THE SECURITIES ACT AND THE CONSTITUTION

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There are several distinct ways—to say nothing of tempers or political biases—in which one might approach the question of the constitutionality of the Federal Securities Act of 1933.¹ Shall we dignify these differences by ascribing them to what might be called distinct Schools of Constitutional Thought? Their proponents may lack the self-consciousness, but they have generally the self-righteousness, of such Schools. Some of them, especially the extremists, have succeeded in working into the early discussions of this Act and its fellows a considerable amount of emotionalism and some excellent oratory.² On one side we are warned against the rigid interpretation of the literalists who would make of the Constitution a thing to be broken rather than bent. We hear pointed contrasts between the letter that killeth and the spirit that giveth life. There are dark suggestions of revolution. Finally, we are reminded that literalism is unhistorical in two senses: in the first place, the Constitution was meant to be general and vague in its terms and has, in the main, been construed accordingly; and, secondly, a scholarly reading of its words raises great doubt as to whether they meant, in their eighteenth century setting, what the dogmatic literalist of today reads into them.³ The Constitution is a means to an end, we are reminded, and this end is not the thwarting of government, but the enabling of government to serve its legitimate functions, no closed list of which has ever been made or ever should or can be made. All that is relevant, according to this view, is the question whether there is a legitimate object to be accomplished by any particular piece of legislation.⁴ In the present case, the advocates of this view see a debacle in which many purchasers of securities have suffered loss. The securities market must be made safe. State laws have failed to make it so and probably are doomed forever to failure. Hence, there must be a federal power to accomplish this legitimate end.

On the other side there is also a possibility of extremism. The Con-

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2. See Legis. (1933) 33 Col. L. Rev. 1220; Dean, Legal Opinion on the Securities Act (1933) 8(2) Fortune 50; Frankfurter, Social Consequences of the Securities Act (1933) 8(2) id. 53; Chamberlain, The Securities Act of 1933 (1933) 19 A. B. A. J. 643; Thorne and Eells, Manual of the Federal Securities Act (1933).
CONSTITUTIONALITY

Constitution is a closed book. Congress has certain enumerated powers and no others. The very fact that it has never heretofore attempted to claim the power to regulate the issue and sale of securities places a heavy burden on the person maintaining the existence of such a power today, a burden that can be sustained only by finding such a power expressed or necessarily implied in the words of the Constitution. The goodness of the end to be served has nothing to do with the case; the regulation of the issuance of securities is no better than the abolition of child labor. Neither is the futility of state legislation relevant. These are arguments to be addressed to those who have the power to amend the Constitution. Nor can Congress do by indirection what it cannot do directly. It is true that the Supreme Court has given a little leeway here, but it has in due course repented. Neither the power of taxation, nor the power to regulate interstate commerce, nor the power over coinage, nor the power to borrow money is to be used as a subterfuge to accomplish ends that are not delegated to Congress. To make the power over the mails a basis for subjecting the users of the mails to a code of rules is, from this point of view, a reductio ad absurdum. The closing of the mails to lotteries and objectionable matter is different—this is an indirect method of gaining control of conduct not directly connected with the use of the mails. To call the issuing of securities connected with the organization of a corporation under state law a matter of interstate commerce simply because interstate communication and transportation of documents across state lines is to be expected—or feared—is blowing the bubble until it bursts. A corporation is, and in our jurisprudence always has been, thought of as a creature of the state chartering it. To assume control over the subscription to the stock of a corporation is an interference with this sovereign power of the state at its very source—and so on.

The line of cleavage here described is superficially very different from the old lines that have divided the Schools of Constitutional Law in the course of our history. It is not simply federalism against states’ rights; it is not merely restrictive against liberal construction; it is not the cry against and defense of federal aggrandizement or usurpation. Nor is it precisely the issue raised when the “new Constitution” is contrasted


6. Cf. the famous dictum of Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 316, 423 (U. S. 1819): “... should Congress under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.”
with the "old" as looking to positive opportunities rather than the
negative removal of oppressive restrictions. It is rather a legal con-
troversy than a political one, a controversy between verbalists and real-
ists. The terms are used with none of the opprobrium nowadays
attached to verbalism nor the boastfulness that causes the appropria-
tion of the term "realism" as a catchword of doubtful meaning. They
are intended to suggest two stages in the normal history of the inter-
pretation of any code or similar legal document. While a document
is fresh and still within the environment that gave rise to it, it can
apparently be picked up by its four corners and read. Actually much is
read into it even then, but the process of reading something into it
is as unconscious as was the corresponding process of leaving all that
was obvious out of it. As the environment changes ever so slightly, the
process of reading calls for a more conscious scholarship, even if there
is no problem of adjusting the law to life.

