congress in the year 1910, although Justice McKenna

[1] 256 U. S. —, decided May 2.

reserved the question of the power of Congress under the Seventeenth Amendment, which has since been added to the Constitution. The other four justices asserted the power of Congress to govern nominations to the House of Representatives and Senate in the way attempted by the act, but were for setting the conviction aside on account of reversible errors in the trial judge's charge to the jury.

Justice McReynolds, in what is rather misleadingly called the "opinion of the court," bases his argument against the act upon three propositions: First, that the only possible source of the power claimed for Congress is Article I, section 4;[2] second, that the power thus conferred is the power to regulate the "manner of holding elections," not the power to regulate elections generally; third, that "election" in the sense of the Constitution means simply "the final choice of an officer by the duly qualified electors"—a proposition which is based on a careful collation of the passages of the Constitution in which the term is employed. That Congress may pass all laws "necessary and proper" for carrying its power to regulate "the manner of holding elections" into execution, Justice McReynolds of course admits; and as an instance of such a law he points to the Act of February 14, 1899, directing that voting for members of Congress be by written or printed ballot or by voting machine.[3] But, he continues, even if it be "practically true that, under present conditions, a designated party candidate is necessary for an election—or preliminary thereto—nevertheless his selection is in no real sense part of the manner of holding election. This does not depend upon the scheme by which candidates are put forward. Whether the candidate be offered through primary, or convention, or petition, or request of a few, or as a result of his own unsupported ambition, does not directly affect the manner of holding elections. Birth must precede, but is no part of either funeral or apotheosis."

Refutation of Justice McReynolds was essayed by both the Chief Justice and by Justice Pitney, the latter speaking also for Justices Brandeis and Clarke. "Why," asks Justice Pitney, plunging to the heart of the issue, "should 'the manner of holding elections' be so nar-

[2] "The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the place of choosing Senators."

[3] For cases involving similar legislation, see Ex parte Siebold, 100 U. S. 371; ex parte Clarke, 100 U. S. 399; ex parte Yarborough, 110 U. S. 651; re Coy, 127 U. S. 731; United States v. Mosley, 238 U. S. 383.

rowly construed?" It relates, he contends, not to a single isolated event, but to "a complex process," nothing less, indeed, "than the entire mode of procedure" by which the popular choice is finally arrived at—all of which is valid reasoning enough, even if not entirely persuasive. But a little later he shifts his position and, assuming the very point to be proved, namely, that Congress has the power to regulate elections generally, proceeds to argue that in view of their vital connection today, elections even in the sense of "the single and definitive step described as an election at the time" the Constitution was adopted, cannot be effectively regulated independently of the processes of nomination to offices, wherefore, under the "necessary and proper" clause taken in connection with Article I, section 4, Congress may as to senators and representatives regulate both.

This clearly begs the question. The defect, however, is remedied when, passing from Article I, section 4, he invokes the much broader power of the national government "to legislate through a Congress consisting of a Senate and House of Representatives chosen by the people, —in short, the power to maintain a law-making body representative in its character." He continues as follows: "The passage of the Act under consideration amounts to a determination by the law-making body that the regulation of primary elections and nominating conventions is necessary if the Senate and House of Representatives are to be, in a full and proper sense, representative of the people." In other words, he finally bases his case—and the same is true of Chief Justice White—upon what may be called the self-preservative powers of the government, although in this connection too he relies in part on the "necessary and proper" clause, remarking: "It would be tragic if that provision of the Constitution which has proved the sure defense of every outpost of national power should fail to safeguard the very foundation of the citadel."[4]

[4] It may be argued perhaps, that the specific delegation of power made by Article I, section 4, precludes the assumption of a broader power inherent in the national government. But the answer is that, in form, Article I, section 4, is primarily a delegation of power, not to Congress, but to the states; and as both Chief Justice White and Justice Pitney point out, if Congress can not regulate the nomination and election of senators under Article I, section 4, then, of course, neither can the states. Nor, Justice Pitney continues, can the states claim such power to be among their reserved powers. "The election of senators and representatives in Congress is a federal function; whatever the states do in the matter they do under authority derived from the Constitution of the United States. The reservation contained in the Tenth

Altogether, the merits of the question are somewhat divided. In his reading of Article I, section 4, Justice McReynolds remains unanswered and probably unanswerable. But his assumption that this is the exclusive basis of the power of Congress to enact laws touching the choice of senators and representatives seems untenable. The national government is after all the national government, with all that that imports; it is a government of the people, and it has the power to safeguard the purity of the wellsprings of its authority. It would be strange indeed if the government which is vested with the duty of guaranteeing a republican form of government to the states could not adopt the measures which are necessary to guarantee itself the same kind of government.[5]

