FIVE TO FOUR SUPREME COURT DECISIONS

BY FRANK R. SAVIDGE

It is being urged that a bare majority of the Justices of the Supreme Court of the United States should not have power to render inoperative as unconstitutional an Act of Congress; and, further, that close decisions, sometimes of five Justices to four, have a tendency to lessen respect for that Court and to detract from a reverence for the law. The situation does not seem to be popularly understood. Otherwise, it would be difficult to perceive why such drastic measures are suggested. One of the recent proposals, introduced in the Senate by Senator Borah, provides that before an Act of Congress may be declared unconstitutional, at least seven of the nine Justices of the Supreme Court must agree. In other words, if only three Justices consider an act constitutional, they shall hand down the prevailing opinion of the Supreme Court of the United States; and the six opposing Justices, who consider the Act unconstitutional, may merely write dissenting opinions!

It is well not only to observe the character of cases in which that Court has been divided, five Justices to four, in declaring Acts of Congress unconstitutional, but to learn, if possible, just what is the basis for differences of opinion between the judges. There are only eight of such cases from the beginning. This in itself is remarkable. We should study whether there exists any relation between the decisions and the developing stages of the history of our country, and how the permanent rights of the people have fared in such decisions.

These cases divide themselves into three classes. In the first class there is but one case, that of *Ex parte Garland* (*4 Wall. 333*), decided in 1867. In order to understand the meaning of that case, we must recall the days just after the Civil War and see then at the bar of the Court a man, named Garland, holding a full individual pardon for all offenses committed by his participa-

tion in the Rebellion, signed by the President of the United States. He is there because he is unable to obtain admission to practice his profession on account of an Act of Congress of January 24, 1865, requiring an oath to be taken by attorneys applying for admission to the Federal courts, containing statements to the effect that the deponent has never been guilty of treason nor in any way aided or abetted any enemy of the United States. The majority opinion decided that this Act was unconstitutional, for it prohibited a man, although pardoned for an offense, from practicing law in the Federal courts because of that offense, and was in the nature of a bill of attainder.

On account of the circumstances of the period, it is hard to place this case in a class with any of the others, except in the justice of its result, which was one of the steps in giving to former enemies of the United States all the rights and imposing upon them all the duties of full United States citizenship, the wisdom of which no one will question at this date. Indeed, Mr. Justice Miller in his dissent, in which three other Justices concurred, stated: "For the speedy return of that better spirit, which shall leave us no cause for such laws, all good men look with anxiety, and with a hope, I trust, not altogether unfounded."

The second class also contains but one case, that of *Pollock vs. Farmers Loan and Trust Co.*, twice argued before the Court and reported first in *157 United States 429 (1895)*; and on rehearing in *158 United States 601*. This is commonly known as the "Income Tax Case", and held that the imposition of an income tax, being a direct tax not apportioned according to population, was not a constitutional exercise of the power of Congress to tax. This case stands alone because of the situation in which we find it when in the Supreme Court. The Act as laid before the Court was ill advised, and the tax when imposed was immensely unpopular and greatly criticised by large masses of the people as well as by the majority of the lawyers of the country. Nevertheless, the power of Congress was by many judicial minds considered to be sufficiently wide to admit of the tax, and there was realized a great change in our economic conditions since the Civil War. At the time this Act was passed there was no general pressing demand for an income tax. It was a departure.

The point of demarcation here is very clear—the majority striving through strong argument to protect the right of the people to be free from all Federal taxation except that specifically provided for in the Constitution, the minority claiming for Congress the fullest powers to tax in order that the financial welfare of the country might not be undermined. The people, faced with the problems of a nation now become one of the leading powers of the world, met the situation with characteristic courage and forestalled the dangers seen in the minority opinion by adopting the Sixteenth Amendment to the Constitution. This Amendment followed the judgment of the majority of the Court, that the Constitution as it stood did not contemplate or permit an income tax, and at the same time satisfied the dissent of the minority.

