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Report of the Committee On Federal-State Relationships As Affected by Judicial Decisions

This Report was submitted to and approved by the Conference of Chief Justices at Pasadena, Cal., on August 23, 1958. The complete text of the Report is published in this special four-page edition.

Foreword

Your Committee on Federal-State Relationships as Affected by Judicial Decisions was appointed pursuant to action taken at the 1957 meeting of the Conference, at which, you will recall, there was some discussion of recent decisions of the Supreme Court of the United States and a Resolution expressing concern with regard thereto was adopted by the Conference. This Committee held a meeting in Washington in December, 1957, at which plans for conducting our work were developed. This meeting was attended by Sidney Spector of the Council of State Governments and by Professor Philip B. Kurland, of the University of Chicago Law School.

The Committee believed that it would be desirable to survey this field from the point of view of general trends rather than by attempting to submit detailed analyses of many cases. It was realized, however, that an expert survey of recent Supreme Court decisions within the area under consideration would be highly desirable in order that we might have the benefit in drafting this report of scholarly research and of competent analysis and appraisal, as well as of objectivity of approach.

Thanks to Professor Kurland and to four of his colleagues of the faculty of the University of Chicago Law School several monographs dealing with subjects within the Committee's field of action have been prepared and have been furnished to all members of the Committee and of the Conference. These monographs and their authors are as follows:

1. "The Supreme Court, The Due Process Clause, and the In Personam Jurisdiction of State Courts" by Professor Kurland;
2. "Limitations on State Power to Deal with Issues of Subversion and Loyalty" by Assistant Professor Cramton;
3. "Congress, the States and Commerce" by Professor Allison Dunham;
4. "The Supreme Court, Federalism, and State Systems of Criminal Justice" by Professor Francis A. Allen; and
5. "The Supreme Court, the Congress and State Jurisdiction Over Labor Relations," by Professor Bernard D. Meltzer.

These gentlemen have devoted much time, study and thought to the preparation of very scholarly, interesting and instructive monographs on the above subjects. We wish to express our deep appreciation to each of them for his very thorough research and analysis of these problems. With the pressure of the work of our respective courts, the members of this Committee could not have undertaken this research work and we could scarcely have hoped, even with ample time, to equal the thorough and excellent reports which they have written on their respective subjects.

It had originally been hoped that all necessary research ma-

terial would be available to your Committee by the end of April and that the Committee could study it and then meet for discussion, possibly late in May, and thereafter send at least a draft of the Committee's report to the members of the Conference well in advance of the 1958 meeting; but these hopes have not been realized. The magnitude of the studies and the thoroughness with which they have been made rendered it impossible to complete them until about two months after the original target date and it has been impracticable to hold another meeting of this Committee until the time of the Conference.

Even after this unavoidable delay had developed, there was a plan to have these papers presented at a Seminar to be held at the University of Chicago late in June. Unfortunately, this plan could not be carried through, either. We hope, however, that these papers may be published in the near future with such changes and additions as the several authors may wish to make in them. Some will undoubtedly be desired in order to include decisions of the Supreme Court in some cases which are referred to in these monographs, but in which decisions were rendered after the monographs had been prepared. Each of the monographs as transmitted to us is stated to be in preliminary form and subject to change and as not being for publication. Much as we are indebted to Professor Kurland and his colleagues for their invaluable research aid, your Committee must accept sole responsibility for the views herein stated. Unfortunately, it is impracticable to include all or even a substantial part of their analyses in this report.

Background and Perspective

We think it desirable at the outset of this report to set out some points

which may help to put the report in proper perspective, familiar or self-evident as these points may be.

First, though decisions of the Supreme Court of the United States have a major impact upon federal-state relationships and have had such an impact since the days of Chief Justice Marshall, they are only a part of the whole structure of these relationships. These relations are, of course, founded upon the Constitution of the United States itself. They are materially affected not only by judicial decisions but in very large measure by Acts of Congress adopted under the powers conferred by the Constitution. They are also affected, or may be affected, by the exercise of the treaty power.

Of great practical importance as affecting federal-state relationships are the rulings and actions of federal administrative bodies. These include the independent agency regulatory bodies, such as the Interstate Commerce Commission, the Federal Power Commission, the Securities and Exchange Commission, the Civil Aeronautics Board, the Federal Communications Commission and the National Labor Relations Board. Many important administrative powers are exercised by the several departments of the Executive Branch, notably the Treasury Department and the Department of the Interior. The scope and importance of the administration of the federal tax laws are, of course, familiar to many individuals and businesses because of their direct impact, and require no elaboration.

Second, when we turn to the specific field of the effect of judicial decisions on federal-state relationships we come at once to the question as to where power should lie to give the ultimate interpretation to the Consti-

The Resolution

RESOLVED:

1. That this Conference approves the Report of the Committee on Federal-State Relationships as Affected by Judicial Decisions submitted at this meeting.
2. That in the field of federal-state relationships the division of powers between those granted to the national government and those reserved to the state governments should be tested solely by the provisions of the Constitution of the United States and the Amendments thereto.
3. That this Conference believes that our system of federalism, under which control of matters primarily of national concern is committed to our national government and control of matters primarily of local concern is reserved to the several states, is sound and should be more diligently preserved.
4. That this Conference, while recognizing that the application of constitutional rules to changed conditions must be sufficiently flexible as to make such rules adaptable to altered conditions, believes that a fundamental purpose of having a written constitution is to promote the certainty and stability of the provisions of law set forth in such a constitution.
5. That this Conference hereby respectfully urges that the Supreme Court of the United States, in exercising the great powers confided to it for the determination of questions as to the allocation and extent of national and state powers, respectively, and as to the validity under the federal Constitution of the exercise of powers reserved to the states, exercise one of the greatest of all judicial powers — the power of judicial self-restraint — by recognizing and giving effect to the difference between that which, on the one hand, the Constitution may prescribe or permit, and that which, on the other, a majority of the Supreme Court, as from time to time constituted, may deem desirable or undesirable, to the end that our system of federalism may continue to function with and through the preservation of local self-government.
6. That this Conference firmly believes that the subject with which the Committee on Federal-State Relationships as Affected by Judicial Decisions has been concerned is one of continuing importance, and that there should be a committee appointed to deal with the subject in the ensuing year.

tution and to the laws made in pursuance thereof under the authority of the United States. By necessity and by almost universal common consent, these ultimate powers are regarded as being vested in the Supreme Court of the United States. Any other allocation of such power would seem to lead to chaos. (See Judge Learned Hand's most interesting Holmes Lectures on *The Bill of Rights* delivered at the Harvard Law School this year and published by the Harvard University Press.)

Third, there is obviously great interaction between federal legislation and administrative action on the one hand, and decisions of the Supreme Court on the other, because of the power of the Court to interpret and apply Acts of Congress and to determine the validity of administrative action and the permissible scope thereof.

Fourth, whether federalism shall continue to exist, and if so in what form, is primarily a political question rather than a judicial question. On the other hand, it can hardly be denied

that judicial decisions, specifically decisions of the Supreme Court, can give tremendous impetus to changes in the allocation of powers and responsibilities as between the federal and the state governments. Likewise, it can hardly be seriously disputed that on many occasions the decisions of the Supreme Court have produced exactly that effect.

Fifth, this Conference has no legal powers whatsoever. If any conclusions or recommendations at which we may arrive are to have any effect, this can only be through the power of persuasion.

Sixth, it is a part of our obligation to seek to uphold respect for law. We do not believe that this goes so far as to impose upon us an obligation of silence when we find ourselves unable to agree with pronouncements of the Supreme Court (even though we are bound by them), or when we see trends in decisions of that Court which we think will lead to unfortunate results. We hope that the expression of our views may have some value. They pertain to matters which directly affect the work of our state courts. In this report we urge the desirability of self-restraint on the part of the Supreme Court in the exercise of the vast powers committed to it. We endeavor not to be guilty ourselves of a lack of due restraint in expressing our concern and, at times, our criticisms in making the comments and observations which follow.

Problems of Federalism

The difference between matters primarily local and matters primarily national was the guiding principle upon which the framers of our national Constitution acted in outlining the division of powers between the national and state governments.

The guiding principle, central to the American federal system, was recognized when the original Constitution was being drawn and was emphasized by de Tocqueville. Under his summary of the federal Constitution he says:

The first question which awaited the Americans was to divide the sovereignty that each of the different states which composed the union should continue to govern itself in all that concerned its internal prosperity, while the entire nation, repre-



DOUGLAS BRENNAN BLACK CLARK WARREN HARLAN FRANKFURTER WHITTAKER BURTON

The Supreme Court as it was composed last August at the time of the Conference of Chief Justices in Pasadena, Cal. Since then Justice Burton has been replaced by Justice Potter Stewart.

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 ber 19, 1946, at the post office in Lexington,
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 1879.

v. Washington, 326 U. S. 310, is
 probably the most significant case
 in this development. In sustaining the
 jurisdiction of a Washington court to
 render a judgment *in personam*
 against a foreign corporation which
 carries on some activities within the
 State of Washington, Chief Justice
 Stone used the now familiar phrase
 that there "were sufficient contacts
 or ties with the State of the forum
 to make it reasonable and just, ac-
 cording to our traditional conception
 of fair play and substantial justice,
 to enforce the obligation which ap-
 ellant has incurred there." Formalistic
 doctrines or dogmas have been re-
 placed by a more flexible and realistic
 approach, and this trend has been
 carried forward in subsequent cases
 leading up to and including *McGee*
v. International Life Insurance Co.,
 355 U. S. 220, until halted by *Han-*
son v. Denckla, 357 U. S. decided
 June 23, 1958.

Taxation

In the field of taxation the doc-
 trine of intergovernmental immunity
 has been seriously curtailed partly by
 judicial decisions and partly by statu-
 te. This has not been entirely a
 one-way street.

