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The President's Page

Just Compensation

THE fifth and final clause of the Fifth Amendment to the Federal Constitution, providing "nor shall private property be taken for public use without just compensation," was designed to place a limitation on the Federal Government in the exercise of its right of 'eminent domain,' a right which all governments possess.

This clause in the Fifth Amendment applies exclusively to the Federal Government. However similar provisions are set forth in the Constitutions of the several states of this country.

Section 19 of the Bill of Rights of the Ohio Constitution provides:

"Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner."

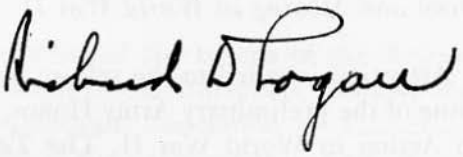
Thus the American citizen possesses guarantees from both his National and State Governments against the arbitrary seizure and confiscation of his property, which frequently occurred in England before Magna Carta and occasionally thereafter.

While these provisions do not prevent government from acquiring any property it may need, they do guarantee to the owner of such property a fair price for it. If such price cannot be agreed upon between government and the owner, laws have been passed which authorize action in the courts to determine such price.

An additional safeguard against the exercise of arbitrary

power by the Federal Government is found in the penultimate paragraph of Section 8 of Article I of the Federal Constitution, which requires the Government, when purchasing property "for the Erection of Forts, Magazines, Arsenals, Dock Yards, and other needful Buildings," first to secure the consent of the Legislature of the State within which such property lies.

The requirement that government shall make compensation for private property is not found exclusively in English and American law. Such guarantee appears also among the enactments of Roman law and in the Code Napoleon of France.



News

Dead and Missing in World War II

Attention is called to the release by the War Department in June of the preliminary Army Honor List of Dead and Missing in Action in World War II. The *Toledo Blade* for June 27, 1946 contained the names for 23 northwest Ohio counties and for Monroe and Lenawee counties in Michigan. Subsequent issues made corrections and additions. The *Toledo Times* for June 27, 1946 carried the list for Lucas county. Other northwest Ohio papers similarly honored their war dead and missing.

A copy of the Government Printing Office proof of the Navy's "State Summary of War Casualties" for Ohio has been received. The Casualty Division of the Navy's Office of Public Information has corrected it in preparation for official release in October. A special list of northwest Ohioans has been made from it by the editor for public use after the Navy has made its release.

The QUARTERLY will eventually publish an authoritative Honor List of all northwest Ohio service men and women who lost their lives during World War II. It is not deemed wise to do so at present because the Navy list is not yet ready and because the Army list contains many errors. General Lewis B. Hershey, Director of Selective Service, has asked all selective service boards to check the Army list against local records and to report all corrections to the War Department. Meanwhile the Office of Public Information of the Navy Department plans

to issue its own official Honor List of Navy, Marine, and Coast Guard personnel in the near future.

Ohioana Library

Two Toledoans, Mrs. F. B. McNierney and Dr. G. Harrison Orians, have been nominated for trustees of the Ohioana Library Association. Election of 20 trustees is scheduled at the 1946 meeting in Columbus on October 12.

Mrs. McNierney is a member of the boards of the Toledo Public Library and the Friends of the University Library. She has been active in the American Association of University Women. Dr. Orians is head of the department of English and director of summer sessions at the University of Toledo.

October 12 has been designated "Ohioana Day," at which time the association will honor authors and composers who have had works published during the last year.

Miss Lucille B. Emch is chairman of the Lucas County Ohioana Committee. Other members are Mrs. Mildred Shepherst, head of the local history and genealogy division of the Toledo Public Library; Sister Virginia Marie, librarian at Mary Manse College; Henrietta Winkelman, first assistant at the Lucas County Library at Maumee; and Lillian M. Miller, librarian at the Sylvania Public Library.

Adena

Adena, home of Thomas Worthington, sixth governor of Ohio, is to be maintained by the state as a historical monument. Acquisition was approved at the special summer session of the Legislature.

The stone mansion stands on 300 acres near Chillicothe and

the view from its front porch is conventionalized in the Ohio state seal.

Latrobe, architect of the Capitol at Washington, designed the mansion for Governor Worthington, whom he came to know while the latter was serving as one of Ohio's two first senators.

