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Lecture

The Forest and the Trees in Constitutional Law*

Charles Black†

The pride of selecting a good catchy title, before you have actually sketched out the lecture, is a pride that goeth before a fall. My earliest discovered difficulty — and I imagine you will agree that it is enough difficulty for one effort — has been that while I can see how over-long, over-loving attention to the trees one-by-one might narrow and confine one's view of the forest, I have been unable, after some considerable trial, to see how you can look at the forest without looking at the trees. Some pretty big mistakes, in writing and talking about law, have come from trying to describe the forest without bothering too much about the trees. Have we here to do with a tragic predicament, one of the innumerable facets of original sin? Maybe, but since we have to go on living, despite original sin, I shall live as best I can with this title; I have buttered my bread, now let me lie in it. I hope my title may at least have some of the thing called "heuristic value" — that last refuge of inept titles as of inapt hypotheses.

So I have thought I should start on a saunter through the forest, just waiting to see what might happen about the trees. Because I must start somewhere, I have started with Article I, Section 1, "All legislative powers herein granted shall be vested

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† B.A., Yale University; M.A., University of Texas; LL.B., Yale University; Adjunct Professor of Law, Columbia University; Sterling Professor of Law Emeritus, Yale University.

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in a Congress of the United States . . .," and with the annotation appended to this in the *Annotated Constitution of the United States*[1] — forest material if ever I saw it.

I found that this annotative material takes a singularly depressed and depressing tone; we are in a pretty sad forest, where no birds sing.

"Two important doctrines of constitutional law — that the federal government is one of enumerated powers and that legislative powers may not be delegated — are derived in part from this section,"[2] says the first sentence of the annotation. Then we are told at once that the "enumerated powers" doctrine is "severely strained" by Marshall's (1819) opinion in *McCulloch v. Maryland*.[3] But the mischievous Marshall didn't stop there; he continued his severely straining work for a long time. A dozen years later he gave life to the doctrine of "resulting powers,"[4] as Story baptized it.[5] Another blow to the doctrine of enumerated powers. But stay! There is worse to come — "powers have been repeatedly ascribed to the National Government on grounds that ill accord with the doctrine of enumerated powers."[6] "[F]or the most part," we are told, "these . . . do not . . . directly affect 'the internal affairs' of the nation; they touch principally its pe-

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1. THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION (1973 & Supp. 1980) [hereinafter THE ANNOTATED CONSTITUTION].

2. *Id.* at 61.

3. 17 U.S. (4 Wheat.) 316 (1819).

> We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. 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.

Id. at 421.

4. Resulting powers are those which flow from the entire spectrum of powers rested in the national government rather than from those powers specifically enumerated in the Constitution. *See* American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828), *cited in* THE ANNOTATED CONSTITUTION, *supra* note 1, at 62.

5. 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1251, at 124 (1833).

6. THE ANNOTATED CONSTITUTION, *supra* note 1, at 62.

ripheral relations, as it were."[7] Oh, this forest is full of weasels, whistling, as weasels are wont to do, in the dark. "For the most part," like "principally," in effect concedes the game; "as it were" is as it may be — but "as it is," some of these powers — the power to provide an integrated currency for the whole nation, to make paper money legal tender, to legislate for the Indian tribes, the power to enforce by appropriate legislation all the rights and duties created by the Constitution — are not confined to external or peripheral relations. But the worst is not even yet. "The most serious inroads on the doctrine of enumerated powers . . . have taken place under cover of the doctrine — the vast expansion, in recent years of national legislative power in the regulation of commerce among the States and in the expenditure [in the intervening 160 years] of the national revenues."[8] This forest is a place of strange shadows. The doctrine of enumerated powers actually suffers "serious inroads" when the very powers enumerated are construed broadly, without ingeniously crafted but altogether non-textual limits.

And that's all there is about enumerated powers. Just one long disappointment.

But let us bravely press on to the second effect of the constitutional sentence under examination. Here the gloom is even thicker. In the very case most epigrammatically stating the "no delegation" doctrine,[9] the delegation is sustained. Protesting it would ne'er consent, the Court consented. And kept consenting on and on and on. The "three distinct ideas"[10] that grounded

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7. *Id.* at 63.