In recent years cases involving
 state taxation have arisen in many
 fields. Sometimes they have involved
 questions of burdens upon inter-
 state commerce or the export-import
 clause, sometimes of jurisdiction to
 tax as a matter of due process, and
 sometimes they have arisen on the
 fringes of governmental immunity,
 as where a state has sought to tax
 a contractor doing business with the
 national government. There have
 been some shifts in holdings. On
 the whole, the Supreme Court seems
 perhaps to have taken a more liberal
 view in recent years towards the
 validity of state taxation than it
 formerly took.

Other Fourteenth Amendment Cases

In many other fields, however, the
 Fourteenth Amendment has been in-
 voked to cut down state action. This
 has been noticeably true in cases in-
 volving not only the Fourteenth
 Amendment but also the First
 Amendment guarantee of freedom
 of speech or the Fifth Amendment
 protection against self-incrimination.
 State anti-subversive acts have been
 practically eliminated by *Pennsyl-*
vania v. Nelson in which the de-
 cision was rested on the ground of
 pre-emption of the field by the fed-
 eral statutes.

The Sweezy Case — State
Legislative Investigations

One manifestation of this restric-
 tive action under the Fourteenth
 Amendment is to be found in *Sweezy*
v. New Hampshire, 354 U. S. 234.
 In that case, the State of New
 Hampshire had enacted a subversive
 activity statute which imposed var-
 ious disabilities on subversive per-
 sons and subversive organizations. In
 1953 the legislature adopted a reso-

certainty is in part undoubtedly due
 to the failure of Congress to make
 its wishes entirely clear. Also, some-
 what varying views appear to have
 been adopted by the Supreme Court
 from time to time.

In connection with this matter, in
 the case of *Textile Union v. Lincoln*
Mills, 353 U. S. 448, the majority
 opinion contains language which we
 find somewhat disturbing. That case
 concerns the interpretation of Section
 301 of the Labor Management Rela-
 tions Act of 1947. Paragraph (a) of
 that Section provides: "Suits for vio-
 lation of contracts between an em-
 ployer and a labor organization
 representing employees in an industry
 affecting commerce as defined in this
 Chapter, or between any such labor
 organizations, may be brought in any
 district court of the United States
 having jurisdiction of the parties,
 without respect to the amount in con-
 troversy or without regard to the
 citizenship of the parties." Paragraph
 (b) of the same Section provides in
 substance that a labor organization
 may sue or be sued as an entity with-
 out the procedural difficulties which
 formerly attended suits by or against
 unincorporated associations consist-
 ing of large numbers of persons. Sec-
 tion 301 (a) was held to be more than
 jurisdictional and was held to author-
 ize federal courts to fashion a body of
 federal law for the enforcement of
 these collective bargaining agree-
 ments and to include within that body
 of federal law specific performance of
 promises to arbitrate grievances under
 collective bargaining agreements.

What a state court is to do if con-
 fronted with a case similar to the
Lincoln Mills case is by no means
 clear. It is evident that the substan-
 tive law to be applied must be federal
 law, but the question remains, where
 is that federal law to be found? It
 will probably take years for the de-
 velopment or the "fashioning" of the
 body of federal law which the Su-
 preme Court says the federal courts
 are authorized to make. Can a state
 court act at all? If it can act and does
 act, what remedies should it apply?
 Should it use those afforded by state
 law, or is it limited to those which
 would be available under federal law
 if the suit were in a federal court?
 It is perfectly possible that these
 questions will not have to be an-
 swered, since the Supreme Court may
 adopt the view that the field has been
 completely pre-empted by the federal
 law and committed solely to the ju-
 risdiction of the federal courts, so
 that the state courts can have no
 part whatsoever in enforcing rights
 recognized by Section 301 of the La-
 bor Management Relations Act. Such
 a result does not seem to be required
 by the language of Section 301 nor yet
 does the legislative history of that
 Section appear to warrant such a
 construction.

Professor Meltzer's monograph has
 brought out many of the difficulties in
 this whole field of substantive labor
 law with regard to the division of
 power between state and federal gov-
 ernments. As he points out much of
 this confusion is due to the fact that
 Congress has not made clear what
 functions the states may perform and
 what they may not perform. There
 are situations in which the particular
 activity involved is prohibited by fed-
 eral law, others in which it is pro-
 tected by federal law, and others in
 which the federal law is silent. At the
 present time there seems to be one
 field in which state action is clearly
 permissible. That is where actual vio-
 lence is involved in a labor dispute.

State Law in Diversity Cases

Not all of the decisions of the Su-
 preme Court in comparatively recent
 years have limited or tended to limit
 the power of the states or the effect
 of state laws. The celebrated case of
Erie R. R. v. Tompkins, 304 U. S. 64,
 overruled *Swift v. Tyson* and estab-
 lished substantive state law, decision-
 al as well as statutory, as controlling
 in diversity cases in the federal
 courts. This marked the end of the
 doctrine of a federal common law in
 such cases.

In Personam Jurisdiction
Over Non-Residents

Also, in cases involving the *in per-*
sonam jurisdiction of state courts
 over non-residents, the Supreme
 Court has tended to relax rather
 than tighten restrictions under the
 due process clause upon state action
 in this field. *International Shoe Co.*

argument was advanced in that case
 that the general welfare clause would
 sustain the imposition of the tax and
 that money derived from the tax
 could be expended for any purposes
 which would promote the general
 welfare. The Court viewed this argu-
 ment with favor as a general proposi-
 tion, but found it not supportable on
 the facts of that case. However, it
 was not long before that clause was
 relied upon and applied. See *Steward*
Machine Co. v. Davis, 301 U. S. 548,
 and *Helvering v. Davis*, 301 U. S. 690.
 In those cases the Social Security Act
 was upheld and the general welfare
 clause was relied upon both to sup-
 port the tax and to support the ex-
 penditures of the money raised by the
 Social Security taxes.

Grants-in-Aid

Closely related to this subject are
 the so-called grants-in-aid which go
 back to the Morrill Act of 1862 and
 the grants thereunder to the so-called
 land-grant colleges. The extent of
 grants-in-aid today is very great, but
 questions relating to the wisdom as
 distinguished from the legal basis for
 such grants seem to lie wholly in the
 political field and are hardly appropri-
 ate for discussion in this report. Per-
 haps we should also observe that since
 the decision of *Massachusetts v. Mel-*
lon, 262 U. S. 447, there seems to be
 no effective way in which either a
 state or an individual can challenge
 the validity of a federal grant-in-aid.

Doctrine of Pre-emption

Many, if not most, of the problems
 of federalism today arise either in
 connection with the commerce clause
 and the vast extent to which its sweep
 has been carried by the Supreme
 Court, or they arise under the Four-
 teenth Amendment. Historically,
 cases involving the doctrine of pre-
 emption pertain mostly to the com-
 merce clause. More recently the
 doctrine has been applied in other
 fields, notably in the case of *Common-*
wealth of Pennsylvania v. Nelson,
 in which the Smith Act and other
 federal statutes dealing with Com-
 munist and loyalty problems were
 held to have pre-empted the field and
 to invalidate or suspend the Pennsylv-
 ania anti-subversive statute which
 sought to impose a penalty for con-
 spiracy to overthrow the government
 of the United States by force or vio-
 lence. In that particular case it hap-
 pens that the decision of the Supreme
 Court of Pennsylvania was affirmed.
 That fact, however, emphasizes rather
 than detracts from the wide sweep
 now given to the doctrine of pre-
 emption.

Labor Relations Cases

In connection with commerce clause
 cases, the doctrine of pre-emption,
 coupled with only partial express
 regulation by Congress, has produced
 a state of considerable confusion in
 the field of labor relations.

One of the most serious problems
 in this field was pointed up or created
 (depending upon how one looks at the
 matter) by the Supreme Court's de-
 cision in *Amalgamated Association*
v. Wisconsin Employment Relations
Board, 340 U. S. 383, which over-
 turned a state statute aimed at pre-
 venting strikes and lockouts in public
 utilities. This decision left the states
 powerless to protect their own citizens
 against emergencies created by the
 suspension of essential services, even
 though, as the dissent pointed out,
 such emergencies were "economically
 and practically confined to a [single]
 state."

In two cases decided on May 28,
 1958, in which the majority opinions
 were written by Mr. Justice Frank-
 furter and Mr. Justice Burton, re-
 spectively, the right of an employee
 to sue a union in a state court was
 upheld. In *International Association*
of Machinists v. Gonzales, a union
 member was held entitled to main-
 tain a suit against his union for
 damages for wrongful expulsion. In
International Union, United Auto.
etc. Workers v. Russell, an employee,
 who was not a union member, was
 held entitled to maintain a suit for
 malicious interference with his em-
 ployment through picketing during a
 strike against his employer. Pickets
 prevented Russell from entering the
 plant.

Regardless of what may be the ul-
 timate solution of jurisdictional prob-
 lems in this field, it appears that at
 the present time there is unfortunately
 a kind of no-man's land in which
 serious uncertainty exists. This un-

certainty is in part undoubtedly due
 to the failure of Congress to make
 its wishes entirely clear. Also, some-
 what varying views appear to have
 been adopted by the Supreme Court
 from time to time.

The General Welfare Clause

One provision of the federal Con-
 stitution which was included in it
 from the beginning but which, in
 practical effect, lay dormant for more
 than a century, is the general welfare
 clause. In *United States v. Butler*,
 297 U. S. 1, the original Agricultural
 Adjustment Act was held invalid. An

argument was advanced in that case
 that the general welfare clause would
 sustain the imposition of the tax and
 that money derived from the tax
 could be expended for any purposes
 which would promote the general
 welfare. The Court viewed this argu-
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 In those cases the Social Security Act
 was upheld and the general welfare
 clause was relied upon both to sup-
 port the tax and to support the ex-
 penditures of the money raised by the
 Social Security taxes.

Second only to the increasing domi-
 nance of the national government has
 been the development of the immense
 power of the Supreme Court in both
 state and national affairs. It is not
 merely the final arbiter of the law;
 it is the maker of policy in many
 major social and economic fields. It
 is not subject to the restraints to
 which a legislative body is subject.
 There are points at which it is dif-
 ficult to delineate precisely the line
 which should circumscribe the judicial
 function and separate it from that of
 policy-making. Thus, usually within
 narrow limits, a court may be called
 upon in the ordinary course of its
 duties to make what is actually a
 policy decision by choosing between
 two rules, either of which might be
 deemed applicable to the situation
 presented in a pending case.

