

## UMPIRE TO THE FEDERAL SYSTEM\*

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**H**AND in hand together, Due Process and the Commerce Clause amble across the pages of the United States Reports. Though one is supposed to provide a balance between the individual and his government and the other between state and nation, they have more or less been interchangeable devices for protecting the status quo against social legislation. A Court which struck down state legislation in the name of the Fourteenth Amendment was usually a Court which also found a negative implication in the Commerce Clause to prevent state regulation of interstate business.<sup>1</sup> And except for certain traditional types of commerce<sup>2</sup> and a few pronouncements of the Taft Court,<sup>3</sup> the Commerce Clause hardly seemed a strong affirmative instrument for national regulation. By adept manipulation of these two constitutional provisions the Court steadily erected a no man's land free from any governmental regulation.<sup>4</sup> In fact, the primary objective of no-regulation finally became so important that the Court lost its adeptness and in one instance confused the two concepts by saying in effect that the Commerce Clause did not extend to regulation of commerce if the regulation was without due process of law.<sup>5</sup>

It is hardly surprising, therefore, to find that when the new Court launched its campaign to undo past wrongs, it moved on three fronts at

\* The title is a subtitle of an article Walton Hamilton and I published last year, in which we did no more than hint at some of the problems here discussed. See Hamilton and Braden, *The Special Competence of the Supreme Court*, 50 *Yale L. J.* 1319, 1367-69 (1941). It goes without saying that I am greatly indebted to Mr. Hamilton, but fortunately for him I must assume all the responsibility for what is said here.

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<sup>1</sup> Compare *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), with *Schollenberger v. Pennsylvania*, 171 U.S. 1 (1898), and *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); and *Di Santo v. Pennsylvania*, 273 U.S. 34 (1927), with *Tyson & Brother v. Banton*, 273 U.S. 418 (1927), and *Ribnik v. McBride*, 277 U.S. 350 (1928).

<sup>2</sup> Such as transportation, foreign commerce, and, within the limits of reason, antitrust.

<sup>3</sup> See *Board of Trade of Chicago v. Olsen*, 262 U.S. 1, 40 (1923); Corwin, *The Schechter Case—Landmark or What?*, 13 *N.Y. U. L. Q. Rev.* 151, 167-69 (1936).

<sup>4</sup> It is unnecessary to parade the sorry cluster of cases which resulted from the nullification spree immediately preceding the Court Unpacking Bill.

<sup>5</sup> *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330 (1935). See Powell, *Commerce, Pensions, and Codes*, 49 *Harv. L. Rev.* 1, 4-6 (1935).

once. It virtually eliminated Due Process as a bar to social legislation,<sup>6</sup> it expanded the Commerce Clause to permit extensive national regulation,<sup>7</sup> and it chipped away at the negative force of the clause.<sup>8</sup> The dominant driving force behind this three-pronged advance was a conviction that the legislature, not the judiciary, is the competent agent to act in the social and economic field.<sup>9</sup> There was obviously an effort to keep the Court out of all areas in which decision could be made only on the basis of personal, economic, or political predilections. In large measure this effort was successful. By shutting off Due Process and by granting Congress almost free rein, local and national action was freed from restraint. But on the third front, the negative side of the Commerce Clause, a more cautious advance has been made.

The necessity for cautious action is obvious. Although the argument that a state statute burdens interstate commerce may be only so much theoretical balancing of governmental powers, it may also be an effective way to prevent one state from mulcting the outlander, or from erecting tariff barriers against national competition. It requires considerable discrimination to detect when there is a real burden on national commerce and not just a slight burden on some reluctant individual doing interstate business. If the Court is unthinking, its action in closing off Due Process may be wasted because those who used to invoke that clause soon shift ground and come running into court with the cry that interstate commerce is burdened. True, there is no longer a no man's land so long as the Court

<sup>6</sup> The statute considered in *Wood v. Lovett*, 313 U.S. 362 (1941), and *People of Puerto Rico v. Russell & Co.*, 62 S. Ct. 784 (1942), involved impairment of the obligation of a contract. I know of no statute thrown out in the past three terms on substantive due process grounds.

<sup>7</sup> *United States v. Darby*, 312 U.S. 100 (1941), is a sufficient example of expansion. *United States v. Wrightwood Dairy*, 315 U.S. 110 (1942), and *Kirschbaum v. Walling*, 62 S. Ct. 1116 (1942), are more recent instances of the same trend.

<sup>8</sup> See *Dowling*, *Interstate Commerce and State Power*, 27 Va. L. Rev. 1 (1940). Since *Dowling* wrote, *California v. Thompson*, 313 U.S. 109 (1941), and *Duckworth v. Arkansas*, 314 U.S. 390 (1941), have continued the trend.

<sup>9</sup> See *Olsen v. Nebraska*, 313 U.S. 236, 246 (1941) ("We are not concerned, however, with the wisdom, need, or appropriateness of the legislation"); *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 445 (1940) ("Nothing can be less helpful than for courts to go beyond the extremely limited restrictions [of] the Constitution . . ."); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 394 (1940) ("Those matters . . . relate to questions of policy, to the wisdom of the legislation, and to the appropriateness of the remedy chosen—matters which are not for our concern"); *Osborn v. Ozlin*, 310 U.S. 53, 66 (1940) ("All these are questions of policy not for us to judge"); *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 320 (1940) ("The wisdom of such a policy—its efficacy to achieve the desired ends—is of course not our concern"); *McCarroll v. Dixie Greyhound Lines*, 309 U.S. 176, 189 (1940); *Polk v. Glover*, 305 U.S. 5, 16 (1938); *Indiana v. Brand*, 303 U.S. 95, 117 (1938).

permits Congress to regulate or to sanction state regulation. But in the period, short or long, during which no congressional action is forthcoming, active use of the Commerce Clause enables the Court to dabble with social legislation. And in this narrow area the Court must exercise that independent judgment of social values which it eschews in other fields.

There are two ways out of this situation. One is for the Court to evolve rules for determining when state legislation is really a burden on commerce and when it is not.<sup>10</sup> This has been the path taken by Mr. Chief Justice Stone.<sup>11</sup> It has not been accepted by all the Court, however, for it requires judicial weighing of the practical operation of legislation, a task the Court is said to be unable to fulfil well through lack of proper perspective, and a task some of the justices do not care to undertake because it is legislative in nature.<sup>12</sup> Accordingly, Mr. Justice Black has evolved a thesis concurred in in varying degrees by other justices, which purports to complete the Court's self-effacement in policy-making fields. He says, in effect, that if state legislation on its face discriminates against commerce he will strike it down,<sup>13</sup> but if any quarrel arises over whether there is discrimination in fact, he will quit and toss the problem to Congress.<sup>14</sup> Unless justices quarrel about whether legislation is discriminatory on its face, or, in other words, if the justices see discrimination only where everyone else would, Justice Black's rule is one which narrows the area in which the Court exercises a veto power over a legislature's political decision. So far he has participated in knocking out only two statutes under this rule,<sup>15</sup> and although they were unanimous opinions, there is no proof what use he will make of the rule, since he is probably the justice least likely to strike down discriminatory legislation. To date it is possible to say only that the justice, with such supporters as have joined him, has given no indication that he will overuse this modicum of power under the Commerce Clause.