8. *Id.*

9. Under the "no delegation" doctrine, Congress may not delegate its power to enact laws to the other branches of government. However, Congress may confer authority to the other branches to prescribe rules and regulations necessary to execute its laws. United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932), *cited in* THE ANNOTATED CONSTITUTION, *supra* note 1, at 63.

10. The first of these ideas is separation of powers. In Field v. Clark, 143 U.S. 649 (1892), the Supreme Court reaffirmed the concept that our government is separated into three branches, each with distinct, nondelegable authority.

The second idea concerns the resting of governmental power to regulate activities on private parties. In Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936), the Court called this form of delegation "most obnoxious" because it allows those with partisan interests to regulate the activities of others thus raising due process implications.

The third concept "Delegata potestas non potest delegari" means that the powers endowed by the People to each branch of government may not be abdicated to any other

the doctrine (none of them expressed in the Constitution) are nevertheless set out, and then we go on a long forest walk down a path called "Delegation Which Is Permissible." We start in the first quarter of the nineteenth century; coming on down to now, we find only two cases in which "delegation" was actually struck down — both from 1935, at the apogee of the Court's anti-New Deal feeling, neither at all clear as to its grounds, neither having any forerunner or any progeny.[11] That's not many trees, for a forest where the doctrine of non-delegation is supported by three whole reasons, as well as (in some mystic manner) by the first sentence in the Constitution. Can we perhaps have mistaken the kind of forest we're really in? No wonder there is no section on "Delegation Which Is Not Permissible."

Don't you recognize the kind of commentary I am referring to? Under our Constitution, we have developed into a great nation. On this matter of national empowerment, the result has hardly been deplorable; the national government (subject of course to the prohibitive canons in what I may call generically the Bill of Rights material) can do what the majorities of the Senate and the House, in co-action with the President, think best. Including, of course, needful delegation. This has been accomplished — as virtually all desirable developments in law have been accomplished — by creative, yea-saying interpretation and use of the material to which we are textually or otherwise committed. Yet one reading the passages I have summarized might easily gather that, in regard to the two matters deemed worth mentioning as a beginning, the whole thing has been nothing but a lamentable lapse from grace.

Meanwhile, in another part of the forest, we encounter

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branch. Hampton & Co. v. United States, 276 U.S. 394, 405-06 (1928). *See* THE ANNOTATED CONSTITUTION, *supra* note 1, at 64.

11. Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

In *Panama Refining*, the Court struck down § 9(c) of the National Industrial Recovery Act as an excessive delegation of legislative power to the executive branch because it authorized the President, solely at his discretion, to prohibit interstate shipments of petroleum products in excess of state permitted amounts.

In *Schechter*, the Supreme Court invalidated § 3 of the National Industrial Recovery Act for permitting the Chief Executive to exercise unfettered discretion in adopting rules and regulations to foster economic growth.

something called the "electoral college."[12] Or, one might better say, something *not* called the "electoral college," because that term does not occur in the Constitution. Justice Robert Jackson is quoted as saying, "No one faithful to our history can deny that the plan originally contemplated . . . that electors would be free agents, to exercise an independent and non-partisan judgment as to the men best qualified for the nation's highest offices."[13] Does one sense here bitter regret for a lost dream, even guilt for our infidelity to our beginning? If so, we have to do here with yet another disappointment, another lapse from grace.

What I would suggest, rather, is that the political genius of the American people has rescued from certain shipwreck a plan for election of the President that was the great failure of the 1787 Convention. Before you cry "heresy" or "blasphemy," look freshly at what the original plan was.

First of all, this "electoral college," as it has for some obscure reason come to be called, was by geographical and constitutional necessity, in their linked co-action, *prevented* from collective deliberation before voting. The several ballotings were to take place *on the same day, in states as far apart as New Hampshire and Georgia.* Just think about that! No discussion, no nominations, no possibility of any elector's taking into account, in bestowing his vote, of the realistic possibility of nationwide success by the candidate of his choice. No chance, in sum, for even minimally intelligent politics.