But if and when a court in constru-
 ing and applying a constitutional pro-
 vision or a statute becomes a policy
 maker, it may leave construction be-
 hind and exercise functions which
 are essentially legislative in character,
 whether they serve in practical effect
 as a constitutional amendment or as
 an amendment of a statute. It is here
 that we feel the greatest concern, and
 it is here that we think the greatest
 restraint is called for. There is noth-
 ing new in urging judicial self-
 restraint, though there may be, and
 we think there is, new need to urge
 it.

It would be useless to attempt to
 review all of the decisions of the
 Supreme Court which have had a pro-
 found effect upon the course of our
 history. It has been said that the
 Dred Scott decision made the Civil
 War inevitable. Whether this is really
 true or not, we need not attempt to
 determine. Even if it is discounted as
 a serious overstatement, it remains a
 dramatic reminder of the great influ-
 ence which Supreme Court decisions
 have had and can have. As to the
 great effect of decisions of that Court
 on the economic development of the
 country, see Mr. Justice Douglas' Ad-
 dress on *Stare Decisis*, 49 *Columbia*
Law Review 735.

Sources of National Power

Most of the powers of the national
 government were set forth in the
 original constitution; some have been
 added since. In the days of Chief Jus-
 tice Marshall the supremacy clause of
 the federal Constitution and a broad
 construction of the powers granted to
 the national government were fully
 developed, and as a part of this de-
 velopment the extent of national con-
 trol over interstate commerce became
 very firmly established. The trends
 established in those days have never
 ceased to operate and in comparative-
 ly recent years have operated at times
 in a startling manner in the extent to
 which interstate commerce has been
 held to be involved, as for example in
 the familiar case involving an elevator
 operator in a loft building.

From a practical standpoint the in-
 crease in federal revenues resulting
 from the Sixteenth Amendment (the
 Income Tax Amendment) has been of
 great importance. National control
 over state action in many fields has
 been vastly expanded by the Four-
 teenth Amendment.

We shall refer to some subjects and
 types of cases which bear upon
 federal-state relationships.

The General Welfare Clause

One provision of the federal Con-
 stitution which was included in it
 from the beginning but which, in
 practical effect, lay dormant for more
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 297 U. S. 1, the original Agricultural
 Adjustment Act was held invalid. An

Two Major Developments
in the Federal System

The outstanding development in
 federal-state relations since the adop-

Voices in Dissent

The Resolution approving the Report of the Committee on Federal-State Relationships was passed by the State Chief Justices on August 23, 1958, by a vote of 36 to 8. Votes against the Resolution came from California, New Jersey, Pennsylvania, Rhode Island, Utah, Vermont, West Virginia, and Hawaii. No votes were recorded from Arkansas, Connecticut, Indiana, Nevada, and North Dakota.

This insert contains the speeches of the 4 Chief Justices who spoke in opposition to the Report and Resolution before the Conference of Chief Justices at Pasadena, California, and on side B, part of an address by Chief Justice John R. Dethmers of Michigan, the Conference Chairman, explaining the background of the Resolution.

Jones:

The following are remarks made by Charles Alvin Jones, Chief Justice of the Supreme Court of Pennsylvania, on August 23, 1958, at the Conference of Chief Justices in Pasadena, Cal.

Mr. Chairman and Members of the Conference of State Chief Justices: For this intrusion upon your time to speak in opposition to the pending resolution, I shall neither apologize nor palliate. The matter is of such transcendent importance, constituting, as it does, an unwarranted attack on the constitutional structure of our Federal Union of such shocking portent in the circumstances as to warrant the fullest and freest discussion before definite action with respect thereto is taken by this body.

My only embarrassment in speaking, as I shall on this occasion, stems from the pleasant social relations I have heretofore enjoyed with the members of the Committee, as well as others of the Conference, which relationships I trust may continue to endure unimpaired. But, however that may be, a stern duty confronts me which requires me to do all that I can within my limited capacity to help bring about, if possible, the defeat of the resolution now before us.

The Committee report, which the resolution approves, concludes that the over-all tendency of decisions of the Supreme Court in more recent years has been to press the extension of federal power; that, to an extent, the Supreme Court has assumed the function of policy-making; that, too often, the Supreme Court has tended to adopt the role of policy-maker without proper judicial restraint, particularly in respect of the extent and extension of federal power and the supervision of State action by the Supreme Court by virtue of the Fourteenth Amendment; and that the result of all this is that a study of recent decisions of the Supreme Court will raise at least considerable doubt as to the validity of the long-time American boast that we have a government of laws and not of men.

These strictures on the Supreme Court are entirely uncalled for and certainly are not justified on the basis of the decisions, which the report cites for criticism, such as *Pennsylvania v. Nelson*, 350 U.S. 497, designated by the report as an example of "the wide sweep now given to the doctrine of pre-emption"; or *Schwartz v. Board of Bar Examiners of New Mexico*, 353 U.S. 232; *Konigsberg v. State Bar of California*, 353 U.S. 252; *Watkins v. U.S.*, 354 U.S. 178, and *Sweezy v. New Hampshire*, 354 U.S. 234. Each of the latter decisions afforded appropriate judicial protection to the rights of the individual involved against hostile State action violative of the Fourteenth Amendment. Regardless of one's point of view, none of those cases can, in my opinion, be logically cited as an extension of federal power or a contraction of State's rights. Each was merely a judicial application of a long-ordained federal power to a new set of circumstances.

Judging from the public prints and the agitation in Congress ever since *Pennsylvania v. Nelson* was handed down by the Supreme Court of the United States on April 2, 1956, it has been evident that the doctrine of federal pre-emption, as applied in that case, was being made the special *bête noir* of the bitter critics of the present day work of our Supreme Court. As it happened to fall to my lot to write the majority opinion in the *Nelson* case for the Supreme Court of Pennsylvania, whose judgment, incidentally, was affirmed and not reversed, I beg your indulgence while I endeavor to demonstrate that the ruling in the *Nelson* case was in no sense "a wide sweep of the doc-



Charles Alvin Jones

trine of pre-emption" or any extension whatsoever of federal power. It was but the enforcement of a power inherent in our Federal Government ever since the adoption of the Constitution in 1787, namely, the right to protect itself most efficiently and effectively against all enemies, foreign or domestic.

The curt observation with which the Committee report dismisses and implicitly condemns the *Nelson* decision derives from a monograph by a law professor whose services, as the report indicates, were specifically enlisted by the Committee for the purposes of its work. While the monographer, himself, devoted 14 of his total 28 pages of writing to treatment of the *Nelson* case, the Committee report disposes of that decision, as the primarily designated object of its criticism, in one brief paragraph with the palpable and irrelevant non-sequitur that the fact that the Supreme Court's decision was an *affirmance* of the State court "emphasizes rather than detracts from the wide sweep now given to the doctrine of pre-emption."

And, while we are considering State complaints of Supreme Court decisions, fairness compels it to be recognized that in the *Nelson* case the Supreme Court of the United States did not ascribe to the Federal Government any greater power than what Pennsylvania's highest court had considered conceded to be the Federal Government's. But, before getting into the established constitutional principle, which the Pennsylvania Supreme Court deemed to be decisive of *Nelson*'s appeal, let me make the following plain beyond misunderstanding.

The ruling in the *Nelson* case will not impede or interfere with the detection, prosecution or conviction of a single communist or other subversive who advocates the overthrow of our government by force and violence, and no one can authentically assert to the contrary. What the *Nelson* decision did was to recognize in the Federal Government the unrestricted right to control its defense against internal subversion, unhampered by meddlesome or officious interference from any subordinate sovereignties or political subdivisions. At the same time, the *Nelson* decision does not deny to the States the right to condemn sedition against themselves. But, of course, it is fanciful to contemplate sedition against a State which is not at once sedition against the Federal Government, whose constitutionally imposed duty it is to guarantee the maintenance of a republican form of government in each of the several states.

Any information as to possible offenders against the Federal Sedition Act which a State obtains can, and should be, promptly transmitted to the Federal Bureau of Investigation. And, if sedition cases should, perchance, become numerous, Cong-

ress can constitutionally confer concurrent jurisdiction on State courts to try such cases in relief of Federal court administration. But — and this is basically essential — informations against alleged seditious offenders must be made under the Federal statute and the prosecution of indictments therefor conducted at the direction and under the supervision of the Department of Justice.

In *Nelson*'s appeal to our Court, he contended that the Pennsylvania Sedition Act of 1939, under which he had been convicted of conspiracy with others to overthrow the government of the United States by force and violence, had been superseded by the Alien Registration provisions of Title III of the same Smith Act of 1940. The *Nelson* case cannot rationally be distinguished on constitutional principle from *Hines v. Davidowitz*; and no one, so far as I am aware, ever objected to the decision in the *Hines* case. The difference between the two cases which the monograph advances is a factual immateriality which does not point a legal distinction.

Four of the five members of the Pennsylvania Supreme Court who sat for the argument of the *Nelson* appeal accordingly held that the Smith Act of 1940 superseded the Pennsylvania Sedition Act of 1939. That the opinion for the court was fully concurred in by all the members of the majority was not left to inference. Chief Justice Stern, joined by Justice Allen M. Stearne and Justice Chidsey, filed the following succinct and cogent joinder: "We concur in the foregoing opinion (for the Court) in its entirety. Sedition against the United States is not a local offense. It is a crime against the Nation. As such, it should be prosecuted and punished in the Federal courts where this defendant has been prosecuted and convicted and is now under sentence. It is not only important but vital that such prosecutions should be exclusively within the control of the Federal Government, and we are of the opinion that this is required in order to harmonize the respective constitutional powers of the Nation and the several states."

