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## Precedent and Adjudication

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### *Editors' Preface*

The following article is a difficult one. Its unusual style, its sophistication, and its multilayered patterns of thought make considerable demands of the reader. We have therefore taken the step, unique for the *Journal*, of providing a brief preface.

Constitutional review by the Supreme Court has evoked two great crises of legitimacy in this century: once, as a reaction to invalidations of New Deal economic legislation in the 1930's,<sup>a</sup> and again in response to the activist decisions of the Warren Court.<sup>b</sup> These crises have generated important views concerning proper guidelines for the Court; roughly, such views have focused either on the development of general adjudicatory principles that are neutral in character<sup>c</sup> or on the political and institutional role of the Court in relation to other institutions.<sup>d</sup>

In an article published six years ago in the *Stanford Law Review*,<sup>e</sup> Professor Deutsch analyzed the various attempts to formulate successful theories of constitutional adjudication. He there argued that none of these theories were satisfactory and concluded by suggesting that a contextual approach to the question is required.<sup>f</sup>

In the present piece, Professor Deutsch offers an example of such an approach. Examining the *Florida Lime & Avocado Growers*<sup>g</sup> litigation,

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a. See G. GUNTHER & N. DOWLING, *CONSTITUTIONAL LAW: CASES & MATERIALS* 268-89 (1970).

b. See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962); *Brown v. Board of Education*, 347 U.S. 483 (1954).

c. See, e.g., Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

d. See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969); M. SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE* (1964); Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973).

e. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1968).

f. See *id.* at 249-61.

g. *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73 (1960); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *J.R. Brooks & Son, Inc. v. Reagan*, Civ. No. C-71-1311 SC (N.D. Cal., Sept. 18, 1973).

we are carefully taken through varying arrangements of the facts, from different perspectives, as legal issues emerge from the factual configuration. The propositions which may be said to underlie this examination are: (1) No comprehensive, normative theory can be stated which will guide the Court in reaching a decision. (2) The act of the Court is to employ the conceptual tool of precedent in order to choose among various plausible grounds of decision. (3) Precedent is more importantly prospective rather than retrospective; therefore the judicial activity is to attempt to anticipate the future relevance of the present decision and the language in which it is framed. (4) On the success of this activity depends the Court's legitimacy.

We offer a crude example to contrast the critical underpinnings of Professor Deutsch's view with some of those alluded to above. Consider the recent *DeFunis* decision<sup>h</sup> by the Supreme Court. It makes a difference which of the following prescriptions one applies: (a) The Court correctly disposed of the case on the mootness issue, for it is a general principle that the Court will not render an advisory opinion. Moreover, similar previous cases in which a defendant had privately agreed to grant effective (although not complete) relief to the plaintiff have been held moot. (b) The institutional competence of the Court and the fact that it is not democratically chosen properly impelled the Court to choose the better part of valor. The political sense that a decision on the merits would lead to an invalidation of many recent executive and legislative efforts or a vitiation of the Court's own ringing statements on the suspect nature of racial classifications counseled the same course. (c) Because the Court simply could not anticipate the applications of such a decision, particularly in an area of rapid flux, it appropriately elected to avoid decision, to avoid the creation of precedent.

But this *is* crude. It omits the feelings of what is meet and right which imbue the traditional expositions of (a); notably absent from (b) are the subtle characterizations and sound common sense which mark the writers of that view; straying from the factual context distorts the fundamental tenets of (c). This last brings us to comment on the intricate methodology Professor Deutsch employs in the following article.

His method—the constant, repeated forcing of the reader into considerations of the fact pattern, while eschewing the statement of points or directions or conclusions or even opinion—is required by Professor Deutsch's epistemological conviction that universals cannot be stated. It implies a rejection of the two poles of the Holmes epigram about logic and experience<sup>i</sup> (which terms Professor Deutsch has used to characterize the two competing points of view<sup>j</sup>), and it forbids the dichotomies, definitions, and guidelines which are the prominent characteristics of a body of expository literature that tries to state rules rather than show them. It is a demanding method<sup>k</sup> and the Editors, being bound by no such philosophical restraints,

h. *DeFunis v. Odegaard*, 94 S. Ct. 1704 (1974).

i. O. HOLMES, *THE COMMON LAW* 5 (Howe ed. 1963).

j. See Deutsch, *supra* note e, at 229-35.

k. Compare the method of L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (3d ed. 1958). See *id.* at 50e.

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have occasionally added notes to aid the reader in working through the exercise Professor Deutsch has provided.

The cases to be examined arose out of efforts by Florida avocado growers to have enjoined the enforcement of a California statute. The statute, designed to prevent the sale of immature avocados, forbade the marketing in California of avocados with less than a designated oil content. It thus applied a different maturity test from that established by federal regulation, the state's test apparently being more difficult for Florida avocados to satisfy. The challenge reached the Supreme Court twice in the early 1960's; the statute was not overturned.<sup>1</sup> A federal district court finally declared it unconstitutional in 1973, holding that it unreasonably burdened interstate commerce.<sup>m</sup> This is a series of cases that is ideal both for Professor Deutsch's method and his examination of precedent, for it allows the reader to begin *in medias res* with a fact pattern that is involved in both an earlier case and a subsequent one.

Of course, to urge a judge to consider the future relevance of his decision is hardly news, but then neither is it novel to propose that his decisions be principled, or made with an awareness of the role of the institution of which he is a part. Legal writing is not discovery, it is emphasis. Professor Deutsch's proposal that a decision should be seen primarily as the creation of precedent does represent a radical view, and it has substantial jurisprudential implications.<sup>n</sup> The theory presented is one that recasts the initial question concerning appropriate guidelines for the Court, and asks of us, if we are unsatisfied by the answer offered, whether anything more can be said.

—The Editors

### I. The Lesson of Law: On the Cost of Contextual Concreteness

Imagine: the last meeting of a class in constitutional law. The professor speaks:

The shortest way to define what it is I hope we accomplish today is that our discussion will demonstrate what I have frequently argued in earlier classes: that the value of the system of common law adjudication inheres in its success in accomplishing the necessary but impossible feat of defining relevance.<sup>1</sup> Precedent, as we have previously agreed, is a prior decision that constitutes a relevant analogy to the situation before the court. The hope, therefore, is that today's case will be relevant.

1. *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73 (1960); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

m. *J.R. Brooks & Son, Inc. v. Reagan*, Civ. No. C-71-1311 SC (N.D. Cal., Sept. 18, 1973).

n. See, e.g., Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962, 1015-17 (1973).

1. See Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 205 (1968).

We are discussing today *Florida Lime & Avocado Growers, Inc. v. Paul, Director of the Department of Agriculture of California*.<sup>2</sup> I assume we all agree that what this case is about is accurately described by the first paragraph of the majority opinion:

Section 792 of California's Agricultural Code, which gauges the maturity of avocados by oil content, prohibits the transportation or sale in California of avocados which contain "less than 8 per cent of oil by weight . . . excluding the skin and seed." In contrast, federal marketing orders approved by the Secretary of Agriculture gauge the maturity of avocados grown in Florida by standards which attribute no significance to oil content. This case presents the question of the constitutionality of the California statute insofar as it may be applied to exclude from California markets certain Florida avocados which, although certified to be mature under the federal regulations, do not uniformly meet the California requirement of 8% of oil.<sup>3</sup>

Your suggestion that the case is a simple one—that the California law represents a clear violation of the Commerce Clause—is not only interesting, but also backed by authority. Unfortunately, however, the authority is not that of the majority of the Court. Indeed, Mr. Justice White in dissent, joined by Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Clark, did not even reach the issue: "Since we in the minority have concluded that the Agricultural Adjustment Act and regulations promulgated thereunder leave no room for this inconsistent and conflicting state legislation, we reach only the Supremacy Clause issue."<sup>4</sup>

Nor does the suggestion of the Supremacy Clause as a ground for decision fare much better, since it was the dissent which noted that:

The ultimate question for the Court is whether the California law may validly apply to Florida avocados which the Secretary or his inspector says are mature under the federal scheme. We in the minority believe that it cannot, for in our view the California law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67.<sup>5</sup>

2. 373 U.S. 132 (1963).

3. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 133-34 (1963) (footnotes omitted).

4. *Id.* at 160 (dissenting opinion).

5. *Id.* at 165 (dissenting opinion) (footnote omitted).

