California Law Review

Volume 50 | Issue 5  

December 1962

The Supreme Court and the Federal System

Archibald Cox

Follow this and additional works at: https://scholarship.law.berkeley.edu/californialawreview

Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z38SJ4P

This Article is brought to you for free and open access by the California Law Review at Berkeley Law Scholarship Repository. It has been accepted for inclusion in California Law Review by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
The Supreme Court and the Federal System†

Archibald Cox*

ONE of the salient features of our Constitution is its own special branch of federalism. The Founding Fathers sought to solve, governmentally speaking, the problem of the one and the many; and by extraordinary insight and “with a little bit of luck” they made a novel and extraordinarily successful contribution to the science of government. No small part of our freedom and progress is due to the strength of the federal system.

Our second unique contribution to the science of government is the Supreme Court of the United States and the doctrine of judicial review. The Court had no precedent, and to the best of my knowledge none of the judicial tribunals modeled upon it in other countries have played as important a role in national history. Certainly no other people has gone so far in committing fundamental and divisive issues, whether social, economic, governmental, or even philosophical, to a court for decision according to law. The habit has kept the Court in the center of a maelstrom of criticism ever since Jefferson’s feud with John Marshall, but this habit too, I think, is part of the foundation of our freedom and progress.

Manifestly, the Supreme Court and the federal system are closely linked. Since the beginning the Court has been the ultimate arbiter of the federal system, confining Nation and State each to its proper sphere and keeping each from interfering with the other. Without the Court’s power to review this aspect of the constitutionality of state and federal laws when the issue arose in a case or controversy, the federal system could hardly have been successful.

It is useful from time to time to withdraw and take a general view of the way in which the federal system has been growing under the constitutional decisions of the Supreme Court over a substantial period. In August, one of the country’s most distinguished lawyers, the President of the American Bar Association, asserted:

Until the last quarter century the Supreme Court’s decisions in this area were generally in harmony with the true principles of constitutional construction. . . . [S]ince 1937 the Supreme Court has tended to depart from these long-established principles in a number of areas.1

† This article is based upon the Morrison Lecture delivered to the Annual Convention of the State Bar of California, Beverly Hills, California, Sept. 20, 1962.

* Solicitor General of the United States.

Looking back over the same decisions, I find no departure from true constitutional principles—no disturbance of the balance between State and Nation—no tendency to disregard the values of local government or to curtail the powers of the states. Since the question is important, I ask you to join me in a long range and general view of the development of the federal system under the Court's review during the past quarter century. Much of what I say will seem like threshing out old straw, but in view of the resurgence of criticisms, it is important to see where we are and to recall how we got here. Make whatever allowances you think are necessary because of any bias I may have acquired from the Solicitor General's customary role as advocate for the national interest.

The inquiry has two branches. First, we must examine the decisions under the commerce clause, which is the chief source of federal authority in domestic affairs as well as an implied limitation upon the power of the states. Second, we must consider the applications of the fourteenth amendment, which has always imposed national constitutional limits upon state action, even within the sphere of local responsibility.

I

INTERSTATE COMMERCE CLAUSE

During this century the activities of the federal government under the commerce clause of the Constitution have multiplied in geometrical ratio. Federal regulation of railroads and steamships has greatly increased. Trucking, aviation, radio and television, and various forms of telecommunications have become major industries and have been brought largely under federal control by the Interstate Commerce Commission, Civil Aeronautics Board, and Federal Communications Commission. The Federal Power Commission regulates in substantial measure the generation and transmission of electric power and natural gas. The federal government has fixed the minimum wage and requires the payment of premiums for overtime work in virtually all mines, mills, and factories. It regulates union organization and collective bargaining in almost every commercial enterprise. The Supreme Court has held that the national government has constitutional power to regulate the wages paid in such establishments without regard to size;² that a local druggist may be prosecuted for offering for sale a mislabeled product which found its way to his shelves from another state;³ and that a farmer may be prosecuted for growing more

than his quota of wheat to feed his own livestock. All this represents a vast change in the activities of the federal government. In the early days of the Republic, the United States did not, and, I assume, could not constitutionally, regulate the wages paid in the handicraft shops and occasional iron foundries that constituted our manufactures. Nor did it regulate the labels on goods for sale in village stores, or the amount of wheat that a farmer might grow. Change there has been, but change is not the equivalent of a departure from constitutional principles.