That problem, however, comes eventually, and simple word-study
leads to word-stretching. That such "spurious interpretation" is inter-
pretation, is in itself a legal fiction. It may easily give rise to a host
of specific pretenses under which lip homage is given to rules that are
virtually repealed in practice. Our Constitution has gone through such
a stage. Much of the vaunted Constitutional Law of the last century
was the merest word-study. The pretense by which we kept the College
of Electors—with its function a pious fiction—after our system of elec-
tion had been changed; the pretense by which we saved federal jurisdic-
tion after the coming of corporations which could not claim diversity
of citizenship since they could not be citizens; the pretence by which
the white slavery act and the pure food act were allowed to stand under
the Interstate Commerce Clause: these are but a handful out of a
bushel of instances in which the element of legal fiction has been present
in the growth of our constitutional law.

The possibilities of growth by this method are, however, limited.
When the court speaks to its own hurt, like the good man of the Psalms,
it changeth not. The Supreme Court of the United States once de-
declared, for example, that insurance was not commerce—and curiously
enough insurance has remained beyond the scope of federal power. It
is easier to read a current economic concept into the Constitution than
to read it out again when it ceases to be current. Laissez faire may not

7. For a remarkable tabulation of the older constitutional rights in parallel column
with the new economic and social rights, see Young, The New American Government
and Its Work (2d ed. 1931) 524-525.
8. Pound, Spurious Interpretation (1907) 7 Col. L. Rev. 379.
10. Hoke and Economides v. United States, 227 U. S. 308 (1913); Hipolite Egg Co.
v. United States, 220 U. S. 45 (1911).
be in the Constitution, but it was in the minds of the judges in the formative days of constitutional interpretation. Furthermore, as generations pass and the rate of change in human affairs increases, the application of the unchanging words of the past to current conditions becomes exceedingly difficult. The term "post roads" has had to do service from the days of the post-rider on horseback, down through railroad and canal days, to the age of automobiles and aeroplanes. The time comes when we must face more or less frankly the fact that we are concerned rather with what the Fathers would have said if a certain condition or thought had been before them than what they did say. In Anglo-American jurisprudence this stage of development is resisted. We do not argue consciously by analogy from a statute as we do from cases, and of course a constitution is in this respect only a variety of statute. Hence, we resist the departure from verbalism in Constitutional Law. Furthermore, we fear the substitution of vague principles for the old and tried rules, however good the new principles may be. They seem to substitute the rule of men for the rule of law. It is precisely because of the tendency to cling to the old methods that the increasing demand for a less verbalistic interpretation comes into such sharp conflict with the general conservatism of the legal profession.

In France the movement for libre recherche and in Germany freie Rechtsfindung came about much more easily and gracefully in similar periods of development. Here the growth of constitutional concepts by experimentation is, on the one hand, accompanied by the mechanism of emergencies coupled with apologetic fictions and, on the other, put forward defiantly. The experimental invasion by the federal government of such a new field as Blue Sky legislation is no exception.

Viewed in this perspective, it seems futile as well as inadvisable to insist on a literal interpretation of the Constitution. But it does not follow that we go to the other extreme of declaring all things permissible. Granted that the spirit of the Constitution is what must prevail, the spirit may be just as conclusive against certain courses as the letter is against others. Granted that we have reached a higher stage of constitutional interpretation, we have a double task: that of formulating principles and applying them. This requirement is not satisfied by saying that whatever is reasonable is constitutional, or that there must be under the existing constitution the necessary power to do all that is desirable or even necessary for the public welfare—even if we can assume general accord as to what is desirable or necessary.

It is thus by no means a logical necessity that the older School condemn the Securities Act or the new School uphold it. The matter lies thus: to uphold this extension of federal power the verbalist must stretch his words not in unprecedented ways, but somewhat further than any single precedent goes; whereas the new School, with principles unformulated as yet, demands proof that an essential principle is violated before
admitting unconstitutionality. The former approach resolves itself into a discussion of the probable tolerance of the Supreme Court as at present constituted. The latter, an approach more difficult and in the long run more significant, will occupy our attention here.