II. THE FEDERAL FARM LOAN ACT

There is an old saying about "the tail wagging the dog." It is well illustrated in the result arrived at in Smith v. the Kansas City Title and Trust Company,[6] in which was sustained an act of Congress establishing

Amendment cannot properly operate upon this subject in favor of the state governments; they could not reserve power over a matter that had no previous existence; hence, if the power was not delegated to the United States, it must be deemed to have been reserved to the people, and would require a constitutional amendment to bring it into play,—a deplorable result of strict construction." Justice McReynolds, on the other hand, emphasizes the numerous points of contact of the national with the state government and the frequent dependence of the former upon the latter. But by way of comment, it should be pointed out that wherever this dependence exists it is specifically provided for by the Constitution. Chief Justice White seems to argue in one place that even if the act of 1910 was invalid when enacted, the defect had been cured by the subsequent adoption of the Seventeenth Amendment; but a careful examination of his language makes it probable that he was arguing only that the amendment should be regarded as interpretative of the original Constitution. The precise effect of the decision in the case at bar on the Corrupt Practices Act remains a matter of some doubt, especially in view of Justice McKenna's isolated position. It should be carefully noted, however, that the underlying principle of Justice McReynolds' opinion withholds from Congress not simply the right to govern nominations to the office of senator or representative in Congress, but all power concerning any of the preliminaries of the single definitive act of their election.

[5] Art. IV, sec. 4: "The United States shall guarantee to every State in this Union a republican form of government," etc.

[6] 255 U. S. 180. The case has some of the earmarks of a moot case, and Justice Holmes, in a dissenting opinion, in which Justice McReynolds concurred, contended that it was not one "arising under the Constitution or laws of the United States," within the meaning of section 24 of the Judicial Code, under which the

a system of banks for the purpose of loaning money to farmers on special terms and exempting them from taxation, federal, state, and municipal. One hundred years ago it was ruled in the famous case of McCulloch v. Maryland that the national government could incorporate a bank to act as its fiscal agent and exempt it from taxation, even though the capital stock of such bank was largely owned by private persons and its principal business was that of private banking; and this ruling was later availed of to justify the establishment of the national banking system, which quite recently was reorganized under the Federal Reserve Act of 1913. It was, however, alleged against the Federal Farm Loan Act, that far from establishing a fiscal agent for the government, with the functions of a private bank incidentally attached thereto, it did exactly the reverse. The court held, none the less, "that the creation of these banks and the grant of authority to them to act for the government as depositories of public moneys and purchasers of government bonds, brings them within the creative power of Congress, although they may (*sic*) be intended, in connection with other privileges and duties, to facilitate the making of loans upon farm security at low rates of interest."

The decision is beneficial, but rather insecurely grounded. The use made of the farm loan banks as fiscal agents of the national government is an obvious pretext, insufficient to hoodwink the fondest complacency. Nor is the court's answer that, "when Congress acts within the limits of its constitutional authority, it is not the province of the judicial branch of the government to question its motives," more than a technical evasion, since the question is whether Congress was acting within the limits of its constitutional authority. And in this connection we are reminded that in the very act of sustaining the national authority in McCulloch v. Maryland, Marshall gave warning that, "should Congress . . . . under the pretext of executing this power, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal . . . . to say that such an act was not the law of the land."

The court might have taken a somewhat broader view of the question raised by the Farm Loan Act. It might have considered the act, not

appeal was taken. Justice Day, speaking for the majority, answered with Marshall's definition of this phrase in Cohens v. Virginia, 6 Wheat. 264, 379: "A case . . . . may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends upon a construction of either." Justice Brandeis took no part in the consideration of the case.

in relation to the needs of the government but rather in relation to its duty, to wit, that of making a beneficial exercise of its powers. Through the federal reserve system, the constitutionality of which none has challenged, the government is custodian today of a vast proportion of the credit of the country. Is it not, then, vested with the duty of making credit available on reasonable terms to meet the widespread interests of the people of the United States? In other words, the government is vested by the Constitution with the power of taxation, the power to coin money, the borrowing power, etc., and as a means "necessary and proper" for carrying these powers into execution it has chartered banks and organized them into a system which largely controls the indispensable service of affording credit to the community. Certainly, then, it may take the further step and provide agencies for the proper discharge of this office. In First National Bank v. Fellows[7] it was held that Congress could authorize national banks to exercise the powers of trust companies, that service today being a usual one for banks to perform. Similarly, the federal farm loan banks are to be regarded as constitutional, not because they are themselves fiscal agents of the national government, but because they are part and parcel of the national banking system as a whole, and enable it to perform the service which modern conditions require that it should perform.