Imagine yourself to be an elector for Massachusetts. You come to Boston on the day appointed, knowing that others are likewise assembling, on that very day, in Philadelphia and in Richmond — and a few decades later in Austin and in Sacramento. The meaning and force of your own vote altogether depends on the patterns of voting in all those places. But you can't do much about that; you have no means even slightly reliable for making a good guess. (Here, in parentheses, let us note that all

12. The President of the United States is not directly elected by the American people. Rather, the President is chosen by the majority vote of presidential electors appointed by each state for this express purpose. Each state receives a number of electors equal to the number of seats in its congressional delegation (Representatives and Senators). The electors meet in their representative states and vote by ballot. U.S. CONST. art. II, § 1, cl. 3.

13. Ray v. Blair, 343 U.S. 214, 232 (1952) (Jackson, J., dissenting).

such statements are untrue when applied to the elections of 1788 and 1792, because everybody knew that Washington would win. Any system would have produced this result; if dice had had to be used, people would benignly have loaded the dice. But systems are not to be judged by their offering a solution when there is no problem. And since 1792 there has always been a problem.)

Now I put it to you that these 13, or 25, or 50 widely separated but simultaneous ballotings would produce a winner only by something like a miracle. General Eisenhower could hardly have been such a winner in 1952;[14] millions of the people who voted for him would have preferred Robert Taft. Nor is there any reason whatever to think that the choice would have been limited to Eisenhower, Taft, Stevenson, Strom Thurmond, Alben Barkley, Harry Truman, and one or two others, because these possiblities that occur to us now are suggested by the narrowing actions of conventions, in 1952 and even in 1948. What would each elector have done, if that elector walked into the balloting conceiving that what duty called for was an independent vote for the best person, cast without any reliable information on what was happening in Austin and Honolulu? I think that the only person who would have won under such a system was "The first, the last, and of all the best, The Cincinnatus of the West."[15] But he was not immortal.

So what was to happen if no one emerged with a majority of the electoral vote? Well, in the original plan, the House of Representatives chose among the highest five — a number, by the way, indicating that the Framers must have expected some pretty wide scattering of the votes. The twelfth amendment soon cut this number to three.[16] The difficulties with either of these numbers could not reliably or near reliably be dealt with by the

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14. Dwight D. Eisenhower, the Republican candidate for President in 1952, received 55.1% of the popular vote and 442 electoral votes out of a total of 531. N.Y. Times, Nov. 5, 1952, at 1, col. 8.

15. George Washington, in his day, was often compared to the Roman politician and general, Cincinnatus, who, like Washington, was both a farmer and military leader. The above quotation is from a poem by Lord Byron. M. CUNLIFFE, GEORGE WASHINGTON, MAN AND MONUMENT at 16-17 (1958).

16. The twelfth amendment provides in pertinent part that "if no persons have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for a President, the House of Representatives shall choose immediately, by ballot, the President." U.S. CONST. amend. XII.

voting in the House, because of the rules of that voting.

The states were to vote separately, with one vote for each state's congressional delegation. This set up the clear possibility that any particular state might be unable to vote, because of division in its delegation. (If a majority of the delegation were needed to determine the state's vote, then, with as many as three candidates, a state that showed only a plurality for one candidate would not be able to cast its vote. Or if two of the three candidates were tied for first place in any state's delegation, that state could not vote.)

Further, *a majority of the whole number of states* is necessary for election. Such a majority could turn out to be unattainable, for either of two reasons or for both of them in combination: First, if one or more states' delegations so divided as not to be able to cast a vote, then a majority of states voting for one candidate might not be a majority of the whole number of states; secondly, with three candidates, the states' votes might themselves be split three ways, so that no majority of states, for any one candidate, was formed.

Now there are other troubles with this presidential election scheme; there appears, for example, no reason at all for shifting, when the electors do not produce a winner, to the state-by-state mode in the House of Representatives. But the main trouble with it is the worst trouble possible: It need not, almost certainly sometimes would not, produce a winner, when all the procedures were exhausted, with no further constitutional action possible. Some scheme of divination, or dice-throwing itself, would be better than that. Take yourself, in imagination, through the purely constitutional procedures, and see if I am not right.