The other half of the rule is a different matter entirely. Aside from this

<sup>10</sup> See Dowling, *op. cit.* supra note 8.

<sup>11</sup> His classic statement is in *South Carolina v. Barnwell Bros.*, 303 U.S. 177 (1938).

<sup>12</sup> See the dissent of Black, Frankfurter, and Douglas, JJ., in *McCarroll v. Dixie Greyhound Lines, Inc.*, 309 U.S. 176, 183 (1940).

<sup>13</sup> See his dissents in *Adams Mfg. Co. v. Storen*, 304 U.S. 307, 316 (1938); *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 446 (1939).

<sup>14</sup> See the dissent of Black, Frankfurter, and Douglas, JJ., in *McCarroll v. Dixie Greyhound Lines*, 309 U.S. 176, 183 (1940).

<sup>15</sup> *Best & Co. v. Maxwell*, 311 U.S. 454 (1940); *Hale v. Bimco Trading, Inc.*, 306 U.S. 375 (1939). Note that Justice Black agreed with Justice Douglas' concurrence in *Edwards v. California*, 314 U.S. 160 (1941), which relied on privileges and immunities and not on the commerce clause as used by the majority opinion.

narrow power to invalidate which is drawn directly and independently from the Constitution and the nature of a federal system, the main strength of the rule is derived from a judicial recognition of the predomination of congressional power over state power. Even in the old days when there was a more extensive use of the negative aspect of the Commerce Clause, the same theory obtained. Then the Court acted on a presumption that Congress wished the channels of commerce to be unobstructed, which meant that Congress had to announce that a given type of state regulation was valid notwithstanding the Commerce Clause.<sup>16</sup> The present Court has done no more than shift the presumption around so far as nondiscriminatory legislation is concerned. Now the Court presumes that so long as Congress is silent, it does not care whether commerce is trammelled. Congress need only speak and petty obstructions vanish. In theory this entirely removes the Court from the field of policy making. Instead of undertaking to preserve the federal system from hidden or questionable instances of Balkanization, it can sit back passively and let one organ of the electorate, Congress, save the country from the shortsighted selfish action of lesser organs of smaller groups of people, state legislatures. Thus, the theory virtually completes the three-sided advance of the Court against appeal to its power to strike down economic legislation.

In practice, however, policy making rears its head in a new guise. Granted that legislatures have the last word and that the Court sits back and waits for Congress to override states, the Court's work has only begun. The problem of applying the congressional command is not so simple as it was under the old theory of presumption when congressional action took the form of a lifting of the bans. Now the Court must take affirmative congressional legislation by the four corners, study it, and decide whether it forecloses all state action; or, to use Mr. Justice Roberts' plan for matching allegedly conflicting documents, lay the congressional enactment which is invoked beside the state statute which is challenged and see whether the latter conflicts with the former.<sup>17</sup> When former Courts laid statute beside Constitution to divine the constitutional answer, economic predilections quickly came to their aid. The question is whether statute matching may not exhibit the same tendency.

Admittedly, the problem is more complex than was the constitutional egerdeman. The constitutional provisions remained constant and were comparatively simple statements. Federal statutes come along in a never slackening stream, and are highly complex. Naturally, Congress might

<sup>16</sup> See generally Bicklé, *The Silence of Congress*, 41 *Harv. L. Rev.* 200 (1927).

<sup>17</sup> See *United States v. Butler*, 297 U.S. 1, 62 (1936).

say that a given statute "hereby supplants all state statutes in this field."<sup>18</sup> But this would still require the Court to decide whether a state statute was in the field, and, more rarely, to decide whether Congress could constitutionally foreclose all state action. The trouble is, however, that the Court is not aided even in this slight way. Congress has usually been content simply to legislate on a subject without consideration of conflicts. The Court is left with the task of evolving criteria for deciding when there is conflict and when there is not.

In the emerging pattern of current constitutional law, this problem of federal pre-emption and federal conflict becomes of utmost importance. Once the Court declines to invalidate state statutes for constitutional infirmity, and at the same time greatly expands federal power in order to avoid no man's lands, it has opened the gates for a flood of potential conflicts. It has also opened the gates to considerable potential judicial sleight of hand, for so long as Congress keeps quiet about what it considers a conflict, the Court has no more constraining rules of decision than it did when the Due Process and Commerce Clauses were the rules of decision. After all, the legal proposition is simple: When Congress exercises its plenary power, all state statutes which conflict with the federal exercise become invalid. This is a truism, of course, and gets nowhere. The task is to find the "inarticulate major premise" which lies behind the application of this empty legal rule to the facts of a given case.

#### THE RENOVATED BUTTER CASE

The most important of the recent cases dealing with conflicts between federal and state legislation is *Cloverleaf Butter Co. v. Patterson*.<sup>19</sup> There Mr. Justice Reed, joined by Justices Roberts, Black, Douglas, and Jackson, found a conflict between the Renovated Butter Act<sup>20</sup> and an Alabama statute providing for seizure of adulterated and misbranded food.<sup>21</sup> The federal statute provides for seizure of renovated butter and for inspection of factories manufacturing it. There is no power under the Renovated Butter Act to seize the ingredients of renovated butter.<sup>22</sup> Under the Ala-

<sup>18</sup> This may be done by using the word "exclusive" in an appropriate context. See the Wagner Act, 49 Stat. 453 (1935), 29 U.S.C.A. § 160 (a) (Supp. 1941); the United States Warehousing Act, 46 Stat. 1465 (1931), 7 U.S.C.A. § 269 (1939).

<sup>19</sup> 315 U.S. 148 (1942).

<sup>20</sup> Int. Rev. Code, 53 Stat. 252 (1939), 26 U.S.C.A. §§ 2320-2327 (1940).

<sup>21</sup> Ala. Code Ann. (Mitchie, 1940) tit. 2, § 495.

<sup>22</sup> The Court states that adulterated packing stock, an ingredient of renovated butter, can be seized and condemned under the Food, Drug, and Cosmetics Act. 52 Stat. 1046 (1938), 21 U.S.C.A. § 342 (Supp. 1941). *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 163

bama statute as construed by the Court, seizure of ingredients of renovated butter is authorized. Pursuant to this latter statute, Alabama officials seized large quantities of packing stock butter, from which renovated butter is made, belonging to the Cloverleaf Butter Company. In protest the company brought an equity action in a federal district court to enjoin the seizures on the ground that the Renovated Butter Act pre-empted the field and invalidated any seizures by state officials. The case went up on a stipulation which did not disclose whether the seizures were justified under the Alabama act, whether they were made with the approval of federal inspectors, whether the Federal Government had been seizing any of the company's completed product, or whether the state officials had been seizing any of the completed product offered for sale in Alabama. Only the two statutes were before the Court. No extensive facts such as are called for in constitutional cases<sup>23</sup> were on hand to aid the Court.