But indeed the decision might have been placed on an even broader basis, that namely of the power of Congress to raise revenue to provide for the "general welfare." For if Congress can appropriate money for child welfare work, as by the recent Sheppard-Towner Act, what is to hinder it from loaning money for agricultural purposes; and if it can do that, why may it not, under the "necessary and proper" clause, create a system of banks as a convenient agency for this work?[8] Apparently, however, the court did not like to face the socialistic implications of such reasoning, and so it took the more roundabout route.[9]

[7] 244 U. S. 416.

[8] Mr. Hughes' brief in the case follows this general line of reasoning. As a matter of fact, the recent extension of life granted to the War Finance Corporation, for the purpose of making agricultural loans, can rest on no other foundation. That Congress is not confined in making appropriations to "cases falling within the specific powers enumerated in the Constitution" was recognized by Story (*Commentaries*, sec. 991). The expansion of the field within which congressional appropriations occur is sketched by H. L. West, in his *Federal Power, Its Growth and Necessity*, pp. 97–113.

[9] Another case involving Congress' fiscal powers was that of Baender v. Barnett, 255 U. S. 224, in which it was argued for plaintiff in error that Article 1,

III. INCOME TAXATION

1. Taxation of Gains from Sales of Property

The Sixteenth Amendment received additional elucidation of an important character in a series of cases headed by Merchants Loan and Trust Company v. Smietanka.[10] The great question at issue in all these cases was whether the gains from a single isolated sale of personal property which has appreciated in value through a series of years but subsequently to the going into effect of the Sixteenth Amendment on March 1, 1913, is "income" within the meaning of the amendment. Thus in the case just mentioned, one Ryerson had died in 1912, leaving certain shares of stock which on March 1, 1913, were worth some $500,000, and which were sold early in 1917 at an advance of more than $700,000. Was the latter sum properly to be treated as "income" for the year 1917? That the act of Congress so regarded it was plain; but was the act of Congress in that respect constitutional?

The court held that it was. To the argument that such a gain was really an accretion of property, Justice Clark, speaking for the majority, responded with the definition of income which had been arrived at earlier by the court in the interpretation of the Corporation Excise Tax Act of 1909,[11] which had been summed up by Justice Pitney in Eisner v. Macomber, in the following words: "Income may be defined as the gain derived from capital, from labor, or from both combined, provided it be understood to include profits gained through the sale or conversion of capital assets."[12] Nor would the court admit that the gain from capital realized by "a single sale of property," as in the case before it, was essentially different from the gains "realized from sales by one engaged in buying and selling as a business," for instance, a merchant, a real estate agent, or broker. The distinction, said Justice Clarke, was "interesting and ingenious," but the argument in its support "fails to

section 8, clause 6 of the Constitution, authorizing Congress "to provide for the punishment of counterfeiting the securities and current coin of the United States" was a limitation as well as a grant of power. The argument was easily disposed of by the case of United States v. Marigold, 9 How. 560.

[10] 255 U. S. 509.

[11] See Straton's Independence v. Howbert, 231 U. S.; Hays v. Ganley Mountain Coal Co., 247 U. S. 189; United States v. Cleveland, C. C. and St. L. R. Co. 247 U. S. 195.

[12] 252 U. S. 189, 207. For a review of Eisner v. Macomber, see this *Review* for November, 1920 (Vol. 14, pp. 635–41).

convince us that a construction should be adopted which would, in a large measure, defeat the purpose of the Amendment."

Unquestionably the court has avoided an alluring pitfall. For what it was invited to do was really to contract the definition of income as "gains" to a definition of income as "earnings," which would have brought about again very much the situation which the Sixteenth Amendment was designed to correct. Yet it must in candor be admitted that the court's achievement reposes rather upon its official authority than upon its logic, which for the most part consists simply in crying down "the refinements of lexicographers or economists" and crying up "the common understanding" of the term income. But it is submitted that if anything is not income in the common understanding, it is an increase in the value of property, albeit reduced to monetary terms by the sale of the property, which has accrued through a series of years, albeit subsequent to March 1, 1913. The very essence of the common understanding of income is that it is of current or very recent origin; and when it is of recent origin it does not have to be reduced to terms of money to become income. A sale is no miraculous process whereby to convert capital into income, as people who have to sell their furniture to keep the larder stocked are well aware.

Furthermore, it is difficult to see just how, in a case of conversion of capital, the idea so insisted upon by Justice Pitney in Eisner v. Macomber as "fundamental" to the conception of income underlying the Sixteenth Amendment, has any operation at all. This was, it will be recalled, that "income" must be "dissevered" from its "source." But how, or in what sense, is the gain derived from a sale of property "dissevered" from the rest of the price—unless perhaps that part of the price was paid in marked dollars?[13] It ought to be noted, too, in passing, that precedents dealing with the respective rights of life-tenants and remaindermen in gains derived from invested capital,[14] though they were relied upon in part by Justice Pitney in his opinion, are now dismissed by Justice Clarke as of little value in determining questions arising under the Sixteenth Amendment.