Responsible Pennsylvania newspapers of wide circulation understood and approved the Supreme Court's affirmance of the State Court's *Nelson* decision. A Washington correspondent of the Philadelphia Inquirer in a special article of April 15, 1956, wrote, "In the *Steve Nelson* case, the Court ruled the protection of the Nation against sedition is a Federal, not a State, responsibility, and that, therefore, the State anti-sedition laws are unconstitutional [i.e. superseded]. This decision does not mean that the States can't help the Federal Government guard against subversion. It does mean that the responsibility for investigation belongs to the Federal Bureau of Investigation and the responsibility for prosecution belongs to the Department of Justice."

The *Pittsburgh Post Gazette* of April 3, 1956, editorialized that "the Federal Government, having entered the field of sedition control, has pre-emptory interest in that field and is the agency to prosecute therein. This view is endorsed by the U. S. high court, which says further that 'a state sedition statute is superseded regardless of whether it purports to supplement the Federal law.' Common sense as well as law argues thus. The control of sedition is tricky business; it calls for timing, tact, and central direction. The intrusion of state governments in this field could impede the work of Federal agents, confuse the issues, and even discredit laws against sedition."

The *New York Times* in an editorial of April 16, 1956, entitled "Three Decisions," said: "In the second of this series of decisions, the *Nelson* case, the Court spelled out its view that the area of national security belongs pri-

marily to the Federal Government rather than to the states. * * * The decision, which seems to us to be a simple matter of common sense, puts the responsibility for internal security where it belongs, and in fact the only place where it can be effectively exercised, with the Federal Government."

Thus far, I have endeavored to prove to those of you who would vote for the pending resolution, in the belief that the Supreme Court was guilty of an unconstitutional extension of federal power in its decision in the *Nelson* case, would do so on a fallacious assumption and give aid and comfort to those who are striving in Congress and out of it to curtail the Smith Act of 1940. We accredited the contention on the authority of the Supreme Court's decision some thirteen years earlier in *Hines v. Davidowitz*, 312 U.S. 52. In that case, the Supreme Court had held that the Pennsylvania Alien Registration Act of 1939 had been superseded by the powers of the Supreme Court to interpret, expound and apply the Constitution.

On August 8th last, the *New York Times* said editorially, "The consistently liberal decisions of the United States Supreme Court in the general area of civil liberties have produced a reaction in Congress which may have been inevitable but can and should be thwarted. The reaction has taken the form of several bills designed in one way or another to override or to turn back the rulings at which they are aimed. The worst of these bills to have passed the House is the one that would wreck the historic doctrine of Federal pre-emption by providing that no Federal law could supersede a state law on the same subject unless Congress specifically so stated or unless the two were absolutely irreconcilable." And then, speaking with special reference to H.R. 3, the editorial continued, "This bill grew out of the decision in the *Nelson* case in 1956, in which the Supreme Court agreed with the Supreme Court of Pennsylvania in invalidating a state statute aimed at sedition against the Federal Government, on the sensible grounds that Congress had already pre-empted the field by the Smith Act of 1940."

Whence, then, comes the impetus behind the movement to obviate by Congressional action the effect of the ruling in the *Nelson* case? Is it possible that that decision is the whipping boy (to employ a somewhat mixed metaphor) of those who would flay the doctrine of federal pre-emption to extinction? Let us stop beating around the bush about this thing. Let us come out in the open and acknowledge the decision which is the real basis for the current widespread criticism of the Supreme Court. Only in that way can we deal fairly and above board with the recent Civil Liberties decisions of the Supreme Court which share the report's criticism. The preponderant backing of the attack on the decision in the *Nelson* case is made up of those who would undo the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483. That statement finds confirmation, as lately as night before last, in the vote in the Senate on the motion to re-commit H.R. 3, which was admittedly introduced in an effort to nullify the doctrine of federal pre-emption as applied in the *Nelson* case.

It is true that nowhere in the report is the public school segregation decision mentioned. According to reliable newspaper account of the introduction of the resolution and the report whereon it is based, "It was explained that Committee members felt that to inject this into the study would stir sectional feelings and defeat the over-all purpose of the study." I readily and wholeheartedly concede the good faith of the Committee's desire and intent in such regard, but the fact remains that no matter how meticulously reference to the school segregation case is avoided, it must be recognized that the principal cause of the present-day criticism of the Supreme Court is that decision. And, thus, the Committee report, quite unintentionally but nonetheless actually, exploits a hostility to the Supreme Court bred of a decision (involved in current litigation) which the report does not, and could not properly, discuss.

Of course, the segregation issue has no proper place in determining whether the decision in *Pennsylvania v. Nelson* constituted an extension of federal power by the Supreme Court in its application of the doctrine of pre-emption, or whether the Civil Liberties cases above referred to worked a deprivation of States' rights because of the Supreme Court's interpretation of the protection afforded the individual by the Fourteenth Amendment against hostile State action. The segregation issue is here, nevertheless, inextricably imbedded in the background of the resolution you are asked to adopt. You might as well face that fact.

If prosecution for sedition against the Federal Government were permitted to State courts acting under State statutes (and that is what the pending resolution envisions), confusion amounting to chaos in the hunt for and prosecution of alleged subversives would result to the detriment and peril of the internal security of our citizenry. In such a deplorable situation, I would hold with Judge Learned Hand that "Risk for risk, for myself, I would rather take my chance that some traitors will escape detection than spread abroad a spirit of general suspicion and distrust which accepts rumor and gossip in the place of undismayed and unimpaired inquiry."

Coming, then, to the matter of procedure to be pursued with respect to the pending resolution, it is my opinion that the best thing to do would be to dispose of it without reference to its substance. Consequently, I shall move that the resolution be tabled. If that motion should fail and a vote is taken on the resolution, I desire that I be recorded as having voted against it. Indeed, it seems no more than appropriate that, in a matter of such grave importance, a roll call vote should be had.

I now move that the resolution be tabled.

Weintraub:

The following are remarks made by Joseph Weintraub, Chief Justice of the Supreme Court of New Jersey, on August 23, 1958, at the Conference of Chief Justices in Pasadena, Cal.



Joseph Weintraub

Mr. Chairman and members of the Conference, I am confident that every member of this Conference has carefully considered this important resolution and has reached, as I have, a firm view with respect to it. I sense that the resolution will attract a spanking majority. I doubt that extended debate will add very much. I speak simply because, in the light of the importance of the matter, I should state the reasons why I cannot join in the resolution. May I say to members of the Committee who prepared the Report that my difference of view certainly does not suggest any personal criticism. I am just one lawyer differing with another.

I place no institution, office or public official beyond full and frank public criticism. Nor do I question the right of any member of this Conference, at least in his capacity of private citizen, to express his disagreement with the work of the Supreme Court. But I do question the wisdom, and indeed the propriety, of a joint pronouncement by this Conference of

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DISSENTS

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Chief Justices, assembled as it is in an official or quasi-official capacity. I doubt that it is within the proper function of this Conference to issue what in essence is a blast, devoid of any specific recommendation as to any specific matter. Most importantly, in my judgment, the criticism and characterizations in the Report are unwarranted.

As I read the Report it laments the readjustment of power and authority between the national government and the states and then belabors the Supreme Court for its role in the process.

I agree that John Marshall would be astounded by the present scene. This, I believe, is most fortunate, because if the present scene were such as to appear at all familiar to him, our nation would be a third or fourth rate power, if indeed it would exist at all. The Report itself acknowledges the inexorable sweep of scientific and economic events which have dictated the readjustment of responsibility and power, events which have led the states themselves to look to federal authority for the solution of problems beyond their abilities.

I am sure that if the federal government would abandon its many programs of local assistance and release to the states the sources of revenue gathered for those purposes, my little state — small in acreage but large in population, industry, and tax remittance to Washington — would profit greatly. Yet I would not urge so provincial a view, because the welfare of the several states and territories is single and indivisible. For the same reason, in all matters involving the relationship between the nation and state, the rights of a single state must yield to federal needs. And for the same reason, in international matters it is today unthinkable that any state may possess the power to pursue a course of action or inaction which may embarrass or jeopardize the well-being of the entire nation.

Such is the background against which the Supreme Court must resolve the issues before it. Its horizon is different from ours. We may lament the course of history and even weep in its wake, but let us not suppose that we can by resolution stay the current of events.

The Report assails decisions of the Supreme Court in two areas: interpretation of acts of Congress and interpretation of Constitution, especially the Fourteenth Amendment.

The Report cites a number of decisions as to many of which it is adversely critical.

I assume it is not intended to obtain a vote in this Conference upon each of those decisions. I should be surprised if some 50 Justices could, upon careful consideration, be unanimous as to any of those decisions and I would be amazed if unanimity were achieved as to the basket-full. And although each of us might venture a curbstone view with respect to the cases cited, I doubt that we would assume responsibility for a public pronouncement without consideration of the record, briefs and arguments presented in each case. We would want the benefit of the same material with which the Supreme Court was favored in those matters.

Hence we can only deal with the generalized conclusions and criticisms which appear in the closing portion of the Report.

With respect to the interpretation of acts of Congress, the Supreme Court is contending with a well-known phenomenon — legislative ambiguity. I think it enough to say that if the Court has incorrectly divined the legislative intent, correction is within the easy reach of the authors of the ambiguity.

As to its work in the interpretation of the Constitution, we may of course readily disagree. But our disagreement should be tempered by our understanding of the inherent difficulties of the constitutional interpretive process. It would hardly be a justifiable criticism to say the Supreme Court engages in a process of evaluation and judgment. The Constitution does not offer a literal, definitive answer to the awesome problems which confront the Court. One may read the commerce clause, the due process clause, the equal protection

clause, a thousand times and still not detect the slightest clue to the proper decision. The answer must be found elsewhere. The Constitutional framework, as we all know, is a mere skeleton expression of governmental power and individual rights. The actual contours of those powers and rights must be determined in the context of changing conditions, by a process which is more than a mere mechanical application of a constitutional phrase to a set of facts.

