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IMPLIED POWERS AND IMPLIED LIMITATIONS IN CONSTITUTIONAL LAW

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It is a well recognized principle of American constitutional law that the state legislature has all powers not forbidden to it by the national Constitution and by the constitution of the particular state. Expressed in another form, the action of the state legislature is said to be valid and constitutional unless it comes into conflict with some provision of either state or national Constitution. The states possess all powers not granted to the national government by the United States Constitution; and the state legislature is regarded as a sort of residuary legatee, possessing all powers of the state government not forbidden to it by the state constitution or granted by that instrument to some other department or organ of the state.

On the other hand, the national legislature is regarded as one of delegated powers, and is recognized as having only such powers as have been granted to it by the national Constitution. For this reason it is often said that the state constitution is to be interpreted as a limitation upon state legislative power, and the national Constitution as a grant of national legislative power. So far as it restricts state power, either expressly or by conferring power upon the national government, the national Constitution is of course also to be construed as a limitation. Under the accepted rule, therefore, it may be said that state constitutional law deals primarily with limitations, whether state or national, upon state legislative power, and national constitutional law primarily with powers conferred upon the national government, although of course also, but to a more restricted degree, with limitations under which such powers are to be exercised.

The American constitutional theory of legislative powers is still one which proceeds upon the assumption that national constitutional law is a body of principles dealing with granted powers, whereas state constitutional law is one dealing with a broader sphere of powers existing unless they are denied. This theory is one which would apparently lead to a broader interpretation of state powers than of national powers, and it is the purpose of this article to deal with some of the conditions which have caused our constitutional law as applied by the courts to be much more restrictive upon state powers than upon national powers.

The Constitution of the United States performs several functions: (1) It organizes a national government; (2) it confers powers upon that government; (3) it imposes limitations upon that government; and (4) it imposes limitations upon the states. The first of these functions does not require discussion here. That having to do with limitations upon the states may be considered first. The national Constitution as a grant of powers to, and as a limitation upon, the United States may then be considered.

UNITED STATES CONSTITUTION AS A LIMITATION UPON THE STATES

Express limitations upon the states are found in the Constitution of the United States as originally adopted, and in the amendments which resulted from the Civil War. But these express limitations, though of great importance, are relatively less important than the limitations derived from implication. Each power granted to the United States raises a necessary implication of limits upon state power with respect to the same matter, and such implication is, of course, supported by the constitutional declaration of the supremacy of federal powers. Some of the powers expressly granted to the United States are expressly denied to the states, but this is by no means true in all cases. Some of the powers expressly granted to the United States but not expressly denied to the states are of such a character that they can properly be exercised by only one government within the same territory, and such powers are properly held to be exclusively exercisable by the national government.

But some of the powers expressly granted to the United States, and not expressly denied to the states, are of such a nature that the power may at the same time be exercised in part by both state and nation without conflict,[1] and such powers are called concurrent. Such a power is concurrent in its actual exercise only when the United States does not exercise it in full, for if a power is granted to the United States it may be exercised in such a manner as to cover everything

[1] This view was first fully established by *Cooley v. Board of Wardens* (1851, U. S.) 12 How. 298, 13 L. ed. 299.

within the power, leaving no authority in that field for concurrent state action. In a field of concurrent authority the state's power is, therefore, subject to diminution or extinction through the complete exercise of the superior national authority in the same field. The scope of state power here depends not merely upon the terms of the national Constitution, but also upon the extent to which Congress has actually exercised the powers so granted. As tested by national authority an act of state legislation regulating hours of labor on interstate trains may be valid to-day, and the same act may be invalid to-morrow because Congress has itself legislated upon the subject, and this without any change in constitutional text.

As tested by national authority, there are two types of invalidity of state laws. A state act which violates limitations of the United States Constitution, either express or implied, may properly be called unconstitutional in the true sense of that term. But a state legislative act in the field of concurrent power, proper and valid at the time of its passage, may become invalid through subsequent action of Congress. It can hardly be said to be unconstitutional (although this term is employed with reference to it), unless we adopt the somewhat metaphysical argument that it violates a constitutional limitation always present, but only just brought into application by act of Congress.

Whatever terms we may use to describe them, the two things just referred to are different, although in both we are dealing with limitations derived from constitutional texts. In recent years Congress has tended to occupy to a greater and greater extent the field of concurrent powers, and has thus narrowed powers previously exercisable by the states. This is especially true in the field of interstate commerce, and here the more complete exercise of national powers has limited state action in two ways: (1) by occupying a field previously occupied or capable of occupation by state legislation; and (2) in occupying this field, by regulating matters of state commerce, because they are incident to and inseparable from interstate commerce. For example, a state once had power to regulate hours of labor on trains within that state, irrespective of whether such labor was engaged in interstate or purely domestic commerce. But Congress could, and did regulate hours of labor for interstate commerce, and because of the close interrelation between the two types of transactions, its regulation of interstate commerce controls as an incident practically the whole field of purely domestic commerce.[2] Through a more complete exercise by Congress of powers belonging to it, the scope of state power is materially narrowed. Limitations upon powers actually exercisable by states are found perhaps more largely here than in the express limitations of the national Constitution upon state powers, and the recent war has been responsible for further extensions of national

[2] *Erie Railroad Co. v. New York* (1914) 233 U. S. 671, 34 Sup. Ct. 756.

power.[3] The determination of the extent to which national legislative power has been exercised, and therefore of the extent to which state legislative power has been displaced is a matter of statutory construction,[4] though the issues presented are in part constitutional, and the extent of national power to regulate purely domestic commerce as an incident to the regulation of interstate commerce is, of course, a question of pure constitutional law.

From the nature of the federal system and the constitutionally asserted superiority of the national government is derived by implication the limitation that the states may not burden by taxation organs or agencies of the national power, though this implication is supplemented also by another, based upon similar arguments, that the national government may not tax state organs or agencies.[5] These implications may have been desirable but they were not necessary. Full protection of each government from interference by the other would have been obtained by the principle that each might tax agencies of the other, provided it did so at no higher rate than that applicable to others.[6] Yet such a principle would be based upon implications equally as much as the one actually established.

UNITED STATES CONSTITUTION AS A GRANT OF POWER TO THE NATIONAL GOVERNMENT

Let us turn now to the Constitution of the United States as a grant of power to the national government. Powers are granted to Congress in general terms and the powers of other departments are also expressed broadly. The powers so conferred are supplemented by authority in Congress to make "all laws which shall be necessary and

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[3] For example, the national operation of railroad and telegraph lines deprived the states of power as to purely intrastate rates, even though such rates were otherwise separable from interstate rates. *Northern Pacific Ry. v. North Dakota* (1919) 39 Sup. Ct. 502; *Dakota Central Telephone Co. v. South Dakota* (1919) 39 Sup. Ct. 507.

[4] For the difficulties as to interstate commerce presented by the federal employers' liability act and state workmen's compensation laws, see *Seaboard Air Line v. Horton* (1914) 233 U. S. 492, 34 Sup. Ct. 635; and the directly opposing views in *Staley v. Illinois Central R. R.* (1915) 268 Ill. 356, 109 N. E. 342, (1916) 25 YALE LAW JOURNAL, 497, and *Matter of Winfield v. New York Central & H. R. R.* (1915) 216 N. Y. 284, 110 N. E. 614, (1917) 244 U. S. 147, 37 Sup. Ct. 546. Federal legislation in aid of a state policy, such as prohibition, may cause trouble. *United States v. Hill* (1919) 248 U. S. 420, 39 Sup. Ct. 143, (1919) 28 YALE LAW JOURNAL, 501.