As might well be expected, both the majority and minority opinions state the applicable rule in substantially the same words. Mr. Justice Reed said that "where the United States exercises its power of legislation so as to conflict with a regulation of the state, either specifically or by implication, the state legislation becomes inoperative and the federal legislation exclusive in its application."<sup>24</sup> But, he conceded, "When the prohibition of state action is not specific but inferable from the scope and purpose of the federal legislation, it must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulation."<sup>25</sup> For the minority Mr. Chief Justice Stone put it that "Congress, in enacting legislation within its constitutional authority, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless the state act, in terms or in its practical administration, conflicts with the act of Congress or plainly and palpably infringes its policy."<sup>26</sup> Both agreed that if there is an express prohibition, the state act falls. Such is not the case

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(1942). Nothing is made of this, however, and we may assume that the case stands for a conflict between only the federal Renovated Butter Act and the state statute. In fact, the Chief Justice observed in dissent that the Department of Agriculture has praised the action of state officials in seizing adulterated packing stock while Food and Drug officials were preparing a libel in federal courts. It is ironical, he said, that a company can escape seizure because of a conflict with a statute not allowing seizure, when no conflict has been found with a statute allowing seizure. *Ibid.*, at 176.

<sup>23</sup> See *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310 (1940); *Polk v. Glover*, 305 U.S. 5 (1938); *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194 (1934).

<sup>24</sup> *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 156 (1942).

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*, at 170.

here, and there is little likelihood of a divided Court where it is the case. The dispute arises because a conflict must be implied. Mr. Justice Reed requires "clearness" under these circumstances; Mr. Chief Justice Stone, a "plain or palpable" infringement or conflict. Except for the fact that Mr. Justice Reed more or less implies a presumption in favor of finding a conflict whereas the Chief Justice balances the preservation of federalism against paramount federal power, the two statements say the same thing. Obviously, the differences between the groups of justices must be sought elsewhere.<sup>27</sup>

A closer study of the majority opinion yields little that is more enlightening. Mr. Justice Reed first sought to demonstrate the operation of this principle by contrasting two old cases dealing with the Pure Food and Drug Act. In *Savage v. Jones*,<sup>28</sup> he noted, the Court upheld an Indiana statute which required "disclosure of formulas on foods offered for sale in Indiana while in interstate commerce."<sup>29</sup> But in *McDermott v. Wisconsin*,<sup>30</sup> it was pointed out, the Court struck down a Wisconsin statute which "required glucose mixtures offered for retail sale to be labeled 'Glucose flavored with' the flavoring material. Any other 'designation or brand' on the package was prohibited."<sup>31</sup> The justice then produced two quotations, one from each case, which were supposed to give the rationales, and concluded with the statement: "In the *Savage* case there was no conflict, inconsistency or interference; in the *McDermott* case there was."<sup>32</sup>

These cases of contrast are not happy ones. Certainly, they do not offer a distinction that is arresting in its sharpness. In both instances, the products conformed to the requirements of the Pure Food and Drug Act. Both state acts required certain statements not required by the Pure Food and Drug Act. The Indiana statute required an exact statement of ingredients; the Wisconsin act, a partially exact statement of ingredients. Yet the former was valid, the latter was not. Nor are the quotations set out by Mr. Justice Reed of much help. One says the Indiana statute does not conflict with the Food and Drug Act;<sup>33</sup> the other says the Wisconsin statute does.<sup>34</sup> But why? Mr. Justice Reed let the cat out of the bag when he observed that the Food and Drug Act "tolerated the more euphemistic label prohibited by [Wisconsin]."<sup>35</sup> In other words, the Food and

<sup>27</sup> Mr. Justice Frankfurter added a few dissenting words of his own. *Ibid.*, at 177-79.

<sup>28</sup> 225 U.S. 501 (1912).

<sup>29</sup> *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 157-58 (1942).

<sup>30</sup> 228 U.S. 115 (1913).

<sup>31</sup> *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 158 (1942).

<sup>32</sup> *Ibid.*, at 159.

<sup>33</sup> *Ibid.*, at 158.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

Drug Act did not destroy Indiana's power "to prevent imposition upon the public" by concealing ingredients, but it did destroy Wisconsin's power to require a special label which said the same thing as the label permitted under the federal act, only less "euphemistically," and perhaps in a way that discouraged purchase of the product.<sup>36</sup> This rationale leads to a rule which might be stated thus: If the state statute does a Good Thing which the federal statute does not, no conflict; but if the state statute requires a stupid variation on a Good Thing that the federal statute does, conflict. Stated another way, it might be said that if the state statute requires more of a Good Thing—here truthful and informative labeling—than the federal statute does, no conflict; but if the state statute does not require more of a Good Thing, and in fact is considered a stupid requirement, conflict. But Mr. Justice Reed would undoubtedly repudiate any such deduction and perhaps it is best to forget this attempt to deduce contrasting rules from old cases and seek a more direct argument in his own opinion.

The only other argument which can be used is a factual demonstration of the conflict. The conflict, Mr. Justice Reed states,<sup>37</sup> takes the form of a destruction of the effectiveness of the inspection provisions of the Renovated Butter Act. Finished products may be seized if they are unsuitable "for food through the use of unhealthful or unwholesome materials . . ."<sup>38</sup> and this may be determined "upon observation of the use of such materials in the process of manufacture."<sup>39</sup> Further, federal regulations and inspections see to the "sanitation of the factories in such minutiae as the clean hands of the employees and the elimination of objectionable odors. . . ."<sup>40</sup> If state officials can seize ingredients, "federal discretion" over them is nullified. Later he says that state seizure of material "while federal enforcement deemed it wholesome, would not only hamper the administration of the federal act but would be inconsistent with its requirements."<sup>41</sup>

These then are the Court's reasons for finding a conflict. Apparently, state regulation must fall because it is possible that state officials might find some ingredients unwholesome which the federal officials would not

<sup>36</sup> I do not deny that the Wisconsin statute was pretty stupid, and obviously designed to discourage importation into the state of Karo and similar syrups; see the dissenting opinion in the state court. *McDermott v. State*, 143 Wis. 18, 38, 126 N.W. 888, 893 (1910). But if this was the rationale, out with it. Cf. *infra* p. 37.

<sup>37</sup> *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 168 (1942).

<sup>38</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>41</sup> *Ibid.*, at 169.

find so unwholesome that they would seize the finished product. So far as this situation is concerned, it represents a government of men and not of laws, for the legislative standards of unwholesomeness are substantially the same<sup>42</sup> and the only conflict arises because men might differ. For Congress to allow concurrent action in these circumstances, it must affirmatively grant the state permission to seize. If this analysis be correct, the old presumption against state interference with interstate commerce shows up in a new guise. There is now a presumption that if somewhere along the line a possible disagreement over a set of facts might arise between federal and state officials, Congress meant to exclude state action.