Nothing in the commerce clause or elsewhere in the Constitution commits us to the very limited kind of government, state or federal, which prevailed during the nineteenth century. We have been transformed from a nation of farmers, shopkeepers, and small artisans into a vast industrial complex, with most of our citizens living in urban communities and dependent upon employment as wage earners. The transformation puts increasing pressure upon both State and Nation for new forms of governmental action. Most men can no longer do as much by themselves as the trapper, farmer, rancher, and even artisan and shopkeeper in the simpler America of the early nineteenth century. The change is partly a matter of economic interdependence and partly the result of technology. At one time, preserving freedom from governmental oppression was the chief problem in securing liberty. Today, affirmative governmental action is often required to make men free, for restraints may be imposed upon a man's freedom by other men, by economic conditions, or by oppressive circumstance. Obviously, the intervention of government to secure voting rights for Negroes and create equality of educational opportunities increases both liberty and human dignity. Similarly, by helping individuals to fill material needs which they cannot meet alone, government may add to individual freedom. The industrial workers of today are immeasurably freer under the eight hour day and five day week than their fathers and grandfathers who labored twelve hours a day for six and seven days a week for lower real earnings.

I am not seeking to debate the wisdom of this change in the role of government. Whether it be good, as I firmly believe, or bad, as a few of you may think, nothing in the Constitution prevents all government, state or federal, from responding to the demand for more effective action helping to meet the needs of individuals in a complex industrial society, provided, of course, that the measures are consistent with the Bill of Rights and the fourteenth amendment. Our inquiry is how far the response of the federal government is consistent with the division of governmental power between State and Nation envisaged by the framers when they adopted a federal system.

---

One major part of their vision was a country economically united—in the current phrase, "a common market." In the 1780's states were beginning to engage in trade wars and to raise tariff barriers against each other. The framers' dream was that our vast natural resources should be open to all the people of all the states wherever located; conversely, that the produce of any state should have free access to markets in any other.

To realize the dream of a common market required taking away from the states, with their consent, the power to interfere with freedom of commercial intercourse, and vesting control in the federal or national government. The concept was expressed in affirmative language: Congress was given power "to regulate commerce... among the several States." Since the power was taken from the states we may certainly infer that this grant included giving the federal government power to keep the channels of interstate commerce from being used internally to injure the people of the several states.

Along with the dream of economic unity the founding fathers possessed a keen sense of the values of local government, values which have not diminished with the passage of time. This is partly a matter of convenience. Dealing with Washington involves time, travel, and expense burdensome to small businesses and ordinary people scattered thousands of miles away. A federal agency, being remote from the facts, often lacks knowledge of local conditions, and is forced to consider problems on a printed record separated from the human actors by repeated straining through sieves of review. Precedent is too often substituted for flexibility, and "agency policy" for discretion, in appraising human situations. Local governments can do more to meet divergent local needs. In so vast a country as ours there is a great diversity of conditions, customs, and outlook. Still more important, federalism makes a healthy dispersion of power that introduces both safeguards and the flexibility inherent in having more than one forum for petition for the redress of grievances and more than one procedure for the solution of problems of public concern. Lord Acton, in writing of liberty in the age of antiquity, said:

> If the distribution of power among the several parts of the State is the most efficient restraint on monarchy, the distribution of power among several States is the best check on democracy. By multiplying centres of government and discussion it promotes the diffusion of political knowledge and the maintenance of healthy and independent opinion. It is the protectorate of minorities, and the consecretion of self-government.\(^5\)

The great body of liberal thought once stressed the value of having forty-eight states each of which might serve as a laboratory for testing progressive measures.\(^6\)

---


In *Gibbons v. Ogden*, Chief Justice Marshall summarized the essence of the original federal plan:

The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself.

A. The Scope of Federal Power

In applying these principles to current federal regulation of various activities the test is not whether the activity was in 1800—to use John Marshall's words—one of "those internal concerns which affect the states generally" or one of those "which are completely within a particular state, [and] which do not affect other states." The test is whether the activities in question today affect the states generally and are now a matter with which it is "necessary to interfere, for the purpose of executing some of the general powers of government."

To be concrete, I suppose that there was little, if any, federal power to regulate the conditions under which cattle were slaughtered and beef was packed in central Pennsylvania in 1800. How the central Pennsylvanians slaughtered their cattle hardly mattered to the people of Georgia or even New York. Today, however, conditions in the slaughter houses of Chicago and Kansas City affect the health of people in every state. The change in effects gave rise to federal power and evoked federal regulation.

Of course, most of the criticism is leveled at the use of the commerce power to support national social and economic legislation. The argument seems to be that Congress had no power to regulate the price paid for agricultural commodities in 1789, and therefore has none today; that since Congress could not prohibit child labor or fix wages in iron foundries in 1789, the Court departed from true constitutional principles in sustaining such regulation after 1937.