(If this first-choice method did fail to produce a winner, then recourse would have to be had to the Vice-President. But the procedure mandated for his election, in the twelfth amendment, might also fail to produce a winner, because a majority of whole number of Senators might be unattainable — owing to absences or abstentions.)

We, the constitutionally gifted American people, attacked all this at the root — by the introduction of the two things most needful in politics — mutual dependence and partisanship among like-minded people. Only these things could suffice to produce what those fifty separate but simultaneous ballotings

needed — the fixing of a simple and binding agenda, the channeling of choice. (When a single balloting is to take place, the best choice is a binding *binary* choice, because the third candidate inevitably drains off votes from the candidate nearer to him in political beliefs, and increases the chances of the candidate not so near to either of these two.) And that is what we have brought to Article II — first in the formation of parties, then in congressional caucuses, and then in the evolving form of the conventions, and more recently in the still problematic primaries. We have done this not perfectly, but to some satisfactory approximation. We can perhaps do better, if we cease to see our efforts as a degradation of a noble pristine plan, and see them for what they are — a work of rescue.

Now I've taken us on three walks through the forest, and it's a place, it seems, of deep shadow, of chronic gloom.

Or can it be that we have forgotten to take off our dark glasses? The example of the so-called electoral college makes us suspect that, does it not? If we can bring ourselves around to looking at the matter freshly, are not our dealings with the presidential election system a pretty successful case of adding, to a system simply unworkable in its own terms, a super-imposed procedure that makes it go rather well? Have we any sin, really, to feel dreary about? Somebody just made up a phrase, "electoral college," and seemed to be hinting, as Jackson does in the passage I have quoted, at a more virtuous scheme than the one we follow. But we at least can read, and the Constitution itself, with the clarity of physical necessity, shows us that the "electoral college" — if by that term we mean a group of electors consulting together — was never planned, or was made impossible by what was planned. We are disappointed at the non-happening of something that the written Constitution makes quite impossible. The scheme actually set up guaranteed no pooling of wisdom; instead, it broke decision into little pieces, and ordained no reliable process for putting them together again. Why not just wake up, and congratulate ourselves? And go forward unembarrassed to the further tuning-up of the presidential election machinery that there must be?

As to the "delegation" matter, on the one side is a three-headed phantom, and on the other side necessity. We have abundant delegation because we have to. The phantomic "three

reasons"[17] set out in the *Annotated Constitution* have no real constitutional standing.

As to the problems of national empowerment, let me digress — or rather, let me say something of a preliminary sort. I was about to say that our people's appreciation of constitutional law is made difficult by the fact that this subject is too often treated journalistically. But let me back up, because I am not talking here about journalists. Of course day-to-day judgments of the Supreme Court may be news. I am saying rather that professional and, above all, academic dealings with constitutional law suffer grievously from its being taught and learned as something written today by a moving finger. The eagerness with which we are invited to await the *Annual Supplement* of the casebook betokens something deep and important. Here I intend (and will offer) no criticism of anyone. I shall keep what I have to say quite general, inviting you simply to think whether I am not pointing to something you have yourself observed in the academic handling of constitutional law, as exemplified, let's say, in the selection and arrangement of most if not all casebooks.

The result of focus on the present and recent past is that old battles have to be fought over and over again. I have lately, on several occasions, touched on this phenomenon, but I would like here to look on it from a somewhat different perspective. I should like to consider the rich legacy not so much of *result* as of *method* that is likely to be lost if we forget entirely about the great struggles and the great decisions of the past.

One can start anywhere. I suppose the struggle most thoroughly forgotten is the one that ended so tritely in the words on a dollar bill — "This Note is Legal Tender For All Debts Public and Private." That was a long and bitter struggle. Accusations poured out. Friendships were broken up.

The problem first reached the Supreme Court in respect of paper money issued to finance the Civil War. In 1870, in *The First Legal Tender Case,*[18] the Court in a four-to-three decision

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17. *See supra* note 10.

18. Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870). The Court held that the Legal Tender Acts, enacted during the Civil War, making United States notes legal tender for most public and private debts, were unconstitutional when applied to preexisting debts. *Id.* at 626.

held that Congress acted outside its power in making these paper notes legal tender. About a year later, in *The Second Legal Tender Case,*[19] this decision was overruled, and the Civil War paper money was held properly made legal tender. Then in 1884 the Court finally upheld the power of Congress to issue legal tender paper money in general, without reference to any war or other emergency.[20]

Now these decisions beyond any doubt have to be justified, and were justified, on exceedingly broad grounds — grounds about as broad as any before or since. To say "broad grounds" is not to say "wrong grounds"; questions concerning the empowerments of a great nation need to be viewed broadly.

I suppose few questions could now be considered more dryly one-sided than the question whether the national government is empowered to take by eminent domain the land for a post office. Yet that question remained open till the decision in *Kohl v. United States,*[21] in 1876. The opinion, by Justice Strong, goes into structural grounds for the new holding.[22]

So one walks into the new post office with a legal tender dollar bill in one's pocket quite unconscious of the constitutional foundation upon which one is treading. Does this matter?

I think it greatly matters. The most important general truth about the present-day state of American constitutional law is that it rests upon an enormously strong foundation, stretching back to the beginning, put in place by almost innumerable resolutions of questions — *by means of broad and creative interpretive techniques.* For two hundred years, these techniques have been shaping the government of the United States; we could not honestly and effectively repudiate them and still have a working government, or even a real nation.

And it matters that the people know this, in its *generality.*

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19. Knox v. Lee, 79 U.S. (12 Wall.) 457 (1871), overruled *Hepburn* and upheld the constitutionality and application of the Legal Tender Acts. *Id.* at 553.

20. Juilliard v. Greenman, 110 U.S. 421 (1884). The Court held that notes of the United States declared to be legal tender by acts of Congress were valid tender for payment of debts, whether in times of war or times of peace.

21. 91 U.S. 367 (1876).

22. Since the Constitution grants specific powers to the federal government to maintain armies and build courthouses and post offices, it is axiomatic that a right of eminent domain accompanies these powers as a necessary tool to effectuate them. *Id.* at 371.

Let's take a quick walk through the forest, past the protective tariff; the "internal improvements" of the early "American System"; the exceedingly wide congressional power over Indian affairs; the transmission of "intelligence" as "commerce"; the carriage of human beings as "commerce"; national power over bridges and dams on navigable waters; motion pictures as subjects of copyright; the application of *passenger* safety regulations to a ship, on the ground of its carrying some *packages* that were to be transshipped interstate; Congress' power to protect agains floods; the protection of trademarks; the prevention of postal fraud.

I stopped this list one-third of the way through the *Annotated Constitution.* I didn't look very hard or very long at any page, and I consciously passed over a good many more illustrations. That's the kind of forest we live in.

But take a stroll through the *Annotated Constitution* for yourself. This time try to collect cases of really strict verbal construction of the Constitution. This effort should convince you that broad creative interpretation is the only kind that (with quite rare exceptions) we have ever used. The government of the United States was created and is in all its branches and works upheld and legitimated by that kind of interpretation. The *trees* that the seemingly harmless journalistic mode of viewing shows us are at the very edge nearest us in time. Looking at these is not enough to give any adequate sense of the kind of *thought* that this country is built upon.

Let me offer a further and deeper illustration. I shall use the chief constitutional argument in *Butler v. Boston Steamship Co.,*[23] decided in 1889.

The raw facts were that about 100 passengers had died, and many more had been seriously injured, in a marine accident of which the negligence of the steamer was alleged to be the cause. The only defense that needed to be considered was the defense created by the Limitation of Liability Act of 1851.[24] That Act, if applied, would reduce the possible recovery for these 100 deaths

23. 130 U.S. 527 (1889). This case involved a maritime disaster in Massachusetts waters and the question of whether the Limited Liability Act of 1851 would apply to limit the damages sought to the value of the vessel and the freight therein.