We may of course disagree with the nine gentlemen at Washington. Lawyers have always disagreed with each other and always will. But while we may register disagreement, we cannot justly impute to members of the Supreme Court anything less than conscientious devotion to duty as they see it.

And hence I disapprove strongly of what to me is the essence of the Report — the charge that the Justices of the Supreme Court have violated the duty of judicial self-restraint in constitutional areas, the suggestion that their behavior has been such as to raise considerable doubt that we remain a government of laws and not of men. I have no doubt whatever that the Justices are men of conscience and honor, that they respect the rule of law, that none would set himself above the law or seek to arrogate power or responsibility which he believes is not his.

It is one thing for a judge to say that he disagrees with another; it is something else to impute to that other a violation of the basic standards of judicial behavior. I find no bill of particulars within the Report which in my view supports the charge and I know of no facts that would sustain it.

I think it unfortunate that the prestige of the Conference of Chief Justices should be placed behind so serious an indictment. I think it unfortunate that there should emanate from this Conference a document which will surely be misunderstood and so readily lends itself to misuse by anyone who tilts with the federal government. Any man or group of men who choose to place themselves above constituted authority or to flout basic rights as the Supreme Court authoritatively finds them to be, will surely claim comfort and support in the sweeping reflection upon the Supreme Court in the Report.

Gibson:

The following are remarks made by Phil S. Gibson, Chief Justice of the Supreme Court of California, on August 23, 1958, at the Conference of Chief Justices in Pasadena, Cal.



Phil S. Gibson

This resolution is intended as criticism of recent decisions of the United States Supreme Court. With the exception of those cases discussed in the report which relate to the pre-emption question, the decisions deal for the most part with the protection of the fundamental rights of individuals guaranteed by our Constitution. It is, of course, the duty of the Supreme Court to protect the constitutional rights of the individual against the power of government, whether it be the power of national, state or local governments, and the court has my enthusiastic support in the performance of this duty.

Conference Chairman Explains Resolution

John R. Dethmers, Chief Justice of the Supreme Court of Michigan, was Chairman of the Conference of Chief Justices at Pasadena, Cal. He was a member of the Committee on Federal-State Relationships as Affected by Judicial Decisions, and favored passage of the Resolution.

The following is part of an address delivered by Chief Justice Dethmers on August 25, 1958, at the Annual Dinner in Honor of the Judiciary Section of Judicial Administration of the American Bar Association, at Los Angeles, Cal. It summarizes the background of the Resolution and some of the reasons for its passage.

Of transcendent importance to the nation, overshadowing all others in the concern of the Conference, is the matter of federal-state relationships as affected by judicial decisions. Increasingly, in recent years, members of the Conference had been expressing themselves in terms sharply critical of what they viewed as a trend in this area. Accordingly, at the sessions of the Conference in Dallas, two years ago, the formal program was in large part devoted to the subject of the division of powers between the federal and state governments. In New York, last year, several members urged adoption of resolutions strongly condemnatory of that asserted trend. The majority, shunning hasty or precipitate action, determined on the appointment of a committee to devote the ensuing year to a study of the subject and to report to the 1958 session with recommendations for achieving sound and appropriate relationships. The committee, upon appointment, engaged the assistance of a number of law professors for research in several areas of the general subject. Each of them prepared an excellent monograph based on study and research on specific constitutional questions and United States Supreme Court decisions relating thereto. These afforded much assistance to busy committee members. On such a foundation, the committee drafted a scholarly and comprehensive report. It was presented to the full Conference last Wednesday morning, as were personal reports by two of the professors; the Conference divided into four

The cases dealing with the problem of whether a federal statute has preempted the field present difficult questions where the statutes are unclear. We have the same problems in the state courts in determining whether a local ordinance has invaded a field occupied by a state statute. If a court is mistaken in its interpretation of the legislative intent in any of these cases, the error can easily be corrected by legislative action unless a constitutional question is presented. It does not seem to me that any of the decisions of the Supreme Court holding that a federal statute has preempted the field may properly be characterized as lacking in judicial restraint even if we disagree with the result. Moreover, in my opinion *Commonwealth v. Nelson* was correctly decided.

Some of the decisions discussed in the report are criticized upon the ground that the Supreme Court has erroneously construed the record. One of those decisions, *Konigsberg v. State Bar of California*, involves a matter now pending in our court and, of course, it would not be proper for me to discuss the merits of that case. I might mention, however, that the Supreme Court of the United States did not have the benefit of an interpretation of the record by an opinion of our court which has the power to make an independent determination of questions of fact in all matters dealing with admissions to practice. I think it improper for the members of this Conference to criticize the court for its interpretation of a record unless, as Chief Justice Weintraub has pointed out, they have read the record. And even if we assume that the Supreme Court of the United States has made a mistake in its interpretation of a record, how many justices gathered here today can say that the court they represent has not made a similar mistake. I think we would



John R. Dethmers

sections Wednesday afternoon for piecemeal consideration and discussion of the report, and at the concluding session, last Saturday, the Conference, by an overwhelming majority, adopted a resolution approving the report and making certain observations, expressions of belief, and recommendations in the premises. This did not come about in haste or in a spirit of rancor, but upon calm reflection, careful consideration and in a spirit of humility and love for American freedoms and our free institutions, with a view to calling attention, respectfully, to matters of grave concern to the Conference and to the country.

Time will not permit, nor is this the occasion for detailing the treatment in the report of specific phases of the subject and the decisions of the United States Supreme Court relating thereto. Copies of the report are available and we would commend it to the careful and appraising examination of each of you. In general, it expresses the concern of its framers and adopting members of the Conference over the constant expansion of the powers of the national government and consequent contraction of the powers of state and local governments, which result from Supreme Court interpretations of constitutional and statutory provisions. Note is taken of what is viewed as an assumption

make a much greater mistake in adopting this resolution and I hope it will be defeated.

Condon:

The following are remarks made by Francis B. Condon, Chief Justice of the Supreme Court of Rhode Island, on August 23, 1958, at the Conference of Chief Justices in Pasadena, Cal.



Francis B. Condon

I profoundly regret that this body did not adopt the motion by Chief Justice Jones. I intended to make that motion myself.

The first time I saw this report was on the first day of this Conference. I assume that practically all of the members saw this report for the first time that day. That report covers a great deal. It ought to receive, it seems to me, the same mature delib-

tion by the Court of the legislative function and the role of policy maker in this area of federal-state relationships.

Maintenance of the historic division of powers between national and state governments, and retention of the highest possible degree of local self government compatible with national security and well-being, are deemed of the utmost importance by members of the Conference, as they were by the founding fathers, only as they serve as effective instrumentalities for the preservation of the liberties of the people and the perpetuation of our free institutions. No other, or sectional, interest was sought to be subserved by the report.

It is the feeling of the members of the Conference that, as judicial officers, entrusted by the people with positions of high responsibility and trust, they would be remiss in their duties, indeed, if they were to cower in a corner and neglect to speak out in temperate tone, to alert the public to trends and developments of tremendous moment to the people. Particularly is this true in view of the peculiar training, experience and contact with events that especially equip Justices of the State Appellate Courts to discern such trends and to appreciate their significance. Where can it be said that greater obligation rests than on them to call public attention to a gradual sapping of state and local powers and rights, portending peril to the rights of the people. Inasmuch as the people must make the final judgments on these matters, existence of the problems and the involvements must be proclaimed. It is intended that the report shall serve that office.

Mention has been made of the dread responsibility of members of bench and bar for enhancing the prestige of Courts and the judicial process in public esteem and the consequent duty to criticize court decisions, if at all, with only the greatest restraint. That responsibility and that restraint must be deemed to apply not only to the critic but as well to the formulator of court opinions and the making of court decisions. We, lawyers and judges, share, as advocates, as critics and as final arbiters of right and law, one common responsibility to the people in that regard. If, in public appraisal, we do not make our system work, as an instrument for good and for human freedom, it must fail.

eration which the members of this Court in the discharge of their judicial duties give to the briefs presented in the most ordinary case that comes before the Court. We have not had that opportunity.

I have not read the report since it was read by Mr. Chief Justice Brune, but I must confess, gentlemen, that I would like more time to consider it. What are we doing? Forty-eight Chief Justices are sitting here in a brief conference and undertaking to disapprove of and condemn the actions of nine Justices of the highest court in this Republic. What right have we to condemn them? What right have we to disapprove of the manner in which they have discharged their duties? Indeed, Mr. Chairman, I question whether this Conference has the right under our Articles of Organization to adopt such a report. This is a consultative organization. It is not an organization to sit in judgment upon the conduct of any state officers of any of our several states, nor indeed is it an organization to sit in judgment upon the highest court in the land. And so, Mr. Chairman, I have asked for these few moments here this morning in order that I might explain my vote.

I do not intend to support this resolution. I do not intend to support it because, as our Chairman of Group Three said: "Everything in the report is incorporated in the resolution by reference." So, when you vote to pass this resolution, you vote to approve every single paragraph in that report, and I, for one, do not care to be recorded in that manner. Therefore, I subscribe to the suggestion made by Mr. Chief Justice Jones of Pennsylvania that when the vote is taken on this resolution, it shall be by ayes and nays so that each of us shall have an opportunity to record his stand, and it will be a matter of public record.

lution under which it constituted the Attorney General a one-man legislative committee to investigate violations of that Act and to recommend additional legislation. Sweezy, described as a non-Communist Marxist, was summoned to testify at the investigation conducted by the Attorney General, pursuant to this authorization. He testified freely about many matters but refused to answer two types of questions: (1) inquiries concerning the activities of the Progressive Party in the state during the 1948 campaign, and (2) inquiries concerning a lecture Sweezy had delivered in 1954 to a class at the University of New Hampshire. He was adjudged in contempt by a state court for failure to answer these questions. The Supreme Court reversed the conviction, but there is no majority opinion. The opinion of the Chief Justice, in which he was joined by Justices Black, Douglas and Brennan, started out by reaffirming the position taken in *Watkins v. United States*, 354 U.S. 178, that legislative investigations can encroach on First Amendment rights. It then attacked the New Hampshire Subversive Activities Act and stated that the definition of subversive persons and subversive organizations was so vague and limitless that they extended to "conduct which is only remotely related to actual subversion and which is done free of any conscious intent to be a part of such activity." Then followed a lengthy discourse on the importance of academic freedom and political expression. This was not, however, the ground upon which these four Justices ultimately relied for their conclusion that the conviction should be reversed. The Chief Justice said in part:

The respective roles of the legislature and the investigator thus revealed are of considerable significance to the issue before us. It is eminently clear that the basic discretion of determining the direction of the legislative inquiry has been turned over to the investigative agency. The Attorney General has been given such a sweeping and uncertain mandate that it is his discretion which picks out the subjects that will be pursued, what witnesses will be summoned and what questions will be asked. In this circumstance, it can not be stated authoritatively that the legislature asked the Attorney General to gather the kind of facts comprised in the subjects upon which petitioner was interrogated.