But the effects of these activities have changed. Since 1800 we have experienced an economic as well as a technological revolution. The dream of a common market has materialized beyond the fondest expectations. The iron foundries of the early nineteenth century were dependent upon local resources. Now a steel mill in Chicago obtains its ore from Minnesota,

---

7 22 U.S. (9 Wheat.) 1, 195 (1824).
8 See Address by Mr. Satterfield, *supra* note 1, at 926–27.
its coke from West Virginia, its limestone from Michigan, its chrome from foreign lands. National markets have given rise to nationwide corporations. In 1960, the eight largest concerns in each of a dozen or more major industries sold more than one half of the industry's products: motor vehicles, refined petroleum products, steel, meatpacking, aircraft, aircraft engines and equipment, refrigeration machinery, organic and inorganic chemicals, flour and meal, tires, cigarettes, motors and generators, and all kinds of tinware. Industry has also become extraordinarily mobile. A nationwide company can not only shift production from a plant in one locality to another plant far across the country, but in a relatively short time the company can move its plants. Californians have experienced the influx of new industry. We in New England have seen more than one industry leave.

As a consequence of this economic unity, conditions physically confined to a single state, which would once have had only local consequences, are now matters of interstate concern as a result of economic interdependence; and individual states, which surrendered the power to regulate the movement of goods in interstate commerce, have been rendered unable to deal with matters which seriously affect their citizens.

As an example, consider milk prices. Before the days of pasteurization and rapid transport the price paid for milk in Vermont was surely a local matter not subject to federal regulation; the milk did not move in interstate commerce and the Vermont price was no concern to the people of any other state. By 1930, the situation had changed radically. When competition in the sale of milk for resale in the city markets drove the prices received by upstate New York farmers to a point so low as to endanger continuance of a wholesome supply of milk, New York sought to deal with the problem by fixing the minimum price to be paid her farmers by handlers purchasing their milk. The dealers simply went and bought their milk at lower prices in Vermont; today the dealers would go to Indiana or Wisconsin. The basic conception of the commerce clause—that one state should not control the terms on which goods moved into its markets from other States—disabled New York from regulating the prices paid to Vermont farmers or the terms on which Vermont milk could be brought into New York. But milk prices in Vermont—to use Marshall's words again—were no longer concerns "which do not affect other states." A federal law was necessary unless the channels of interstate commerce were to be used to injure New York farmers with low priced Vermont milk.

Consider one more example. In 1800, the wages paid in a Pennsylvania iron foundry had little or no effect upon the wages of foundry workers in

---

Saugus, Massachusetts. Once markets for iron and steel or other manufactures became nationwide, however, comparative costs of production, including wage costs, took on vital significance; for one state to enact legislation raising costs would tend to put its business men at the mercy of competitors in states which eschewed such legislation. Put another way, the principle of a common market—the free availability of the channels of interstate commerce—did not make low wages in Pennsylvania an evil to Massachusetts under the conditions of 1800, but once competition became nationwide, substandard labor conditions in one state, through the interplay of economic forces, inevitably came to affect labor conditions generally.

I do not mean to imply that the Court decisions sustaining regulatory laws in these areas involved no change in constitutional interpretation. There were a good many decisions prior to 1937 which would support the statement that Congress had no power to regulate the price of Vermont milk or the conditions under which coal, textiles, and other goods could be produced for interstate shipment. What I am suggesting is that when these legal formulas were developed, matters like the price of agricultural commodities and labor conditions in one state had no effect—or at least no understood effect—upon other states; the legal formulas conformed to the facts. For a time the formulas were repeated, even after they had lost their factual foundation. Then there was a revolution in legal analysis. About 1937, constitutional interpretation broke through the conceptualism of the immediately preceding decades under the impact of a more pragmatic philosophy: "[C]ommerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." This willingness to examine the interplay of economic forces was no departure from original principles. Chief Justice Marshall was equally pragmatic. Mr. Justice Jackson did no more than restate the law declared by Marshall when he said, "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." It is the development of a complex and interrelated industrial economy that increased the kinds and number of activities subject to federal regulation, not a judicial departure from the federal system envisaged in the constitutional convention.

We should note one additional consequence of the Supreme Court rulings. Congress is not obliged to exercise the full scope of its power under

---

the commerce clause; it has never done so in the past and even today the federal government regulates only a small fraction of those activities that sufficiently affect interstate commerce to furnish constitutional support for federal legislation. The result of the Supreme Court's constitutional decisions has been to vest in Congress, in the first instance, the responsibility for determining the extent to which the factual relation between business activity and interstate commerce requires the exertion of federal power. Frequently Congress draws the line in general phrases such as "affecting commerce," "in commerce," and "production of goods for commerce," leaving it to the courts to particularize whatever guidance can be found in these general standards, but if Congress and the voters are dissatisfied with the judicial interpretations they can be changed by new legislation.