[5] See 1 Willoughby, *Constitutional Law* (1910) 92-119.

[6] For a view as to other federal systems different from that of the United States, see *Webb v. Outrim* L. R. [1907] A. C. 81; *Abbott v. City of St. John* (1908, Can.) 4 S. C. R. 597; and 2 Keith, *Responsible Government in the Dominions* (1912) 821-837.

proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department of officer thereof." The interpretation given to this clause by Chief Justice Marshall is the one adhered to by the United States Supreme Court almost consistently:

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[7]

To this quotation may be added one from the opinion of the court, through Justice Strong, in the *Legal Tender Cases*:[8]

"And here it is to be observed it is not indispensable to the existence of any power claimed for the Federal government that it can be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is allowable to group together any number of them and infer from them all that the power claimed has been conferred."

"Implied limitations" have played a very large part in state constitutional construction; "implied powers" have played an equally large part in federal constitutional construction. There is no need to enter here upon a discussion of cases involving the doctrine of implied powers, but, in addition to the cases just quoted from, reference may well be made to *Ex parte Garnett*,[9] where a grant to the federal courts of authority in "all cases of admiralty and maritime jurisdiction" was said to vest power over the same subject in the national legislature.

But national power has received an extended application not merely through judicial employment of the doctrine of "implied powers," but also through a broad and developing interpretation of express powers themselves. Yet it is an accepted doctrine of the United States Supreme Court that the meaning of the Constitution does not change. Mr. Justice Brewer in the case of *South Carolina v. United States*[10] gave expression to the accepted view:

"The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now. Being a grant of powers to a government its language is general, and as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply

[7] *McCulloch v. Maryland* (1819, U. S.) 4 Wheat. 316, 421, 4 L. ed. 579.

[8] (1871, U. S.) 12 Wall. 457, 534, 20 L. ed. 287.

[9] (1891) 141 U. S. 1, 2 Sup. Ct. 840. A contrary view was taken in Australia. *Kalibia v. Wilson* (1910, H. C. of Austr.) 11 C. L. R. 689.

[10] (1905) 199 U. S. 437, 445-449, 26 Sup. Ct. 110.

from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning. Those things which are within its grants of power, as those grants were understood when made, are still within them, and those things not within them remain still excluded."[11]

An earlier and more eloquent statement to much the same effect was that by Chief Justice Waite regarding the postal and commerce powers:

"The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth."[12]

That is, the constitutional power remains the same, but the objects upon which that power is exercised change. It is as if a city were granted power to light its streets at a time when oil was used, the power to light the streets continuing by this grant and extending to the use of gas or electricity. So interstate commerce is said to be the same thing even though the instrumentalities by which it is conducted change. Traffic between New York and Pittsburgh is interstate commerce, whether conducted by canal boat and pack train or by a modern fast train. It is true that the new method makes the number of transactions greater, thus increasing the number and importance of things to which the power attaches; and it is also true that the new method, by uniting more fully interstate and domestic transactions, causes the regulation of interstate commerce to cover as an incident matters of domestic commerce. But these are incidents to new methods that have grown up into the term "interstate commerce" rather than extensions of the term itself. There is much basis for this view, and certainly it is true that if a power were limited by interpretation to the instrumentalities for the exercise of that power at the time it was granted, the power itself would soon be destroyed. Substantially no federal power over interstate commerce would now exist under such an interpretation.

Yet the power cannot be precisely separated from the instrumentalities for its exercise, and an increase in the power itself is actually produced as a result of more co-ordinated instrumentalities employed

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[11] See also statement by the same justice in *Re Debs* (1895) 158 U. S. 564, 591, 15 Sup. Ct. 900; and 1 Willoughby, *op. cit.*, 44-51.

[12] *Pensacola Telegraph Co. v. Western Union Telegraph Co.* (1877) 96 U. S. 1, 9, 24 L. ed. 708.

in the field over which the power extends.[13] And with changing instrumentalities of interstate commerce, increases of national power come not only from more extended development of such commerce, but through some extension by judicial construction of the content of the constitutional language granting power to regulate interstate commerce. The original content of the phrase itself would probably not have included the type of transaction brought within the interstate commerce power by such decisions as *Pensacola Telegraph Company v. Western Union Telegraph Company*[14] and *International Textbook Company v. Pigg.*[15] Here telegraph and postal transactions were brought within the commerce power; and perhaps it was desirable that they should be so brought. Certainly with the interrelation of modern business the court was soon driven from its narrow position in *United States v. Knight Company,*[16] where on the ground that manufacture was not commerce, the power to regulate commerce was said not to permit regulation of a purely domestic combination of manufacturers. That the power to regulate interstate commerce includes a power to control things not themselves interstate commerce, if such things affect such commerce, is now fully recognized.[17] The point suggested here is not one as to the desirability nor as to the logical need for the present view of the court. But the question is whether present national power over interstate commerce has not come in part through an extended interpretation of the constitutional language itself, as well as through the growth of new methods of conducting that commerce. Has the court been a mere passive or quasi-mechanical instrument registering the effect of new methods, or has it been an active force in extending constitutional language?[18]

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[13] Or through a greater use of such instrumentalities. Is the development of the parcel post a growing up of new phenomena within the term "postal power," or is it an actual extension of what this power was at first supposed to include?

[14] *Supra.*

[15] (1910) 217 U. S. 91, 30 Sup. Ct. 481. It may be possible that at some time in the future insurance will be brought within "interstate commerce." The recent case of *New York Life Ins. Co. v. Deer Lodge County* (1913) 231 U. S. 495, 34 Sup. Ct. 167, did not necessarily involve the issue as to whether Congress may control insurance, and much of the discussion there which excludes insurance from interstate commerce was unnecessary for the disposition of the issue presented; should the court's view change, this decision would probably make no great difficulty.

[16] (1895) 156 U. S. 1, 15 Sup. Ct. 249.

[17] *Northern Securities Co. v. United States* (1904) 193 U. S. 197, 24 Sup. Ct. 436; *Standard Oil Co. v. United States* (1911) 221 U. S. 1, 31 Sup. Ct. 502; *United States v. American Tobacco Co.* (1911) 221 U. S. 106, 31 Sup. Ct. 632. Justice White's view in the *Northern Securities* case would, if adopted, have materially crippled national power.