Four members of the Court, two in a concurring opinion and two in a dissenting opinion, took vigorous issue with the view that the conviction was invalid because of the legislature's failure to provide adequate standards to guide the Attorney General's investigation. Mr. Justice Frankfurter and Mr. Justice Harlan concurred in the reversal of the conviction on the ground that there was no basis for a belief that Sweezy or the Progressive Party threatened the safety of the state and hence that the liberties of the individual should prevail. Mr. Justice Clark, with whom Mr. Justice Burton joined, arrived at the opposite conclusion and took the view that the state's interest in self-preservation justified the intrusion into Sweezy's personal affairs.

In commenting on this case Professor Cranton says:

The most puzzling aspect of the *Sweezy* case is the reliance by the Chief Justice on delegation of power conceptions. New Hampshire had determined that it wanted the information which Sweezy refused to give; to say that the State has not demonstrated that it wants the information seems so unreal as to be incredible. The State had delegated power to the Attorney General to determine the scope of inquiry within the general subject of subversive activities. Under these circumstances the conclusion of the Chief Justice that the vagueness of the resolution violates the due process clause must be, despite his protestations, a holding that a state legislature cannot delegate such a power.

Public Employment Cases

There are many cases involving public employment and the question of disqualification therefor by reason of Communist party membership or other questions of loyalty. *Slochower v. Board of Higher Education*, 350 U.S. 551, is a well known example of cases of this type. Two more recent cases, *Lerner v. Casey*, and *Beilan v. Board of Public Education*, both in 357 U.S. and de-

cided on June 30, 1958, have upheld disqualifications for employment where such issues were involved, but they did so on the basis of lack of competence or fitness. Lerner was a subway conductor in New York and Beilan was a public school instructor. In each case the decision was by a 5 to 4 majority.

Admission to the Bar

When we come to the recent cases on admission to the bar, we are in a field of unusual sensitivity. We are well aware that any adverse comment which we may make on those decisions lays us open to attack on the grounds that we are complaining of the curtailment of our own powers and that we are merely voicing the equivalent of the ancient protest of the defeated litigant — in this instance the wail of a judge who has been reversed. That is a prospect which we accept in preference to maintaining silence on a matter which we think cannot be ignored without omitting an important element of the subject with which this report is concerned.

Konigsberg v. State Bar of California, 353 U.S. 252, seems to us to reach the high water mark so far established by the Supreme Court in overthrowing the action of a state and in denying to a state the power to keep order in its own house.

The majority opinion first hurdled the problem as to whether or not the federal question sought to be raised was properly presented to the state highest court for decision and was decided by that court. Mr. Justice Frankfurter dissented on the ground that the record left it doubtful whether this jurisdictional requirement for review by the Supreme Court had been met and favored a remand of the case for certification by the state highest court of "whether or not it did in fact pass on a claim properly before it under the Due Process Clause of the Fourteenth Amendment." Mr. Justice Harlan and Mr. Justice Clark shared Mr. Justice Frankfurter's jurisdictional views. They also dissented on the merits in an opinion written by Mr. Justice Harlan, of which more later.

The majority opinion next turned to the merits of Konigsberg's application for admission to the bar. Applicable state statutes required one seeking admission to show that he was a person of good moral character and that he did not advocate the overthrow of the national or state government by force or violence. The Committee of Bar Examiners, after holding several hearings on Konigsberg's application, notified him that his application was denied because he did not show that he met the above qualifications.

The Supreme Court made its own review of the facts.

On the score of good moral character, the majority found that Konigsberg had sufficiently established it, that certain editorials written by him attacking this country's participation in the Korean War, the actions of political leaders, the influence of "big business" on American life, racial discrimination and the Supreme Court's decision in *Dennis v. United States*, 341 U.S. 494, would not support any rational inference of bad moral character, and that his refusal to answer questions "almost all" of which were described by the Court as having "concerned his political affiliations, editorials and beliefs" (353 U.S. 269) would not support such an inference either. On the matter of advocating the overthrow of the national or state government by force or violence, the Court held (as it had in the companion case of *Schwartz v. Board of Bar Examiners of New Mexico*, 353 U.S. 232, decided contemporaneously) that past membership in the Communist party was not enough to show bad moral character. The majority apparently accepted as sufficient Konigsberg's denial of any present advocacy of the overthrow of the government of the United States or of California, which was uncontradicted on the record. He had refused to answer questions relating to his past political affiliations and beliefs, which the Bar Committee might have used to test the truthfulness of his present claims. His refusal to answer was based upon his

views as to the effect of the First and Fourteenth Amendments. The Court did not make any ultimate determination of their correctness, but (at 353 U.S. 270) said that "prior decisions by this Court indicated that his objections to answering the questions (which we shall refer to below) were not frivolous."

The majority asserted that Konigsberg "was not denied admission to the California Bar simply because he refused to answer questions." In a footnote appended to this statement it is said (353 U.S. 259):

Neither the Committee as a whole nor any of its members ever intimated that Konigsberg would be barred just because he refused to answer relevant inquiries or because he was obstructing the Committee. Some members informed him that they did not necessarily accept his position that they were not entitled to inquire into his political associations and opinions and said that his failure to answer would have some bearing on their determination whether he was qualified. But they never suggested that his failure to answer their questions was, by itself, a sufficient independent ground for denial of his application.

Mr. Justice Harlan's dissent took issue with these views — convincingly, we think. He quoted lengthy extracts from the record of Konigsberg's hearings before the subcommittee and the committee of the State Bar investigating his application. (353 U.S. 284-309.) Konigsberg flatly refused to state whether or not at the time of the hearing he was a member of the Communist Party and refused to answer questions on whether he had ever been a Communist or belonged to various organizations, including the Communist Party. The Bar Committee conceded that he could not be required to answer a question if the answer might tend to incriminate him; but Konigsberg did not stand on the Fifth Amendment and his answer which came nearest to raising that question, as far as we can see, seems to have been based upon a fear of prosecution for perjury for whatever answer he might then give as to membership in the Communist Party. We think, on the basis of the extracts from the record contained in Mr. Justice Harlan's dissenting opinion, that the Committee was concerned with its duty under the statute "to certify as to this applicant's good moral character" (p. 295), and that the Committee was concerned with the applicant's "disinclination" to respond to questions proposed by the Committee (p. 301), and that the Committee, in passing on his good moral character, sought to test his veracity (p. 303).

The majority, however, having reached the conclusion above stated, that Konigsberg had not been denied admission to the bar simply because he refused to answer questions, then proceeded to demolish a straw man by saying that there was nothing in the California statutes or decisions, or in the rules of the Bar Committee which had been called to the Court's attention, suggesting that a failure to answer questions "is *ipso facto*, a basis for excluding an applicant from the Bar, irrespective of how overwhelming is his showing of good character or loyalty or how flimsy are the suspicions of the Bar Examiners." Whether Konigsberg's "overwhelming" showing of his own good character would have been shaken if he had answered the relevant questions which he refused to answer, we cannot say. We have long been under the impression that candor is required of members of the bar and, prior to *Konigsberg* we should not have thought that there was any doubt that a candidate for admission to the bar should answer questions as to matters relating to his fitness for admission, and that his failure or refusal to answer such questions would warrant an inference unfavorable to the applicant or a finding that he had failed to meet the burden of proof of his moral fitness.

Let us repeat that Konigsberg did not invoke protection against self-incrimination. He invoked a privilege which he claimed to exist against answering certain questions. These might have served to test his veracity at the Committee hearings held to determine whether or not he was possessed of the good moral character required for admission to the bar.

The majority opinion seems to ignore the issue of veracity sought to

be raised by the questions which Konigsberg refused to answer. It is also somewhat confusing with regard to the burden of proof. At one point (pp. 270-271) it says that the Committee was not warranted in drawing from Konigsberg's refusal to answer questions any inference that he was of bad moral character; at another (p. 273) it says that there was no evidence in the record to justify a finding that he had failed to establish his good moral character.

Also at page 273 of 353 U.S., the majority said: "We recognize the importance of leaving States free to select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner nor in such way as to impinge on the freedom of political expression or association. A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important to society and the bar itself that lawyers be unimpaired — free to think, speak and act as members of an Independent Bar." The majority thus makes two stated concessions — each, of course, subject to limitations — one, that it is important to leave the states free to select their own bars and the other, that "a bar composed of lawyers of good character is a worthy objective."

We think that Mr. Justice Harlan's dissent on the merits, in which Mr. Justice Clark joined, shows the fallacies of the majority position. On the facts which we think were demonstrated by the excerpts from the record included in that dissent, it seems to us that the net result of the case is that a state is unable to protect itself against admitting to its bar an applicant who, by his own refusal to answer certain questions as to what the majority regarded as "political" associations and activities, avoids a test of his veracity through cross-examination on a matter which he has the burden of proving in order to establish his right to admission to the bar. The power left to the states to regulate admission to their bars under *Konigsberg* hardly seems adequate to achieve what the majority chose to describe as a "worthy objective" — "a bar composed of lawyers of good character."