**B. Restrictions Upon State Taxation and Regulation of Interstate Commerce**

The increasing demands which our modern industrial society puts upon all governments have increased the pressure for state legislation and for state expenditures requiring heavier taxes and new sources of revenue. The interstate commerce clause, in the absence of congressional action, impliedly excludes state taxation of interstate commerce and interdicts state regulation obstructing the interstate movement of persons and goods. If the Court had been allowing the federal government to swallow up state functions and destroy state's rights, one would expect the trend to be reflected in the decisions determining the effect of the commerce clause upon the power of the states.

In the field of taxation, quite the opposite has occurred. The Supreme Court has been sustaining state taxes upon interstate businesses and transactions that one strongly suspects would have been held immune in earlier periods. In *McGoldrick v. Berwind-White Co.*, the Court sustained the application of a nondiscriminatory sales tax to an interstate sale of goods to be consumed in the taxing jurisdiction. In the *Northwest Portland Cement* case, the Court upheld the imposition of a net income tax upon a foreign corporation which did only an interstate business in the taxing jurisdiction. In both cases powerful dissents argued, with a great deal of plausibility, that the Court had broken new ground if not overturned its prior precedents. The trend is quite in keeping with the line of decisions

---

15 309 U.S. 33 (1940).
cutting down the immunity from state taxes that federal employees and contractors had previously enjoyed upon the ground that the state taxes imposed an economic burden upon the federal government. So far as the ability of the states to raise revenue is concerned, therefore, the Court has been increasing, not curtailing, state power.

The power of states to regulate activities that affect interstate commerce, despite the negative implications of the commerce clause, has not changed discernibly during the past quarter century. In a context of increasing interaction of all parts of the economy, even the preservation of the ancient balance attests to careful judicial restraint in the interests of local autonomy.

C. Federal Suppression of State Laws

One consequence of the increasing regulatory activity on the part of both state and federal governments has been multiplication of the number of occasions on which state and federal laws arguably overlap with resulting conflict or duplication. Since the Constitution provides that valid federal statutes shall be the supreme law of the land, Congress has power to exclude state law from any area of activity affecting interstate commerce regulated by the federal government, or from any area that Congress thinks should go unregulated, even though the state could apply its own laws in the absence of federal regulation. On the other hand, Congress may, and often does, authorize the states to enforce their own laws in an area also regulated by the federal government.

More often than not Congress says nothing about the effect that federal legislation should have upon state laws, thus leaving the question to the Supreme Court, which, under the conventional formula, repays the compliment by divining the intent of Congress. The true inquiry, I suggest, is whether one who is thoroughly sympathetic not only with the policy of the federal statute in all its aspects, but also with all its limitations, would find the application of the state law more of a hindrance than a help. If a help, the state law should apply; if a hindrance, it should be held invalid.

The inquiry is often a subtle and difficult business, but the Court cannot escape the responsibility when Congress gives no direction. The point to be emphasized, however, is that the Congress is the ultimate arbiter upon all questions of pre-emption. When the Supreme Court held, in Penn-
that the federal laws dealing with subversive activities prevent state prosecutions for conspiracy to overthrow the government of the United States, there was violent criticism; yet if a sufficient majority of the people and in both houses of Congress wished the states to have this power, they had only to enact the necessary legislation. The Court passed judgment upon the probable intent of Congress concerning a question upon which Congress had failed to speak. That Congress did not overturn the decision strongly suggests that despite the criticism the Court did not badly mistake the original unarticulated intention.

This is a wise distribution of power. The Congress cannot foresee in advance all the possible interaction between state and federal law in future situations. The courts can deal with the problems as actual controversies develop. The Congress retains the power to reverse the judicial determination if it proves contrary to the legislative will.

In one field—labor relations—the exercise of federal power has indubitably curtailed the power of the states. In my opinion, this was not only wise but inevitable. The heart of the national labor policy is the private adjustment of conflicts of interests over wages, hours, and other conditions of employment by the negotiation and administration of collective bargaining agreements between employers and unions designated as their representatives by a majority of the employees in appropriate bargaining units. In providing a legal framework for the organization of unions and these private collective bargaining negotiations, Congress was obliged to determine not only how far the conduct of unions and employers should be regulated but also how far they should be free. Since freedom to negotiate terms of employment implies freedom to reject the terms proposed by the other party, the framework necessarily includes the law of strikes and picketing. Labor-management relations, in the popular phrase, is "one ball of wax." At every point the formulation of a national labor policy involved balancing the various interests of management, union, employees, and the public. To allow a state to prohibit conduct that the federal policy requires to be free, or to allow a state to license conduct that the federal policy prohibits, would upset the balance contemplated by federal law. Again, it seems significant that Congress has not seen fit to reverse the Court decisions excluding the states from this potential area of regulation.

Although I have not surveyed them all, few other federal regulatory laws seem to have subtracted anything substantial from the state's regulatory authority. The Securities Exchange Act, for example, leaves the

states entirely free to regulate the public issuance of securities, and the state "blue sky" laws continue to provide consumers with important protection.