[18] The discussion here relates to the changing of the content of constitutional language, so far as that change leads to an increase of national power, and this is the most important aspect of this subject with respect to the national govern-

With respect to "admiralty and maritime jurisdiction" the growth of new forms of navigation has increased the number of things to which national power applies, but it is perhaps clear also that the content of the power itself was enlarged by judicial action. Under the case of *The Thomas Jefferson*[19] this jurisdiction was said to extend only to tidal waters. This position was later expressly rejected, and admiralty jurisdiction held to apply to all navigable waters.[20] Perhaps an accepted legal theory might say that the earlier view never was law and that the later view was law from the beginning, but however this may be, the fact of importance here is that a narrow view of the court at one time was replaced by a broader view at another, and that the accepted extent of the power results from this broader and later judicial construction.[21]

The national power of taxation furnishes another illustration of the possible extension of the content of constitutional language. The taxing power of the national government has from the beginning been regarded as one that may incidentally accomplish purposes other than

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ment. However, changes in the meaning of constitutional words and phrases through judicial construction are not uncommon with respect to limitations in both state and national Constitutions. "Due process of law" is a striking illustration of this fact. See remark of Winslow, C. J., in *Borgnis v. Falk Co.* (1911) 147 Wis. 327, 349, 133 N. W. 209. What constitutes a direct tax, as that term is used in the Constitution of the United States, has had several variations in actual interpretation. What constitutes an "export tax" under the national Constitution has received a somewhat narrow, though perhaps not a changing, interpretation. *United States v. Hvoslef* (1915) 237 U. S. 1, 35 Sup. Ct. 459. Trial by jury has received a similarly narrow interpretation. *Slocum v. New York Life Ins. Co.* (1913) 228 U. S. 364, 33 Sup. Ct. 523.

There has been some variation at least in point of view as to what constitutes a "contract," whose obligation is protected from impairment by state legislative action; had an issue presented itself in the earlier days, lottery charters would pretty clearly have come under this protection, as they actually did to some extent through state decisions in Delaware and Missouri. *State v. Phalen & Paine* (1842, Ct. Err. & App. Del.) 3 Harr. 441; *State v. Miller* (1872) 50 Mo. 129. But they were held not to be contracts when the issue presented itself to the United States Supreme Court in 1879. *Stone v. Mississippi* (1880) 101 U. S. 814, 25 L. ed. 1079. Tax exemptions were held to be contracts at an early day, but the propriety of this ruling was later doubted, though not overruled, and a good deal of the earlier protection withdrawn through strictness of attitude against those seeking to set up tax exemptions as contracts. See *The Delaware Railroad Tax* (1873, U. S.) 18 Wall. 206, 21 L. ed. 888. Punishments which may have been regarded as proper in 1787 would probably now be held to be "cruel and unusual," not because of any change in the words of the Constitution, but because of a changed attitude of the community and of the courts. A change has thus apparently come in the meaning of the words themselves.

[19] (1825, U. S.) 10 Wheat. 428, 6 L. ed. 358.

[20] *Genesee Chief v. Fitzhugh* (1851, U. S.) 12 How. 443, 13 L. ed. 441.

[21] See also the statement of Justice Clifford in *The Lottawanna* (1874, U. S.) 21 Wall. 558, 583, 22 L. ed. 654.

that of producing revenue. But in *McCray v. United States*[22] a tax was sustained the purpose of which was to accomplish under the guise of taxation a result not directly within the power of Congress; and this decision has been responsible for several laws (tax laws in form) intended not to raise revenue, but to destroy or regulate particular industries: the tax upon phosphorous matches, of April 9, 1912;[23] the cotton futures tax, of August 18, 1914;[24] the act for the control of traffic in habit-forming drugs, of December 17, 1914;[25] and the act taxing articles manufactured by the use of child labor, of February 24, 1919.[26] Undèr each of these laws, the purpose is not to raise revenue, but under the guise of a taxing power belonging expressly to Congress to exercise a control over matters not otherwise within national power. It may be said that this is not an extension of congressional power through judicial action, yet the *McCray* case is the basis for the power.

Judicial construction of federal powers in Australia shows what a difference in the content of constitutional language may be produced by judicial action. In Australia a use of the Commonwealth taxing power for other than revenue purposes was materially restricted by an interpretation which may be summed up in the language of Chief Justice Griffith:

"*Prima facie,* the selection of a particular class of goods for taxation by a method which makes the liability to taxation dependent upon conditions to be observed in the industry in which they are produced is as much an attempt to regulate those conditions as if the regulation were made by direct enactment."[27]

The Commonwealth Parliament, under a power to make laws with respect to "trade-marks," legislated as to the registration and use of trade-marks of labor unions. A majority of the Commonwealth High Court said that the term "trade-mark" must be given the meaning it had when the constitution was adopted in 1900, although it was agreed that the power extended to new developments relating to the same subject-matter; but what was the same subject-matter was narrowly construed. "Trade-marks" were defined restrictively, and upon somewhat questionable evidence workers' marks were held not to be within the term as used in 1900.[28] Similarly narrow views have

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[22] (1904) 195 U. S. 27, 24 Sup. Ct. 769. See also the case of *Veazie Bank v. Fenno* (1869, U. S.) 8 Wall. 533, 19 L. ed. 482.

[23] 37 U. S. Stat. at L., 81.

[24] 38 *ibid.*, 693.

[25] 38 *ibid.*, 785. See *United States v. Jin Fuey Moy* (1916) 241 U. S. 394, 36 Sup. Ct. 658, and *United States v. Doremus* (1919) 249 U. S. 86, 39 Sup. Ct. 214, (1919) 28 YALE LAW JOURNAL, 599.

[26] U. S. Comp. St. 1919 Supp., secs. 6336-7/8a-6336-7/8h.

[27] *The King v. Barger* (1908, H. C. of Austr.) 6 C. L. R. 41, 73.

[28] *Attorney General for New South Wales v. Brewery Employés Union* (1908, H. C. of Austr.) 6 C. L. R. 469.

been taken in other cases;[29] and the emphasis of Australian interpretation may be said to be one limiting rather than extending powers of the federal government.[30] That this narrower view has had the support of the people of Australia is shown by the fact that popular referenda have twice rejected proposed constitutional amendments seeking to give to the Commonwealth powers denied as a result of strict interpretation.

But the emphasis of the United States Supreme Court has been upon national powers, whether extended through implication or by increasing the content of constitutional language; and this emphasis has been a rather consistent one from the beginning. The period of Taney's chief-justiceship has frequently been spoken of as one in which a narrow view was taken of national powers, but though numerous dicta during this period assert narrow views,[31] there is little of actual decision to this effect. Some important cases did moderate an unnecessary strictness in interpreting national limitations upon state action, but these did not narrow national powers, but rather made it possible for the states to exercise powers in fields where the national government could not act.[32] In fact one of the great extensions of national power, that as to admiralty jurisdiction, came under Taney's chief-justiceship, by a reversal of the court's action under Chief Justice Marshall. The court is an organ of the national government, associated with that government, and has in the long run shown a disposition to support national powers.[33]

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[29] *Huddart, Parker & Co. v. Moorehead* (1908, H. C. of Austr.) 8 C. L. R. 330; *State of New South Wales v. Commonwealth* (1915, H. C. of Austr.) 20 C. L. R. 54.

[30] A similar attitude toward powers of the Commonwealth government has also been taken by the Judicial Committee of the English Privy Council. *Webb v. Outrim, supra. Attorney General v. Colonial Sugar Refining Co.*, L. R. [1914] A. C. 237. Perhaps a changing view is indicated by *Australian Steamships v. Malcolm* (1914, H. C. of Austr.) 19 C. L. R. 298; *The King v. Bernasconi* (1915, H. C. of Austr.) 19 C. L. R. 629; *Farey v. Burnett* (1916, H. C. of Austr.) 21 C. L. R. 433; *Stemp v. Australian Glass Manufacturers Co.* (1917, H. C. of Austr.) 23 C. L. R. 226; *Pankhurst v. Kiernan* (1917, H. C. of Austr.) 24 C. L. R. 120; although the liberality in two of these cases is traceable to the exercise of war powers.