Personal Notes

Two more members have been added to the history department staff at Bowling Green State University. They are Dr. Jacqueline Eckert Timm, research worker in the Division of International Law of the Carnegie Endowment for International Peace in Washington, and John W. Stockton, history teacher and assistant principal of the high school at West Carrollton, Ohio.

Dr. Timm holds the B.A., M.A., and Ph.D. degrees from the University of Texas where she taught before going to Southern Illinois Normal University at Carbondale in 1941. She will teach history and political science.

Mr. Stockton has taught at Miami University where he obtained his master's degree. For one year he was an exchange teacher at Rugby, England. He will teach economic history and Oriental civilization.

Dr. Walter S. Sanderlin, appointed last spring, has resigned to go to Washington and Jefferson College.

Dr. Emil Lucki, associate professor of history at the University of Toledo, has been appointed assistant dean of the College of Arts and Sciences. Dr. Lucki, who received his B.A. degree at the University of Manitoba and the M.A. and Ph.D. at the University of Chicago, will aid Dean Andrew J. Townsend.

Two additional appointments have been made to the history staff at the University of Toledo, each as assistant professor. Dr. Duane D. Smith took his graduate work at the University of Michigan and Ohio State University. He has taught at a number of other colleges, including Miami University and Baldwin-Wallace College. Marshall J. Lipman is a graduate of

the University of Chicago with a Master's degree from Loyola University. He is a veteran of World War II, having served as a naval officer.

News Briefs

Piqua, named for a Shawnee Indian tribe in 1796, observed its 150th anniversary with a five day celebration beginning August 4. Governor Frank J. Lausche was one of the main speakers.

Only 10 Civil War veterans were able to attend the 80th national encampment of the Grand Army of the Republic in Indianapolis in August.

Sandusky Bay bridge, gateway to many sites of historic interest, was opened as a toll-free span for motorists on August 31. It is on the route to Thomas A. Edison's birthplace at Milan, the Blue Hole at Castalia, Perry Memorial at Put-in Bay, the lighthouse at Marblehead and many lake shore recreational facilities.

A memorial monument to the dead of World Wars I and II was dedicated August 14 in Toledo Zoological park. The memorial, gift of South Side Post 530, American Legion, stands just inside the park entrance. The dedication was in conjunction with national Victory day, proclaimed by President Truman on the anniversary of Japan's surrender.

An Ohio city, either Cleveland or Dayton, will be the site of a National Air Museum, it has been announced in Washington. President Harry S. Truman is to make the choice. The museum will be operated by the Smithsonian Institution in co-operation with the Army Air Forces, the Navy and two civilians to be appointed by the President. The necessary legislation has already been passed by Congress.

Camp Perry, under consideration as a site for a veterans' memorial park, may become a university instead. The camp was inspected by Governor Lausche in August, with the final decision awaiting determination of enrollment in the six state schools. About 1500 students could be accommodated.

The camp, which served as an induction center in World War II, was long a training area for the Ohio National Guard.

Local War Records

MILDRED M. SHEPHERST

RECORDS of the men and women of the Toledo metropolitan area who took part in World War II are kept in the Local History Room of the Toledo Public Library. The file consists of newspaper clippings pasted on 3 x 5 cards, alphabetically arranged, and covers enlistments, training, personal experiences, meritorious awards and casualties. Induction and discharge records are arranged by date. A separate casualty file includes those killed or missing and those taken prisoners.

Many men from this area were members of Ohio's 37th Division. Dick McGeorge of the staff of the Toledo *Blade* spent seven months in the South Pacific as war correspondent and his daily dispatches as they appeared in the newspapers are arranged in sequence for easy reading. Feature articles about other divisions made up of local men are also available.

During the war these records were useful in locating addresses and the names of parents of service men and women. The file was used also by members of the American Legion, the Gold Star Mothers and the Chamber of Commerce. Now that the war is over, those who took part in the campaigns are interested in reading the newspaper accounts, especially those concerning comrades who did not come back.

The file of approximately 180,000 cards will serve as a permanent record of Toledo's part in the war.

Judicial Review Under the Ohio Constitution of 1802

RANDOLPH C. DOWNES

THE purpose of this article is to tell the strange story of how the people of Ohio changed their collective minds about a great constitutional question during the brief space of fifty years after 1802. In the first pioneer flush of democratic statehood they placed their trust in the superior wisdom of their elected legislators. But years of experience with politics and law making, particularly of the Jacksonian variety, weakened this trust and led them to a faith in the greater wisdom of the courts to protect them from the constitutional vagaries of the legislators. Nor is the change of mind and heart surprising when it is realized that the people of Ohio were following the same path being taken by the people of the nation as a whole in respect to the Constitution of 1787.