The third class contains the six other decisions, and in all of them we see very much the same personnel in the Supreme Court. The first of these decisions in date, but probably the least important in its effect upon our national life, was the decision in the case of *Fairbank vs. United States, 181 U. S. 283 (1901)*, which declared unconstitutional an Act imposing a stamp tax on a foreign bill of lading, on the ground that this amounted to a tax on exports, which is categorically prohibited by Article 1, Section 9, Clause 5, of the Constitution. The majority opinion in that case was written by Mr. Justice Brewer, who took occasion to introduce a declaration of the necessity for branding the Act as unconstitutional by quoting Chief Justice Marshall in the celebrated case of *Marbury vs. Madison, 1 Cranch 137*, as follows:

> The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then the legislative act contrary to the Constitution is no law. If the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable.

Next in point of time of this third class are the *Employers' Liability cases (Howard vs. Ill. Central R. R. Co., et al., Brooks vs. Southern Pacific Co., 207 U. S. 463, 1908)*, which involved the Act of Congress of June 11, 1906, where Congress failed to make any distinction between interstate commerce, over which it has

control, and intrastate commerce, over which it does not have control. It contained, also, the attempt to abrogate the "fellow servant" rule in the case of death caused by negligence. In this case, and in all the decisions following, the majority of the Court has held that it is the office of Congress to consider the subject matter and policy of the law, while the obligation of the Supreme Court is to decide whether or not Congress, the agent of the people, has acted strictly within its authority granted by its commission—the Constitution.

In this particular case the dissenting judges concur with the majority of the Court in their general interpretation of the Act, but argue that it is possible for the Court to put such a construction upon the Act as to bring it within the terms of the Constitution and that, therefore, this should be done in order to save it. The leading dissenting opinion in this case was written by Mr. Justice Moody, in which he brilliantly argued the position of the minority. Mr. Chief Justice White, however, established a strong precedent for those who believe that the decisions of this high Court must look as much to the future as to the particular Act in question, and pointed out that it is very definitely the first duty of the Supreme Court to guard the form of Acts of Congress, and to see that they comply strictly with the Constitution, and that where they do not so comply, it is the duty of the Court, whatever the subject matter of the Act may be, to declare the Act unconstitutional.

Mr. Justice Holmes, we are to see, is a consistent champion of the doctrine that the Supreme Court should, wherever possible, uphold Congress in carrying out the legislative power by applying the most favourable construction upon its acts that is at all possible, however narrow that construction may be, in order to pronounce them constitutional. He says:

> I think there are strong reasons in favour of the interpretation of the statute adopted by the majority of the court. But as it is possible to read the words in such a way as to save the constitutionality of the act, I think they should be taken in that narrow sense.

This argument of Mr. Justice Holmes, and his desire to "save" the Acts of Congress by placing upon them a constitutional interpretation when the Act is beneficial to the nation, is strongly

marked in his dissenting opinion in *Hammer vs. Dagenhart (1918), 247 U. S. 251*, involving an Act of Congress of September 1, 1916, which was an attempt by Congress to reach by indirection the admitted evil of unregulated child labour, which it could not in a direct manner regulate under the terms of the Constitution. The Act sought to control the employer of child labour by preventing within thirty days from the manufacture the shipment, in interstate or foreign commerce, of any goods made in a factory employing children under the statutory age. The Act was framed as the result of the fear in Congress that it would adjourn without complying with a popular demand that some definite action be taken in the matter, and by this Act the responsibility for the constitutional question was transferred to the Supreme Court instead of being solved in Congress before the final passage of the Act. There is no doubt that every member of the Supreme Court of the United States is as conscious of the evils that Congress desired to remedy as any one instrumental in the passage of the Act involved. It is not to be supposed that any one will doubt the wisdom of rules regarding this question when imposed by the proper authority. But the sole duty of the Supreme Court was to decide the constitutional question. In the majority opinion, written by Mr. Justice Day and concurred in by Mr. Chief Justice White, Mr. Justice Van Devanter, Mr. Justice Pitney and Mr. Justice McReynolds, the Court carefully states:

> We have neither authority nor disposition to question the motives of Congress in enacting this legislation. The purposes intended must be attained consistently with constitutional limitations and not by an invasion of the powers of the States.