[31] See Corwin, *National Supremacy* (1913) 99-120.

[32] *Charles River Bridge v. Warren Bridge* (1837, U. S.) 11 Pet. 420, 11 L. ed. 773, is a case of this type.

[33] Of course powers of the United States have been narrowly interpreted in some cases. *Hepburn v. Griswold* (1870, U. S.) 8 Wall. 603, 19 L. ed. 513; *Employers' Liability Cases* (1907) 207 U. S. 463, 28 Sup. Ct. 141; *Adair v. United States* (1909) 208 U. S. 161, 28 Sup. Ct. 277; *Keller v. United States* (1909) 213 U. S. 138, 29 Sup. Ct. 470; but *Hepburn v. Griswold, supra,* was almost immediately overruled; the ground lost in the *Employers' Liability* cases was largely recovered by the construction of interstate commerce under the second employers' liability act; and the view of the *Adair* case as to interstate commerce is likely to disappear if it is not already rejected by *Wilson v. New*

The emphasis upon powers of the national government has naturally led constitutional limitations to be less important in national than in state affairs. The national Constitution is a brief and general document, and limitations upon Congress implied from it have for this reason been relatively unimportant. Reference has already been made to the fact that the national government may not tax organs of the state government; the limitation here is implied from the nature of the federal system.

At one time the view seemed likely to be adopted in American constitutional law that the states have reserved to them a definite *residuum* of power, which limits the grant of national power,[34] i. e., that a power granted to the national government without reservation, as for example, to regulate interstate commerce, was not a complete power over this matter but a power to be exercised only in so far as it did not trench upon an equal state power to regulate purely domestic commerce. But this view did not prevail, and the fully accepted doctrine was well stated recently by Justice Hughes:

"This reservation to the States manifestly is only of that authority which is consistent with and not opposed to the grant to Congress. There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere."[35]

Under constitutional language substantially similar to that of the United States, the Australian High Court has taken a different view as to the relationship between granted national powers and reserved

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(1917) 243 U. S. 332, 37 Sup. Ct. 298, (1917) 26 YALE LAW JOURNAL, 496. Cases like *United States v. Dewitt* (1870, U. S.) 9 Wall. 41, 19 L. ed. 593, and the *Trade Mark* cases (1879) 100 U. S. 82, 25 L. ed. 550, are not ones of narrow interpretation, but are merely instances of Congressional action in fields where the constitution had conferred no power upon it.

[34] See Corwin, *op. cit.*, 99-120, and expressions in majority opinion in *Hammer v. Dagenhart* (1918) 247 U. S. 251, 38 Sup. Ct. 529. For example, the interstate commerce power of Congress must find its operation within the territory of states. Does this fact limit the interstate commerce power, as contrasted with the power over foreign commerce, which to a much less extent controls operations within the territory of states?

[35] *Minnesota Rate Case* (1913) 230 U. S. 352, 399, 33 Sup. Ct. 729.

state powers. Speaking of a federal act based upon a general power to regulate "trade-marks," Chief Justice Griffith said that a power to regulate its internal trade and commerce was reserved to the states and

"this as fully and effectively as if sec. 51 (i.)[36] had contained negative words prohibiting the exercise of such powers by the Commonwealth Parliament, except only, in the words of *Chase,* C. J., 'as a necessary and proper means of carrying into execution some other power expressly granted.' It follows that, in order to warrant such interference with the trade and commerce of a State as would be authorized by the extended meaning claimed for the words in question, it must be shown that such a power of interference is a necessary and proper means of carrying into execution the power to legislate as to trade marks. If such an invasion of the exclusive power of the States was intended, it is strange that the power should have been conferred in language which seems at first sight so inadequate for the purpose."[37]

A reservation to the states of all powers not granted to the Commonwealth was held to limit and qualify the terms of an express and unqualified grant of power to the Commonwealth. But in the United States no such limitation of national powers exists; superior national powers limit the powers of the state; and clearly granted powers of the national government are in no way limited through implication, or otherwise, by a general reservation to the states of powers not so granted.

Perhaps the whole principle of separation of powers in the federal system should also be referred to here, as an implied limitation, but this principle has, on the whole, never received so wide an extension in federal as in state constitutional law.

In only a few cases have limitations upon national legislative power been implied from grants of power to the national government, though this is quite common in state constitutional construction. The first and most important case of federal limitation derived by implication from a grant of power is *Marbury v. Madison.*[38] The Constitution of the United States enumerates the cases falling within the judicial power and provides:

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

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[36] This clause grants to the Commonwealth Parliament power to legislate with respect to "trade and commerce with other countries, and among the states."

[37] *Attorney General for New South Wales v. Brewery Employés Union, supra.*

[38] (1803, U. S.) 1 Cranch, 137, 174, 2 L. ed. 60.

Chief Justice Marshall said, for the court, that this confined the original jurisdiction of the court to the cases specified, and that:

> "Affirmative words are often in their operation, negative of other objects than those affirmed; and in this case a negative or exclusive sense must be given to them or they have no operation at all."

Was it necessary to construe the enumeration of "ambassadors, other public ministers and consuls, and those in which a state shall be a party" in a negative sense as forbidding any other original jurisdiction in the Supreme Court? The judicial clauses under discussion do several things: (1) enumerate all cases of federal judicial power; (2) specify certain cases within the general grant of judicial power in which the Supreme Court shall have original jurisdiction, by virtue of constitutional provision, without need for congressional action; (3) provide an appellate jurisdiction of the Supreme Court in all other cases, with such exceptions as Congress may make. How may Congress make exceptions as to this appellate jurisdiction? Clearly by not providing at all for the exercise of jurisdiction in certain cases or by providing for an original jurisdiction in the Supreme Court in cases excepted from the appellate jurisdiction.[39] This broader interpretation favorable to congressional power is as tenable as the view taken.

If the affirmative words conferring original jurisdiction were to negative "other objects than those affirmed," then (a) the United States Supreme Court can have original jurisdiction only in the cases enumerated, as held in *Marbury v. Madison*; and (b) no other court could take original jurisdiction in these cases. But when the view of *Marbury v. Madison* was urged in support of (b), the court, through Chief Justice Marshall, rejected it, saying:

> "It is, we think, apparent that to give this distributive clause the interpretation contended for, to give to its affirmative words a negative operation, in every possible case, would, in some instances, defeat the obvious intention of the article."[40]

He sought to distinguish this view from that of *Marbury v. Madison* by saying that in that case the affirmative words would have had no meaning unless given an exclusive sense, but this is not true for the words under consideration in *Marbury v. Madison* given a merely affirmative sense would have accomplished the result mentioned in (2) of the paragraph preceding this one.

In the recent case of *Brushaber v. Union Pacific Railroad*[41] it was

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[39] For an elaboration of the point here under consideration, see Corwin, *Doctrine of Judicial Review* (1914) 4-6.

[40] *Cohens v. Virginia* (1821, U. S.) 6 Wheat. 264, 398, 5 L. ed. 257.