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The majority notes in this connection:

That the California statute and the federal marketing orders embody different maturity tests is clear. However, this difference poses, rather than disposes of the problem before us. Whether a State may constitutionally reject commodities which a federal authority has certified to be marketable depends upon whether the state regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67.<sup>6</sup>

What, then, is the situation concerning this California statute? The majority's view is that:

The California statute was enacted in 1925. Like the federal marketing regulations applicable to appellants, this statute sought to ensure the maturity of avocados reaching retail markets. The District Court found on sufficient evidence that before 1925 the marketing of immature avocados had created serious problems in California. An avocado, if picked prematurely, will not ripen properly, but will tend to decay or shrivel and become rubbery and unpalatable after purchase. Not only retail consumers but even experienced grocers have difficulty in distinguishing mature avocados from the immature by physical characteristics alone. Thus, the District Court concluded, "[t]he marketing of . . . [immature] avocados cheats the consumer" and adversely affects demand for and orderly distribution of the fruit. 197 F.Supp., at 783.<sup>7</sup>

And the dissent's:

The California statute was enacted in 1925, when, according to the District Court, practically all the avocados in the United States came from that state. 197 F.Supp., at 782. The purpose of this legislation was to prevent the marketing of immature avocados, which never ripen properly, but decay or shrivel up and become rubbery and unpalatable after purchase by the consumer. *Ibid.* The effect of marketing immature avocados is to "cheat the consumer," and thus have "a bad [economic] effect upon retailers and producers as a whole, since it increases future sales resistance" against buying avocados. *Id.*, at 783.

In 1925, when the state law was enacted, most of the avocados grown in California were, as they are at the present time, from

6. *Id.* at 141.

7. *Id.* at 137-38 (footnotes omitted).

trees derived from Mexican varieties. Such avocados contain at least 8% oil when mature. The Florida avocado growers, however, the only substantial competitors of the California growers, 197 F.Supp., at 787, n. 8, depend in substantial part on trees of non-Mexican parentage. The Florida avocados involved here, hybrid and Guatemalan varieties, may reach maturity and be acceptable for marketing, at least under federal standards, prior to reaching an 8% oil content.<sup>8</sup>

Since the majority does not dispute<sup>9</sup> the dissent's contention that "[t]here is no health interest here. The question is, as the District Court recognized, 197 F.Supp., at 782-783, a purely economic one: the marketing of immature avocados, which do not ripen properly after purchase by the consumer but instead shrivel up and decay, has a substantial adverse effect on consumer demand for avocados,"<sup>10</sup> perhaps the issue was best put in the majority opinion as follows:

Although Florida and California were competitors in avocado production when the statute was passed in 1925, the present record permits no inference that the California statute had a discriminatory objective.

[footnote] The District Court assumed that in 1925 California growers faced no meaningful competition from Florida growers. It appears, however, that the Florida industry was well developed when the California industry was in its infancy, see Collins, *The Avocado, A Salad Fruit From the Tropics* (U.S. Dept. of Agriculture Bureau of Plant Industry, Bull. No. 77, 1905), 35-36. Not only does there appear to have been vigorous competition between Florida and California producers for all markets in 1925, see Popenoe, *The Avocado—California vs. Florida*, 61 *California Cultivator*, Nov. 3, 1923, p. 459; but in some years during the 1920's the Florida production exceeded that of California. See Traub [et al., *Avocado Production in the United States* (U.S. Dept. of Agriculture Circular No. 620, 1941)] at 2. See generally Hodgson, [The California Avocado Industry (Calif. Agricultural Extension Service Circular No. 43, 1930)], at 60, 82-83.

The passage of the California statute was immediately and vigorously protested by Florida producers, and a United States Senator from Florida filed an informal complaint with the Department of Agriculture, see, e.g., *California Avocado Law Unfair to Florida: New Pacific Coast Maturity Standards Practically Ban All Shipments from this State*, 32 *Florida Grower*, Nov. 7, 1925,

8. *Id.* at 160-61 (dissenting opinion) (footnotes omitted).

9. *See id.* at 137 n.4.

10. *Id.* at 168-69 (dissenting opinion).

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pp. 4, 22. See also *id.*, Nov. 21, 1925, p. 15. Even in California there was contemporaneous recognition that passage of the statute severely restricted the access of Florida growers to the markets at least of Northern California, see Hodgson, *The Florida Avocado Industry—A Survey II*, 66 *California Cultivator*, June 26, 1926, pp. 721, 743. And see 80 *American Fruit Grower*, Feb. 1960, p. 64.

On the other hand, there have been suggestions that neither the adoption nor the application of the California statute reflected any discriminatory or anticompetitive purpose. In some years, California growers themselves experience great difficulty meeting the oil content requirement, and sizable shipments must be destroyed—see *Demand for Avocados*, 74 *California Cultivator*, Feb. 8, 1930, p. 167; Roche, *Look Out for Immature Avocados*, 87 *California Cultivator*, Nov. 2, 1940, p. 590; *California Avocado Assn.*, 1937 *Yearbook (1937)*, 88—even though the oil content of mature California avocados in good years runs substantially above 8%, see Traub, *supra*, . . . at 6-8. Moreover, the California Growers' Association has regarded its ability to market Florida fruit during the months when California fruit is not available as strengthening rather than weakening its own market position. See *Fourteenth Annual Report of the General Manager of the Calavo Growers of California (1937)*, 20. Plainly the questions indicated by these conflicting materials can be resolved only at a trial fully developing the Commerce Clause issue. [end footnote]

The District Court . . . concluded that the California oil content test was not burdensome upon or discriminatory against interstate commerce. 197 F.Supp., at 786-787. However, we are unable to review that conclusion or decide whether the court properly applied the principles announced in these [precedents] because we cannot ascertain what constituted the record on which the conclusion was predicated. Much of the appellants' offered proof consisted of depositions and exhibits, designed to detail both the rejection of Florida avocados in California and the oil content of Florida avocados which had met the federal test but which might nonetheless have been excluded from California markets.<sup>11</sup>

If that really is an accurate description of the situation before the Court, however, it should by now be apparent that substance has once again become inextricably intertwined with procedure, and how important the decision in the companion case, *Paul v. Florida Lime & Avocado Growers, Inc.*,<sup>12</sup> was in terms of the case we are presently

11. *Id.* at 153-54 & n.19.

12. *Id.* at 157.

considering. Thus, there is no dissent from the holding in that companion case that:

In No. 49, the state officers cross-appeal on the ground that the District Court should have dismissed the action for want of equity, rather than for lack of merit. Their contention is that there was insufficient showing of injury to the Florida growers to invoke the District Court's equity jurisdiction. We reject that contention, and affirm the judgment insofar as it is challenged by the cross-appeal.

In *Florida Lime & Avocado Growers, Inc., v. Jacobsen*, 362 U.S. 73, we held that because of the Florida growers' allegations that California officials had consistently condemned Florida avocados as unfit for sale in California, "thus requiring appellants [the Florida growers]—to prevent destruction and complete loss of the shipments—to reship the avocados to and sell them in other states," it was evident that "there is an existing dispute between the parties as to present legal rights amounting to a justiciable controversy which appellants are entitled to have determined on the merits," 362 U.S., at 85-86. In view of our mandate in *Jacobsen*, therefore, the District Court necessarily assumed jurisdiction and heard the case on its merits.<sup>13</sup>

What the *Jacobsen* opinion actually focuses on, however, is that "[t]he first and principal question presented is whether this action is one required by [the relevant statute<sup>14</sup>] to be heard by a District Court of three judges and, hence, whether we have jurisdiction of this direct appeal . . . ."<sup>15</sup> And what it concludes is that the relevant statute "seems rather plainly to indicate a congressional intention to require an application for an injunction to be heard and determined by a court of three judges in *any* case in which the injunction may be granted on grounds of federal unconstitutionality."<sup>16</sup>

A Frankfurter dissent, joined in by Mr. Justice Douglas, is based on the consideration that:

13. *Id.*

14. [Editors' note] 28 U.S.C. § 2281 (1970):

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

15. *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73, 75 (1960).

16. *Id.* at 76-77.