It declares the Act to be unconstitutional on the double ground that it transcends authority delegated to Congress over commerce, and exerts power in a matter reserved solely to the local governments; Congress did not say that certain things shall or shall not be done in interstate commerce resting upon the character of particular goods with which Congress was dealing for some reason inherent in them, but Congress attempted to prevent goods, in themselves entirely innocent and able to be transported by interstate commerce, from being so transported by reason of acts performed in the manufacture of such articles.

Of legislation drawn on the theory that the present public advantage is of greater importance than the mandate of the Constitution, Mr. Justice Lurton said at a meeting of the Maryland and Virginia Bar Associations in 1910:

> The contention that the obligation of a constitution is to be disregarded if it stands in the way of that which is deemed of public advantage, . . . is destructive of the whole theory upon which our American Commonwealths have been founded, to say nothing of the constitutional relation of the Union and the States to each other. It is a substitution of men for a government of law. It is against this that I raise a warning voice.

The dissenting opinion, in which Mr. Justice McKenna, Mr. Justice Brandeis and Mr. Justice Clarke concurred, was written by Mr. Justice Holmes, In it he advocated the constitutionality of the Act upon the right of Congress to prohibit that which it may regulate; declaring that there is no doubt that if Congress can regulate it can prohibit, because regulation can easily go to that limit. But he also shows clearly that he looks beyond the mere thing passing from one State to another. He cites authorities in which the Court decided that certain objects could be excluded by Congress on the ground that they were bad, and by comparison says that the good to be accomplished in child labour is of greater value than in those other cases, and adds:

> But if there is any matter upon which civilized countries have agreed—far more unanimously than they have with regard to intoxicants and some other matters, over which this country is now emotionally aroused, it is the evil of premature and excessive child labour. I should have thought that if we were to introduce our own moral conceptions, where in my opinion they do not belong, this was pre-eminently a case for upholding the exercise of all its powers by the United States.

This tends to lead away from the issue. Of course the point is well taken, that if the Supreme Court is to intrude its judgment upon any question of policy or morals, child labour is one of the best objects for such intrusion. Still, the fact remains that, in the first place, the Supreme Court has no such right, and in the second place, the Constitution reserves such questions to the States, and does not give the right to Congress to interfere with local government, as this particular Act decidedly did. As stated in the majority opinion, the Act would place a wide field of

local matter under Federal control which under our present form of government is unquestionably in the hands of the States. As the Court said:

> Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles intended for interstate commerce is a matter of local regulation.

No student of American history can escape the importance of the position of the State in our form of government. The fear of many of the framers and supporters of the Constitution was that in some manner the Central Government would usurp the power of the States and absolutely absorb them, and it was only because the Convention at Philadelphia guarded the whole structure of the States with great jealousy that the Constitution was ratified at all. Alexander Hamilton, at the New York ratification convention, had the State Rights doctrine to encounter, and upheld it in the following words:

> While the Constitution continues to be read, and its principles known, the State must, by every rational man, be considered an essential, composite part of the nation; and therefore the idea of sacrificing the powers to the latter is wholly inadmissible. . . . The gentlemen are afraid that the State Governments will be abolished. But, sir, their existence does not depend upon the laws of the United States. Congress can no more abolish the State Governments than they can dissolve the union. The whole Constitution is repugnant to it.

And it is the duty of the Supreme Court to maintain both the definite powers of the Central Government and the rights of the State.

The next of these cases is that of *Eisner vs. Macomber, 252 U. S. 189 (1920)*, which held that the Revenue Act of September 8, 1916, is in conflict with Clause 3 of Section 2 and Clause 4 of Section 9 of Article I of the Constitution, in so far as it attempts to tax as income of the stockholder, without apportionment, a stock dividend made legally and in good faith against profits accumulated by the corporation since March 1, 1913. The part of the Act in question clearly taxed the stock dividend solely because there was a form of distribution to the stockholder, but as a matter of common economic knowledge, a stock dividend is not a distribution to the stockholder unless and until the stock is

sold by him, and then only to the amount that his original investment has increased. This is one of the more technical cases. Mr. Justice Holmes dissented, contending that the Sixteenth Amendment is sufficiently broad to cover the clause in question, in that—

> The only question of this amendment was to set right all nice questions as to what might be direct taxes, and I cannot doubt that most people, not lawyers, would suppose when they voted for it that they put a question like the present to rest.