[13] For, as was just said, sale does not convert "capital" into "income." The same question also arises, from another angle, if the income is the reward of labor. Can the Sixteenth Amendment be really considered as requiring that "income" be "dissevered" from the labor that produced it; and if so, in what sense?

[14] See the *Review*, Vol. 14, p. 640, note.

Nevertheless, in Walsh v. Brewster,[15] decided at the same sitting with the Smietanka case, the decision in the latter and that in the Macomber case are lined up side by side without the breath of a hint that they may be in any way incompatible. But the Brewster case has also an independent interest, since it challenges the sacrosanctity, in certain situations, of the previouly inviolate date of March 1, 1913, as that from which all taxable gains are to be reckoned. The facts of the case were as follows: Certain bonds were purchased in 1909 for $191,000 and sold in 1916 for the same amount, after having stood on March 1, 1913, at $151,845. The question arose whether the vendor, who was the original investor, was taxable under the Sixteenth Amendment on the difference, namely $39,155, that being the gain which had accrued to him since March, 1913. The court held, however, with the acquiescence of the government, that an income must be a true gain on the part of the investor, and that no such gain was realized by the sale in question. The query suggests itself, whether the obverse of this rule would apply. Thus suppose the bonds in question had been bought and sold at the lower figure, but had stood on the intervening March 1, 1913, at the higher figure; should the vendor be allowed to reckon the difference as a deductible loss for the year 1916? Certainly, by the logic of Walsh v. Brewster, he should not.

2. Excess Profits and Estate Taxes

It was the purpose of the excess profits tax clause of the Revenue Act of October 3, 1917, to lay a special tax upon the incomes of trades and businesses exceeding what was deemed a normally reasonable return upon the capital actually invested. But how was the capital "actually invested" to be ascertained? In general, the test imposed by the act was the actual cost of the property, a test which, in view of the general advance in values during the war worked considerable hardship to investments antedating the period of inflation. Nevertheless, in La Belle Iron Works v. United States,[16] the act was upheld in this respect against the charge that it violated both the "due process of law" clause of the Fifth Amendment and the "uniformity" clause of Article I, section 8.[17] The latter, the court pointed out, requires only territorial

[15] 255 U. S. 489; see also Goodrich v. Edwards, *ibid.*, p. 527.

[16] 256 U. S. —, decided May 16.

[17] "All duties, imposts, and excises shall be uniform throughout the United States."

uniformity.[18] The other objection it answered as follows: "The difficulty of adjusting any system of taxation so as to render it precisely equal in its bearings is proverbial, and such nicety is not even required of the states under the 'equal protection' clause [of the Fourteenth Amendment], much less of Congress under the more general requirements of due process in taxation."

In New York Trust Company v. Eisner,[19] the estate tax levied by the act of September 8, 1918, was assailed as unconstitutional. Plaintiffs in error admitted that the case of Knowlton v. Moore[20] established the right of the national government to levy a tax on legacies, and that such a tax was an excise. But, they said, whereas a legacy tax is on the right of the legatee to take, the estate tax is on a transfer of property while it is still being effectuated by the state and so both an intrusion by the national government upon state processes, and a tax on the "unalienable" right of ownership and so a "direct" tax. Notwithstanding the support it received from Justice White's opinion in the Knowlton case, the argument was brushed aside by Justice Holmes with the pertinent remark that in this matter of taxation "a page of history is worth a volume of logic." In short, the estate tax is constitutional; and furthermore, state inheritance and succession taxes are not deductible from the value of the gross assets when determining the net assets upon which it may be reckoned. On the other hand, by another case,[21] the amount of the federal estate tax is deductible from the gross income of a testator's estate for the purpose of the income tax imposed by the Act of February 24, 1919.

IV. FREEDOM OF PRESS AND THE POSTMASTER GENERAL

The question of constitutional freedom of speech and press was again before the court in two cases, that of Gilbert v. Minnesota, which is mentioned later in connection with questions of state power, and that of United States, ex rel. Milwaukee Social Democratic Publishing Company

[18] The court, therefore, assumes that the excess profits tax is an impost or excise, that is, an indirect tax; and this probably involves a similar assumption as to income taxes, since the excess profits tax is, in form certainly, an income tax. Apparently, therefore, the court still adheres to Brushaber v. Union P. R. Co., 240 U. S. 1, notwithstanding some implications to the contrary in Justice Pitney's opinion in Eisner v. Macomber.

[19] 256 U. S. —, decided May 16.

[20] 178 U. S. 41.