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I deem regard for [the] demands which the three-judge requirement makes upon the federal judiciary to be the jurisdictional consideration of principal importance in a case such as this where a claim is seriously urged which necessarily involves, certainly in the first instance, construction of local or federal statutes, thus making potentially available a non-constitutional ground on which the case may be disposed of. It is more important that the ordinary operation of our judicial system not be needlessly disrupted by such a case than it is to insure that every case which may turn out to be constitutional be heard by three judges. I am led therefore to construe strictly the statutes providing the three-judge procedure relevant to this case so as to permit their invocation only when the claim is solely constitutional, thus tending to insure that the three-judge procedure will not be extended to non-constitutional cases not within its proper sphere.<sup>17</sup>

What makes the *Jacobsen* decision<sup>18</sup> so relevant to the case under discussion is that:

In chronological sequence, the course of the litigation [in *Paul*] was as follows: Trial before United States Circuit Judge Bone, and United States District Judges Goodman and Halbert was heard February 7 and 8, 1961. . . . A memorandum and order announcing judgment for appellees was signed by the three judges and was filed July 12, 1961. . . . United States District Judge Louis E. Goodman died on September 15, 1961. . . . The Order Re Plaintiffs' Motion to Substitute and Ruling on Evidentiary Matters, and Findings of Fact and Conclusions of Law were signed by Judge Bone and Judge Halbert, and were filed September 21, 1961. The judgment, dismissing appellants' action, signed by Judge Bone and Judge Halbert, was entered September 22, 1961.<sup>19</sup>

17. *Id.* at 93 (dissenting opinion).

18. *Cf. Hagans v. Lavine*, 94 S. Ct. 1372, 1382-83 (1974):

It is true that the constitutional claim would warrant convening a three-judge court and that if a single judge rejects the statutory claim, a three-judge court must be called to consider the constitutional issue. Nevertheless, the coincidence of a constitutional and statutory claim should not automatically require a single-judge district court to defer to a three-judge panel, which . . . could then merely pass the statutory claim back to the single judge. . . . "In fact, it would be grossly inefficient to send a three-judge court a claim which will only be sent immediately back. This inefficiency is especially apparent if the single judge's decision resolves the case, for there is then no need to convene the three-judge court." *Norton v. Richardson*, 352 F. Supp. 596, 599 (D.C. Md. 1972) (citations omitted). Section 2281 does not forbid this practice, and we are not inclined to read that statute "in isolation with mutilating literalness. . . ." *Florida Lime & Avocado Growers, Inc. v. Jacobsen, supra*, 362 U.S., at 94 . . . (Frankfurter, J., dissenting).

19. Appellees' Motion to Dismiss or Affirm at 13-14, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

As a result:

The parties' own assumptions concerning the content of the record are in irreconcilable conflict: the appellants have argued the case on the apparent assumption that the depositions and exhibits *were* admitted before the District Court; the appellees, on the other hand, have assumed both in their briefs and in oral argument that the disputed evidence *was not* admitted. This lack of consensus is altogether understandable in light of the confusion created by the District Court's evidentiary rulings: The appellees objected to the introduction of the disputed materials on several grounds, both during and after the trial. The court expressly reserved its rulings on the issue of admissibility, and after the entry of its order on the merits of the case made a supplemental "ruling on evidentiary matters," in which it stated that the disputed exhibits and depositions "are not admitted into evidence, but have been considered by the Court as an offer of proof by the plaintiffs. . . ." The earlier memorandum of the court explained that it would "assume, *arguendo*, that the exhibits and depositions offered by plaintiffs are all admissible." 197 F.Supp., at 782. If this was intended to mean that appellants would not have made out a case for relief, even were the evidence to be admitted, then there would have been no need to rule on admissibility. But we are unable to determine, just as the parties were unable to agree, whether the District Court viewed the evidence in that posture.

[footnote] At the very close of the trial, two of the three members of the court offered inconsistent views when appellees' counsel asked for clarification concerning the status of appellants' disputed depositions and exhibits. One member of the court replied that "your objections stand to every word that is in these depositions here," while another responded, "[t]hey are all in evidence subject to your objections and the Court will rule on them when it makes its ruling in the case if it is necessary."<sup>20</sup>

It was the insistence upon the three-judge procedure, in short, that forced both the *Jacobsen* and the *Paul* Court to remand for a new trial. We have, of course, agreed at various points during this term that a successful insistence on correct procedure may prove pyrrhic<sup>21</sup>

20. 373 U.S. at 155 & n.20 (1963).

21. *Cf. id.* at 175-76 (dissenting opinion) (footnote omitted):

Even if the California oil test were an acceptable test for the maturity of the Florida avocados, which the Secretary found it was not, the cumulative application of that test solely for the purpose of a second check on the maturity of Florida avocados, solely to catch possible errors in the federal scheme, would prove only that the particular avocados actually tested (and thereby destroyed) were immature, and it would not justify the rejection of whole lots from which these samples came. If Florida avocados are to be subjected to this test, the alternatives are to leave

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if the cost constitutes a substantive error.<sup>22</sup> In *Paul*, however, which is, after all, the case under discussion, the procedural dispute seems focused on the substantive issue of the division of commercial power between state and federal authority.

Thus, it is the majority's view that:

An examination of the operation of these particular marketing orders reinforces the conclusion we reach from [an] analysis of the terms and objectives of the [congressional] statute. The regulations show that the Florida avocado maturity standards are drafted each year not by impartial experts in Washington or even in Florida, but rather by the South Florida Avocado Administrative Committee, which consists entirely of representatives of the growers and handlers concerned. It appears that the Secretary of Agriculture has invariably adopted the Committee's recommendations for maturity dates, sizes, and weights. Thus the pattern which emerges is one of maturity regulations drafted and administered locally by the growers' own representatives, and designed to do no more than promote orderly competition among the South Florida growers.<sup>23</sup>

The dissent, on the other hand, stresses that:

The State may have a legitimate economic interest in the subject matter, but it is adequately served by the federal regulations and this interest would be but slightly impaired, if at all, by the supersession of § 792.

[footnote] It is suggested that the regulations involved here are "simply schemes for regulating competition among growers . . . initiated and administered by the growers and shippers themselves." From this proposition it is in some way reasoned that "the self-help standards of this marketing program" should not be deemed to preclude application of state law which conflicts with and interferes with the operation of the comprehensive federal marketing program. The "simply" part of the proposition

the California market to the California producers (at least, to producers of Mexican varieties) or else, in order to avoid the hazard of rejection, to leave the Florida avocados on the trees past the normal (and federally prescribed) picking date, thereby shortening the post-picking marketing period and thus frustrating the federal scheme aimed at moving avocados mature under federal standards into all interstate markets. A reasonable balancing of the state and federal interests at stake here requires that the former give way as too insubstantial to warrant frustration of the congressional purpose.

22. Cf. *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. at 86:

MR. JUSTICE DOUGLAS joins in the part of the opinion that passes on the merits, the Court having held, contrary to his view, that the case is properly here on direct appeal from a three-judge court.

23. 373 U.S. at 150-51 (footnotes omitted).

overlooks, however, the fact that these are the *Secretary's* regulations, promulgated under congressional authority. It also overlooks the Secretary's extensive supervisory powers and his statutory duty . . . to insure that regulations be carried on "in the public interest." And no case has been cited to us which indicates that the delegation to the regulatees of the power to propose regulations in the first instance violates any provision of general law.<sup>24</sup>

In terms of precedent, what comes to mind when delegation is mentioned is the decision in *Panama Refining Co. v. Ryan*. That case involved the question whether a statutory provision which "purports to authorize the President to pass a prohibitory law"<sup>25</sup> constituted "an unconstitutional delegation of legislative power."<sup>26</sup>

The subject to which this authority relates is defined. It is the transportation in interstate and foreign commerce of petroleum and petroleum products which are produced or withdrawn from storage in excess of the amount permitted by state authority. Assuming for the present purpose, without deciding, that the Congress has power to interdict the transportation of that excess in interstate and foreign commerce, the question whether that transportation shall be prohibited by law is obviously one of legislative policy. Accordingly, we look to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition.<sup>27</sup>

After finding that no statutory "provisions can be deemed to prescribe any limitation of the grant of authority,"<sup>28</sup> the Court noted that "[t]he question whether such a delegation of legislative power is permitted by the Constitution is not answered by the argument that

24. *Id.* at 177 & n.20 (dissenting opinion). *See also id.* at 169 (dissenting opinion):

Despite the repeated suggestions to this effect in the Court's opinion, there is no indication that the state regulatory scheme has any purpose other than protecting the good will of the avocado industry—such as protecting health or preventing deception of the public—unless as a purely incidental by-product. Similar findings on damage to the industry because some growers marketed immature avocados are contained in the United States Department of Agriculture order which preceded the issuance of the federal regulations. . . . These two regulatory schemes have precisely the same purpose, which is purely an economic one; they seek to achieve it, however, by applying different tests to the same avocados.

25. 293 U.S. 388, 414 (1935).

26. *Id.*

27. *Id.* at 414-15.

28. *Id.* at 420.