The principles called into question have to do in the first place with the fitness of the government machinery for the purpose in hand. Let us look at the control by the government of the mails as a basis for attempting to control the financing of business. Obviously the connection is pretty thin. We already have provisions for punishing those who use the mails to defraud, and little or nothing has been added by the Act in this respect, whether on the criminal side or the administrative side with its power to issue fraud orders. But here we are attempting to subject a business, and more than a business, to rules and regulations that go far beyond the prevention of fraud, even to the extent of imposing liabilities not based on tort or on contract, and not capable of being modified by contract, upon everyone connected with the industry if the mails are used even in preliminary negotiations connected with ever so small a part of the enterprise. The principle is loaded with danger. Every government, city or state as well as federal, will be tempted under it to extend its constitutional jurisdiction by making the use of machinery which it controls subject to a stipulation that whoever cares to use this machinery does so subject to rules which that government could not legally impose. We need not conjure up possible but improbable extensions of this doctrine. We have already gone pretty far in attempting to extend the state's jurisdiction for calling into court by substituted service all those who use our highways. Obviously the draftsmen of the Act realized that the mail-basis for the constitutionality of their Act was flimsy, for they provided specifically that the prohibition against using the mail for unregistered securities should not apply to securities originated and sold entirely within a state. Paradoxically enough, at this point the old School of verbalists might probably have been more liberal than the new, for they have their lottery cases which embrace intrastate as well as interstate mailing within their prohibition.

Is interstate commerce an essential or only a fortuitous element in the sale of securities? If we are to rise to the heights of applying principles, it is not enough to seize on a technical transportation phase of a business and, closing our eyes to everything else, declare the whole matter interstate commerce. We are familiar with the phenomenon of activities within a state which are none the less incidental to interstate commerce.

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13. See, for example, Mass. Gen. Laws (1932) c. 90, § 3A.
14. § 5(c).
15. Lottery Case, 188 U. S. 321 (1903); France v. United States, 164 U. S. 676 (1897).
and therefore are removed from state to federal control. But the converse is also true: there are activities as to which the crossing of state lines is incidental and which remain intrastate matters. It must be remembered that the state is just as clearly supreme in its power over these matters as is the federal government in its power over the others. The answer to the question whether the “use of any means or instruments of transportation or communication in interstate commerce” is in the security business a mere excuse or a substantial reason for federal regulation, calls for a study of the facts of the business. What is carried? The Act speaks of making use of interstate commerce “to sell or offer to buy such security through the use or medium of any prospectus or otherwise.” Presumably this clause embraces letters and telegrams and possibly telephone and wireless messages. It further speaks of the carrying of “any such security for the purpose of sale or for delivery after sale,” or the carrying of a prospectus. “Security” in the Act is defined—none too clearly—as the pieces of paper that are tokens of certain choses in action rather than as the choses in action themselves. This tendency to look on the paper as the thing is in accord with modern convenience, if not necessity. Rights represented by paper are looked upon as having for taxation and administration purposes, a physical situs wherever the paper is found. They have long been considered things of value in the law of larceny. The tendency to make securities negotiable has overcome the logic of the old law that made the certificate of stock subordinate in all respects to the official records on the books of the company. Had this novel attitude towards paper tokens existed in the days of Paul v. Virginia, insurance policies might have been a subject of interstate commerce. The securities as things carried, then, may be looked upon as substan-

16. Cf. Austin v. Tennessee, 179 U. S. 343, 349 (1900): “We have had repeated occasion to hold, where state legislation has been attacked as violative . . . of the power of Congress over interstate commerce . . . that, if the action of the state legislature were a bona fide exercise of its police power, and dictated by a genuine regard for the preservation of the public health or safety, such legislation would be respected, though it might interfere indirectly with interstate commerce.” This was the case in which the original-package doctrine of Brown v. Maryland, 12 Wheat. 419 (U. S. 1827), was held inapplicable to an “original package” of cigarettes.
18. §§ 5(a) (1), 5(b) (1).
19. §§ 5(a) (2), 5(b) (2).
20. § 2.
22. The common-law doctrine was that such instruments were only evidence of a right and that a mere right was not such a thing as could be stolen. Under statutes with widely varying phraseology, they are almost universally made the subject of licensing. Cf. Young v. People, 193 Ill. 236, 61 N. E. 1104 (1901).
23. Uniform Stock Transfer Act § 1(b). Cf., however, id. § 3.
24. Supra note 11.
tial. Still, can the carrying of them across state lines for sale in intrastate commerce or for delivery after sale in intrastate commerce be seized upon to subject the terms and conditions of the manufacture and sale of the security to the Interstate Commerce Clause? Something of the sort has been unsuccessfully attempted with prison goods. The analogy obviously before the eyes of the draftsmen of this Act was based on another constitutional clause, the Eighteenth Amendment, and not on the Interstate Commerce Clause. The truth is that securities are made and ordinarily sold, whether on exchanges or in brokerage houses, outside of the channels of interstate commerce. Negotiations and transportation occur across state lines, but it is putting the cart before the horse to say that the interstate part is essential and the state part incidental.