24. Ch. 43, § 3, 9 Stat. 635 (1851).

and the other injuries to a grand total of about $1,000, just ten dollars a death, and less than that when the merely injured were brought in. Since it *construed* the 1851 Act to cover this aggregate of liabilities, the Court had to consider whether the Act so construed was *constitutional.*

The Court answered "yes" because:

First, though the admiralty and maritime jurisdiction clause in Article III[25] concerns on its face *only* the *judicial* jurisdiction of the federal courts, it *implies* the adoption of a *national substantive code* of maritime law, because without this the objectives sought by the conferring of judicial jurisdiction would largely be frustrated. (In comparison with this, think how modest was Marshall's treatment of "implied powers" in *McCulloch v. Maryland.*)

Second, since it cannot have been contemplated that this maritime law, so called into being, was to be forever unalterable, Congress must have the power to introduce changes.[26] Any other holding would be inconvenient. The Statute of 1851, with its near-obliteration of serious claims for hurt and death, was such a "molding or modification" by Congress.

Third, *neither* of these conclusions is made inapplicable to this case by the facts that *no action for wrongful death existed in admiralty*, but had to be given, if at all, by *state* law since the boat burned and sank in territorial waters of Massachusetts.[27] This is important, because in this step the argument seems to rise above its source; a nationwide substantive maritime law, and a congressional power to change that law, actually seem to go distinctly beyond the limits of that very judicial jurisdiction whose granting was the very basis of steps one and two.

The hypothesis of there being a *national* maritime law is made to rest entirely on the ground that the constitutional grant

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25. Article III states in pertinent part that: "The judicial Power shall extend . . . to all cases of admiralty and maritime jurisdiction. . . ." U.S. CONST. art. III, § 2.

26. As Justice Bradley stated in Butler v. Boston & Savannah Steamship Co., 130 U.S. 527, 555 (1889) (quoting The Lottawana, 88 U.S. (21 Wall.) 558, 577 (1874)): "It cannot be supposed that the framers of the Constitution contemplated that the law [maritime law] should forever remain unalterable. Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed."

27. *Butler*, 130 U.S. at 558.

of *judicial jurisdiction* over maritime cases would be *far less effective* in attaining its own (largely postulated) ends if the federal courts did not have a national maritime code to apply. The power of Congress over this same corpus of maritime law is necessary, because it would be inconvenient not to have it. Finally, as a sort of grace note, the "states' rights" question is dealt with, certainly summarily, and I think a little scornfully.[28]

Now you can treat such a case as holding something about the constitutional validity of the Limitation of Liability Act, in general or applied to these harrowing facts. You might believe the case helps in regard to the limits of liability for accidents at atomic plants. But the case must certainly be read to contain *another kind of holding* — the holding, first that it is a valid method of constitutional interpretation to *add* to a provision actually in the text *another* provision that (though *not* in the text) is wanted or needed because without it the provision that *is* in the text would lose a great part of its effectiveness; and, secondly, that it is an example of permissible constitutional inference to hold that Congress is to have a power that it is convenient for it to have.

We recognize in these patterns of reasoning the voice of common sense. If you set up an arrangement, you very likely will disfavor some other thing that largely frustrates the purposes of that arrangement; if this latter result imports an undesired rigidity, it might be best to provide for a means of alteration from time to time. Nothing better illustrates the truth of the saying that, just as the aim of all training in singing is to learn to sing naturally, so the aim of all training in law is to learn to think

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28.

> It is unnecessary to consider the force and effect of the statute of Massachusetts over the place in question. Whatever force it may have in creating liabilities for acts done there, it cannot neutralize or affect the admiralty or maritime jurisdiction or the operation of the maritime law in maritime cases. Those are matters of national interest . . . . We have no hesitation, therefore, in saying that the limited liability act applies to the present case, notwithstanding the disaster happened within the technical limits of a county of Massachusetts, and notwithstanding the liability itself may have arisen from a state law. It might be a much more serious question whether a state law can have force to create a liability in a maritime case at all, within the dominion of the admiralty and maritime jurisdiction, where neither the general maritime law nor an act of Congress has created such a liability. On this subject we prefer not to express an opinion.