We shall close our discussion of *Konigsberg* by quoting two passages from Mr. Justice Harlan's dissent, in which Mr. Justice Clark joined. In one, he states that "this case involves an area of federal-state relations — the right of States to establish and administer standards for admission to their bars — into which this Court should be especially reluctant and slow to enter." In the other, his concluding comment (p. 312), he says: "[W]hat the Court has really done, I think, is simply to impose on California its own notions of public policy and judgement. For me, today's decision represents an unacceptable intrusion into a matter of State concern."

The *Lerner* and *Beilan* cases above referred to seem to indicate some recession from the intimations, though not from the decisions, in the *Konigsberg* and *Slochower* cases. In *Beilan* the school teacher was told that his refusal to answer questions might result in his dismissal, and his refusal to answer questions pertaining to loyalty matters was held relevant to support a finding that he was incompetent. "Incompetent" seems to have been taken in the sense of unfit.

State Administration of Criminal Law

When we turn to the impact of decisions of the Supreme Court upon the state administration of criminal justice, we find that we have entered a very broad field. In many matters, such as the fair drawing of juries, the exclusion of forced confessions as evidence, and the right to counsel at least in all serious cases, we do not believe that there is any real difference in doctrine between the views held by the Supreme Court of the United States and the views held by the highest courts of the several States. There is, however, a rather considerable difference at times as to how these general principles should be applied and as to whether they have been duly regarded or not. In such matters the Supreme Court not

only feels free to review the facts, but considers it to be its duty to make an independent review of the facts. It sometimes seems that the rule which governs most appellate courts in the view of findings of fact by trial courts is given lip service, but is actually given the least possible practical effect. Appellate courts generally will give great weight to the findings of fact by trial courts which had the opportunity to see and hear the witnesses, and they are reluctant to disturb such findings. The Supreme Court at times seems to read the records in criminal cases with a somewhat different point of view. Perhaps no more striking example of this can readily be found than in *Moore v. Michigan*, 355 U.S. 155.

In the *Moore* case the defendant had been charged in 1937 with the crime of first degree murder, to which he pleaded guilty. The murder followed a rape and was marked by extreme brutality. The defendant was a Negro youth, 17 years of age at the time of the offense, and is described as being of limited education (only the 7th grade) and as being of rather low mentality. He confessed the crime to law enforcement officers and he expressed a desire to plead guilty and "get it over with." Before such a plea was permitted to be entered he was interviewed by the trial judge in the privacy of the judge's chambers and he again admitted his guilt, said he did not want counsel and expressed the desire "to get it over with," to be sent to whatever institution he was to be confined in, and to be placed under observation. Following this, the plea of guilty was accepted and there was a hearing to determine the punishment which should be imposed. About 12 years later the defendant sought a new trial principally on the ground that he had been unfairly dealt with because he was not represented by counsel. He had expressly disclaimed any desire for counsel at the time of his trial. Pursuant to the law of Michigan, he had a hearing on this application for a new trial. In most respects his testimony was seriously at variance with the testimony of other witnesses. He was corroborated in one matter by a man who had been a deputy sheriff at the time when the prisoner was arrested and was being questioned. The trial court, however, found in substance that the defendant knew what he was doing when he rejected the appointment of counsel and pleaded guilty, that he was then calm and not intimidated, and, after hearing him testify, that he was completely unworthy of belief. It accordingly denied the application for a new trial. This denial was affirmed by the Supreme Court of Michigan, largely upon the basis of the findings of fact by the trial court. The Supreme Court of the United States reversed. The latter Court felt that counsel might have been of assistance to the prisoner, in view of his youth, lack of education and low mentality, by requiring the state to prove its case against him (saying the evidence was largely circumstantial), by raising a question as to his sanity, and by presenting factors which might have lessened the severity of the penalty imposed. It was the maximum permitted under the Michigan law — solitary confinement for life at hard labor. The case was decided by the Supreme Court of the United States in 1957. The majority opinion does not seem to have given any consideration whatsoever to the difficulties of proof which the state might encounter after the lapse of many years or the risks to society which might result from the release of a prisoner of this type, if the new prosecution should fail. They are, however, pointed out in the dissent.

Another recent case which seems to us surprising, and the full scope of which we cannot foresee, is *Lambert v. California*, 355 U.S., decided December 16, 1957. In that case a majority of the Court reversed a conviction under a Los Angeles ordinance which required a person convicted of a felony, or of a crime which would be felony under the law of California, to register upon taking up residence in Los Angeles. Lambert had been convicted of forgery and had served a long term in a California prison for that offense. She was arrested on suspicion of another crime and her failure to register was then discovered and she was prosecuted, convicted and fined. The majority of the Supreme Court found that she had no notice of the ordinance, that it was not likely to be known, that it was a measure merely for the con-

venience of the police, that the defendant had no opportunity to comply with it after learning of it and before being prosecuted, that she did not act willfully in failing to register, that she was not "blameworthy" in failing to do so, and that her conviction involved a denial of due process of law.

This decision was reached only after argument and reargument. Mr. Justice Frankfurter wrote a short dissenting opinion in which Mr. Justice Harlan and Mr. Justice Whittaker joined. He referred to the great number of state and federal statutes which imposed criminal penalties for non-feasance and stated that he felt confident that "the present decision will turn out to be an isolated deviation from the strong current of precedents — a derelict on the waters of the law."

We shall not comment in this report upon the broad sweep which the Supreme Court now gives to habeas corpus proceedings. Matters of this sort seem to fall within the scope of the Committee of this Conference on the Habeas Corpus Bill which has been advocated for some years by this Conference for enactment by the Congress of the United States, and has been supported by the Judicial Conference of the United States, the American Bar Association, the Association of Attorneys General and the Department of Justice.

We cannot, however, completely avoid any reference at all to habeas corpus matters because what is probably the most far reaching decision of recent years on state criminal procedure which has been rendered by the Supreme Court is itself very close to a habeas corpus case. That is the case of *Griffin v. Illinois*, 351 U. S. 12, which arose under the Illinois Post Conviction Procedure Act. The substance of the holding in that case may perhaps be briefly and accurately stated in this way: If a transcript of the record, or its equivalent, is essential to an effective appeal, and if a state permits an appeal by those able to pay for the cost of the record or its equivalent, then the state must furnish without expense to an indigent defendant either a transcript of the record at his trial, or an equivalent thereof, in order that the indigent defendant may have an equally effective right of appeal. Otherwise, the inference seems clear, the indigent defendant must be released upon habeas corpus or similar proceedings. Probably no one would dispute the proposition that the poor man should not be deprived of the opportunity for a meritorious appeal simply because of his poverty. The practical problems which flow from the decision in *Griffin v. Illinois* are, however, almost unlimited and are now only in course of development and possible solution. This was extensively discussed at the 1957 meeting of this Conference of Chief Justices in New York.

We may say at this point that in order to give full effect to the doctrine of *Griffin v. Illinois*, we see no basis for distinction between the cost of the record and other expenses to which the defendant will necessarily be put in the prosecution of an appeal. These include filing fees, the cost of printing the brief and of such part of the record as may be necessary, and counsel fees.

The *Griffin* case was very recently given retroactive effect by the Supreme Court in a per curiam opinion in *Eskridge v. Washington State Board of Prison Terms and Paroles*, 78 S. Ct. 1061. In that case the defendant, who was convicted in 1935, gave timely notice of an appeal. His application then made for a copy of the transcript of the trial proceedings to be furnished at public expense was denied by the trial judge. A statute provided for so furnishing a transcript if "in his [the trial judge's] opinion justice will thereby be promoted." The trial judge found that justice would not be promoted, in that the defendant had had a fair and impartial trial, and that, in his opinion, no grave or prejudicial errors had occurred in the trial. The defendant then sought a writ of mandate from the Supreme Court of the state, ordering the trial judge to have the transcript furnished for the prosecution of his appeal. This was denied and his appeal was dismissed. In 1956 he instituted habeas corpus proceedings

which, on June 16, 1958, resulted in a reversal of the Washington Court's decision and a remand "for further proceedings not inconsistent with this opinion." It was conceded that the "reporter's transcript" from the trial was still available. In what form it exists does not appear from the Supreme Court's opinion. As in *Griffin*, it was held that an adequate substitute for the transcript might be furnished in lieu of the transcript itself. Justices Harlan and Whittaker dissented briefly on the ground that "on this record the *Griffin* case decided in 1956 should not be applied to this conviction occurring in 1935." This accords with the view expressed by Mr. Justice Frankfurter in his concurring opinion in *Griffin* that it should not be retroactive. He did not participate in the *Eskridge* case.

Just where *Griffin v. Illinois* may lead us is rather hard to say. That it will mean a vast increase in criminal appeals and a huge case load for appellate courts seems almost to go without saying. There are two possible ways in which the meritorious appeals might be taken care of and the non-meritorious appeals eliminated. One would be to apply a screening process to appeals of all kinds, whether taken by the indigent or by persons well able to pay for the cost of appeals. It seems very doubtful that legislatures generally would be willing to curtail the absolute right of appeal in criminal cases which now exists in many jurisdictions. Another possible approach would be to require some showing of merit before permitting an appeal to be taken by an indigent defendant at the expense of the state.

Whether this latter approach which we may call "screening" would be practical or not is, to say the least, very dubious. First, let us look at a federal statute and Supreme Court decisions thereunder. What is now subsection (a) of Section 1915 of Title 28, U. S. C. A. contains a sentence reading as follows: "An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." This section or a precursor thereof was involved in *Miller v. United States*, 317 U. S. 192, *Johnson v. United States*, 352 U. S. 565, and *Farley v. United States*, 354 U. S. 521, 523. In the *Miller* case the Supreme Court held that the discretion of the trial court in withholding such a certificate was subject to review on appeal, and that in order that such a review might be made by the Court of Appeals it was necessary that it have before it either the transcript of the record or an adequate substitute thereof, which might consist of the trial judge's notes or of an agreed statement as to the points on which review was sought. Similar holdings were made by per curiam opinions in the *Johnson* and *Farley* cases, in each of which the trial court refused to certify that the appeal was taken in good faith. In each case, though perhaps more clearly in *Johnson*, the trial court seems to have felt that the proposed appeal was frivolous, and hence not in good faith.