This analysis reveals, perhaps, why the Court was willing to rely on such cases as *Savage v. Jones*<sup>43</sup> and *McDermott v. Wisconsin*.<sup>44</sup> A reading of those cases reveals a mental attitude of caution in allowing state police power to interfere with interstate commerce, a mental attitude that also caused police power to have an uphill battle in combating laissez-faire. The majority in the *Renovated Butter* case revive to some extent this laissez-faire situation, for if Congress unwittingly passes a general statute which can conceivably be construed to create a disagreement between a state and federal official, a state statute must go. And this will probably mean that some business interest will be less stringently regulated than otherwise. It is not at all certain, for example, that the renovated butter produced in Alabama will always be free from the impurities which might be removed by that state's officials. To assure such purity it must be assumed that impurities can always be detected in the finished product, and that examinations of it are always made, or that federal inspection of packing stock butter is complete and that the inspectors never lose track of the impure ingredients and hence always confiscate the processed butter when it comes through.<sup>45</sup> Since this is rather unlikely, it follows that the Court, acting in the name of congressional intent, partly frees an interstate industry from supervision.

The net result of the Court's decision, therefore, seems to be a judicial exercise of power over economic legislation. Congress can control the power, to be sure, and the Court can claim it does no more than presume

<sup>42</sup> See Int. Rev. Code, 53 Stat. 252 (1939), 26 U.S.C.A. § 2325 (1940) ("deleterious or unwholesome"); Ala. Code Ann. (Mitchie, 1940) tit. 2, § 306 ("poisonous or deleterious").

<sup>43</sup> 225 U.S. 501 (1912).

<sup>44</sup> 228 U.S. 115 (1913).

<sup>45</sup> See Mr. Chief Justice Stone's dissent on this point. *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 171-73 (1942). Conceivably, impurities might be removed in the processing. But this is apparently doubtful. See the quotation in the dissenting opinion. *Ibid.*, at 173 n. 3.

congressional intent to avoid this sort of conflict. The fact remains, however, that within the limits of the Court's rule it has said the final word, and has thrust the burden on Congress to legislate carefully in order to be positive that a sleeping presumption will not arise. Within these limits, the Court exercises the same negative power it exercises under the Commerce Clause.

In fact, it may be that a solicitude for the elimination of interstate trade barriers lies behind this presumption of congressional intent. Both Justices Roberts and Reed, of the majority here, dissented in *West India Oil Co. v. Domenech*,<sup>46</sup> which allowed Puerto Rico to tax fuel oil imports despite an act of Congress which could be interpreted to forbid such taxation. "Nothing," Mr. Justice Reed observed, "requires us to frustrate the legislative policy of free competition in world markets."<sup>47</sup> And Mr. Justice Jackson, also of the majority, has been quite frank in admitting that the trend toward interstate trade barriers is something "with which [he] would have no part," and that he would be willing to use his power to hamper the trend.<sup>48</sup> If these justices do not really care for the theory that trade barriers should usually be eliminated only by Congress, it is likely that they will sooner find a conflict with a federal statute than others might. Not only do they have an additional opportunity to strike a blow at a trade barrier; they can do it more easily because Congress has spoken and thereby created a judicial tool more tangible and handier than the Commerce Clause. If Alabamians protest, they will do so to Capitol Hill, not the Court.

Though Justices Roberts, Reed, and Jackson may be reviving judicial power to supervise the national economy in a negative sort of way, Justices Black and Douglas, the remaining members of the majority, cannot be so easily explained away. They are the men of the *Dixie Greyhound* dissent<sup>49</sup> which so frightened the opponents of Balkanization.<sup>50</sup> And Justice Black is the exponent par excellence of the theory of judicial self-abnegation.<sup>51</sup> Why should these men suddenly indulge in a dubious presumption of congressional intent in order to eliminate a state statute, probably passed after a "careful and cautious consideration given to the matter,"

<sup>46</sup> 311 U.S. 20 (1940).

<sup>47</sup> *Ibid.*, at 32.

<sup>48</sup> Concurring in *Duckworth v. Arkansas*, 314 U.S. 390, 401-2 (1941).

<sup>49</sup> 309 U.S. 176, 183 (1940).

<sup>50</sup> See McAllister, *Court, Congress and Trade Barriers*, 16 *Ind. L. J.* 144 (1940); Dickinson, *The Functions of Congress and the Courts in Umpiring the Federal System*, 8 *Geo. Wash. L. Rev.* 1165 (1940).

<sup>51</sup> See *supra* p. 29.

by a legislature of reasonable men?<sup>52</sup> It may well be that there is something undisclosed about this case, such as a fight between federal and state officials which could be arrested only by invalidating the state statute. If so, it would be better to disclose it than to produce a result that smacks so strongly of gratuitous judicial legislation. Or it may be that Mr. Justice Black figures that when he withdraws from the constitutional level he has done his duty and may proceed to exercise judicial power freely. If so, he has stopped far short of the ideal he seemed headed for—complete legislative control over economic legislation. Or it may be that once he accords supremacy to Congress in eliminating trade barriers he is not inclined to be parsimonious in finding that Congress has exercised that power. If so, he is unconsciously forcing Congress to the lengths it had to go in the old days in order to permit state action—specific grants of concurrent jurisdiction.<sup>53</sup>

#### THE ALLEN-BRADLEY CASE

The strange nature of the *Renovated Butter* case is easily seen when it is compared with *Allen-Bradley Local v. Wisconsin Employment Relations Bd.*<sup>54</sup> There the Court unanimously upheld part of the Wisconsin Employment Peace Act<sup>55</sup> against the claim that it conflicted with the Wagner Act.<sup>56</sup> The Wisconsin board had enjoined striking employees of the Allen-Bradley plant from mass picketing, threatening employees, obstructing factory entrances, and the like. This was within the power of the board under the Wisconsin statute which declared such activities unfair labor practices by employees. In rejecting the argument of a conflict with the Wagner Act, Mr. Justice Douglas, speaking for the Court, made four points. First, he confined the issue to the precise facts involved, and thus by-passed any conflict with other provisions of the state act not required to support the order before the Court. Likewise, he rejected the claim that because under the state act the strikers lost their status as employees, there was an inconsistency with their status under the Wagner Act. The Wisconsin Supreme Court had observed that the board had not denied

<sup>52</sup> See Mr. Justice Black dissenting in *Polk v. Glover*, 305 U.S. 5, 16 (1938).