Butler, 130 U.S. at 557-58.

naturally. But these particular modes of thinking naturally are, just because they are natural, not applicable only to the admiralty jurisdiction. These particular trees are more than just two trees; *they are an illustration of how the trees in this forest may permissibly grow.*

So let's say the fourteenth amendment lays it down that "no State" may deprive anyone of life without due process of law nor deny to anyone equal protection of the law.[29] A lynch mob forms. Congress looks on, in about the year of the *Butler* case,[30] and says, "Well, that's too bad; wish we could do something. But you know it does say 'no State' and surely you agree that those bad boys in the mob are not the State. Q.E.D." But, though the mob is not mentioned in the text, are its members not proposing to do something that *pro tanto* will bring to nothing the values and interests the text seeks after?

The year of the *Butler* case — 1889 — was a bad year for that kind of thinking. Just six years before, the very same Justice Bradley, whose mind was so receptive, in the *Butler* case, to the forms of argument I have picked out from that case and described, wrote for the Court in the *Civil Rights Cases of 1883*[31] an opinion that strangled the hopes of the black people of America, holding that Congress had no constitutional power to pass laws banning racial discrimination on public carriers, in hotels, and in other places of public resort.[32] The ground was sim-

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29.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

30. Butler v. Boston & Savannah Steamship Co., 130 U.S. 527 (1889).

31. 109 U.S. 3 (1883).

32.

> [I]t is clear that the law in question cannot be sustained by any grant of legislative power made to Congress by the Fourteenth Amendment . . . . Whether it would not have been a more effective protection of the rights of citizens to have clothed Congress with plenary power over the whole subject, is not now the question. What we have to decide is, whether such plenary power has been conferred upon Congress by the Fourteenth Amendment; and, in our judgment, it has not.

Id. at 18-19.

ple. The fourteenth amendment says that "no *State* shall deny equal protection of the laws" to any person; Congress, in section 5 of the amendment, is given the power to "enforce" this among other provisions, and this confines Congress to tracking exactly the very words of the amendment, and enacting nothing that does not directly and immediately concern "state action."

Now there are many faults in that opinion. Basically, it fails to give proper weight to the deep involvements of government with common carriage and other public callings. Even more radically, it fails to deal at all with the fact that an obligation *not to deny equal protection* is primarily and archetypically an obligation to *act*, and can most obviously be breached by inaction, the form that *denial of protection* very often takes. The "state action" test triumphs by asking the wrong question. But, more generally, the narrow verbal approach of this case is completely out of consonance not only with Bradley's own opinion in the *Butler* case, and with his splendid nationalistic opinion in one of the *Legal Tender cases*, but with very nearly all of the nineteenth century cases on the powers of Congress — with their methods more importantly than with their holdings.

Now I will be well satisfied if I have sent some of you on a yet wider stroll of inquiry, through our constitutional forest. What kind of a forest is it? By what laws of growth do its trees grow? *The Annotated Constitution* can be the guide.

What I invite you to look for, just now, are the modes of interpretation, whether of the constitutional matter on empowerment of Congress, or of the human rights material. Every single case on empowerment, besides its substantive holding, is a precedent for some mode of interpretation. Obedience to precedent, therefore, requires us not only to accept the truth, so bitter a truth to some people in the later nineteenth century, that paper money may be given legal tender status by Congress. We must also accept that those *modes of reasoning and those wider postulates* that got us there are legitimate.

If this were a matter of one or two cases, we might treat them as aberrant, enjoying perhaps only a prescriptive right to live. But that is where the forest comes in. Methodologically, the aberrant case is the *Civil Rights* decision of 1883, tracking as it did, with what the dissenting Justice Harlan called "narrow verbal criticism," the very words of the constitutional passage. The

trees in this part of the forest — the empowerment part — pretty much all grow by a different process than that. A full canvass of the development of this field will make this entirely plain.

The two-century American *tradition* as to interpretation of the powers of the nation is a strong tradition of broad and creative reasonings and concepts. (I guess I have to express my — well, something like surprise — that the people who are trying to lay the axe to the root of this tradition can call themselves "conservatives.")

And remember that modes of constitutional interpretation that are sanctioned for the "empowerment" part of this forest do not lose either their warrant or their power when we move on to the continual building of a system of constitutional human rights.