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it should be assumed that the President has acted, and will act, for what he believes to be the public good. The point is not one of motives but of constitutional authority, for which the best of motives is not a substitute.”<sup>29</sup> As a result, it concluded that it was compelled to hold the challenged Executive Orders and administrative regulations unconstitutional, because a failure to do so would mean that “[i]nstead of performing its law-making function, the Congress could at will and as to such subjects as it chose transfer that function to the President or other officer or to an administrative body.”<sup>30</sup>

Given the teaching of that decision, it seems to me less important—in connection with the case we are considering today—that a three-judge district court has recently concluded as a matter of law that:

Were it not for the United States Supreme Court decision in *Florida Avocado Growers v. Paul*, 373 U.S. 112 [*sic*] (1963), we would conclude that: the application of [the relevant section of the] California Agricultural Code . . . to Florida avocados previously certified as mature under the Federal Marketing Order, violates the Supremacy Clause.<sup>31</sup>

and that:

The application of the California statute to Florida avocados discriminates against Florida avocados and unreasonably burdens interstate marketing of Florida avocados in violation of the Commerce Clause.<sup>32</sup>

than that it found as a matter of fact that:

In the fall of 1963, when California’s Bureau of Standardization relaxed inspection standards and permitted the entry of some Florida avocados when the samples tested averaged less than 8 percent oil, the California industry brought immediate pressure on the State to enforce the 8 percent standard against “all imported avocados” to protect the California growers from competition, and obtained a commitment from the State that such a policy would be implemented.<sup>33</sup>

29. *Id.*

30. *Id.* at 430.

31. *J.R. Brooks & Son, Inc. v. Reagan*, Civ. No. C-71-1311 SC, at 17-18 (N.D. Cal., Sept. 18, 1973).

32. *Id.* at 18.

33. *Id.* at 8.

and that:

In 1968, a provision was added to the California Administrative Code, purportedly to enforce the 8 percent statute, to the effect that, if any single avocado in a lot tested less than 7 percent oil, the entire lot would be rejected.<sup>34</sup>

The question presented, then—whether the delay was a justifiable one—is not, for all its procedural clarity, a question without considerable meaning, for it searches precisely the efficacy of reliance on precedent: the significance of the difference between acting as an administrator, who has detailed and comprehensive rules on which to rely, and a judge, who has only precedent.

As to whether it is worth bearing the cost of the delay, in other words, the only conclusion I can offer is that if we know the answers to the questions being asked, then of course there exists no valid reason why implementation of our conclusions should not be as rapid and efficient as possible. But if the law is being asked to provide satisfactory<sup>35</sup> solutions to unanswerable questions, then precedent, rather than rule, is the only tool in terms of which the creation of responsive answers can be accomplished.<sup>36</sup>

34. *Id.* Another of the judicial findings of fact was that the relevant section of the California Agricultural Code "arbitrarily and unreasonably burdens interstate commerce in Florida avocados by imposing a standard which is irrational as applied to Florida avocados." *Id.* at 160. *Cf.* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. at 146 n.14:

It might also be argued that the California statute having been designed to test the maturity only of *California* avocados, bears no rational relationship to the marketability of *Florida* fruit. Such a contention would seem untenable, however, in the face of the District Court's express finding of fact, supportable on the testimony before it, that "[a] standard requiring a minimum of 8% of oil in an avocado before it may be marketed is scientifically valid as applied to hybrid and Guatemalan varieties of avocados grown in Florida and marketed in California."

35. *See* 373 U.S. at 156 & n.21:

Thus the only evidence which would seem to support an injunction on the ground of burden on interstate commerce has never been formally admitted to the record in this case. For this Court to reverse and order an injunction on the basis of that evidence would be, in effect, to admit the contested depositions and exhibits on appeal without ever affording the appellees an opportunity to argue their seemingly substantial objections.

[footnote] Specifically, appellees offered to show that in measuring the oil content of avocados the Florida experimental test procedures did not employ the same equipment as is used in California, the former, so it was contended, extracting less oil than the California equipment would obtain from the same avocado. They claimed that the average variation amounted to a failure of the Florida equipment to remove 2.9% of the oil from the fruit, and, further, that the Florida results were erratic. In addition, appellees asserted that the avocados used in the Florida experiments were not representative of the graded, sized, and inspected fruit that appellants would normally market.

36. *Id.* at 165 n.11 (dissenting opinion):

"There is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. This Court, in considering the

I should clarify the reference in note 1 which directed the reader to an article that is the critical complement of the present noncritical, theoretical piece. That article was about various theories of constitutional law; it attempted to show that all of these theories were in fact playing a game whose rules assumed, wrongly, a dichotomy between fact and principle. The Lesson is to play a different game: to demonstrate that if law is a science at all it is a science of context, and that awareness of context is necessary to move from fact to decision.

To demonstrate the proposition that facts themselves are matters of context and to display the theoretical implications of this proposition are the functions served by examining what Felix Frankfurter thought about law. And that thought is presented in the form of commentary on the same material dealt with in the Lesson, precisely because Justice Frankfurter was himself a player of the same erroneous game, defined in terms of "role" and "principle."

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## II. Several Judicial Decades in Search of a Pattern: A Fable

### A

Imagine this scene: a Friday meeting in the Conference Room of the Supreme Court of the United States. Arguments have been heard on January 8, 1963, in cases No. 45, *Florida Lime & Avocado Growers, Inc. v. Paul, Director of the Department of Agriculture of California*, and No. 49, *Paul, Director of the Department of Agriculture of California v. Florida Lime & Avocado Growers, Inc.*; the opinion is to appear at 373 U.S. 132 (1963). When those cases are reached for discussion, imagine that the recently retired<sup>37</sup> Felix Frankfurter<sup>38</sup> enters the

validity of state laws in the light of . . . federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67. (Emphasis added.)

37. Mr. Justice Frankfurter retired effective August 28, 1962. 371 U.S. VII (1962).

38. [Editors' note] It is important to note that the character, Justice Frankfurter, is not a surrogate for Professor Deutsch. The former Justice accepted the established framing of the question of adjudication, and he believed that principles, as answers, could be given. Rather, he appears to have been chosen to guide us through the Fable because he frequently and eloquently discussed the use of precedent by the Court. See, e.g., pp. 1569-70 *infra*. And perhaps Justice Frankfurter is chosen because he once wrote of the judge's need and desire "to pierce the curtain of the future." F. FRANKFURTER, *The Judicial Process and the Supreme Court*, in *OF LAW AND MEN* 31, 39 (Elman ed. 1956).

room. Alone among the players, but like the reader, the former Justice knows the future history of the Court, and of this litigation, to the present. He speaks:

I assume we all agree that what this case is about is accurately described by the first paragraph of the majority opinion:

Section 792 of California's Agricultural Code, which gauges the maturity of avocados by oil content, prohibits the transportation or sale in California of avocados which contain "less than 8 per cent of oil by weight . . . excluding the skin and seed." In contrast, federal marketing orders approved by the Secretary of Agriculture gauge the maturity of avocados grown in Florida by standards which attribute no significance to oil content. This case presents the question of the constitutionality of the California statute insofar as it may be applied to exclude from California markets certain Florida avocados which, although certified to be mature under the federal regulations, do not uniformly meet the California requirement of 8% of oil.<sup>39</sup>

I recognize, of course, that a great many issues involving constitutional provisions other than the Commerce Clause have been raised in this case, including claims based on the Equal Protection Clause of the Fourteenth Amendment and the Supremacy Clause.

As to the former, however, as the majority notes:

It might also be argued that the California statute, having been designed to test the maturity only of *California* avocados, bears no rational relationship to the marketability of *Florida* fruit. Such a contention would seem untenable, however, in the face of the District Court's express finding of fact, supportable on the testimony before it, that "[a] standard requiring a minimum of 8% of oil in an avocado before it may be marketed is scientifically valid as applied to hybrid and Guatemalan varieties of avocados grown in Florida and marketed in California."<sup>40</sup>

And as to the latter:

That the California statute and the federal marketing orders embody different maturity tests is clear. However, this difference poses, rather than disposes of the problem before us. Whether a State may constitutionally reject commodities which a federal authority has certified to be marketable depends upon whether

39. 373 U.S. at 133-34 (footnotes omitted).

40. *Id.* at 146 n.14 (emphasis in original). See also note 35 *supra* and p. 1570 *infra*.