The strongest evidence that the people of Ohio, in 1802, did not mean to confer upon the State Supreme Court the right to decide upon the constitutionality of acts of the state legislature comes from one of the judges of the Ohio Supreme Court itself. In 1852, in a dissenting opinion upholding the constitutionality of an act of 1850 enabling the people of Crawford County to subscribe to the stock of the Ohio and Indiana Railroad, the venerable Chief Justice Peter Hitchcock said, speaking of Thomas Jefferson's belief that judicial review of the constitutionality of laws was usurpation, "Such was the opinion entertained by a majority of the public men of this state, at the time of, and soon after the adoption of our own constitution."[1] A similar view has been expressed by Professor W. T. Utter in his study of the case of Rutherford *v.* McFadden in 1807 in which the Supreme Court declared unconstitutional the law giving justices of the peace jurisdiction in cases involving as much as fifty dollars. Professor Utter allows himself to "question whether judicial review was established after all."[2] A majority of both House and Senate of the Ohio Legislature did not believe so,

as evidenced by the House vote to impeach the offending judges, Calvin Pease and George Tod, and the Senate vote of 15 to 9 for conviction, just one short of the two-thirds majority required to remove the judges from office.

And then the issue slept. Twenty-eight years passed before the Supreme Court again set aside a legislative enactment. Only 11 times were laws passed under the Constitution of 1802 negatived by the Court, and in four of these cases the bench subsequently reversed itself. It may be said that during the period from 1802-1851 there were only four unqualified judicial reversals of the Legislature and, counting the hang-over cases after 1851 involving the constitution of 1802, the total number of such reversals was six.[3] On the other hand in the vast majority of cases in which the constitutionality of laws was at issue, the court decided in favor of the Legislature.

In the Ohio Constitutional Convention of 1850 Judge Hitchcock said, "I have recollections of but one case which was ever decided in such a manner as to give offense to the democracy, and that was the case of the State of Ohio against the Commercial Bank of Cincinnati."[4] If this is true, then it is safe to say that not once since the "fifty dollar case" of 1807 was the will of the people of Ohio permanently defied by the Ohio Supreme Court, because the decision to which Judge Hitchcock alluded was overruled by a different Supreme Court within three years from the time he spoke.[5]

This does not mean that the power of judicial review was rejected by the court itself. It means emphatically the opposite. The right of judicial review is exercised just as much in upholding a law as it is in rejecting it. Indeed, the most outspoken assertions of this right were made in cases in which laws were sustained. In 1848 in upholding the retrospective law of January 27, 1839 permitting the trustees of an unauthorized bank to sue its debtors, Judge Hitchcock said, "There was a time when it was dangerous for the courts of this state to inquire as to the constitutionality of legislative enactments. . . . But we have fallen upon different times. Supremacy seems to be claimed for

the court instead of the general assembly. And scarce a case has been presented to us, dependent upon legislative enactments, in which it is not claimed that the constitution has not been violated."[6] Different times indeed! When, under the new constitution of 1851, the first popular elections of Supreme Court judges brought a majority of Democratic members to the bench, these judicial successors of the party of Jefferson engaged in an orgy of judicial review in rejecting the Whig bank tax law culminating in 1860 in a denial of the right of the United States Supreme Court to overrule them.[7]

An excellent illustration of how Democratic dogma had been forced to change in regard to judicial review is found in the debates of the Ohio Constitutional Convention in 1850 on the question of substituting popular election of judges for legislative appointment. On July 3, 1850 in the midst of Knox County delegate Matthew A. Mitchell's paean of praise of Thomas Jefferson for pioneering the cause of judicial responsibility to the people, Judge Hitchcock, who was also a delegate, arose and tartly asked, "I would like to inquire of him [*Mitchell*] whether, in the life and writings of Mr. Jefferson in his possession, there is not somewhere to be found the doctrine, that in the construction of the constitutionality of a law, the authority of the Legislature alone is supreme, and whether the gentleman from Knox supports that doctrine." Mitchell frankly replied in the negative, saying, "Suppose Mr. Jefferson does hold that doctrine, and I grant that he may. . . . Like all other men, he must have had his faults: he must have run into some errors; no man ever wrote and thought as much as he did without doing so. . . . I freely admit that there are some things which Mr. Jefferson has advocated which I could not exactly subscribe to."[8]