II

THE FOURTEENTH AMENDMENT

The original conception of the federal system left the states sovereign in wide areas of potential governmental activity such as the preservation of the peace and order, the protection of public health, education, the regulation of commercial transactions, and the acquisition, protection, and transfer of property. But even within their spheres of action states have always been subject to restrictions imposed by national authority. Some of the limitations imposed by the original Constitution, like the commerce clause and the prohibition against import or export duties, excluded the states from areas turned over to the federal government. Others, like the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts, imposed restrictions thought to have intrinsic value in a democratic community.

The fourteenth amendment added additional restrictions upon the exercise of state sovereignty in the areas of state jurisdiction. The central purpose was to secure the former slaves equality of civil rights, especially equality before the law. Almost from the beginning, however, the fourteenth amendment's guarantees, that no person should be deprived of life, liberty, or property without due process of law, or denied the equal protection of the laws, were held to set up fundamental rules of decency applicable to all state conduct. The restrictions guarantee fair procedure. They exclude purely arbitrary discriminations. They protect individual liberty against arbitrary and capricious legislation. No one has ever explained the phrase "due process of law" in very meaningful generalizations. It is said to protect rights "found to be implicit in the concept of ordered liberty"\(^\text{24}\) and which are "of the very essence of a scheme of ordered liberty",\(^\text{25}\) to forbid the states to enact laws or take action that would violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,"\(^\text{26}\) or that would be inconsistent with those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."\(^\text{27}\)

The Supreme Court is charged with enforcing these minimum national standards of fundamental fairness and respect for individual rights. The


\(^{25}\) Ibid.

\(^{26}\) Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

\(^{27}\) Hebert v. Louisiana, 272 U.S. 312, 316 (1926).
charge has been leveled at the Court that it has been interpreting the standards too severely so as to impose excessively strict national standards curtailing local autonomy contrary to the true principles of the Constitution.\textsuperscript{28} Let us look at the record.

\textbf{A. Social and Economic Legislation}

In this area the Court's decisions since 1937 have indisputably increased the power of the states to provide their own solutions to the problems of a complex industrial society. In a six year period during the 1920's the Supreme Court sustained fifteen constitutional attacks upon social and economic legislation under the due process clause of the fourteenth amendment.\textsuperscript{29} Since 1937 many of those decisions restricting state's rights have been overruled.\textsuperscript{30} In the last decade the Supreme Court has not held a single state law in this area to be unconstitutional under the fourteenth amendment. During the previous fifteen years there were few, if any, adverse decisions. Anyone who thinks in terms of the ability of a state to discharge affirmative governmental responsibilities must agree that the decisions in this area during the past quarter century have resulted in a vast increase of state power, and therefore of states' rights.

\textbf{B. Freedom of Speech and Political Activity}

The fourteenth amendment is held to incorporate and protect against state oppression the guarantees of freedom of speech and political association secured against federal infringement by the first amendment. The doctrine goes back a good many years,\textsuperscript{31} but recently the volume of litigation has become much greater. During the past decade, twenty-eight cases of this general character have been decided by the Supreme Court; in fifteen of them the state law or municipal ordinance was held unconstitutional, either generally or in some specific application.\textsuperscript{32}

\begin{itemize}
\item \textsuperscript{28}See Address by Mr. Satterfield, \textit{supra} note 1.
\item \textsuperscript{29}See Brown, \textit{Due Process of Law, Police Power, and the Supreme Court}, 40 HARV. L. REV. 943, 944 (1927).
\item \textsuperscript{30}See, \textit{e.g.}, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).
\item \textsuperscript{31}Gitlow v. New York, 268 U.S. 652 (1925).
\end{itemize}
Of these fifteen cases, five involved laws or ordinances censoring publications in the supposed interest of public morality. The rulings are illustrated by *Butler v. Michigan* in which the Court held that a statute forbidding the sale to the general reading public of any book containing obscene language "tending to the corruption of morals of youth" could not constitutionally be applied to the sale of a book to an adult police officer; thus enforced, the Court reasoned, the statute violated freedom of expression because it would permit circulating among the adult population only such literature as was fit for children.

Undoubtedly, recent Court decisions have greatly increased freedom to publish and circulate books and magazines which would have been censored for obscenity thirty years ago. Whether this is a departure from true constitutional principles or a sound example of our historic sensitivity toward freedom of expression, each man must determine for himself. There is no doubt, however, about the power of both state and federal governments to suppress hard-core pornography and commercial smut; there are indications that the Court's respect for state autonomy may result in allowing the states somewhat more scope in this area than the federal government.