[21] United States v. Woodward, 256 U. S. —, decided June 6.

v. A. L. Burleson, Postmaster General,[22] which dealt with the power of the postmaster general under the acts of Congress and the Constitution in revoking second-class mail privileges. The case turned in the first instance on the construction to be given to the act of March 3, 1879, which provides "that the conditions upon which a publication shall be admitted to the second class are as follows: First, it must regularly be issued at set intervals, as frequently as four times a year," etc. In a letter to Senator Bankhead, dated August 22, 1917, Postmaster General Burleson declared that, "for many years this Department has held publications not to be 'regularly issued' in contemplation of the law when any issue contained non-mailable matter," and it is apparently on this theory that a month later the department revoked the second-class privilege of the *Milwaukee Leader* for carrying matter alleged to be "non-mailable" under title 12 of the Espionage Act. In other words, by treating the term "non-mailable" as used in the act passed in 1917, as an equivalent of the phrase "not regularly issued" in the sense of the act of 1879, the postmaster general conferred upon himself, tentatively, the power to revoke the *Leader's* second-class privilege—a privilege indispensable to profitable publication—for an indefinite future, whereas if he had acted under the Espionage Act alone, his only power would have been to exclude from the mails altogether such issues of the *Leader* as from time to time he might have found to be "non-mailable" because containing matter forbidden by the act.

Did Congress ever intend that these two statutes should be thus brought into juxtaposition? Though the court apparently so held, since it sustained the postmaster general's order,[23] it is difficult not to agree with Justice Brandeis, in his dissenting opinion, that "the fact that material appearing in the newspaper is non-mailable under wholly different provisions of the law can have no effect upon whether or not the publication is a newspaper"—which is all that the act of 1879 had in contemplation. When, however, Justice Brandeis goes on to argue that the construction of the law impliedly ratified by the court raises grave constitutional questions, he is on less secure ground. It may be, at least it is not denied by the court, both that the right of circulation is an essential element of the right of publication, and so of freedom of the

[22] 255 U. S. 407.

[23] The court does speak of "its [Congress'] practically plenary power over the mails," but the cases which it cites in this connection by no means establish an arbitrary authority in this field: Ex parte Jackson, 96 U. S. 727; Public Clearing House v. Coyne, 194 U. S. 497; Lewis Publishing Co. v. Morgan, 229 U. S. 288.

press, and that the second-class privilege is for newspapers an essential part of the right of circulation. But it is equally true that where the right of publication does not exist, then neither does the right of circulation; and the right of circulation does not exist, on the clearest principles, for matter designed "to create hostility and to encourage violation of the law," which is just the kind of matter the *Leader* is alleged to have contained.

The constitutional issue thus boils down to the question whether relator was deprived of its rights "without due process of law," and this raises the question whether the postmaster general's order was punitive in nature, as Justice Brandeis says, or only a fair measure of administration. On this point Justice Clarke remarks with force, that it was "not possible for the United States to maintain a reader in every newspaper office of the country to approve in advance each issue before it should be allowed to enter the mails," and that "when, for more than five months, a paper had contained, almost daily, articles which under the express terms of the statute, render it 'non-mailable' it was reasonable to conclude that it would continue its disloyal publications." Besides, as Justice Clarke points out, it was always "open to relator to mend its ways . . . . and then to apply anew for the second-class privilege."

For the rest, the postmaster general's action was attended by due notice to relator, which was given the right to a hearing, and was followed by a review of the facts by a court for the purpose of determining their sufficiency to support the order based upon them. That, however, the decision enlarges greatly the postmaster general's power in respect to "non-mailable" matter is obvious, and this is a change in the law which the court might well have left to Congress, and probably would have, had it not feared to expose Mr. Burleson, about to quit office, to vexatious prosecutions.

V. POLICE POWER IN THE DISTRICT OF COLUMBIA

During the emergency of the war, Congress enacted a statute, to run for two years, which gave existing tenants in the District of Columbia the right to continue in occupancy of their dwelling places at their own option, provided only that they paid rent and performed other conditions as already fixed by lease, or as required by the commission created by the act. In Block v. Hirsh[24] the validity of this statute, which was

[24] 256 U. S. —, decided April 18.

enacted by virtue of the power of Congress over the District of Columbia, was assailed as contravening the "due process of law" clause of the Fifth Amendment, while in Brown Holding Company v. Feldman,[25] which was decided the same day, a similar enactment by the New York legislature for the city of New York was challenged under the "due process of law" clause of the Fourteenth Amendment.