<sup>53</sup> I do not mean to imply that the dissenters did not have their own set of values to aid in finding no conflict. Mr. Justice Frankfurter, for example, has long since served notice that his respect for state police power is such that he requires a clear and unambiguous showing that Congress meant fully to exercise its power at the expense of the states. See *Federal Trade Com'n v. Bunte Brothers*, 312 U.S. 349 (1941), noted in 50 *Yale L. J.* 1294 (1941); *Kirschbaum v. Walling*, 62 S. Ct. 1116, 1119 (1942).

<sup>54</sup> 62 S. Ct. 820 (1942).

<sup>55</sup> Wis. Stat. (1939) c. 111.

<sup>56</sup> 49 Stat. 449 (1935), 29 U.S.C.A. § 151 et seq. (Supp. 1941).

employee status in the order, and this, Mr. Justice Douglas held, was conclusive. Second, reliance was placed on the fact that the National Labor Relations Board had not acted. Third, he noted that Congress had given no indication of an intention to pre-empt the field and to make its action exclusive in all respects. And finally, he was unable to see how the action of the state officials "impaired, diluted, qualified or in any respect subtracted from" rights guaranteed by the Wagner Act.<sup>57</sup>

If the arguments here are turned back on the *Renovated Butter* situation, a conclusion of no conflict in that case can be reached. There, it will be remembered, the case came up on stipulation. There was no attempt to analyze the actual facts to see whether in that specific case an inconsistency really existed. Had this been done, possible difficulties might have melted away as quickly as did unapplied portions of the Wisconsin act in the *Allen-Bradley* case.<sup>58</sup> Nor in the Alabama case was there any evidence that federal officials had rushed in to act at cross-purposes with the state officials.<sup>59</sup> True, there was not complete aloofness, for general jurisdiction was exercised over the renovating plant. But this could hardly be decisive. The result in the *Allen-Bradley* case would hardly be changed if the company had to file reports with the NLRB and had to allow periodic inspections of the factory to see if anti-union posters adorned the walls. Also usable against the conflict in the butter situation is the argument that no intention to pre-empt the field was manifested by Congress. The only difference is that in the butter situation no evidence of intention existed whereas in the labor case there was some evidence of a desire to preserve some state power.<sup>60</sup> Finally, the butter instance does not look very much like a situation where rights guaranteed by the *Renovated Butter* Act were "impaired, diluted, qualified or subtracted from." The only possible right was a right not to have butter seized by state officials. But that was the ultimate question to be decided.<sup>61</sup> In general, the two

<sup>57</sup> *Allen-Bradley Local v. Wisconsin Employment Relations Bd.*, 62 S. Ct. 820, 826 (1942).

<sup>58</sup> For example, it was not shown whether the company was fully complying with all federal regulations, whether the federal regulations effectively dealt with the problem, or whether the methods of detection available under the federal statute effectively prevented impure packing stock from being sold as renovated butter.

<sup>59</sup> Mr. Chief Justice Stone stated in dissent that actually there had been active cooperation between state and federal officials generally. *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 173-74 (1942).

<sup>60</sup> Actually, the dissenters asserted that what legislative history there was indicated that concurrent jurisdiction existed. *Ibid.*, at 172.

<sup>61</sup> To make the analogy exact, the rights subject to impairment were consumers' rights, for they are to processors as employees are to employers. From this point of view, consumers' rights are apparently more likely to be impaired if the Alabama statute goes than if it stays.

situations, while not absolutely parallel, are close enough to demonstrate the interchangeability of legal argument.

Interchangeability may be further shown by taking the arguments from the butter situation and applying them in the labor case. Again it will be remembered, the argument of Mr. Justice Reed was reduced to the proposition that the statutes conflicted because some federal official sometime might disagree with a state official as to what were impure ingredients. A literal application of this is not possible because in the labor case no single fact would be crucial to both agencies. But by analogy the reasoning may be used. The Wagner Act preserves the right to bargain collectively. If as part of that bargaining strikers engage in the activities denounced by the Wisconsin Labor Board, an eventual order of the NLRB attempting to restore the status quo might be ineffective because in the meantime the union had been broken. Even if the NLRB used its full power to destroy any advantage gained by what could in effect be strike-breaking by the Wisconsin board, the time lost and the difficulties involved would constitute interference with the Wagner Act. This is, no doubt, an exaggerated analogy. Yet such a method of demonstrating a conflict is of the same order as that used in the *Renovated Butter* case.

If arguments like these can be thrown around fairly easily, it becomes evident that something new must be added to get a differentiation between the labor case and the butter case. Mr. Justice Douglas asserted by indirection that control in the butter situation was more "pervasive." Some employers who have fallen afoul of the Wagner Act may raise an eyebrow at this distinction. Be that as it may, "pervasiveness" hardly discloses the argument. If Congress has plenary power over an activity it can supersede state action or not, as it wishes. Then "pervasive" must mean that congressional intention to supersede state action is found solely from the scope of action provided for. But even this hides a premise. If ordinary state police power is impinged on, as in keeping the streets clear, or if the connection with national commerce is not too obvious, as in labor relations, then more complete congressional coverage is needed to make the control look "pervasive" than might be the case with a statute regulating a clearly interstate subject such as transportation. If this is so, then the underlying political philosophies of the justices spring up again as important factors to be considered.<sup>62</sup> And when these come in, lesser political issues may play their part. Just as it is possible to speculate on a fight between state and federal officials over renovated butter,<sup>63</sup> so is it possible to

<sup>62</sup> See note 53 supra.

<sup>63</sup> See p. 37 supra.

raise the possibility that some justices felt that the NLRB would be more secure if states were not deprived of the power to interdict labor policies which many people deplore. In fact, the very technique employed by the Court<sup>64</sup>—that of limiting its decision to the precise order before it—may be an indication that a careful line of distinction will be followed, designed to protect vital parts of the Wagner Act at the same time that minor scraps are tossed to less labor-minded state legislatures. Whatever ultimate reasons explain the *Allen-Bradley* decision, the fact remains that simple statements that the Court follows congressional intent are neither the whole story, nor perhaps the chief element.

#### HINES V. DAVIDOWITZ

Although not a Commerce Clause case, *Hines v. Davidowitz*<sup>65</sup> serves the purpose of demonstrating how small a part congressional intent can play when large issues are at stake. And if the issue is important enough, a literal conflict between state and federal acts is unnecessary. In the *Davidowitz* case the Court knocked out a Pennsylvania alien registration act<sup>66</sup> solely because Congress also had one.<sup>67</sup> There was no conflict. Aliens in Pennsylvania could register annually, pay an annual registration fee, carry an identification card, present it on proper demand, all without interfering in any way with federal registration. Any conflict must be spelled out by implying that Congress pre-empted the field. This the Court did by a mixture of semiconstitutional exalting of federal power over foreign relations and judicial expansion of the scope and purpose of the federal registration law. Mr. Justice Black, who wrote the majority opinion, demonstrated in his usual forthright manner that the legal rules of pre-emption were meaningless. After pointing out that previous opinions had used many different words to express the reason for invalidity of a state statute, the justice went on to observe that “none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick.” “In the final analysis,” he said, “there can be no one crystal clear, distinctly marked formula.”<sup>68</sup> There was good reason for him to take this broad, sophisticated view of the subject, for under the tradi-

<sup>64</sup> See *Reitz v. Mealey*, 314 U.S. 33 (1941), a 5-4 decision, where Mr. Justice Douglas strongly protested against the majority's technique of circumscribing the issue before it so as not to find a conflict between a state statute and the Bankruptcy Act.