[41] (1916) 240 U. S. 1, 36 Sup. Ct. 236.

urged that a federal income tax could not make certain exemptions, because the Sixteenth Amendment authorized taxes on incomes "from whatever source derived," but this contention was dismissed without serious consideration. Perhaps reference should also be made to suggestions occasionally indulged in that a national power may be extended further under certain conditions than under others. In the *Legal Tender Cases*[42] there is a suggestion that the condition of war may extend national power to issue legal tender notes, though perhaps what is meant is that the constitutional power to conduct war is at such a time an added power for the support of such action.[43] Implied limitations, as already suggested, have played a small part in constitutional discussions as to the power of the national government. We may now turn to express limitations upon national power.

UNITED STATES CONSTITUTION AS A LIMITATION UPON NATIONAL POWERS

The express limitations in the Constitution of the United States upon national power are more numerous than the express limitations in the same document upon state power. Yet the decisions holding federal statutes unconstitutional on the basis of these express restrictions have not been numerous, nor, with a few exceptions, have they materially interfered with powers which the national government desired to exercise. Perhaps the one case that made most trouble is that of *Pollock v. Farmers' Loan and Trust Company*,[44] in which - prohibition of direct taxes without apportionment was held to prevent a general income tax, but this view was well on its way toward disappearance[45] before the Sixteenth Amendment was adopted. The prohibition of export taxes has also been applied somewhat narrowly, although not so as to create very great difficulty.[46] An interpretation recently given to the guaranty of jury trial is likely to prove troublesome;[47] but the general guaranties in criminal cases have not proven materially burdensome upon national power. Perhaps from this statement an exception should be made as to the guaranty against self-in-

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[42] (1871, U. S.) 12 Wall. 457, 541, 20 L. ed. 287.

[43] Of course national power was in many respects employed, irrespective of constitutional restraints, during the Civil War, *Ex parte Milligan* (1866, U. S.) 4 Wall. 2, 18 L. ed. 281, to the contrary notwithstanding. For recent denials of an enlargement of national power because of emergency, see majority and dissenting statements in the Adamson law case. *Wilson v. New, supra.* Irrespective of the denial in the majority opinion, the emergency seems to have been a decisive factor in the case.

[44] (1895) 157 U. S. 429, 15 Sup. Ct. 673, (1895) 158 U. S. 601, 15 Sup. Ct. 912.

[45] *Flint v. Stone Tracy Co.* (1911) 220 U. S. 107, 31 Sup. Ct. 342.

[46] *United States v. Hvoslef, supra.*

[47] *Slocum v. New York Life Ins. Co., supra.*

crimination, but the constitutional defect pointed out in *Counselman v. Hitchcock*[48] was remedied without loss in the effectiveness of the legislation, and federal power is free, under later decisions, to deal with corporate actions without being limited by this guaranty.

Hammer v. Dagenhart[49] in holding unconstitutional federal child labor legislation, is evidence of a somewhat narrow attitude in interpreting the commerce clause; but the result sought in vain under the commerce power in this case is likely to be accomplished under a broadly construed taxing power.[50]

So far as the broadest express constitutional restriction is concerned, that of "due process of law" in the Fifth Amendment, *Adair v. United States*[51] stands out as a decision restrictive of federal power. The *Adair* case was based in large part on the ground that the thing regulated was not within federal power over interstate commerce, and it is doubtful whether the "due process" standard of that case would be applied to restrict an action of Congress clearly within its granted powers. Under any circumstances the *Adair* case is of doubtful authority since the decision of *Wilson v. New* sustaining the Adamson law.[52]

The relatively small degree of limitation through judicial construction exercised over Congress as a result of express restrictions in the Constitution of the United States, raises the whole question as to the relationship between powers granted to the United States government and constitutional limitations upon that government. Powers and limitations appear in the same instrument. Shall limitations be given equal weight with granted powers? That equal weight is in substantially all cases to be attached to powers and limitations was said in several cases in which Justice Brewer rendered the opinion of the court. In *Fairbank v. United States*,[53] he said:

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[48] (1892) 142 U. S. 547, 12 Sup. Ct. 195.

[49] *Supra.*

[50] See Child labor legislation under the taxing power, U. S. Comp. St., 1919 Supp., secs. 6336-7/8a-6336-7/8h. This legislation seems likely to be sustained by the United States Supreme Court. It is an interesting fact that three of the Judges who were with the majority in *Hammer v. Dagenhart, supra,* dissented in the case upholding the use of the taxing power with respect to narcotics, *United States v. Doremus, supra,* both decisions being by a bare majority of the court.

[51] *Supra.*

[52] *Wilson v. New, supra.* But see *Coppage v. Kansas* (1915) 236 U. S. 1, 35 Sup. Ct. 240. Due process as a narrow restriction was employed in *Dred Scott v. Sandford* (1857, U. S.) 19 How. 393, 15 L. ed. 691, and *Hepburn v. Griswold, supra;* but the view of these cases has been rejected in *Juilliard v. Greenman* (1884) 110 U. S. 421, 4 Sup. Ct. 122, and some later cases to be referred to in this discussion.

[53] (1901) 181 U. S. 283, 21 Sup. Ct. 648. See also Justice Brewer's expressions in *Kansas v. Colorado* (1907) 206 U. S. 46, 27 Sup. Ct. 655; and in *Keller v. United States, supra.*

"If powers granted are to be taken as broadly granted and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution; in other words, if the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed and that language of restriction is to be narrowly and technically construed."

But this quotation does not appear to state the doctrine applicable to all cases of federal powers and limitations. When a power is expressly granted, as is that of taxation, and then express limitations upon that power are imposed, as with respect to direct and export taxes, it is clear that the power cannot be exercised except subject to these limitations.[54] This was the case of *Fairbank v. United States* but it raises no presumption in favor of or against strict interpretation of the express limitation.

Some of the express limitations are so definite that it is clear they are limitations upon Congress in all its actions, without restricting themselves to any one power. So Congress may not in the exercise of any of its express or implied powers disregard limitations with respect to *ex post facto* laws, bills of attainder, searches, seizures, jury trial, and self-incrimination, although even to this statement an exception must be made as to the insular possessions.

In all of the cases just referred to, the limitations accompany the powers to the full extent to which the powers may themselves be exercised. The real problem presents itself where a power is granted generally, as that of taxation or commerce, and a general limitation such as that of "due process of law" in the Fifth Amendment, is imposed. Conditions may conceivably present themselves in which a power generally granted may be limited to a narrower scope than

[54] Perhaps an apparent exception to this statement should be indicated. In the *Head Money Cases* (1884) 112 U. S. 580, 596, 5 Sup. Ct. 247, Justice Miller said for the court: "If this is an expedient regulation of commerce by Congress, and the end to be attained is one falling within that power, the act is not void, because, within a loose and more extended sense than was used in the Constitution, it is called a tax. In the case of *Veazie Bank v. Fenno,* 8 Wall. 533, 549, the enormous tax of eight per cent. per annum on the circulation of State banks, which was designed, and did have the effect, to drive all such circulation out of existence, was upheld because it was a means properly adopted by Congress to protect the currency which it had created, namely, the legal-tender notes and the notes of the national banks. It was not subject, therefore, to the rules which would invalidate an ordinary tax pure and simple." This means nothing more than that two congressional powers may unite to sustain an act and that an act within the power of Congress will not be declared invalid because Congress has designated one power rather than another as its basis. But see 1 Willoughby, *op. cit.,* 61-62.

that of the words of the grant, if the general limitation be held to restrict the grant in all cases. Several things unite in such a case to suggest that the power should be regarded as superior to the limitation: (1) The government is created to exercise powers, and limitations are an incident to governmental powers. (2) There is an express provision as to powers necessary and proper to carry into execution other powers granted; i. e., powers by implication are expressly recognized. There is no clause seeking to broaden limitations.[55]

The court in certain cases has taken the view that general powers are superior to general limitations. In *Juilliard v. Greenman*,[56] Justice Gray rendered an opinion for the court upholding the power of Congress to issue legal tender notes, and, sustaining this power largely on the basis of an expressly granted authority "to borrow money on the credit of the United States," said:

"If, upon a just and fair interpretation of the whole Constitution, a particular power or authority appears to be vested in Congress, it is no constitutional objection to its existence, or to its exercise, that the property or the contracts of individuals may be incidentally affected."