Speaking of the congressional act, Justice Holmes, for the majority of the court, said: "The general proposition to be maintained is that circumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law . . . . . The space in Washington is nearly monopolized in comparatively few hands and letting portions of it is as much a business as another. Housing is a necessary of life. All the elements of public interest justifying some degree of public control are present. The only matter that seems to us open to debate is whether the statute goes too far. For just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort, pressed to a certain height, might amount to a taking without due process of law. . . . . The regulation is put and justified as a temporary measure.[26] . . . . A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change. Machinery is provided to secure the landlord a reasonable rent," and to deprive him "of the power of profiting by the sudden influx of people to Washington, caused by the needs of government and the war, and thus of a right usually incident to fortunately situated property. . . . . But while it is unjust to pursue such profits with sweeping denunciations the policy of restricting them has been embodied in taxation and has been accepted. It goes little further than the restriction put upon the rights of the owner of money by the more debatable usury laws. The preference given to the tenant is almost a necessary incident of the policy and is traditional in English law. If the tenant remained subject to the landlord's power to evict, the attempt to limit the landlord's demands would fail."

Four dissentients, including the late Chief Justice, spoke through Justice McKenna, who took for his text that "maxim of experience" "withstand beginnings."[27] The fact is interesting, since Justice

[25] 256 U. S.—, decided April 18.

[26] Citing Wilson v. New, 243 U. S. 332; and Ft. Smith and W. R. Co. v. Mills, 253 U. S. 206.

[27] Citing Boyd v. United States, 116 U. S. 616.

McKenna himself spoke for the court in the German Alliance Insurance Case,[28] which furnished the majority with its leading precedent on this occasion. But, Justice McKenna rejoins, "the difference is palpable between regulation of life insurance rates, and "the exemption of a lessee from the covenants of his lease in defiance of the rights of the lessor;" and of the earlier cases generally he contends that they only "justify the prohibition of the use of property to the injury of others," while the statute under review aims to "transfer the uses of the property of one and vest them in another." Nor is the statute to be vindicated as a temporary measure to meet emergency. "No doctrine," says he, quoting from Ex parte Milligan,[29] "involving more pernicious consequences was ever invented by the wit of man than that any of its [the Constitution's] provisions can be suspended during any of the great exigencies of government;" and he later adds on his own account that, if a power exists in government at all, "it is perennial and universal, and can give such duration as it pleases to its exercise, whether for two years or for more than two years."

It is impossible not to sympathize a good deal with Justice McKenna in his dismay, though he has hardly defined the problem. Certainly the principle that most private rights must ultimately yield to urgent public interest is not advantageously to be assailed; but we can insist that the full constitutional machinery for ascertaining whether such measure of public interest exists be kept efficiently functioning. Indeed, we can do more, and protest against the too careless embodiment in our constitutional jurisprudence of the assumption that because government has the power to meet emergencies, anything which it may do to that end is necessarily constitutional.[30] Whether Justice Holmes' opinion in the present case really affords the court any foothold against less well justified legislative declarations of emergency, time alone can disclose.

VI. NATIONAL PROTECTION OF CIVIL RIGHTS

Perhaps the most interesting case of the term from the point of view of constitutional theory was that of United States v. Wheeler,[31] which grew out of the Bisbee deportations of 1919. Wheeler and others,

[28] German Alliance Ins. Co. v. Lewis, 233 U. S. 389.

[29] 4 Wall. 2.

[30] This seems to be an assumption underlying the decision in Wilson v. New, 243 U. S. 332.

[31] 254 U. S. 281.

who were active in this affair, were indicted under section 19 of the United States Criminal Code for conspiracy to injure and oppress certain citizens of the United States residing in Arizona in the exercise of rights and privileges secured them by the Constitution and laws of the United States, especially the right and privilege to reside peaceably therein and to be immune from unlawful deportation from that state to another. The Government relied in part upon Article IV, section 2 of the Constitution,[32] whereby, it is claimed, "the right of a citizen of one of the states to free ingress and regress to and from another state . . . . is secured in some sense," but more especially upon Crandall v. Nevada,[33] in which the court had set aside many years ago a state law on the ground that it interfered with the right of a citizen of the United States to pass freely from a state for the purpose of exercising the rights and duties accruing to him from the Constitution and laws of the United States and the existence of the national government. A salient passage of the government's argument reads as follows:

"The existence of the states prevents a citizen of the United States from deriving, as such, a right under the Constitution to territorial mobility within the limits of any particular state. To that extent he is dependent upon the laws and agencies of the several States. The right, however, to move freely, *suo intuitu*, from one State into another is an entirely different matter and brings into the problem the concept of the Union. It is a right necessarily inherent in federal citizenship and secured, therefore, by the Constitution. Unless this be true, no Union was in fact established in 1789, because no less than this can be properly attributed to citizenship of the United States."

And furthermore, it continued:

"The injury done by the defendants in this case has a double aspect, one toward the individuals deported and the other toward the State into which they were deported. By their deportation the individuals became, or might become, a charge upon the State of New Mexico, a disturbance of its peace, or an offense to its own state policy. According to the decisions of this court, and especially Kansas v. Colorado and Missouri v. Illinois,[34] the offended state was secured by the Constitution

[32] "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

[33] 6 Wall. 35.