<sup>65</sup> 312 U.S. 52 (1941).

<sup>66</sup> Pa. Stat. Ann. (Purdon, Supp. 1941) tit. 35, §§ 1801-6.

<sup>67</sup> 54 Stat. 673 (1940), 8 U.S.C.A. §§ 451-60 (1942).

<sup>68</sup> *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

tional rules of conflicts he might have been hard put to find an exact parallel. Only by looking at the "full purposes and objectives of Congress" could a reason for invalidity be spelled out.

It is clear at once that Mr. Justice Black's rule here is much broader than that of the *Renovated Butter* case. In fact, the rule cuts both ways, because it would frequently be an easy matter to look at a "full purpose" of Congress and make an apparent conflict vanish. In the *Renovated Butter* case, for example, the "full purpose" approach could lead to a conclusion that Congress was interested in pure food and obviously would not wish to hamper state seizures not available to federal inspectors.

In line with his "full purpose" rule, Mr. Justice Black approached *Hines v. Davidowitz* in the grand manner. In contrast to Mr. Justice Reed's narrow, specific comparison of the workings of federal and state pure food statutes, Mr. Justice Black started with a discussion of federal power over international relations, of which the method of treatment of other countries' nationals is "important and delicate." His discussion of the supremacy of federal power in this field makes it clear that any state legislation is grudgingly tolerated, and that the smallest peep out of Congress forecloses all state action. When the justice turned his attention to the specific acts before him, he was well prepared for finding incompatibility. He could not find a literal conflict, but he could find that Congress left its provisions lenient in the interests of personal freedom and hence the "full purpose" indicated disapproval of stringent state laws. Without question this can be called determination of congressional intent by attenuation. This is partly explained, of course, by the important premise of the supremacy of federal power over international relations.<sup>69</sup> But it also indicates that in all likelihood one factor was a dislike of what was admittedly a pretty reprehensible state law.<sup>70</sup> In fact, so delicately interwoven are arguments of congressional intent and the great personal freedoms so valiantly upheld in civil liberties cases, that it almost seems as if the state statute was unconstitutional *ab initio*, but so declared by Congress, not the Court. As with Mr. Justice Reed's desire for untrammelled commerce, the result is a double judicial constitutional policy—a high regard for federal supremacy in foreign affairs and for civil liberties—pre-

<sup>69</sup> Justices Black and Douglas have indicated elsewhere their views on international relations; see their concurring opinion in *Z. & F. Assets Realization Corp. v. Hull*, 311 U.S. 470, 490 (1941); *United States v. Pink*, 315 U.S. 203 (1942); and see Mr. Justice Douglas' use of this point in distinguishing the *Davidowitz* case. *Allen-Bradley Local v. Wisconsin Employment Relations Bd.*, 62 S. Ct. 820, 825 (1942).

<sup>70</sup> See the strong disapproval expressed by the district court. *Davidowitz v. Hines*, 30 F. Supp. 470, 477 (Pa. 1939).

sented in the words of Congress. One might be tempted to say that Congress becomes the Charlie McCarthy of the Supreme Court.<sup>72</sup>

#### THE GULF OIL CASE

Even though Congress may not be specific in outlawing conflicting state legislation, it may imply its disapproval so strongly that the Court is a faithful interpreter of congressional intent when striking down state legislation. In this situation the Court will not intrude with its own conception of proper public policy unless it refuses to find an intent to eliminate state action. True, this is saying no more than that the whole federal field is a matter of degree from specific prohibition to vague general inference of intent to prohibit, and that as the federal legislation comes closer to specificity, the area of the Court's freedom is narrowed. In so far as the several members of the Court have theories as to what is evil about trade barriers, for example, they will differ in their choice of points along the scale at which they find sufficient implication to accept prohibition. Nevertheless, a point may be reached where the Court is unanimous in finding implied prohibition, and where outside observers may agree that the Court has probably divined congressional will with precision. Such an instance is *McGoldrick v. Gulf Oil Corp.*<sup>73</sup>

This was one of the several cases involving the New York City sales tax.<sup>73</sup> Most of the impositions of the tax were upheld against a contention that interstate commerce was burdened,<sup>74</sup> but in the *Gulf Oil* case Congress turned the trick and deprived New York City of its levy. In this case, the tax was on a sale of fuel oil for ships' stores, that is, for use by ships as fuel. The oil had been imported from Venezuela, held under bond and federal supervision, processed to make it suitable as ships' fuel, and then sold to vessels engaged in foreign commerce. The important factors relied on by the Court were the various statutes and regulations protect-

<sup>72</sup> Compare the language of the dissenting justices: "At a time when the exercise of the federal power is being rapidly expanded through Congressional action, it is difficult to overstate the importance of safeguarding against such diminution of state power by vague inferences as to what Congress might have intended if it had considered the matter or by reference to our own conceptions of a policy which Congress has not expressed and which is not plainly to be inferred from the legislation which it has enacted." *Hines v. Davidowitz*, 312 U.S. 52, 75 (1941).

<sup>73</sup> 309 U.S. 414 (1940).

<sup>74</sup> N.Y. Loc. L. No. 25 (1934).

<sup>74</sup> See *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940), and companion cases: *McGoldrick v. Felt & Tarrant Co.*, 309 U.S. 70 (1940); *McGoldrick v. Compagnie Generale*, 309 U.S. 430 (1940).

ing such oil from taxation.<sup>75</sup> No import duty had to be paid, and by regulation no levy, process, or taxation could be had while the oil was in a bonded warehouse. The purpose of all this was clearly shown to be a solicitude for oil companies which had to compete with foreign oil companies for commerce in fuel oil.

Even with all this background, there is no specific congressional prohibition of a sales tax. Relief from an import duty does not compel relief from all other taxes. Nor does a regulation forbidding taxation on oil in a warehouse necessarily hit the tax on the sale made upon removal. Yet the cumulative effect of congressional protection leads to a conclusion that a sales tax cannot be tolerated. At the time Congress acted, it presumably embraced all the likely interferences common then. If so, its failure to anticipate a new tax should not vitiate its primary purpose of freeing oil companies from competitive burdens. Otherwise, state and nation could play ducks and drakes so long as legal ingenuity held out. Once it becomes clear that the federal regulation was aimed at furthering a national policy of competition in foreign commerce,<sup>76</sup> it requires no artificial reasoning or high-flown generalization to recognize the danger of permitting state taxes to thwart the very result Congress sought to obtain.