With respect to "due process" in the Fifth Amendment as a limitation upon the interstate commerce power, the statements of the court are somewhat hesitant. In *Addyston Pipe and Steel Company v. United States*,[57] the court said through Justice Peckham:

"On the contrary, we think the provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution, and that the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally and collaterally, regulate to a greater or less degree commerce among the States."[58]

Adair v. United States has sometimes been referred to as if it asserted a superiority of "due process" over the commerce clause, but this is not so, for this case decides that the power sought to be exercised was not an interstate commerce power, and that it deprived of "due process." A part of the opinion of Justice Harlan brings out this fact:

"But it is suggested that the authority to make it a crime for an agent or officer of an interstate carrier, having authority in the premises from

[55] In the *Fairbank* case Justice Brewer suggests this second point as a reason for applying limitations fully as against powers, but the correct view would seem to be directly opposed to this.

[56] *Supra*, 448.

[57] (1899) 175 U. S. 211, 229, 20 Sup. Ct. 96.

[58] The somewhat vague statement in the *Lottery Case* (1903) 188 U. S. 321, 363, 23 Sup. Ct. 321, may indicate a different view. See also *United States v. Joint Traffic Association* (1898) 171 U. S. 505, 571, 19 Sup. Ct. 25; *United States v. Delaware and Hudson Co.* (1908) 213 U. S. 366, 416, 29 Sup. Ct. 527.

his principal, to discharge an employé from service to such carrier, simply because of his membership in a labor organization, can be referred to the power of Congress to regulate interstate commerce, without regard to any question of personal liberty or right of property arising under the Fifth Amendment. This suggestion can have no bearing in the present discussion unless the statute, in the particular just stated, is within the meaning of the Constitution a regulation of commerce among the States."[59]

There is an intimation here that if the matter were one of interstate commerce the "due process" limitation might not defeat it.

With respect to taxation, the court, through Justice White, said in the *McCray* case, that the Fifth Amendment "does not withdraw or expressly limit the grant of power to tax conferred upon Congress by the Constitution;" but he adds that it would be the duty of the court to hold an act improper as not an exercise of the delegated taxing power

"where it was plain to the judicial mind that the power had been called into play not for revenue, but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests."[60]

The act would then be invalid, apparently, not because it violated the Fifth Amendment, but because it was not an exercise of the granted taxing power. In the recent case of *Brushaber v. Union Pacific Railroad Company*,[61] the court through Chief Justice White was more specific:

"So far as the due process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring on the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause. . . . And no change in the situation here would arise even if it be conceded, as we think it must be, that this doctrine would have no application in a case where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment. . . ."

Chief Justice White's statement seems a denial of due process as a limitation and at the same time a definition of the grant of taxing power in such a manner as to include the limitation just rejected; but it and the other statements here referred to, whatever may be their value as enunciations of legal doctrine, are important as indicating

[59] *Supra*, 176.
[60] *McCray v. United States, supra*, 63, 64.
[61] *Supra*, 24, 25.

the emphasis of the United States Supreme Court upon federal powers rather than upon federal limitations. Constitutional limitations upon the national government have not been enlarged by judicial implication, and have not materially burdened the exercise of powers granted to that government.[62]

ENFORCEMENT OF UNITED STATES AND STATE CONSTITUTIONAL LIMITATIONS AGAINST THE STATES

Returning now to limitations upon the states found in the national Constitution, the most striking distinction from limitations upon the federal government is that all state powers are clearly and distinctly inferior to all federal limitations. No state power may be exercised in opposition to federal limitations upon the states, whether such limitations be express or whether they result from implication or from more complete federal legislative occupation of the field of concurrent powers. In judicial application of such limitations there is none of the balancing that results from an interpretation of powers of and restrictions upon one and the same government. This, coupled with the fact that state legislatures are numerous and not always well advised in their measures, has naturally led to great pressure upon the United States Supreme Court to apply constitutional limitations strictly as against the states; and this pressure could not fail to produce a judicial emphasis upon restrictions of state power.[63]

Of express limitations, the contract clause was the one which before the Civil War received most of extension and application. More recently the "due process of law" and "equal protection of the laws" limitations of the Fourteenth Amendment have been the ones urged most persistently in attacks upon state laws before the United States Supreme Court. This court has in the great bulk of these cases been liberal in upholding state action; as is strikingly illustrated by the

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[62] For a classification and discussion of cases in which the United States Supreme Court has held acts of Congress invalid, see Moore, *The Supreme Court and Unconstitutional Legislation* (1913) 77-127 (Columbia University Studies in History, etc. Vol. 54.) For a recent statement that powers are subject to limitations, see Day, J., *dissenting*, in *Wilson v. New, supra,* 366.

[63] *Hans v. Louisiana* (1890) 134 U. S. 1, 10 Sup. Ct. 504, should be referred to as a case in which implications favorable to state power were raised in the construction of a federal constitutional provision. Among recent cases of a similar character previously referred to, see *United States v. Knight Co., supra,* and *Keller v. United States, supra.*

In the *Slaughter House Cases* (1873, U. S.) 16 Wall. 36, 21 L. ed. 394, the privileges and immunities clause was practically read out of the Fourteenth Amendment, in order to preserve state power, but the ground so surrendered was later regained through a broadening construction of "due process" and "equal protection."

recent case of *Arizona Copper Company v. Hammer*;[64] though four important cases stand out as exceptions from this statement: *Lake Shore and Michigan Southern Railway Company v. Smith*;[65] *Connolly v. Union Sewer Pipe Company*;[66] *Lochner v. New York*;[67] and *Coppage v. Kansas*.[68] With reference to railroad rates also, the detailed control over state action exercised by the United States Supreme Court has caused delays and inconvenience, but the judicial revisory power has been cautiously exercised. Yet it may be said that, in actual fact, due process of law in the Fourteenth Amendment as a limitation upon states enforced by the United States Supreme Court has meant more as a constitutional restriction, than due process of law in the Fifth Amendment as a limitation upon the United States.