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the state regulation “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” *Hines v. Davidowitz*, 312 U.S. 52, 67.<sup>41</sup>

The dissent, furthermore, agrees that it is only “[s]ince we in the minority have concluded that the Agricultural Adjustment Act and regulations promulgated thereunder leave no room for this inconsistent and conflicting state legislation [that] we reach only the Supremacy Clause issue.”<sup>42</sup>

Moreover, as I noted almost a generation ago, “[h]ad Marshall pursued the line of least resistance, he would have disposed of *Gibbons v. Ogden*, once he found a conflict between the New York and federal statutes, upon the supremacy which the Constitution explicitly gives to ‘the Laws of the United States which shall be made in Pursuance thereof.’ ”<sup>43</sup>

Few problems in the unfolding of American constitutional law are psychologically more tantalizing than ascertainment of the influences which render some tentative ideas abortive and give enduring life to others. And as to the ideas that survive, it is seldom possible to discover the extent to which their consequences were intended or fortuitous. What Marshall merely adumbrated in *Gibbons v. Ogden* became central to our whole constitutional scheme: the doctrine that the commerce clause, by its own force and without national legislation, puts it into the power of the Court to place limits upon state authority. Of course, national self-consciousness has been with us a developing feeling, and the fluctuation of emphasis on central government or states has not yet spent its force. Marshall’s use of the commerce clause greatly

41. *Id.* at 141.

42. *Id.* at 160 (dissenting opinion). *See also id.* at 175-76 (footnote omitted):

Even if the California oil test were an acceptable test for the maturity of the Florida avocados, which the Secretary found it was not, the cumulative application of that test solely for the purpose of a second check on the maturity of Florida avocados, solely to catch possible errors in the federal scheme, would prove only that the particular avocados actually tested (and thereby destroyed) were immature, and it would not justify the rejection of whole lots from which these samples came. If Florida avocados are to be subjected to this test, the alternatives are to leave the California market to the California producers (at least, to producers of Mexican varieties) or else, in order to avoid the hazard of rejection, to leave the Florida avocados on the trees past the normal (and federally prescribed) picking date, thereby shortening the post-picking marketing period and thus frustrating the federal scheme aimed at moving avocados mature under federal standards into all interstate markets. A reasonable balancing of the state and federal interests at stake here requires that the former give way as too insubstantial to warrant frustration of the congressional purpose.

43. F. FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* 23 (1937) (footnote omitted), *discussing* *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Compare the discussion of “the Grand Style” in K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 62-72 (1960).

furthered the idea that though we are a federation of states we are also a nation, and gave momentum to the doctrine that state authority must be subject to such limitations as the Court finds it necessary to apply for the protection of the national community. It was an audacious doctrine, which, one may be sure, would hardly have been publicly avowed in support of the adoption of the Constitution.<sup>44</sup>

It thus seems to me not unimportant that the last sentence in the dissent's last footnote is devoted to denying the majority's "suggestion . . . that the doctrine of *Gibbons v. Ogden* is limited to carriers . . ." <sup>45</sup>

Indeed, to speak more generally, it still seems to me to be true, as I pointed out in the introduction to my lectures on *The Commerce Clause Under Marshall, Taney and Waite*, that although "[t]he reduction of history to the efforts of a very few personalities is an expression of the ineradicable romantic element in man. We want to dramatize life, and also to simplify it,"<sup>46</sup> it is even more important that:

Often the intellectual history of a great judge before his appointment is largely unrecoverable. The intimacies of the conference room—the workshop of the living Constitution—are illuminations denied to the historian.<sup>47</sup> And it is not easy to disentangle individual influences in the combined work of a Court. But living long with opinions, as with other literary forms, conveys accents and nuances which the ear misses on a single reading, and reveals meaning in silences.<sup>48</sup>

In this case, moreover, as the briefs and a perusal of the trial record indicate, the parties have each adopted contradictory views of the evidentiary record.<sup>49</sup>

## B

At this point, the former Justice wearies and impatiently says: The answer to the question why you should listen to me is that it is now given me to see into the future. And what I see is that almost precisely

44. F. FRANKFURTER, *supra* note 43, at 18-19.

45. 373 U.S. at 178 n.21 (dissenting opinion).

46. F. FRANKFURTER, *supra* note 43, at 5-6.

47. [Editors' note] *Cf.* Deutsch, *supra* note 1, at 259-60.

48. F. FRANKFURTER, *supra* note 43, at 9.

49. *See* 373 U.S. at 156 (footnote omitted):

Thus the only evidence which would seem to support an injunction on the ground of burden on interstate commerce has never been formally admitted to the record in this case. For this Court to reverse and order an injunction on the basis of that evidence would be, in effect, to admit the contested depositions and exhibits on appeal without ever affording the appellees an opportunity to argue their seemingly substantial objections.

## Precedent and Adjudication

a decade hence Mr. Justice Douglas for a unanimous Court will render a decision in *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*,<sup>50</sup> which may bear on the meaning of what is now being discussed.

That decision concerned the fact that:

Petitioner Board denied a permit to Snyder's Drug Stores, Inc., because it did not comply with the stock-ownership requirements of the statute, it appearing that all the common stock of Snyder's was owned by Red Owl Stores and it not being shown if any Red Owl shareholders were pharmacists registered and in good standing in North Dakota. On appeal to the state district court summary judgment was granted Snyder's. On appeal to the Supreme Court of North Dakota, that court held that the North Dakota statute was unconstitutional by reason of our decision in 1928 in *Liggett Co. v. Baldridge*, 278 U.S. 105. That case involved a Pennsylvania statute that required that 100% of the stock of the corporation be owned by pharmacists. The North Dakota statute, however, requires only that a majority of the stock be owned by pharmacists. But the North Dakota Supreme Court held that the difference did not take this case out from under the *Liggett* case because under both statutes control of the corporation having a pharmacist's license had to be in the hands of pharmacists responsible for the management and operation of the pharmacy. That court therefore remanded the case, so that the Board could conduct "an administrative hearing on the application, *sans the constitutional issue*, pursuant to our Administrative Agencies Practice Act," 202 N.W.2d 140, 145 (*italics added*).<sup>51</sup>

And what this Court held was that:

The majority of the Court in *Liggett* for which Mr. Justice Sutherland spoke held that business or property rights could be regulated under the Fourteenth Amendment only if the "legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare," 278 U.S., at 111-112. The majority held the Act governing pharmacies "creates an unreasonable and unnecessary restriction upon private business." *Id.*, at 113. The opposed view stated by Mr. Justice Holmes, and concurred in by Mr. Justice Brandeis, was:

"A standing criticism of the use of corporations in business is that it causes such business to be owned by people who do not know anything about it. Argument has not been supposed to be necessary in order to show that the divorce between the

50. 414 U.S. 156 (1973).

51. *Id.* at 158 (footnote omitted).

power of control and knowledge is an evil. The selling of drugs and poisons calls for knowledge in a high degree, and Pennsylvania after enacting a series of other safeguards has provided that in that matter the divorce shall not be allowed. Of course, notwithstanding the requirement that in corporations hereafter formed all the stockholders shall be licensed pharmacists, it still would be possible for a stockholder to content himself with drawing dividends and to take no hand in the company's affairs. But obviously he would be more likely to observe the business with an intelligent eye than a casual investor who looked only to the standing of the stock in the market. The Constitution does not make it a condition of preventive legislation that it should work a perfect cure. It is enough if the questioned act has a manifest tendency to cure or at least to make the evil less." *Id.*, at 114-115.

Those two opposed views of public policy are considerations for the legislative choice. The *Liggett* case was a creation at war with the earlier constitutional view of legislative power, *Munn v. Illinois*, 94 U.S. 113, 132, 134, and opposed to our more recent decisions. . . . The *Liggett* case, being a derelict in the stream of the law, is hereby overruled.<sup>52</sup>

I of course agree with Mr. Justice Douglas' reading of the *Munn* decision. Indeed, I specifically pointed out that:

When dealing with such large conceptions as the rights and duties of property, judges lacking some governing directions are easily lost in the fog of abstraction. [Chief Justice] Waite's governing direction was his attitude towards the legislative process. He did not stop with mere lip service to the cliché, that "if there is doubt, the expressed will of the legislature should be sustained." He knew that legislation derives from fact, and that in ascertaining the existence of doubt regarding the validity of legislation, the basis of judgment is not some abstract presupposition of rights, but an awareness of the situation which confronted the legislature. Waite insisted that it was the duty of the Court to indulge every assumption that there were facts justifying the legislation:

For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative

52. *Id.* at 166-67.

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power of the State. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge.<sup>53</sup>

I nevertheless remain disturbed concerning the possible relevance of these facts to the situation now before us.