One can undoubtedly argue that all this talk about congressional purpose relative to fuel oil does not differ one whit from congressional purpose to regulate the manufacture of renovated butter or the registration of aliens. If this is true, it shows that almost any time the Court implies that Congress intended to block state legislation, the result is obtained only by the Court's independent judgment of the desirability of finding such an implication. But if there is a difference in the types, the distinguishing feature must be one which partially eliminates the Court's exercise of its own predilections. Such a distinction can perhaps be spelled out. In the *Gulf Oil* case, the purpose of congressional regulation was to free fuel oil from any burden. State taxes would thwart this. But in both the *Renovated Butter* and *Davidowitz* situations, Congress imposed a burden and the state imposed a similar burden. If the state statute in the *Gulf Oil* case provided that no tax should be levied on fuel oil, a closer analogy to the other cases would exist. Or if state statutes said renovating plants could not be inspected except by state officials or that local aliens could not be

<sup>75</sup> Int. Rev. Code, 53 Stat. 414, 415, 419 (1939), 26 U.S.C.A. §§ 3422, 3430, 3451 (1940); Tariff Act of 1930, 46 Stat. 690 (1931), 19 U.S.C.A. § 1309 (1937); Customs Reg., art. 942 (1931).

<sup>76</sup> It should be noted that a policy of furthering competition is not an argument that can be used in the case of renovated butter. Though part of the purpose of those regulations is to suppress impure products, part of the purpose is probably to discourage the sale of renovated butter. The state statute aids, not hinders, this objective.

registered by anyone, a closer analogy to the *Gulf Oil* case could be found. Still it must be admitted that slight variations in statutes can show a breakdown in this distinction. What, for example, would be the status of a state statute requiring state inspection of bonded fuel oil to prevent its untaxed sale within the state for local consumption, or which taxed fuel for ships' stores if the federal regulations were not complied with? One can agree that some state statutes are more likely to fall than others; one can agree that personal preferences of judges will be less influential in some cases than in others. But so long as the door is open for preferences, lines of demarcation designed to separate those cases where preferences prevail from those where logical implementation of congressional purpose prevails are hard to draw, if not wholly illusory.<sup>77</sup>

#### THE POSSIBILITY OF SOLUTIONS

The question may be raised, of course, whether one is to deplore the fact that in the federal field judicial predilection has raised its head again. In the old days, predilections in the constitutional realm were deplored because no one could offset the results reached. Obviously this is not the case in the federal field where Congress has the last word. Yet there was another objection to the course of events in constitutional cases. So long as people could say with reason that "due process of law is what the Supreme Court likes or dislikes," no one could know what the law was likely to be except by astute delving into the probable predilections of the several justices. That criticism obtains in some measure today. Still another objection can be made. The old fights of state against nation were largely smoke screens to hide an attempt by some private interest to invoke the aid of the Court in combating public regulation. In large measure, this is the case today. Few people take cases to the Supreme Court in order to find the answer to some abstract question of political theory. Usually relief from a burden is sought. The Court may easily be a party to enabling a private interest to escape a state regulation which the Federal Government actually does not oppose. There is less permanence in the Court's decision because Congress can set the matter right, but an interval may exist during which regulation is in abeyance. Finally, one may be less impressed by protestations that the Court no longer toys with legislative policy in the constitutional realm when it looks suspiciously as if that is what happens in the federal field.<sup>78</sup>

<sup>77</sup> It is worth while to add that this general problem exists also when the Court is engaged in construing federal statutes. See Hamilton and Braden, *op. cit. supra* note \* at 1357-67.

<sup>78</sup> Of course, there are those who believe that the Court still dabbles in policy when it measures statutes affecting civil liberties by a standard different from that used for statutes

If, then, the present tendency is to be deplored, the question is whether the tendency is inevitable. Clearly not. The rule could be that state statutes retain their force unless specifically outlawed by federal regulation. But this would be intolerable. Congress could not be asked to anticipate all possible legislative conflicts, nor could it really solve the problem by blanket prohibition. In some instances a tag end proviso nullifying all state statutes "conflicting with this act" would only restate the problem. Some leeway must be left. Judge Hutcheson offered a neat rule in his lower court opinion in the *Renovated Butter* case.<sup>79</sup> He said there must be "such an essential conflict between state and federal laws and regulations as that compliance with the one is defiance of the other."<sup>80</sup> This is definite, and largely free from lurking ambiguity in which a personal preference might be hidden. Yet it would not cover the *Gulf Oil* case. Where federal policy is to avoid all burdens, Judge Hutcheson's rule would apparently throw on Congress the responsibility of specific prohibition.<sup>81</sup>

A long step forward can be made by requiring the United States to take a position. If there is doubt whether federal and state statute should both remain, the executive arm of the United States may be able to provide the answer. In the *Renovated Butter* case, for instance, the Court would have appeared a little unrealistic if the solicitor of the Department of Agriculture had filed a brief disclaiming any conflict. On the other hand, as in the *Davidowitz* case, a brief in opposition to continuation of a state statute serves as evidence of federal disapproval of state power.<sup>82</sup> That the administrative arm offers the opposition is immaterial. Courts have long relied on nonlegislative aids in determining the legislator's intent.<sup>83</sup> Furthermore, federal supremacy in a field need not mean congressional supremacy

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affecting economic and social liberties. See Hamilton and Braden, *op. cit. supra* note \* at 1349-52; Lerner, *Ideas Are Weapons*, 66-68 (1939); Commager, *N.Y. Times*, § 6, p. 16, col. 5 (Mar. 30, 1941).

<sup>79</sup> 116 F. (2d) 227 (C.C.A. 5th, 1941).

<sup>80</sup> *Ibid.*, at 232.

<sup>81</sup> It is only fair to state that Judge Hutcheson protected himself by also interdicting state statutes where "there is in effect an express prohibition against state regulation. . . ." *Ibid.* A lot of leeway can be found in the words "in effect."

<sup>82</sup> In the *Allen-Bradley* case the United States filed a brief denying any conflict. Note also that in the *Brown* case, discussed in note 90 *infra*, the Court requested the Solicitor General to file a brief as *amicus curiae*, and to make an oral argument if he wished.

<sup>83</sup> See, for example, *United States v. American Trucking Ass'ns*, 310 U.S. 534 (1940); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933); Paul, *Use and Abuse of Tax Regulations in Statutory Construction*, 49 *Yale L.J.* 660, 662-63, nn. 12, 13 (1940); Griswold, *A Summary of the Regulations Problem*, 54 *Harv. L. Rev.* 398, 408 et seq. (1941).

alone. The executive has policy-making power, and if the Court really seeks to step away from policy determination it can do no better than use the executive's judgment where Congress has been half silent. This is especially true where, as in the *Renovated Butter* case, the only possible conflict arises in the administration of two ostensibly compatible statutes. Naturally, the executive may have no interest in a self-executing statute such as the Bankruptcy Act. If it is too much to require the Government to take a stand in this situation, it is only because no vital public interest is involved. But notwithstanding an absence of executive concern, the legal officers of the sovereign United States could justifiably be required to state whether the supremacy of Congress is threatened. The Court need not articulate its deference to executive judgment; it can hardly remain aloof from mundane questions of legislative policy without heeding the executive's argument.