However, during a period of expanding federal legislation, the most serious restrictions upon previously exercised state power have come through the more complete occupation by Congress of the field of concurrent powers; through the fact that federal power in itself constitutes a limitation upon state power, whereas there are no reserved state powers that limit in any way the full occupation by Congress of the field of granted national powers. Perhaps it may also be suggested that express national limitations on state power sometimes directly aid federal powers. An instance of this will be found in the recent case of *Truax v. Raich*,[69] where an act discriminating against aliens and therefore likely to lead to difficulties in the foreign policy of the national government, was held invalid as a violation of "equal protection of the laws" guaranteed by the Fourteenth Amendment. It is also true that federal constitutional limitations upon state power are enforced not only by the federal courts, but also by the state courts themselves; and state judicial application of federal limitations has often been more restrictive of state powers than has federal judicial enforcement.

After all, however, state judicial enforcement of state constitutional limitations has been more restrictive of state powers than has been either state or federal judicial enforcement of federal limitations upon the states. The principle that the state legislature has all powers not

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[64] (1919) 39 Sup. Ct. 553, with four dissents. For a detailed statement, which may to some extent be an over-statement of the attitude of the court, see Warren, *The Progressiveness of the United States Supreme Court* (1913) 13 Col. L. Rev. 294.

[65] (1899) 173 U. S. 684, 19 Sup. Ct. 565.

[66] (1902) 184 U. S. 540, 22 Sup. Ct. 431. But see *International Harvester Co. v. Missouri* (1914) 234 U. S. 199, 34 Sup. Ct. 859.

[67] (1905) 198 U. S. 45, 25 Sup. Ct. 539. But see *Bunting v. Oregon* (1919) 243 U. S. 426, 37 Sup. Ct. 435.

[68] *Supra.*

[69] (1915) 239 U. S. 33, 36 Sup. Ct. 7. Of course, certain federal prohibitions upon the states are clearly intended to keep the states out of fields of express national power.

forbidden by limitations in the texts of constitutions is theoretically a principle of liberal interpretation in favor of legislative powers, but when it becomes (as it soon became) through judicial application a rule that every state constitutional provision must be interpreted as limiting the legislature, it has developed into one of strict construction against legislative authority, and not only this, but with the increased length of state constitutions, such a rule constructs limitations out of provisions inserted not primarily for such a purpose.

With respect to powers of state legislatures, the most important judicial development in this country has been that which has resulted in the doctrine of implied limitations. The doctrine of implied limitations upon state legislative power was applied in some extreme cases before 1850, but was not of great influence until after 1860, and was in fact denied by the Pennsylvania Supreme Court in 1856.[70] After 1860 denials of the doctrine of implied limitations are found most frequently in dissenting opinions.

Of course, some implications are almost necessary and flow properly from the language of the constitution. A few constitutional provisions are so explicit that implications cannot be well drawn from them. Some are so general that they may be made to mean what the court desires, and implications are therefore unnecessary. Constitutions in the main must speak briefly, and much must therefore be left to judicial construction. So when a constitution guarantees jury trial, the term "jury" must be given some meaning, and may be properly held to require a jury of twelve. However, limitations drawn not from the precise text of a constitutional provision are capable of ready extension. So, for example, a provision that elections shall be by ballot may perhaps properly imply a requirement of secret ballot,[71] but from this provision there seems no necessary implication of a right to vote for one not on the ballot, where the method of getting upon the ballot is easy.[72] An implication of right in a candidate to have his name appear more than once upon the ballot seems so remote as to be almost ridiculous.[73]

It may properly be said that since the early part of the nineteenth century, the doctrine usually applied by the state courts has been that every provision in a state constitution is to be construed as limiting the state government to the furthest extent that may be possible. Reference has just been made to the possible limitations that may be

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[70] *Commonwealth v. Maxwell* (1856) 27 Pa. St. 444, 457-458.

[71] *Williams v. Stein* (1871) 38 Ind. 89; *State ex rel. Birchmore v. Board of Canvassers* (1907) 78 S. C. 461, 56 S. E. 145.

[72] *State ex rel. Attorney General v. Dillon* (1893) 32 Fla. 545, 14 So. 383; *Littlejohn v. People* (1912) 52 Colo. 217, 121 Pac. 159.

[73] *Matter of Hopper v. Britt* (1911) 203 N. Y. 144, 96 N. E. 371, 37 L. R. A. (N. S.) 825, note; and *People ex rel. McCormick v. Czarnecki* (1914) 266 Ill. 372, 107 N. E. 625.

drawn from a provision that elections shall be by ballot. This illustration is by no means exceptional, but can be duplicated with respect to a whole series of state constitutional provisions. The case of *Scott v. Flowers*[74] presents a good illustration of the manner in which implications may be drawn from a constitutional statement of legislative power. In this case the court had under consideration a constitutional provision that

"the legislature may provide by law for the establishment of a school or schools for the safe keeping, education and employment of all children under the age of sixteen years, who, for want of proper parental care, or other cause, are growing up in mendicancy or crime."

The court held that this was neither a command nor a grant of power, and that

"state constitutions are not grants of authority, but limitations of power. State legislatures can exercise such powers as are not inhibited by the fundamental law. To construe the provisions in question as a grant of authority is to impute to the framers the doing of a useless and idle thing."

The conclusion, therefore, was that the legislature was forbidden to provide for the commitment to such a school of children over the age of sixteen.

It is an actual fact that framers of state constitutions have for the past seventy-five years been placing a larger and larger number of provisions into state constitutions which were thought of not primarily as limitations, but as directions or commands, and in some cases as actual grants of power in order to remove doubts raised by judicial decisions. The Nebraska decision represents the decided weight of authority in this country with respect to the interpretation of such provisions. The framers are not to be presumed to do a "useless and idle thing," and therefore constitutional provisions inserted not primarily as limitations must be construed by the court as limitations. This represents a lack of correlation between the development of state constitutional texts during the past seventy-five years and the judicial construction of such texts, but the framers of constitutions should by this time have discovered that provisions placed in state constitutions will be construed as distinct limitations upon legislative power, whether they may have been so intended by the framers or not.

Several other illustrations of the doctrine of implied limitations may be given. The Kentucky constitution provides that a county having a city of 20,000 and a total population of 40,000 may constitute a separate judicial district. The Kentucky court held that a county of less population could not be erected into a separate district.

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[74] (1900) 60 Neb. 675, 681, 685, 84 N. W. 81.

"A state Constitution is not a grant of legislative power. The Legislature has all power, unless restricted by the Constitution. And, when a State Constitution provides that a Legislature may do certain things in a certain contingency, it must mean that it cannot do these things otherwise."[75]

The Illinois constitution of 1848 required the general assembly to provide by general law for a township organization (under which any county may organize whenever a majority of the voters of such county, at a general election shall so determine.) Nothing was said as to the matter of discontinuing township organization, and the general assembly provided for a vote upon discontinuance by a majority of all the voters voting at the next annual town meeting (which was not a general election.) The court, in holding this improper, said:

"Although the constitution makes no express provision for the abandonment of the system when once adopted according to its provisions, we are not prepared to say that it may not reasonably be construed to allow the legislature to provide for its abrogation; but if they do so it must be done by pursuing the same course and adopting the same guarantees to protect the rights of all which the constitution requires to be observed in the adoption of the system, that is to say, it must be done at a general election and by a majority of the voters."[76]

The cases above cited are not referred to in criticism of state courts, and are merely illustrations of what may be found in the decisions of substantially all of the state courts. In many cases the decisions, based upon broad implications, have actually been confirmed by later constitutional provisions, although in probably as many cases they have actually been negatived by constitutional change. A provision once inserted into a state constitution is generally given a broad effect as a limitation upon the state legislature, and until recently the whole development in state constitutions has been toward imposing so many express limitations upon legislatures that the courts may be said to have been justified by popular action in the attitude they have taken. More than one in five of the state decisions declaring state laws invalid are based upon implications drawn from state constitutional texts rather than upon the precise language of such texts.