Thus, this Court specifically held in *Liggett* that “[i]n the light of the various requirements of the Pennsylvania statutes, it is made clear, if it were otherwise doubtful, that mere stock ownership in a corporation, owning and operating a drug store, can have no real or substantial relation to the public health . . . .”<sup>54</sup> And in the present case, the majority does not dispute<sup>55</sup> the dissent’s contention that “[t]here is no health interest here. The question is, as the District Court recognized, 197 F.Supp., at 782-783, a purely economic one: the marketing of immature avocados, which do not ripen properly after purchase by the consumer but instead shrivel up and decay, has a substantial adverse effect on consumer demand for avocados.”<sup>56</sup>

Further, this Court in *Liggett* reversed the decision of a three-judge court, which had held that:

We, of course, recognize the force of the argument addressed to us, based upon the distinction between a law which forbade any one other than a skilled pharmacist to compound medicines, and another law which forbade any one other than pharmacists to have a share in the ownership in the business of a drug store. Even here, however, we are unable to say that there is not a substantial relation of ownership to the public interests. The medicines must be in the store before they can be dispensed to those who come to the store for the help which medicines can afford them. What is there is dictated, not by the judgment of the pharmacist, who hands it out to customers, but by those who have the financial control of the business. It may be the Legislature thought that a corporate owner, in purchasing drugs, might give a greater regard to the price than to the quality; and, if such was the thought of the Legislature, can this court say it was without a valid connection with the public interests, and so unreasonable as to be unlawful?<sup>57</sup>

53. F. FRANKFURTER, *supra* note 43, at 84-85, quoting from *Munn v. Illinois*, 94 U.S. 113, 132 (1877).

54. *Louis K. Liggett Co. v. Baldrige*, 278 U.S. 105, 113 (1928).

55. See 373 U.S. at 137 n.4.

56. *Id.* at 168-69 (dissenting opinion).

57. *Louis K. Liggett Co. v. Baldrige*, 22 F.2d 993, 996 (E.D. Pa. 1927).

Perhaps, then, what the issue before us in No. 45 is, is best summarized by the majority as follows:

[T]here have been suggestions that neither the adoption nor the application of the California statute reflected any discriminatory or anticompetitive purpose. In some years, California growers themselves experience great difficulty meeting the oil content requirement, and sizable shipments must be destroyed . . . even though the oil content of mature California avocados in good years runs substantially above 8% . . . . Moreover, the California Growers' Association has regarded its ability to market Florida fruit during the months when California fruit is not available as strengthening rather than weakening its own market position. . . . Plainly the question indicated by these conflicting materials can be resolved only at a trial fully developing the Commerce Clause issue.<sup>58</sup>

### C

If that really is the issue before us, I trust it is now clear how important the decision in *Florida Lime Growers v. Jacobsen*<sup>59</sup> was in terms of the case and controversy now before us. Thus, there is no dissent from the holding of the Court that:

In No. 49, the state officers cross-appeal on the ground that the District Court should have dismissed the action for want of equity, rather than for lack of merit. Their contention is that there was insufficient showing of injury to the Florida growers to invoke the District Court's equity jurisdiction. We reject that contention, and affirm the judgment insofar as it is challenged by the cross-appeal.

In *Florida Lime & Avocado Growers, Inc., v. Jacobsen*, 362 U.S. 73, we held that because of the Florida growers' allegations that California officials had consistently condemned Florida avocados as unfit for sale in California, "thus requiring appellants [the Florida growers]—to prevent destruction and complete loss of their shipments—to reship the avocados to and sell them in other States," it was evident that "there is an existing dispute between the parties as to present legal rights amounting to a justiciable controversy which appellants are entitled to have determined on the merits." 362 U.S., at 85-86. In view of our mandate in *Jacobsen*, therefore, the District Court necessarily assumed jurisdiction and heard the case on its merits.<sup>60</sup>

58. 373 U.S. at 153-54 n.19.

59. 362 U.S. 73 (1960).

60. 373 U.S. at 157.

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I remember *Jacobsen* rather differently. My dissent, joined by Mr. Justice Douglas, was based on grounds of judicial efficiency.<sup>61</sup>

Nevertheless, I am now troubled by whether I was right to dissent in *Jacobsen*. The answer to that question, it seems to me, crucially involves the meaning of precedent, in which I believe, and which I believe all judges worthy of the appellation should attempt to follow.<sup>62</sup>

Thus, I was careful to note in *Jacobsen* that “[m]y adherence to [the] confining construction of the necessity both for convening three judges and for this Court to be the first appellate tribunal is consistent with the approach this Court has taken when it has in the past refused to apply this legislation.”<sup>63</sup> And I pointed out that in one of the cases I cited for this proposition, *Phillips v. United States*, 312 U.S. 246, “we stressed [that] these cases approach this three-judge statute as a procedural technicality and not as the embodiment of a more or less broadly phrased social policy the enforcement of which requires a generous regard for some underlying social purpose.”<sup>64</sup>

On the other hand, however, the majority did argue that “the cases since 1925 have continued to maintain the view that if the constitutional claim against the state statute is substantial, a three-judge court is required to be convened and has jurisdiction, as do we on direct appeal, over *all* grounds of attack against the statute.”<sup>65</sup> The first case it cited for that proposition was *Sterling v. Constantin*, 287 U.S. 378.<sup>66</sup>

61. Cf. *Hagens v. Lavine*, 94 S. Ct. 1372, 1382-83 (1974), quoted in note 18 *supra*; *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973):

We are met at the outset with a suggestion that the judgment of the Supreme Court of North Dakota is not “final” within the meaning of 28 U.S.C. § 1257 . . . .

Mr. Justice Frankfurter, writing for the Court in *Radio Station WOW v. Johnson*, 326 U.S. 120, 124, summarized the requirement by Congress that in appeals from federal district courts as well as in review of state court decisions the judgments be “final”: “This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice. Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for federal appellate jurisdiction . . . .”

62. Compare pp. 1568-69 *supra* with p. 1556 *supra*.

63. 362 U.S. at 93 (dissenting opinion).

64. *Id.* at 94 (dissenting opinion).

65. *Id.* at 84 (emphasis in original).

66. See also 362 U.S. at 81 n.8 (1960):

In *Sterling v. Constantin*, 287 U.S. 378, for example, certain state administrative orders were sought to be enjoined on the ground that they violated both the State and Federal Constitutions. The Governor of the State had declared martial law in an effort to enforce the orders, and his action was also challenged on the ground that any statute purporting to confer such authority on him was in violation of the State and Federal Constitutions. With regard to the jurisdiction of the three-judge court which had been convened for the purpose of considering an application for injunction, Mr. Chief Justice Hughes said:

“As the validity of provisions of the state constitution and statutes, if they could be deemed to authorize the action of the Governor, was challenged, the application for injunction was properly heard by three judges. . . . The jurisdiction of the

What now troubles me is the question whether I did not underestimate the importance of *Sterling* as a precedent.

In that case, "[t]he District Court, composed of three judges . . . granted an interlocutory injunction restraining the . . . Governor of the State of Texas, . . . Adjutant General of the State, and . . . Brigadier General of the Texas National Guard, from enforcing their military or executive orders regulating or restricting the production of oil from complainants' wells"<sup>67</sup> and this Court unanimously held:

In the present case, the findings of fact made by the District Court are fully supported by the evidence. They leave no room for doubt that there was no military necessity which, from any point of view, could be taken to justify the action of the Governor in attempting to limit complainants' oil production, otherwise lawful. Complainants had a constitutional right to resort to the federal court to have the validity of the Commission's orders judicially determined. There was no exigency which justified the Governor in attempting to enforce by executive or military order the restriction which the District Judge had restrained pending proper judicial inquiry. If it be assumed that the Governor was entitled to declare a state of insurrection and to bring military force to the aid of civil authority, the proper use of that power in this instance was to maintain the federal court in the exercise of its jurisdiction and not to attempt to override it; to aid in making its process effective and not to nullify it; to remove, and not to create, obstructions to the exercise by the complainants of their rights as judicially declared.<sup>68</sup>

Still, analysis of the *Jacobsen* decision is, of course, useful only insofar as it can help us to understand the basis for the division among us concerning the case we presently face.<sup>69</sup>

District Court so constituted, and of this Court upon appeal, extends to every question involved, whether of state or federal law, and enables the court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case." 287 U.S., at 393-394.

In *Phillips v. United States*, 312 U.S. 246, it was held that a suit by the United States to enjoin the action of a Governor in interfering with the construction of a state power project using federal funds was not within [the relevant statute] because the validity of a state statute or order had not been challenged. *Sterling v. Constantin* was distinguished on the ground that it involved an attempt to restrain the action of a Governor as part of a main objective to enjoin execution of certain administrative orders as violative of the State and Federal Constitutions. As such, *Sterling* was said to have been "indubitably within [the relevant statute]." 312 U.S., at 253.