He held that this consideration justifies the tax, despite the fact that he also said—

> I think that *Towne vs. Eisner, 245 U. S. 418* [on which the majority opinion is largely based], was right in its reasoning and result, and that on sound principles the stock dividend was not income.

Mr. Justice Day concurred in this opinion. Mr. Justice Brandeis also delivered a dissenting opinion, in which Mr. Justice Clarke concurred, wherein he sets out a number of illustrations of how stock dividends have been turned into income and taxation has been avoided, and argues from this that stock dividends should therefore be taxed as income.

The next case, *Knickerbocker Ice Company vs. Stewart, 253 U. S. 149 (1920)*, involved an Act of Congress of October 6, 1917, which attempted to impose upon the Admiralty Courts the Workmen's Compensation Laws of any State in cases of injury to claimants within the Admiralty jurisdiction. Under the Constitution the Admiralty jurisdiction is specifically placed in the Federal courts, in the following language:

> The Judicial power shall extend to . . . all cases of Admiralty and maritime jurisdiction;

and the question involved was as to whether it is constitutional for Congress to pass an Act delegating to the several States the legislative power given to it by the Constitution.

The author of this paper argued the case in the Supreme Court against the constitutionality of the Act, and feels now as he did then, not only that it was unconstitutional, but that it would have been unfortunate to have allowed a large group of Admiralty cases constantly arising to be taken out of the jurisdiction of the

Federal courts. The majority opinion of the Court, ably written by Mr. Justice McReynolds, is convincing that the Act was unconstitutional. Mr. Justice McReynolds, in delivering the opinion of the Court, was in just the opposite position to that of Mr. Justice Day in the Child Labour case, for in the latter case the duty rested on the Court to protect the State from encroachment of its power of local government reserved to it by the Constitution, and in the instant case Mr. Justice McReynolds was faced with the problem of keeping inviolate the rights that are definitely given to the Central Government by the same instrument. And he says:

> Moreover it [the Constitution] took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such [general maritime] law, or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal Government was the fundamental purpose; to such definite end Congress was empowered to legislate within that sphere.

Mr. Justice Holmes wrote the dissenting opinion of the Court, in which Mr. Justice Pitney, Mr. Justice Brandeis and Mr. Justice Clarke concurred. In this opinion Mr. Justice Holmes develops his argument for the constitutionality of the Act by pointing out that the Supreme Court has declared constitutional Acts of Congress adopting certain State laws as Federal laws, and that the Federal District Court has adopted as rules of practice the rules of the State in which the district is located. This, he argues, answers the objection of the majority that Congress cannot delegate to the States its power to legislate. In discussing the intention of the Constitution that the Admiralty laws should be uniform, he says that it would in his opinion be wise policy that the Admiralty laws should be as near as may be uniform, but that he does not feel that it is absolutely imperative that they should be so, if Congress chooses otherwise.

The latest of these cases is one which has been the subject of considerable ethical and political discussion, *Newberry vs. U. S., 256 U. S. 232 (1921)*. Whatever the verdict of the country

may be as to the improprieties of candidates for the office of United States Senator or any other office in spending large sums of money to further their elections, the fact remains that the case, as taken to the Supreme Court of the United States, was restricted to a very narrow point of law under the rules of appeal, the particular point being whether the Act in question came within the power of Congress to regulate "the manner of holding elections". The Act attempted to fix the amount to be expended, used, or promised by any candidate for election to Congress at the primaries. This power the majority of the Court held Congress did not have, for there is no connection between the "*manner of holding*" the election itself and the personal conduct of the individual seeking to have his name placed on the ballot for election. The four Justices who dissented, Mr. Chief Justice White, Mr. Justice Pitney, Mr. Justice Brandeis and Mr. Justice Clarke, concurred in part. The Chief Justice and Mr. Justice Pitney wrote opinions. That of the Chief Justice was a plea for the necessity of such legislation, that of Mr. Justice Pitney, an argument for its constitutionality based on the rule laid down in *McCulloch vs. Maryland, 4 Wheat. 316*, that the supremacy of the Government in the exercise of its appropriate power implies the authority to do all things necessary to maintain the supremacy and operation of those powers.