The draftsmen of the Act must have been conscious of this difficulty; otherwise they would have asked Congress to exercise a plenary exclusive power over this newly discovered division of interstate commerce. Yet they said that "Nothing in this title shall affect the jurisdiction of the securities commission... of any State or Territory of the United States... over any security or any person." Is this an attempt on the part of Congress to delegate to the states a part of the plenary and exclusive power which it claims? Can Congress do that? Or has it attempted to make federal officers out of state officers by enacting all existing state laws as supplementary federal laws in the several jurisdictions? One shudders at the constitutional complexities. Quite clearly the inadequacy of Congressional control over securities was recognized as a fact, and at the risk of a constitutional impasse the state supervision had to be preserved. But the reality faced here is precisely the type of reality that helps to answer the question, Are we dealing with what is an interstate matter—that is, substantially, and not merely technically with the aid of such word-stretching as the new School repudiates?

What was the open object of withdrawing the control of interstate commerce from the states? Was it not to permit a free flow of commerce across state borders? We were to have none of the petty tariffs, the discriminations against goods from other states, the stoppage at frontiers, that made the commercial map of eighteenth century Europe into a crazy quilt. The free flow of commerce throughout the length

25. The matter is fully discussed in Hall v. Geiger-Jones Co., 242 U. S. 539 (1917), where the converse of the proposition was under consideration.
26. § 18.
27. Cf. Cooley v. Board of Wardens of the Port of Philadelphia, 12 How. 299 (U. S. 1851). The history of the attitude of the courts on the sense in which the power of Congress over interstate commerce is exclusive is neatly summarized in 12 C. J. 10, n. 47b. The courts have not been consistent throughout this history, but they leave considerable doubt as to the power of Congress to act on an exclusive power and at the same time leave open a sphere of action for the states.
and breadth of the land was to be assured by taking away the power of regulating such commerce from the states and confiding it to a central government. When this power is made the basis of an act which makes a curious caution necessary in crossing state borders and thus tends to confine financing operations within the borders of single states, we are confronted with a paradox of a type not infrequent in legal history. The power vested in Congress in the hope of making business free to cross state borders is utilized so as to erect barriers against it whenever it meets a state line. If the new jurisprudence looks to the spirit of the Constitution, it must hesitate long before relying on the Interstate Commerce Clause for the Securities Act of 1933.

There is one other attack open for those who feel that the time has come for emancipation from the words of the Constitution. They raise the question whether the concentration of certain transactions in a few cities for reasons of convenience—a natural consequence that flows from improved systems of communication and transportation—does not call for an entirely new definition of “interstate” and “intrastate.” The purely physical accident of where certain words are uttered or where a particular office is situated is comparatively unimportant as contrasted with questions of the domicile of the parties, the place or places of contemplated performance, the sources from which funds or goods are drawn and the channels into which they are sent. In other words, without relying on the technical test of the physical transportation of something or other over a state line, we ought to contemplate a transaction in its complete setting. In that sense, the New York Stock Exchange, for example, might be looked upon as a national institution and be governed as such by national law. Perhaps something of the sort is inarticulately behind the arguments of those who for some years have been advocating federal legislation to control stock market transactions. There is more reality to this suggestion than to most of the more technically presentable defenses of some of the new legislation. It is difficult to work out. No definition of interstate commerce has yet been suggested to take care of such national institutions, and perhaps none can with the handicap of a century and a half of judicial definition that looks on physical line-crossing as the only reality upon which interstate commerce can be predicated. It may well be that here we reach the limit of the possibilities of the second stage of constitutional interpretation and that if there is to be undertaken a new sorting out of matters of national import for national control it must be done by constitutional amendment.

We have canvassed the suggestions of the newer Schools of constitutional interpretation to find that unless they stop at the purely negative point of avoiding verbalism so as to declare all things possible for those who have faith in their creed, they must develop a body of principles which may lead to greater restrictions than those that they have removed.
In the case of the Securities Act it may be that the die-hards of the old School will fail to find the necessary words of negation in traditional constitutional law, while reluctantly granting the elasticity of the enabling clauses that have been relied upon. On the other hand, in spite of the general tendency of the realists, or whatever they call themselves, to align themselves with the new legislation, it may well be that their own principles stop them short of their goal. The idea of transferring this branch of police law from the states to the federal government strains traditions and principles more than it does words.