Seven of the fifteen statutes held unconstitutional involved freedom of association. Four resulted from efforts by Southern States to discourage the activities of the National Association for the Advancement of Colored People and other organizations seeking to abolish racial discrimination. For example, in *Shelton v. Tucker*, the Supreme Court invalidated a law requiring public school teachers to disclose as a condition of employment every membership or tie with a voluntary association. In a hostile environment the mandatory disclosure of membership in unpopular organizations would put too much of a burden upon freedom of association, expression, and political activity.

Three cases involved state laws resulting from the pressures toward conformity and the outcry against alleged subversive organizations. Thus,

34 352 U.S. 380, 381 (1957).
36 See id. at 503 (Harlan, J., dissenting).
38 364 U.S. 479 (1960).
the Court invalidated a California law requiring applicants for tax exemptions granted to charitable organizations to subscribe to oaths that they do not advocate the forcible overthrow of the government. The issue was very narrow. Plainly, the tax exemption could be denied to any organization which was shown to advocate a forcible overthrow of the government. The holding was that, in the absence of any indication that it was disloyal, the state could not constitutionally compel an organization seeking the exemption to demonstrate its loyalty by a test oath. Surely, placing the burden on the state to prove that a church or other charitable organization is disloyal before denying it the tax exemption available to loyal charities, instead of allowing the state to require the charity to make an oath as to its loyalty, is not a serious interference with a state’s power to provide for the public welfare.

If I may digress for a moment into the broader field of Supreme Court decisions dealing with alleged subversion, it seems fair to suggest that the decisions invalidating test oaths as prerequisites to tax exemptions for charitable organizations are fairly indicative of the narrow but important line that the Supreme Court has been seeking to draw in this area. In other cases it has held that while a state may not discharge a school teacher simply because sometime in the past the teacher had some kind of membership in the Communist Party, it may constitutionally require a teacher to disclose any such current affiliation. The Court has thus far sustained the power of Congress to inquire into Communist activities and to call alleged Communists as witnesses; on the other hand, it has firmly preserved such procedural safeguards as the requirements that the witness be clearly informed of the pertinency of the inquiry, that the authority of the committee be demonstrated, and that the privilege against self incrimination be carefully respected. In short, there is no Supreme Court decision denying the government constitutional power to deal with active subversion such as a conspiracy to teach the overthrow of the government by force or violence, but the Court has preserved such guarantees of individual liberty as the notion that guilt is personal, the presumption that a person or organization is innocent until proved guilty, and the distinction between active subversion and unorthodox views.

40 First Unitarian Church v. County of Los Angeles, 357 U.S. 545 (1958).
It is hard for me to believe that many people, after reflection, would really want the Court to rule otherwise. One of the ironies of our present situation is that the pressure to curtail these aspects of individual liberty come chiefly in the name of opposition to a regime that is despicable because it imposes iron conformity of thought and tramples brutally upon individual freedom. It would avail us little to win the contest if, during its course, we destroyed the very values that we were struggling to preserve.

C. Criminal Procedures

The most active field of constitutional litigation today involves procedure in criminal investigations and prosecutions, both state and federal. New law is being made, and in some instances the new decisions overturn established practices. The Court has vigorously enforced the right not to be convicted upon a confession obtained in an atmosphere of coercion. Indigents charged with crime have been secured the right to counsel at public expense when they are on trial for their lives or face long prison sentences if convicted of charges too complicated for them to defend without the assistance of legal counsel. In Mapp v. Ohio, the Court held that the fourteenth amendment prevents a state, in a criminal prosecution, from using evidence which it has obtained by an unconstitutional search and seizure. The question is whether this process of growth and change is making state criminal law "a mere appendage of federal constitutional law," as charged by the past president of the American Bar Association, or is consistent with the American heritage, including the vitally important principle of state autonomy within the federal system.

In passing judgment we must keep it constantly in mind that the Constitution has never been supposed to leave the states entirely free to conduct criminal trials according to their whimsy. The original Constitution, as I have said, explicitly interdicted state ex post facto laws and bills of attainder. The fourteenth amendment's injunction that no person shall be deprived of liberty without due process of law has always guaranteed compliance with some national standards of fairness.

Is it not consistent with the constitutional heritage of a humane and liberal people that its basic standards for the administration of justice should tend to rise as its standard of living, economic competence, and, we

52 Address by Mr. Satterfield, supra note 1, at 932.
hope, its human understanding improve? The kind of justice that we can provide today is better than the procedures available in the last century; the problems of a defendant charged with crime in a large metropolitan area are undoubtedly greater. Since criminal prosecutions usually involve the derelicts of society, the brutal thugs and the cynical racketeers, the decisions often reverse conviction of, or release upon habeas corpus, someone who seems obviously guilty, because of what an unthinking press may call "a legal technicality." One measure of the quality of a legal system is the fairness and humanity with which it treats the most worthless of guilty men. One need only read history or cast his eyes upon totalitarian countries to appreciate that the procedural "technicalities" that occasionally shelter the unworthy are the same safeguards upon which the innocent must depend when their only real offense has been to be poor or friendless or to offer political opposition to a tyrannical regime.