67. *Sterling v. Constantin*, 287 U.S. 378, 386 (1932).

68. *Id.* at 403-04.

69. *Cf.* 362 U.S. at 86:

MR. JUSTICE DOUGLAS joins in the part of the opinion that passes on the merits, the Court having held, contrary to his view, that the case is properly here on direct appeal from a three-judge court.

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As I understand that division, its basis is the majority's view that:

An examination of the operation of these particular marketing orders reinforces the conclusion we reach from [an] analysis of the terms and objectives of the [congressional] statute. The regulations show that the Florida avocado maturity standards are drafted each year not by impartial experts in Washington or even in Florida, but rather by the South Florida Avocado Administrative Committee, which consists entirely of representatives of the growers and handlers concerned. It appears that the Secretary of Agriculture has invariably adopted the Committee's recommendations for maturity dates, sizes, and weights. Thus the pattern which emerges is one of maturity regulations drafted and administered locally by the growers' own representatives, and designed to do no more than promote orderly competition among the South Florida growers.<sup>70</sup>

The dissent, on the other hand, stresses that:

The State may have a legitimate economic interest in the subject matter, but it is adequately served by the federal regulations and this interest would be but slightly impaired, if at all, by the supersession of § 792.

[footnote] It is suggested that the regulations involved here are "simply schemes for regulating competition among growers . . . initiated and administered by the growers and shippers themselves." From this proposition it is in some way reasoned that "the self-help standards of this marketing program" should not be deemed to preclude application of state law which conflicts with and interferes with the operation of the comprehensive federal marketing program. The "simply" part of the proposition overlooks, however, the fact that these are the *Secretary's* regulations, promulgated under congressional authority. It also overlooks the Secretary's extensive supervisory powers and his statutory duty . . . to insure that regulations be carried on "in the public interest." And no case has been cited to us which indicates that the delegation to the regulatees of the power to propose regulations in the first instance violates any provision of general law.<sup>71</sup>

70. 373 U.S. at 150-51 (footnotes omitted).

71. *Id.* at 177 & n.20 (dissenting opinion). See also *id.* at 169 (dissenting opinion):

Despite the repeated suggestions to this effect in the Court's opinion, there is no indication that the state regulatory scheme has any purpose other than protecting the good will of the avocado industry—such as protecting health or preventing deception of the public—unless as a purely incidental by-product. Similar findings on damage to the industry because some growers marketed immature avocados are contained in the United States Department of Agriculture order which preceded the issuance of the federal regulations. . . . These two regulatory schemes have precisely the same purpose, which is purely an economic one; they seek to achieve it, however, by applying different tests to the same avocados.

Given my belief in precedent, what comes to mind when delegation is mentioned is the decision in *Panama Refining Co. v. Ryan*. That case involved the question whether a statutory provision which "purports to authorize the President to pass a prohibitory law"<sup>72</sup> constituted "an unconstitutional delegation of legislative power."<sup>73</sup>

I recognize, of course, that Mr. Justice Douglas regards the era of this institution's history during which *Panama Refining Co. v. Ryan* was handed down as productive of "derelict[s] in the stream of the law."<sup>74</sup> I observe, however, that Mr. Justice Douglas noted, not too long ago, that "[s]ince we start with an exercise by an American citizen of an activity included in constitutional protection, we will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold it."<sup>75</sup> He cited *Panama Refining Co. v. Ryan* for the proposition that "if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests."<sup>76</sup>

#### D

Since I at one time agreed<sup>77</sup> with the concern for judicial efficiency expressed by the dissent in the case before us that "[i]n view of the Court's disposition of the matter today, it is probable that this case like a revenant will return to us within another few Terms with a still more copious record,"<sup>78</sup> I am compelled to inform you that, a decade hence, a three-judge federal district court will write:

Were it not for the United States Supreme Court decision in *Florida Avocado Growers v. Paul*, 373 U.S. 112 [*sic*] (1963), we would conclude that: the application of [the relevant section of the] California Agricultural Code . . . to Florida avocados previously certified as mature under the Federal Marketing Order, violates the Supremacy Clause.<sup>79</sup>

The application of the California statute to Florida avocados dis-

72. 293 U.S. 388, 414 (1935).

73. *Id.*

74. See pp. 1571-72 *supra*.

75. *Kent v. Dulles*, 357 U.S. 116, 129 (1958).

76. *Id.*

77. Cf. *Lurk v. United States*, 366 U.S. 712, 714 (1961) (Frankfurter, J., whom Harlan & Stewart, JJ., join, dissenting):

Nothing could be more obvious than that the Court of Appeals, no matter how it may decide the question now put in its keeping, will have it only temporarily. The inevitable final destination of the case is this Court. Decision here should not be delayed by wastefully time-consuming remand to the Court of Appeals of a question that is already before us.

78. 373 U.S. at 159 (dissenting opinion).

79. *J.R. Brooks & Son, Inc. v. Reagan*, Civ. No. C-71-1311 SC, at 17-18 (N.D. Cal., Sept. 18, 1973).

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criminate against Florida avocados and unreasonably burdens interstate marketing of Florida avocados in violation of the Commerce Clause.<sup>80</sup>

And, more importantly, that court will find, as fact:

In the fall of 1963, when California's Bureau of Standardization relaxed inspection standards and permitted the entry of some Florida avocados when the samples tested averaged less than 8 percent oil, the California industry brought immediate pressure on the State to enforce the 8 percent standard against "all imported avocados" to protect the California growers from competition, and obtained a commitment from the State that such a policy would be implemented.<sup>81</sup>

In 1968, a provision was added to the California Administrative Code, purportedly to enforce the 8 percent statute, to the effect that, if any single avocado in a lot tested less than 7 percent oil, the entire lot would be rejected.<sup>82</sup>

What these findings present is the possibility that the length of delay in judicial resolution of the controversy before us will be the result of administrative action. Given this possibility, it seems to me not unimportant that the majority notes, after its analysis of the 1925 statute, that "[n]evertheless it may be that the continued application of this regulation to Florida avocados has imposed an unconstitutional burden on commerce, or has discriminated against another State's exports of the particular commodity."<sup>83</sup>

Indeed, it is this possibility that causes me to ponder the dangers presented by administrators, the meaning of which may not have been clear to me a generation ago. The dangers I refer to are the absence of the checks provided for the judiciary by the existence of public opinions and the possibility of dissents<sup>84</sup> and the effects of the lack of institutional competition for public acceptance resulting from the fact that administrators are part of the Executive rather than members of a separate but equal department of government.<sup>85</sup>

80. *Id.* at 18.

81. *Id.* at 8.

82. *Id.*

83. 373 U.S. at 153-54.

84. "Divisions on the Court and the greater clarity of view and candor of expression to which they give rise, are especially productive of insight." F. FRANKFURTER, *supra* note 43, at 9. "The scope of a Supreme Court decision is not infrequently revealed by the candor of dissent." *Id.* at 106.

85. In *Muskrat v. United States*, 219 U.S. 346 (1911), the Congress had passed a bill granting jurisdiction to the Court of Claims and Supreme Court on appeal, to hear the named parties plaintiff, with the United States to pay their expenses from a trust fund

As to the relevance of these differences between judges and administrators to the issues before us, I should like to call to your attention an article in the *Wall Street Journal* of December 17, 1973, headlined "Fading Dream: Common Market Delay On Oil Decision Signals Slowing of Unity Drive,"<sup>80</sup> which states, *inter alia*:

The German-led group of seven members and the Brussels Commission staff saw their mission as nothing less than saving the European Economic Community—the formal name of the Common Market. The very name would become a hollow mockery, they feared, if the Community didn't seize the opportunity to allocate each member a fair share of oil. Even free-trading Germany would throw up protective barriers against French Renaults, the reasoning went, if France were afloat in oil while Volkswagen slashed output for want of fuel to make or drive cars.

Against the backdrop of scant movement toward European unity lately, even the general expression of intent to deal with problems "in a concerted manner" was enough to leave the Germans

if the acts of Congress they contested were found unconstitutional. The Court held that jurisdiction was lacking in the Supreme Court because of lack of a bona fide case or controversy, and in the Court of Claims because the act giving the two courts jurisdiction was not separable.