The *Eskridge* case, above cited, decided on June 16, 1958, rejected the screening process under the state statute there involved, and appears to require, under the Fourteenth Amendment, that a full appeal be allowed — not simply a review of the screening process, as under the federal statute above cited. The effect of the *Eskridge* case thus seems rather clearly to be that unless all appeals, at least in the same types of cases, are subject to screening, none may be.

It would seem that it may be possible to make a valid classification of appeals which shall be subject to screening and of appeals which shall not. Such a classification might be based upon the gravity of the offense or possibly upon the sentence imposed. In most, if not all, states, such a classification would doubtless require legislative action.

In the *Griffin* case, it will be recalled, the Supreme Court stated that a substitute for an actual transcript of the record would be acceptable if it were sufficient to present the points upon which the defendant based his appeal. The Supreme Court suggested the possible use of bystanders' bills of exceptions.

It seems probable to us that an actual transcript of the record will be required in most cases. For example, in cases where the basis for

appeal is the alleged insufficiency of the evidence, it may be very difficult to eliminate from that part of the record which is to be transcribed portions which seem to have no immediate bearing upon this question. A statement of the facts to be agreed upon by trial counsel for both sides may be still more difficult to achieve even with the aid of the trial judge.

The danger of swamping some state appellate courts under the flood of appeals which may be loosed by *Griffin* and *Eskridge* is not a reassuring prospect. How far *Eskridge* may lead and whether it will be extended beyond its facts remain to be seen.

Conclusions

This long review, though far from exhaustive, shows some of the uncertainties as to the distribution of power which are probably inevitable in a federal system of government. It also shows, on the whole, a continuing and, we think, an accelerating trend towards increasing power of the national government and correspondingly contracted power of the state governments. Much of this is doubtless due to the fact that many matters which were once mainly of local concern are now parts of larger matters which are of national concern. Much of this stems from the doctrine of a strong, central government and of the plenitude of national power within broad limits of what may be "necessary and proper" in the exercise of the granted powers of the national government which was expounded and established by Chief Justice Marshall and his colleagues, though some of the modern extensions may and do seem to us to go to extremes. Much, however, comes from the extent of the control over the action of the states which the Supreme Court exercises under its views of the Fourteenth Amendment.

We believe that strong state and local governments are essential to the effective functioning of the American system of federal government; that they should not be sacrificed needlessly to leveling, and sometimes deadening, uniformity; and that in the interest of active, citizen participation in self-government — the foundation of our democracy — they should be sustained and strengthened.

As long as this country continues to be a developing country and as long as the conditions under which we live continue to change, there will always be problems of the allocation of power depending upon whether certain matters should be regarded as primarily of national concern or as primarily of local concern. These adjustments can hardly be effected without some friction. How much friction will develop depends in part upon the wisdom of those empowered to alter the boundaries and in part upon the speed with which such changes are effected. Of course, the question of speed really involves the exercise of judgment and the use of wisdom, so that the two things are really the same in substance.

We are now concerned specifically with the effect of judicial decisions upon the relations between the federal government and the state governments. Here we think that the overall tendency of decisions of the Supreme Court over the last 25 years or more has been to press the extension of federal power and to press it rapidly. There have been, of course, and still are, very considerable differences within the Court on these matters, and there has been quite recently a growing recognition of the fact that our government is still a federal government and that the historic line which experience seems to justify between matters primarily of national concern and matters primarily of local concern should not be hastily or lightly obliterated. A number of justices have repeatedly demonstrated their awareness of problems of federalism and their recognition that federalism is still a living part of our system of government.

The extent to which the Supreme Court assumes the function of policymaker is also of concern to us in the conduct of our judicial business. We realize that in the course of American history the Supreme Court has frequently — one might, indeed, say customarily — exercised policymaking powers going far beyond those involved, say, in making a selection between competing rules of law.

We believe that in the fields with which we are concerned, and as to

which we feel entitled to speak, the Supreme Court too often has tended to adopt the role of policymaker without proper judicial restraint. We feel this is particularly the case in both of the great fields we have discussed — namely, the extent and extension of the federal power, and the supervision of state action by the Supreme Court by virtue of the Fourteenth Amendment. In the light of the immense power of the Supreme Court and its practical non-reviewability in most instances no more important obligation rests upon it, in our view, than that of careful moderation in the exercise of its policy-making role.

We are not alone in our view that the Court, in many cases arising under the Fourteenth Amendment, has assumed what seem to us primarily legislative powers. (See Judge Learned Hand on the Bill of Rights.) We do not believe that either the framers of the original Constitution or the possibly somewhat less gifted draftsmen of the Fourteenth Amendment ever contemplated that the Supreme Court would, or should, have the almost unlimited policy-making powers which it now exercises. It is strange, indeed, to reflect that under a constitution which provides for a system of checks and balances and of distribution of power between national and state governments one branch of one government — the Supreme Court — should attain the immense, and in many respects, dominant, power which it now wields.

We believe that the great principle of distribution of powers among the various branches of government and between levels of government has vitality today and is the crucial base of our democracy. We further believe that in construing and applying the Constitution and laws made in pursuance thereof, this principle of the division of power based upon whether a matter is primarily of national or of local concern should not be lost sight of or ignored, especially in fields which bear upon the meaning of a constitutional or statutory provision, or the validity of state action presented for review. For, with due allowance for the changed conditions under which it may or must operate, the principle is as worthy of our consideration today as it was of the consideration of the great men who met in 1787 to establish our nation as a nation.

It has long been an American boast that we have a government of laws and not of men. We believe that any study of recent decisions of the Supreme Court will raise at least considerable doubt as to the validity of that boast. We find first that in constitutional cases unanimous decisions are comparative rarities and that multiple opinions, concurring or dissenting, are common occurrences. We find next that divisions in result on a 5 to 4 basis are quite frequent. We find further that on some occasions a majority of the Court cannot be mustered in support of any one opinion and that the result of a given case may come from the divergent views of individual justices who happen to unite on one outcome or the other of the case before the Court.

We further find that the Court does not accord finality to its own determinations of constitutional questions, or for that matter of others. We concede that a slavish adherence to *stare decisis* could at times have unfortunate consequences; but it seems strange that under a constitutional doctrine which requires all others to recognize the Supreme Court's rulings on constitutional questions as binding adjudications of the meaning and application of the Constitution, the Court itself has so frequently overturned its own decisions thereon, after the lapse of periods varying from one year to seventy-five, or even ninety-five years. (See the tables appended to Mr. Justice Douglas' address on *Stare Decisis*, 49 *Columbia Law Review* 735, 756-758.) The Constitution expressly sets up its own procedures for amendment, slow or cumbersome though they may be.

These frequent differences and occasional overrulings of prior decisions in constitutional cases cause us grave concern as to whether individual views of the members of the court as from time to time constituted, or of a majority thereof, as to what is wise or desirable do not unconsciously override a more dispassionate consideration of what is or is not constitutionally warranted. We believe that the latter is the correct approach, and we have no doubt that every

member of the Supreme Court intends to adhere to that approach, and believes that he does so. It is our earnest hope which we respectfully express, that that great Court exercise to the full its power of judicial self-restraint by adhering firmly to its tremendous, strictly judicial powers and by eschewing, so far as possible, the exercise of essentially legislative powers when it is called upon to decide questions involving the validity of state action, whether it deems such action wise or unwise. The value of our system of federalism, and of local self-government in local matters which it embodies, should be kept firmly in mind, as we believe it was by those who framed our Constitution.

At times the Supreme Court manifests, or seems to manifest, an impatience with the slow workings of our federal system. That impatience may extend to an unwillingness to wait for Congress to make clear its intention to exercise the powers conferred upon it under the Constitution, or the extent to which it undertakes to exercise them, and it may extend to the slow processes of amending the Constitution which that instrument provides. The words of Elihu Root on the opposite side of the problem, asserted at a time when demands were current for recall of judges and Judicial decisions, bear repeating:

If the people of our country yield to impatience which would destroy the system that alone makes effective these great impersonal rules and preserves our constitutional government, rather than endure the temporary inconvenience of pursuing regulated methods of changing the law, we shall not be reforming. We shall not be making progress, but shall be exhibiting that lack of self-control which enables great bodies of men to abide the slow process of orderly government rather than to break down the barriers of order when they are struck by the impulse of the moment.

(Quoted in 31 *Boston University Law Review* 43.)

We believe that what Mr. Root said is sound doctrine to be followed towards the Constitution, the Supreme Court and its interpretation of the Constitution. Surely, it is no less incumbent upon the Supreme Court, on its part, to be equally restrained and to be as sure as is humanly possible that it is adhering to the fundamentals of the Constitution with regard to the distribution of powers and the separation of powers, and with regard to the limitations of judicial power which are implicit in such separation and distribution, and that it is not merely giving effect to what it may deem desirable.

We may expect the question as to what can be accomplished by the report of this committee or by resolutions adopted in conformity with it. Most certainly some will say that nothing expressed here would deter a member or group of members of an independent judiciary from pursuing a planned course. Let us grant that this may be true. The value of a firm statement by us lies in the fact that we speak as members of all the state appellate courts with a background of many years' experience in the determination of thousands of cases of all kinds. Surely there are those who will respect a declaration of what we believe. And it just could be true that our statement might serve as an encouragement to those members of an independent judiciary who now or in the future may in their conscience adhere to views more consistent with our own.

Respectfully submitted:

Frederick W. Brune, Chief Judge of Maryland, Chairman

Albert Conway, Chief Judge of New York

John R. Dethmers, Chief Justice of Michigan

William H. Duckworth, Chief Justice of Georgia

John E. Hickman, Chief Justice of Texas

John E. Martin, Chief Justice of Wisconsin

Martin A. Nelson, Associate Justice of Minnesota

William C. Perry, Chief Justice of Oregon

Taylor H. Stukes, Chief Justice of South Carolina

Raymond S. Wilkins, Chief Justice of Massachusetts