In establishing minimum standards of fairness the Supreme Court Justice must guide himself not by his personal predilections but by an inherited legal wisdom and the ideals and customs of the community, yet realistically one must acknowledge that some personal sense of fairness is probably inescapable. Due regard for federalism requires that the Justices temper their concept of the basic national standard of fairness guaranteed by due process of law with an appreciation of the values of state autonomy.

The difference between the decisions in state cases under the fourteenth amendment and the rules which the Court has established for federal criminal procedure, where there is no need for the Court to subordinate its notions of justice to the notions of a state, demonstrates that the Court is giving weight to the values of federalism. For example, the McNabb\(^54\) and Mallory\(^55\) rules, which prevent a federal prosecutor from introducing as evidence a confession or admission of guilt made during an unwarranted delay in arraignment, are not applicable to the states.\(^56\) The states are not required to secure defendants the federal privilege against pressure to give testimony in their own defense.\(^57\) State prosecutions are not subject to the federal prohibition against double jeopardy.\(^58\)

I am not unmindful of the view of some of the Supreme Court Justices that the due process clause of the fourteenth amendment should be held to secure all the guarantees of the Federal Bill of Rights. Thus far, a majority of the Court has rejected this position.\(^59\) It is also important to remember

---

\(^{54}\) McNabb v. United States, 318 U.S. 332 (1943).


\(^{59}\) Adamson v. California, 332 U.S. 46 (1947).
that one of the important supports for the minority view is the need for some tolerably precise and objective standards of "due process of law" to guide the Court in drawing a line between what is fundamentally unfair and what a Justice may regard as tolerable although altogether unwise.

It is difficult to measure the impact of the Court's due process decisions upon the ability of a state to track down and convict those guilty of crime. The decisions improving the quality of criminal trials—a decision requiring a state to provide a pauper with counsel at the state's expense in any major criminal case, for example—impose no handicap whatever. Some of the so-called prophylactic rules, that exclude probative evidence because of police misconduct, may impede the prosecution, although no one has been able to demonstrate factually that even such restrictive rules as the Mallory doctrine and the exclusion of illegally seized evidence have actually diminished the effectiveness of the police; indeed, it is quite arguable that the added respect gained by a law-abiding police force more than offsets any loss of ability to get evidence.

For present purposes, perhaps the best test of the Supreme Court decisions dealing with state criminal procedure is to ask how many of the following "rights," which the Supreme Court has withheld from the states, are really necessary to effective local self-government:

— the right to convict a man upon an involuntary confession extorted by the police; 61
— the right to convict a man upon a confession made while suffering from insanity; 62
— the right to convict a man upon the prosecutor's knowing use of perjured testimony; 63
— the right to try a man before a jury biased against him; 64
— the right to convict a man upon a statute too vague to give notice of the offense; 65
— the right to try a man for a serious crime without affording him counsel; 66
— the right to introduce evidence obtained by an unconstitutional search or seizure; 67 and
— the right to convict a man without evidence. 68

This list is not complete, but it is representative. One need not agree with each and every one of the decisions to assert rather confidently that depriving the states of these “rights” in the interests of minimum standards of fairness will not make state criminal law “a mere appendage of federal constitutional law,” does not distort “true constitutional principles,” and does not upset the balance of the federal system. The states retain ample power to develop their own police procedures, their own rules of evidence, and their own methods of conducting a trial, according to the needs, customs, and wishes of their people.

D. Segregation

Although the single most important group of decisions in the past decade lies in the field of civil rights, their analysis is hardly a necessary part of a study of the decisions administering the federal system. For if history resolves anything, it demonstrates that the thirteenth, fourteenth, and fifteenth amendments took away from the states their power to deal with Negroes as they wished, and gave Negroes a uniform national right to be free from official discrimination. That there should be so much litigation today is, no doubt, due largely to the increased determination and ability of Negroes to insist upon realizing these constitutional rights and to the awakening of the national conscience.

In at least one area the pressure raises extraordinarily difficult constitutional questions. Somewhere a line must be drawn between governmental action, state or federal, which is subject to constitutional limitations, and private decisions which, however immoral and subject to the legislative control, are not restricted by the Constitution itself. The “sit-in” cases are a prime example.

Many department stores in Southern cities deal generally with all members of the public without discrimination against Negroes, except that they refuse to serve all races in restaurants or at lunch counters. Negroes protesting this indignity went quietly to the lunch counters and requested service, which was refused. When the Negroes sat there peacefully without creating any disturbance, unless by their mere presence, they were arrested by the police and prosecuted for criminal trespass or its equivalent.