[34] 185 U. S. 125, and 206 U. S. 46. See also Georgia v. Tenn. Copper Co., 206 U. S. 230.

a right to sue the offending State in the federal courts, and to have applied there, not the law of the offending State, but a general or international law. Is not this a strong reason for believing that the Constitution also secured a right to the individuals, not as citizens of Arizona but as citizens of the United States, to have their cases determined in a federal court by federal law?"

Finally, alluding to Justice Miller's famous phrase in the Neagle Case, it was argued that the deportees came within the protection of "the peace of the United States."[35]

The court, speaking through the Chief Justice, sustained the lower court in quashing the indictment of Wheeler and his associates. Following the distinction developed in the Slaughter House Cases[36] between the rights of state citizenship and those of national citizenship, it classified the right invoked in this case as belonging to the former category, and pointed out that it was protected by Article IV, section 2, only against discriminatory action by the states themselves, not against individual action; nor, it was asserted, did Crandall v. Nevada, rightly interpreted, militate against this view in any way.[37] The Neagle case and the trespass suffered by the state into which the deportation took place were passed over in silence.

Although the decision unquestionably follows conventional lines,[38] it leaves one not entirely satisfied. Perhaps the time will come when, with the spread of the Ku Klux Klan or some equally egregious form

[35] 135 U. S. 1, 69.

[36] 16 Wall. 36.

[37] The words of the Chief Justice are: "Crandall v. Nevada . . . . so much relied upon in the argument, is inapplicable, not only because it involved the validity of state action, but because the state statute considered in that case was held to directly burden the performance by the United States of its governmental functions and also to limit rights of the citizens growing out of such functions; and hence it also follows that the observation made in Twining v. New Jersey, 211 U. S. 78, 97, to the effect that it had been held in the Crandall Case that the privilege of passing from state to state is an attribute of national citizenship, may here be put out of view as inapposite." He then appropriately adds: "With the object of confining our decision to the case before us, we say that nothing we have stated must be considered as implying a want of power in the United States to restrain acts which, although involving ingress or egress into or from a state, have for their direct and necessary effect an interference with the performance of duties which it is incumbent upon the United States to discharge."

[38] In addition to the cases cited above, see Paul v. Virginia, 8 Wall. 168; Ward v. Maryland, 12 Wall. 418; United States v. Cruikshank, 92 U. S. 542; United States v. Harris, 106 U. S. 629; and the Civil Rights Cases, 109 U. S. 3.

of *imperium in imperio*, it will become necessary to discard the outworn artificiality of the decisions in the Slaughter House and Civil Rights Cases. Certainly it is rather dismaying to be told in one breath that national citizenship is "paramount and dominant" and in the next that all our most fundamental rights come from the states and are dependent on them for protection.

VII. THE CONSTITUTION—AMENDING POWER

The cases decided last term still left one objection to the validity of the Eighteenth Amendment unanswered, that which was based on the fact that in proposing the amendment Congress had stipulated that ratification to be operative must take place within seven years. In Dillon v. Gloss[39] this objection is disposed of in the interesting and convincing opinion of Justice Van Devanter. "That the Constitution contains no express provision on the subject," runs the opinion, "is not in itself controlling; for with the Constitution, as with a statute or other written instrument, what is reasonably implied is as much a part of it as what is expressed. . . . .

"We do not find anything in the Article which suggests that an amendment, once proposed, is to be open to ratification for all time, or that ratification in some of the states may be separated from that in others by many years and yet be effective. We do find that which strongly suggests the contrary. First, proposal and ratification are not treated as unrelated acts, but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the states, there is a fair implication that it must be sufficiently contemporaneous in that number of states to reflect the will of the people in all sections of relatively the same period, which, of course, ratification scattered through a long series of years would not do."

Furthermore, there is the general character of the Constitution as a whole:" . . . . As a rule the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require; and Article 5 is no

[39] 256 U. S. —, decided May 16.

exception to the rule." "Of the power of Congress, keeping within reasonable limits, to fix a definite period for the ratification we entertain no doubt."[40]

VIII. FEDERAL JUDICIAL POWERS AND THE SUABILITY OF STATES

Ex parte, in the matter of the state of New York[41] involved the question of the right of a district court of the United States to entertain, by virtue of its admiralty and maritime jurisdiction, an action *in rem* against certain tugs which had been chartered by the superintendent of public works of the state of New York, and which had been libelled for damages done their tows. The court held that since, under the Eleventh Amendment, an action *in personam* would not lie against the superintendent of public works, his liability in the premises being clearly official and not personal,[42] the action *in rem* would not lie either. In a second case of the same title it was further determined that a vessel, the property of a state and employed in public governmental service, is exempt from seizure by admiralty process *in rem*.[43] The two cases