This case has been the one most frequently mentioned in the agitation to limit the powers of the Supreme Court at this time. It is unfortunate, for it leads to the conclusion that many of those who say that they are anxious to protect the will of the people by curtailing the power of our highest Court are, in fact, seeking a way to give vent to their political animosity arising out of the subject matter of this particular case.

Thus we review the cases upon which any criticism of the present system of deciding constitutional questions must be based. They are now the law of the land. The wisdom of the law is reflected in the inevitable reactions to a study of them, and from them we can draw our conclusions:

1.—Perhaps most important of all, the majority decision in every case is a defense of the permanent definite rights of the people, and recognizes that Congress, the agent and not the

ruler of the people, must carry out the wishes of the people within the terms of the agency and not according to the whims of the agent.

2.—The judgment of history, the experience of legal training, the respect for our institutions, completely justify the majority.

3.—They obey the mandates of the Constitution.

It is conceded that a Constitution capable of being revered lives not because the best minds framed it long ago. That satisfaction will not perpetuate it. To survive it should be built upon eternal truths. Nor will the fact that a Civil War settled important differences of opinion regarding our Constitution be other than an argument upon both sides as to its permanent value. For, on the one hand, it may be insisted had the instrument been more clearly expressed a war would have been saved, and, on the other hand, it can be argued, having suffered the war, the construction of the instrument in large scope has thereby become settled. Of course this reference does not take into account the wealth of decisions that have interpreted and in reality become a part of it.

We may acclaim with Tennyson:

> For who would keep an ancient form
> Through which the spirit breathes no more?

Does our Constitution still breathe the spirit?

In fundamental analysis one must acknowledge that at any period of time the sovereign power of the people of necessity resides somewhere. It is never safely lodged without a government of checks and balances. In order practically to insure the substance of liberty, the Constitution inaugurated three coördinate branches of government, the Legislative, the Executive, and the Judicial. Certainly the whole of the Constitution is largely an instrument for the enforcement of its most cherished provision that life, liberty, and property shall not be taken without due process of law. To protect this inherent right of all Americans, an independent court is needed, for a court that is dependent upon any other branch of the Government is no court at all. It follows, too, that a limited legislature like ours, unlike the English Parliament, is composed of our representatives as agents

exclusively under the written authority of the Constitution, which the independent Court is sworn to uphold. As Senator Pepper recently so well put it, "the agent's own assurance that he has the authority which he claims counts for but little in determining the authority which has been conferred". This is particularly true where life, liberty and property are in danger. Hence every Act of Congress, when the question is raised, must be examined by the test of the Constitution, and it would be absurd to hold, as was once contended and has lately been suggested, that Congress should pass upon the constitutionality of its own acts.

Madison, in *The Federalist* (Article 46), wrote:

> The Federal and State Government are in part but different agents and trustees of the people instituted with different powers and for different purposes. The adversaries of the constitution seem to have lost sight of the *people* altogether in their reasonings on this subject, and to have viewed their different establishments, not only as mutual rivals and enemies, but as uncontrolled by any *common* superior in their efforts to usurp the authorities of each other. The ultimate authority whenever the derivative may be found, resides in the people alone.

And it would be dangerous to authorize Congress, the agent, after the Supreme Court has declared an Act unconstitutional, to validate it by another Act. Congress would pass Acts it would not now attempt, knowing that two resolutions, fundamentally unconstitutional, that is two wrongs, would make a right. Shall we ever forget the wisdom of Webster?

> The sovereignty of government is an idea belonging to the other side of the Atlantic. No such thing is known in North America. Our governments are all limited. In Europe sovereignty is of feudal origin and imports no more than the state of the sovereign. It comprises his rights, duties, exceptions, prerogatives and power. But with us all power is with the people and they erect what government they please and confer on them such powers as they please. None of their governments are sovereign in the European sense of the word, all being restrained by written constitutions.