The very inarticulateness of the *Muskkrat* decision in attempting to explain why that situation was not cognizable by the Court is an indication of the great importance the Court attaches to safeguarding its status vis-à-vis the other branches of the federal government. *Muskkrat* may be said to stand for the proposition that the Court will not act at the specific behest of the Congress and thus abandon part of its freedom not to decide inopportune questions. See generally Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961). Professor Bickel notes two of the most important aspects of *Muskkrat*: it was thoroughly concrete and adversary, despite the Court's contentions, and it is frequently cited with approval. *Id.* at 45 & n.25. Cf. Note, *Legislative and Constitutional Courts: What Lurks Ahead for Bifurcation*, 71 YALE L.J. 979, 999 n.139 (1962); note 77 *supra*. See *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. at 92-93 (dissenting opinion):

Were only these considerations claiming judgment in construing inert language it would plainly follow, as the Court has concluded, that three judges are required to hear the complaint in this case, for constitutional claims are made and it is not precluded that injunctive relief may be granted on an obvious conflict with specific constitutional provisions. But so to rule here is in my view to fail to give due regard to countervailing considerations of far-reaching consequences to the federal judicial system, affecting the functioning of district and circuit courts, as well as of this Court. Specifically, the convening of a three-judge trial court makes for dislocation of the normal structure and functioning of the lower federal courts, particularly in the vast non-metropolitan regions; and direct review of District Court judgments by this Court not only expands this Court's obligatory jurisdiction but contradicts the dominant principle of having this Court review decisions only after they have gone through two judicial sieves, or, in the case of federal regulatory legislation, through the administrative tribunal and a Court of Appeals.

86. [Editors' note] The Common Market, not unlike the United States in the early nineteenth century, faces the task of creating a unified economic system out of a collection of diverse states accustomed to autonomous decisions. See pp. 1569-70 *supra*; *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). The decisionmakers, however, are administrators, not judges. Their recent oil decisions threaten, as the last sentence in the passage indicates, to undermine their legitimacy.

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and Dutch publicly pleased. This was true even though the British and the French could contend that they hadn't given anything away. It may take at least the two and one half months they have allowed themselves before anyone knows which view will prove to be correct. . . .

Before the real crisis came along, the Common Market had gotten down to distinctly unexciting tasks. Tariffs among the original six members (France, Germany, Italy, Belgium, Luxembourg and Holland) are already abolished, and tariffs with the new ones (Great Britain, Ireland and Denmark) are being phased out. So the Brussels "Eurocrats" have had to turn to tinkering with intricate farm-price props and to tackling technical barriers to free trade. Their "harmonization" proposals, however, seem to have united Europeans mainly in outraged opposition to what's seen at the grass roots as threats to national ways of life.<sup>87</sup>

What I am now troubled by is, in short, the possibility that I may not have had enough faith in the efficacy of precedent: the importance of the difference between acting as a judge and acting as an administrator.<sup>88</sup> Thus, I was aware in 1927 concerning the institution denominated Commerce Court that:

As was true of the Interstate Commerce Commission itself in earlier days, the Commerce Court encountered numerous reversals by the Supreme Court on so-called questions of jurisdiction. What was merely a permissible resolution of doubt, largely inherent in the situation or in the ambiguities of legislation, with a corrective process available in the Supreme Court, was interpreted by popular feeling, ill-equipped fairly to judge these technical issues, as a conscious attempt on the part of the Commerce

87. Wall St. J., Dec. 17, 1973, at 1, col. 1. Compare *id.* with pp. 1569-70 *supra*. Cf. p. 1574 *supra*.

88. See 373 U.S. at 165 n.11 (dissenting opinion):

"There is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. This Court, in considering the validity of state laws in the light of . . . federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67. (Emphasis added.)

See also *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 160 (1973):

[A]s [Mr. Justice Frankfurter writing for the Court in *Radio Station WOW v. Johnson*, 326 U.S. 120, 124] pointed out, [the] concept of "finality" has a "penumbral area."

Compare pp. 1568-69 *supra* with p. 1556 *supra*. Cf. note 49 *supra*.

Court to usurp authority. To reversals on jurisdictional grounds were added reversals on substantive questions, and, unfortunately, questions full of dramatic interest around which clustered strong popular emotions. Everything combined to make the Court, and that very quickly, a battered bark.<sup>89</sup>

But did I really grasp the importance of the fact that the Commerce Court was an agency dealing with a sharply delimited set of commercial problems rather than a court of general jurisdiction, or did I think that all of the battering was attributable solely to the fact that "[t]he technique of administration, the qualifications of administrators, the scope of judicial review, in a word, the key issues in any fruitful scheme of utility regulation have hardly begun to emerge as pressing problems for scientific judgment"?<sup>90</sup>

## E

Given all of the foregoing, what ultimately disturbs me concerning No. 45 is the response we will give when *J. R. Brooks & Son, Inc. v. Reagan*<sup>91</sup> is appealed to us. In particular, what will we say to the findings of fact? The district court found:

Since 1925, and intensifying in more recent years, the California 8 percent oil content requirement has been maintained and applied against Florida-grown avocados, as the result of pressure from the California avocado industry, for the purpose, inter alia, of excluding competition from Florida avocados in California markets.<sup>92</sup>

The California 8 percent oil content statute has been maintained and applied to operate, and in fact has operated, as an embargo against Florida-grown avocados.<sup>93</sup>

The California 8 percent oil content statute has been maintained to protect the California grower and packer from competition. The statute has caused higher avocado prices to California consumers by preventing the sale of competitive Florida fruit.<sup>94</sup>

In 1927, a bill was introduced in the California Legislature which would have provided that avocados of the West Indian Trapp variety would be saleable in California at 5 percent oil and that other West Indians would be saleable at 7 percent oil.

89. F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 164 (1928) (footnote omitted).

90. *Id.* at 173. *Cf.* notes 34, 35 *supra*.

91. Civ. No. C-71-1311 SC (N.D. Cal., Sept. 18, 1973).

92. *Id.* at 7.

93. *Id.*

94. *Id.*

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This bill was not passed as a result of pressure by the California avocado industry, which was motivated by a fear of increased Florida competition.<sup>95</sup>

In 1958, a hearing before a subcommittee of the State of California Joint Legislative Committee on Agricultural and Livestock Problems was held in Vista, California, with the purpose of determining whether the California 8 percent oil statute should be lowered for certain summer varieties of California avocados. The 8 percent statute was not changed at that time for fear of allowing additional Florida competition.<sup>96</sup>

How will we justify our decision in light of the finding of fact that the relevant section of the California Agricultural Code "arbitrarily and unreasonably burdens interstate commerce in Florida avocados by imposing a standard which is irrational as applied to Florida avocados . . .?"<sup>97</sup>

Perhaps, after all, my retirement was not without its rewards. On the other hand, however, perhaps this Court will not have to render yet another decision in this matter. And as you all know, I had a law clerk whose book<sup>98</sup> details how crucial that possibility is to the successful functioning of this institution.<sup>99</sup>

### III. Coda

(1) The choice among competing grounds of decision is not only a choice among past precedents (or the meaning to be assigned them) but is, most importantly, a choice about the kind and scope of the precedent being created.

(2) This must depend on an assessment of the future relevance of that decision, because only a successful anticipation of social evolution

95. *Id.*

96. *Id.* at 7-8.

97. *Id.* at 16. See also p. 1568 & note 34 *supra*.

98. A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962). See also p. 1568 *supra*; Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463 (1967). Cf. *Smith v. Cahoon*, 283 U.S. 553 (1931), in which the Florida legislature exempted carriers of farm products and certain seafoods from a statute requiring security from carriers for hire to cover injuries caused by their negligence. A claim that the Equal Protection Clause had been violated was upheld, not on the basis that carriers of farm produce could never be given special treatment by the legislature, not because the classification was an inherently suspect one, but on the ground that such special treatment could not be afforded in the context of a statute purporting to protect the public against negligent carriers. Compare *id.* with Tribe, *The Supreme Court, 1972 Term—Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 5 (1973).

99. [Editors' note] See Deutsch, *supra* note 1, at 233-35.

(both in the fact patterns it will churn up and the attitudes and mores it will embody) will confer legitimacy on the court's decision.

(3) The reader has been taken through arrangements of facts, and from a differently organized view, taken through them again in detail. This is a trying process, but it is the only process appropriate to my argument.

(4) What then is the lesson of the Fable? If the point of the exercise is the meaning of precedent, I think the lesson is two-staged: the importance of temporal context has the implications that, as we use precedent, it cannot be sprung from its context, and, as we *create* precedent, by the choice among theoretically possible grounds of decision, we must attempt to anticipate future relevance. Relevant precedent is nothing more and nothing less than both perceived as a rational solution to a set of issues occurring at a given time and a development perceived as a significant contribution to a just future.