Objections galore can be offered to this proposal. One may ask what strength a federal statute has if a supine administrative arm disclaims conflict or if a reactionary executive argues conflict in order to defeat state regulation. That question betrays a belief that the Court should fight to preserve "good" statutes against sabotage by the wrong executive. If the Court should do that much, it ought as well to throw off the cloak of abstinence and devote itself wholeheartedly to the "right and the good" at all times. The last time that happened an Unpacking Bill was forthcoming. Of like quality is the cry that the Court must not abdicate to the executive. But wherein lies the distinction between abdicating to the legislature and abdicating to the executive? If the Court professes to do no more than preserve federal supremacy in the name of Congress, it could do worse than rely on the advice of the sovereign-in-action with an everyday touch on the affairs of government. One may also assert that in so far as Congress has become in some instances a mouthpiece for the Court's policy, reliance on executive advice means in turn that within limits congressional words have their real meaning given to them by the executive. In many ways, perhaps, this is the wave of the future anyway, and certainly there are those who wish it were truer today than it is.<sup>84</sup> Be that as it may, if Congress must be a mouthpiece—and it must where it has not spoken its own mind unequivocally, but has left an ambiguity unresolvable by "pure logic"—it is no difficult choice between Court and executive

<sup>84</sup> See Laski, *The American Presidency* (1940); Herring, *Presidential Leadership* (1940); Clark, *The Function of Law in a Democratic Society*, 9 *Univ. Chi. L. Rev.* 393, 401-403 (1942).

as the competent voice. Administration is legislation in action, and the man who creates the action can better pass on possible impediments than "outsiders without special competence."<sup>85</sup>

#### IS THIS THE GRAND ILLUSION?

There is much to be said for the proposition that regardless of a man's desire not to stir in the wrong cauldron, the atmosphere of the Court, the tradition of power, and the sense of security all tend to encourage the most reluctant to go afield and do what they can to help good government along. The present bench has made a fair bid to withstand the pressure of prestige. Indeed, the auspices under which they took command necessitated retreat. Perhaps the passage of time has weakened resistance and slowly but inevitably the force of the institution has gained the upper hand. If it has, the area is admittedly narrowed, for absolute prohibition on government action has been replaced by prohibition by implications and presumptions that can be overturned. Revolution in the Court still obtains on the broad front. Any retreat which has taken place is in small sectors.

It must be admitted, however, that full retreat is impossible. No matter how specific Congress is, no matter how much reliance is placed on administrative advice, no matter how much a judge leans over backward, decision cannot be certain or questions free from doubt. There is always one inarticulate premise, that full social and economic outlook of a man, which lurks in every ratiocination. No amount of conscious attempt at submergence will ever produce total blackout. "If men were angels," Jerome Frank quotes, "no government would be necessary."<sup>86</sup> They are not. But, as he points out, the really important thing is that fallibility be realized, that men act with an awareness of it.<sup>87</sup> Likewise here, the important question is whether the present justices realize the extent to which they have created new areas in which they can exert power.<sup>88</sup> If they are

<sup>85</sup> *Railroad Com'n of Texas v. Pullman Co.*, 312 U.S. 496, 499 (1941).

<sup>86</sup> "If Men Were Angels" is the title of Judge Frank's recent book on administrative law. The source is the *Federalist* No. 51.

<sup>87</sup> Frank, *If Men Were Angels*, c. 1 (1942).

<sup>88</sup> Strictly speaking this is not a new phenomenon. "Seldom does Congress explicitly negative the further application of state laws. . . . While this issue is referred to the intention of Congress, it is apparent that as a rule it is the court that is doing the intending. . . . The court has drawn its lines where it has drawn them because it has thought it wise to draw them there." Powell, *Supreme Court Decisions on the Commerce Clause and State Police Power, 1910-1914* II, 22 *Col. L. Rev.* 28, 48 (1922); Powell, *Current Conflicts between the Commerce Clause and State Police Power, 1922-1927*, 12 *Minn. L. Rev.* 607, 630-32 (1928). For historical treatment see *Federal Supremacy and the Davidowitz case*, 29 *Geo. L. J.* 755 (1941).

aware of what they do, they have not said so.<sup>89</sup> It is just possible (but hardly probable) that their bold frontal attack on constitutional usurpation of legislative power has created a grand illusion, and the new exercise of legislative power passes unnoticed.

It is at least fair to say that in the past few years the Due Process Clause has ambled right out of the United States Reports, at least so far as economic legislation is concerned; and the Commerce Clause, as a limitation on legislation, is only a shadow of its former self. In their place is a newcomer—the federal field doctrine. This newcomer bears watching. The legislatures of Alabama, Pennsylvania, and New York can testify that he packs a powerful wallop. Other legislatures may soon join the wailing wall.<sup>90</sup> Before the Court was changed, reformers urged that something had to be done because “you can’t teach an old dog new tricks.” To this must be added a new comment: “You can’t keep a new dog from learning the old tricks.”

<sup>89</sup> I suppose that, as in so many things, all is not black and white, and that the sharp lines we attempt to draw must always be blurred in footnotes. Much is being made of *United States v. Bethlehem Steel Corp.*, 62 S. Ct. 581 (1942). Walter Kennedy, that arch critic of the “realists” and “psychologists”—in whose company I suspect he would place me—accepts it that the justices who wrote the principal opinions in that case were intent on keeping the Court from being a superlegislature. Kennedy, *The Bethlehem Steel Case—A Test of the New Constitutionalism I*, 11 *Ford. L. Rev.* 133, 157-62 (1942). On the surface the result in that case is at war with the well-known views of most of the majority justices, and would seem to belie the picture I have sought to draw. I am inclined to doubt, however, that the case need be taken at face value. Rather than believe that the justices felt bound by the *law* I think the majority probably felt that any adequate policy of wartime contract control would be better brought about by warning Congress to act positively, than by leaving the executive to ask the Court to pull the chestnuts out. Be that as it may, I cheerfully concede that most jurists try to be at least a little aloof. This in itself is enough to establish a blurred picture.

<sup>90</sup> California may be next. In *Brown v. Parker*, 39 F. Supp. 895 (Cal. 1941), a statutory three-judge court by a vote of 2-1 invalidated a California proration program for raisins because it burdened interstate commerce. After the argument on appeal, the Supreme Court ordered reargument and requested the parties “to discuss the questions whether the state statute involved is rendered invalid by the action of Congress in passing the Sherman Anti-Trust Act . . . the Agricultural Adjustment Act as amended . . . or any other Act of Congress.” *Parker v. Brown*, 62 S. Ct. 1266, 1267 (1942).