Nor can it be successfully contended that Congress has or should have the right to regulate how many Justices are required for a decision as to one of its own Acts. When Congress begins to "regulate" the Supreme Court, our freedom passes. Fortunately, Congress cannot. The people gave to the Constitution

its life. A Government of which the people are the first consideration keeps that life breathing its spirit, as surely today as in 1789.

It is just as erroneous to say that a five to four decision is a one man decision (five judges decide) as it is incorrect to say that an Act of a branch of Congress passed by a majority of one is a one man Act of that branch of Congress.

These decisions are in themselves strong arguments for the filing of dissenting opinions. The dissenting opinions in the case of *Pollock vs. Farmers Loan and Trust Company* were undoubtedly the most forceful arguments advanced for the passage of the Sixteenth Amendment, and Mr. Justice Holmes's opinion in the Child Labour Case has done much to stir the advocates of a worthy cause to new zeal in the endeavour of accomplishing results in a constitutional manner.

Justices in the Supreme Court of the United States have no temptations to do other than the right, and to hand down in pride to posterity valid reasons for their interpretation of the law. They are not influenced by factional passions. They owe no allegiance to any political party, and are committed to no patronage.

Mr. Chief Justice Robert von Moschzisker, of the Supreme Court of Pennsylvania, has recently given to the country a thorough and convincing work entitled *Judicial Review of Legislation*. In discussing the question as to whether any remedy is needed with reference to our Supreme Court, he says:

> If a remedy is needed, so far as the Federal Supreme Court is concerned, the real one would be to restrict the appellate jurisdiction of that overburdened tribunal, confining it largely to the consideration of appeals involving constitutional questions, and thus allow sufficient time to examine into, upon, and, where possible, to reconcile differences on, these most important points, then let the liberalizing tendencies of the present age work their own way under our existing system as they are steadily doing.

The President of the United States, whose Secretary of State was once a learned member of the Supreme Court, in his message delivered at the opening of the present Congress, suggested that the appellate jurisdiction of the Supreme Court be restricted by relieving it of some of the cases of less national importance,

in order that it might have more time to decide problems of great concern. This suggestion of the President is in effect a pronouncement of the proposition of the Pennsylvania Chief Justice.

The President thus urges that there be strengthened and not curtailed the basic function of the Supreme Court in deciding constitutional questions. That great Court has by its successive members always announced its decisions in the American way—by the majority. It is unthinkable that it shall come to pass that a State or citizen can be deprived of vital constitutional rights contrary to the protest of the majority of the members of the highest Court in the world—constituted chiefly to support such rights. If the faithlessness of the times shall next invade the Supreme Court of the United States, it may be too late, when dire consequences follow, to remedy such a colossal blunder.

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JAPAN IN A QUANDARY

BY K. K. KAWAKAMI

I

THREE months ago Japan reverberated with a chorus singing praise of America and voicing the gratitude of sixty millions of the Empire for the unparalleled generosity with which the American people hastened to the rescue of the earthquake-stricken people. It seemed as if the great holocaust, as it spread death and destruction, took with it also the last vestige of any unfriendly feeling that might have existed between the two nations.

Today all this has changed, and the hands of the clock, as far as American-Japanese relations are concerned, are put back to where they had been before the earthquake.

What is the cause of this sudden change? Are the Japanese fickle? Are they wont to blow hot and cold? Was their demonstration of gratitude for the American succour of the earthquake sufferers naught but a pretense under the cloak of which lurked the sinister reality of anti-American sentiment?

Against insinuations conveyed by such questions the Japanese protest emphatically. They assert their appreciation of all that America did for them, not only in the recent calamity, but through the years of stress and strain that followed the opening of their country to foreign intercourse. They protest their desire to remain most friendly with the United States, and are deeply hurt when charged with hostile intentions. Japan, perturbed, distressed, almost heart-stricken, as one misjudged or betrayed by his best friend, begs America to lend ear to her and try at least to understand her point of view.

The first in the series of incidents, which has shaken Japan's trust and gratitude inspired by American aid to earthquake sufferers, is the ruling of the Supreme Court, upholding the land laws of California and Washington, whose purpose is to prohibit Japanese and other Orientals from cultivating land save as day