[40] For the present writer's review of Hawke v. Smith, 253 U. S. 221, and Rhode Island v. Palmer, *ibid.*, 350, in which important questions as to the validity and construction of the Eighteenth Amendment were dealt with, see the *Review* for November, 1920 (Vol. 14, pp. 648–54). It should be added that the report of the latter case, as it appears in the bound volume, contains a dissenting opinion by Justice Clarke which was not available when the review cited was prepared. Justice Clarke accepts the first seven and the tenth paragraph of the announced "Conclusions" of the court, but demurs to the eighth, ninth, and eleventh, that, taken together, they, "in effect, declare the Volstead Act . . . . to be supreme law of the land,—paramount to any state law with which it may conflict." His own view of the word "concurrent" of the amendment is that it means "joint and equal authority," the view also taken by Justice McKenna, it will be recalled, in his dissenting opinion. Furthermore, Justice Clarke holds that Congress derives no authority from the second section of the amendment to treat as intoxicating liquor which is "expressly admitted" by the court "not to be intoxicating." In this respect its power has not the scope either of the war powers of the national government or of the police powers of the states.

[41] 256 U. S. —, decided June 1.

[42] Citing Beers v. Arkansas, 20 How. 527; Hans v. Louisiana, 134 U. S. 1; Fitts v. McGhee, 172 U. S. 516; Palmer v. Ohio, 248 U. S. 32; Dubine v. New Jersey, 251 U. S. 311.

[43] *Ibid.* The immunity extended by the Eleventh Amendment "even in the case of municipal corporations" to "property and revenue necessary for the exercise" of the powers of government is regarded by Justice Pitney as analogous, citing Klein v. New Orleans, 99 U. S. 149.

He also suggests that the immunity from jurisdiction of public vessels, which is recognized by international law, might furnish a principle applicable to the

therefore illustrate the proposition, which falls in the line of familiar doctrine, that the admiralty and maritime jurisdiction of the federal courts is limited by the Eleventh Amendment.

The orignal jurisdiction of the Supreme Court, however, over controversies between states is not so limited. In New York v. New Jersey,[44] accordingly, the court sustained the right of the former state to maintain an original suit against the latter, to enjoin it from discharging sewage into the waters of upper New York Bay, but finally refused the injunction asked for, on the ground that the threatened invasion of New York's rights had not been established by clear and convincing evidence. The suit was, therefore, dismissed, but without prejudice to a renewal of the application "in conditions which the state of New York may be advised require the interposition of the Court."[45]

(*To be concluded.*)

case at bar; but he refrains from deciding the point. See The Exchange v. McFadden, 7 Cranch 116, and The Parlement Belge, L. R. 5 Probate Div. 197.

[44] 256 U. S. —, decided May 2.

[45] See the cases cited in note 34, *supra*. On the question of what is a case "arising under this Constitution," etc. (Article I, section 2, clause 1), see note 6, *supra;* also American Bank and Trust Co. 2. Federal Reserve Bank of Atlanta, 256 U. S. ——, decided May 16.

AMERICAN GOVERNMENT AND POLITICS

THE FIRST (SPECIAL) SESSION OF THE SIXTY-SEVENTH CONGRESS APRIL 11, 1921—NOVEMBER 23, 1921*

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The New Administration. Beginning on March 4, 1921, the Republican party, for the first time in ten years, was in complete control of the executive and both branches of Congress. Entirely apart from the issues of party politics, its régime promised to be interesting. Campaign pledges had been made that legislation would be speedily passed relieving the country of the ill effects of what President Harding called "war's involvements;" economy and efficiency were to be secured; more business in government and less government in business were among the promises, and the reorganization of the administration, long talked of, was to be achieved. There were, moreover, two significant possibilities from the standpoint of party government. During the campaign, Mr. Harding said that "government is a simple thing," and that, if he was elected President, Congress would be allowed to play its proper part under the Constitution. He pledged the Republicans to inaugurate "party government, as distinguished from personal government, individual, dictatorial, autocratic, or whatnot." This was a pledge not to follow Mr. Wilson's example and coerce, or even lead, Congress; and the interesting question was, whether Congress would not be helpless without executive direction; whether legislative inefficiency is not the price that must be paid for the absence of some executive autocracy. In the second place, remembering the circumstances of President Harding's nomination and the different Republican elements which came together during the campaign, one was justified in wondering whether the party would continue to present a solid front in its congressional work; whether there would not be a split between progressives and reactionaries resembling that of 1910–1912. The congressional session gave answers to both of these questions: there were unmistakable signs that President Harding regretted his self-denying

* For previous notes on the work of Congress, see *American Political Science Review*, Vol. 13, p. 251, Vol. 14, pp. 74, 659, Vol. 15, p. 366.