---

60 Address by Mr. Satterfield, supra note 1, at 932.
of the petitioners' arguments is that the fourteenth amendment has been violated because state police officers made the arrests and state courts entered judgments of conviction. This, it will be said, is state action, and the state action obviously resulted in racial discrimination. The answer for the states, no doubt, will be that a state does not deny equal protection of its laws in violation of the fourteenth amendment when it simply enforces the right of any owner of private property to determine whom he will invite upon his premises and whom he will exclude as trespassers. The state law, it could be said, is color-blind in fact as well as theory; any discrimination is individual not governmental.

This basic issue has important implications for other, nonracial questions. The increasing role of government is blurring the distinctions between public action—or "state action," to use the phrase of constitutional law—and private decision making. Thus, government appropriations are frequently the chief support of important private institutions—universities, schools, hospitals, and even housing projects. The government often delegates something akin to lawmaking power to private groups: a labor union and employer may negotiate collective bargaining agreements binding everyone in the unit over a minority's dissent; 71 under the Securities Exchange Act 72 registered stock exchanges are given a disciplinary power in order to promote self-regulation. The outcome of the "sit-in" cases, where the pressure to expand the notion of state action is strong, may have a profound effect in determining how far the decisions of large private groups, which perform public, if not governmental, functions, are to be subjected to constitutional review in the federal courts. But these are questions that do not affect the distribution of governmental power; their resolution cannot curtail the powers of the states.

III

CONCLUSION

It is difficult to summarize the kaleidoscopic view that I have laid before you. One tendency in the Court's decisions, which stands out in bold relief, is to confirm the legislative power, both federal and state, to deal with our increasingly complex economic problems and economic needs. The decisions sustaining the expansion of federal regulation seem to me to reflect not a departure from the federalism envisaged by the Founding Fathers but

an understanding of the increasing interdependence of the national economic system made possible by the framers' dream.

The Court has been increasingly concerned with civil liberties, criminal procedure, and civil rights. Its sensitivity to the values of individual liberty and the fragile nature of minority rights has resulted in rulings invalidating not only a few novel measures ostensibly aimed at internal subversion but also a number of familiar restrictions upon freedom of speech and customary, if unworthy, practices in criminal cases. Yet, in concentrating upon the constitutional claims that have been sustained, we must not forget those—also in the field of civil liberties—that have been rejected, often over powerful dissenting opinions. Indeed, it was written at the close of the 1960 Term that the Court had recanted some of the most liberal opinions of earlier years.73

As for myself, I am confident that historians will write that the trend of Supreme Court decisions during the 1950's and early 1960's was in keeping with the mainstream of American history—a bit progressive but also moderate, a bit humane, a bit idealistic but seldom doctrinaire, and in the long run essentially pragmatic. And this, I submit, is the true genius of our institutions.

We live in a period of rapid change and high tension which imposes severe strain upon the law especially in constitutional adjudication. It is plain, however, that a free society, indeed all human liberty, ultimately depends upon the rule of law, a rule which binds the Court as well as the litigants, the governors as well as the governed. This is the true difference between the free and open societies of the Western World and the Communist dictatorships; in the one the government is bound by law, in the other the government makes what masquerades as law according to its fiat.

The rule of law itself depends in the final analysis upon the voluntary acceptance of decisions arrived at by legislative bodies and judicial tribunals according to constitutional processes. By "voluntary acceptance" I mean compliance—willing obedience to judicial decrees of the highest tribunals once an issue has been decided, unless and until it is changed.

Those who undermine the habit of voluntary acceptance by attacking the integrity of the tribunal or the constitutional process, like those who attempt to frustrate the rule of law by stalling, evasion, or disobedience until compelled by superior force, are guilty of gross disservice to the cause of freedom. Whatever may be our differences upon any of the complex and varied issues submitted to the Supreme Court for constitutional adjudication, surely we should all agree that the maintenance of the institution has an aspect of the rule of law of transcendent importance.

The responsibility for bringing this lesson home to the community rests most heavily upon the legal profession, for it is we who, through our words and conduct, have daily to convey to the rest of the community an understanding of the meaning of the rule of law and of the importance of an independent judiciary. Whatever our differences upon any of the substantive issues, surely we all share a common conviction in the importance of that lesson.

May I add one personal word. One who argues cases from time to time and sits in the Supreme Court day by day during both oral arguments and the delivery of opinions soon acquires both admiration and affection for the Court and all the Justices. The problems with which they deal are so difficult, the number and variety of cases so overwhelming, the implications so far-reaching, that one sits humbled by the demands upon them. That the institution of constitutional adjudication works so well on the whole is testimony to the wisdom and foresight of earlier Justices as well as those who now sit upon the Court. That the Justices are human—that some opinions seem inadequate and some decisions wrong—makes the experience still more moving because it evidences the sincerity and capacities of men.