Of express limitations in state constitutions, the general ones of most importance, those of "due process" and "equal protection," have in a number of states been applied by state courts with much more strictness than has the Fourteenth Amendment by either federal or state courts; and the highest state court is the final authority as to what "due process" means when found in the constitution of its own state. For example, "due process" and a clause held to be equivalent

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[75] *Scott v. McCreary* (1912) 148 Ky. 791, 795, 147 S. W. 903.
[76] *People ex rel. Manier v. Couchman* (1853) 15 Ill. 142, 145.

to "equal protection," in the constitution of Illinois, have as applied by the supreme court of that state, been much more restrictive of state powers than has the Fourteenth Amendment.

CONCLUSION

The preceding discussion has suggested a real antithesis between constitutional construction as it relates to the national government on the one side and constitutional construction as it relates to the state government on the other. With respect to the United States, emphasis has been upon powers, and perhaps the most important single manifestation of judicial action has been the doctrine of implied powers. With respect to the states, emphasis has been upon limitations, and the most important single manifestation of judicial action has been the doctrine of implied limitations. Theoretically state powers are original powers, subject only to such limitations as appear in constitutional texts, and are to be construed liberally; national powers are granted or delegated, and should in theory receive a more restricted application. Actually the reverse is true, and limitations upon states in state and national constitutions are construed more strictly against the states than are textually equivalent limitations as against the national government. Why should this be the case? Several reasons suggest themselves:

(1) Constitutional law, both state and federal, so far as it looks toward the state, is entirely a law of limitations.[77] State powers are such as have not been denied or withdrawn, and are therefore inferior to limitations, and to two sets of limitations. Judicial action deals only with a construction of limitations. The constitutional law which looks toward the nation, on the contrary, must by the nature of the federal Constitution deal most largely with powers and their construction. Upon federal powers there is but one set of limitations, and this set of limitations is not necessarily superior to federal powers. And a liberal or expansive construction of federal powers is in itself a restriction upon state powers. Federal limitations upon the state, both express and implied, are in their application often aids to expanding federal powers.

(2) Federal limitations upon state powers are enforced by two sets of courts, and state courts in their enforcement of federal limitations often restrict state powers more than do the federal courts in such enforcement.

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[77] In a very few cases state powers have been expressly stated as free from state constitutional limitations; e. g., several Ohio constitutional amendments of 1912 expressly granting power with respect to labor legislation say that "no other provision of the constitution shall impair or limit this power." The Oklahoma constitution states that grants of authority therein shall not be construed as limitations. Okla. Const. 1907, Art. V, sec. 36.

(3) Distrust of state legislatures is almost as old as state legislatures themselves, and the most important development in state constitutional history until recently has been toward ever-increasing express limitations upon state legislatures. This tendency has naturally led state courts to construe provisions in state constitutions strictly against legislatures. Judges would hardly have been human had they not done this, and in many cases when they did not construe limitations strictly against legislatures, constitutions were so changed as to induce such action. There has been no such persistent distrust of Congress, and respect for the national legislature has to some extent been strengthened by lack of confidence in the state legislative bodies.

(4) The pressure upon courts, both state and federal, to apply constitutional limitations against state action began earlier, and has been steadier and more persistent than pressure upon the federal courts to apply limitations against federal action. Several facts account for this: (a) The states have legislated in new fields earlier and more vigorously than has Congress. This has been true because the states have had a wider field in which to legislate, and changes in the legal system have had to come primarily through state legislation; (b) The great expansion of congressional activity has come only in recent years; (c) Statutes are most apt to be contested under broad constitutional limitations when proposed legislative reforms are new, and Congress has usually not been the first to try new plans; the constitutionality of congressional legislation may therefore not present itself until after the issues have been fought out in contests over earlier state legislation.[78] The issues as to constitutionality of state workmen's compensation laws will make unnecessary the testing of a federal law upon this subject, when one is enacted; (d) State legislatures may perhaps be less efficient than Congress. At least, they are more numerous; the product of their combined activity is not only much larger than that of Congress, but is also more promptly and generally influenced by popular opinion. At the time when state legislative activity began to be stimulated by the need for legislation to meet new social and industrial conditions, the Fourteenth Amendment appears upon the scene to offer for the first time federal protection under broad constitutional clauses against state action. The Fifth Amendment with its "due process of law" limitation upon Congress has been less active than the Fourteenth with a similar limitation upon the states, because state action was the thing primarily to be attacked; and because also the Fifth Amendment had already reached respectable middle age (having existed since 1791) with little of the type of activity expected in our later days from the institution of "due process."

Constitutional law so far as it faces the national government is

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[78] Perhaps this process was reversed in *Adair v. United States, supra.*

primarily constructive; so far as it faces state governments, it is primarily restrictive or destructive. It is probably for this reason that federal constitutional decisions are superior to state judicial decisions in the same field. The function of preserving a balance between national and state powers has been the most important single function in our federal system, and on the whole it has been well performed. Into its performance has gone not only legal ability but also real statesmanship. Although often inconsistent and based upon poor logic, the constitutional decisions of the United States Supreme Court command respect, and able members of the court have found it possible to leave a permanent impress upon the institutions of the nation.

On the contrary, decisions of state courts upon questions of state constitutional law leave an impression of pettiness and ineffectiveness. Upon the state courts there have been a number of judges as able as the members of the United States Supreme Court; but while constitutional decisions of the members of the federal tribunal stand out as their ablest and most important work, the state judges have done their most effective service usually in fields of private law, and the level of decisions in constitutional law is probably inferior to that in other subjects. Chief Justice Ruffin of North Carolina was one of the ablest of American judges, but his reputation would rest upon an insecure foundation if based upon his most important constitutional opinion.[79] Perhaps no abler judge than Chief Justice Shaw of Massachusetts has ever been a member of an American court, but this could hardly be discovered from Shaw's opinion in *Commonwealth v. Anthes.*[80] Judge Cooley's name is permanently associated with American constitutional law, but rather because of his treatises than because of his record as a judge. His reputation as a judge would be not nearly so great as it deservedly is, were he to be judged by his opinions in *People ex rel. Twitchell v. Blodgett,*[81] *People ex rel. Railroad v. Salem,*[82] *People ex rel. Trombley v. Humphrey,*[83] *People ex rel. Le Roy v. Hurlbut,*[84] and the communication *In the Matter of Head Notes.*[85] The different character of the function of state judges necessarily makes it less possible to achieve real distinction in state constitutional law, even though the ability of the judges themselves be equal to that of members of the highest federal court.

[79] *Hoke v. Henderson* (1833, N. C.) 4 Dev. 1.

[80] (1855, Mass.) 5 Gray, 185.

[81] (1865) 13 Mich. 127.

[82] (1870) 20 Mich. 452.

[83] (1871) 23 Mich. 471.

[84] (1871) 24 Mich. 44.

[85] (1881) 43 Mich. 641.