Legislatures themselves partook of this surrender. Instead of impeaching the judges of the Supreme Court for exercising this power, the general assemblies in the late 1840's resorted to the device of voluntarily referring the constitutionality of controversial laws to the decision of the Supreme Court. On March 12, 1845 the Legislature resolved that whereas there were doubts

as to whether or not dam and mill owners were entitled to damages caused by the diversion of water into Ohio canals, such owners might apply to the Supreme Court for a writ of mandamus obliging the Board of Public Works to assess damages according to the provisions of the law of February 4, 1825. If the Supreme Court supported the law the Board was to proceed at once to assess damages on all mill and dam properties affected. Only one suit was to be entertained under the law, and the Governor was to appoint counsel to defend the rights of the state.[9]

This deference to the Supreme Court was naturally reserved for vital legislation. Such was the new general tax law of March 2, 1846 which, for the first time, included general property along with land as a tax base. By section 65 of this act it was provided that the State Auditor should advise with the Attorney General as to the true construction of the act subject to an appeal to the Supreme Court.[10] It would hardly have seemed necessary to make such a provision inasmuch as litigants would have had recourse to that tribunal in the ordinary course of appeals. But the fact that the Legislature sought to hasten the process, or even to mention the Supreme Couprt at all, indicates that they were quite willing to submit the complicated structure of the new tax law to judicial review.

It is one of the arguments of the opponents of this practice of legislative consultation of the courts, that it is likely to be abused. This is what happened on March 24, 1851 when the Legislature passed a law conferring jurisdiction on the Supreme Court to prevent the operation of an injunction against the enforcement of the act of March 23, 1850 authorizing the Commissioners of Crawford and Wyandot Counties to subscribe to the stock of the Ohio and Indiana Railroad.[11] On November 6, 1850, after the people of Crawford county had authorized a subscription of $100,000 by the County Commissioners, a group of taxpayers opposed to the subscription obtained a temporary injunction from the Court of Common Pleas in Crawford County against the expenditure of the money. Before the latter

court had heard the merits of the case in order to lift the injunction or make it permanent, the Legislature passed the law referred to, allowing the party against whom the injunction had been issued to file a motion before the Supreme Court to dissolve the injunction. When, therefore, the suit was brought before the Supreme Court, Judge Rufus P. Spalding, speaking for a majority, rebuked the Legislature for interfering with judicial process, and refused to receive the case until it should come in the usual course of trial and appeal.[12]

Another example of this deference to judicial supremacy took place in the city of Cincinnati in 1849-1850 when the school authorities delayed the enforcement of a law establishing separate schools for negro children until a decision was made by the Supreme Court as to the constitutionality of the law. The taxes had been collected and the city council, the city auditor, and the directors of the two negro school districts involved agreed that the latter were entitled to $2177.67 for the school if the law were constitutional. Therefore, the directors sued for a mandamus to force the city council to authorize the auditor to make the payment. The delicacy of the issue was, of course, the factor that made the city so squeamish, but that did not prevent the Supreme Court from deciding in favor of the negroes.[13]

The entire reason for this remarkable change in the attitude of the people of Ohio toward judicial review is complex. Judge Rufus P. Ranney in 1852 saw it as an early evidence that Ohio law had acquired something of the stature of jurisprudence. "The triumph of this great principle," he said, "vital to all constitutional government, must be attributed, in no small degree, to a clearer comprehension of the nature and purpose of fundamental laws, and the power of the legislative body derived from them."[14] It is apparent that the popular acceptance of the doctrine coincided, not only with the rise in the power and prestige of the Ohio bar, but with the decline in the public respect for the Legislature. The dreary spectacle of the politics of gerrymandering, of party boycotts, of Senatorial election bargaining,

and of the building of a State capitol was not such as to justify the idealistic implications of the Jeffersonian doctrine of legislative supremacy.[15] When, on one rare occasion, a law of somewhat technical nature relating to executions was known to have been drafted by special learned counsel appointed by the Legislature as a committee of revision, the Court was led to remark, "We can not but presume many members of the legislature, who passed it, were intimately acquainted with the common and statute law concerning executions."[16] On the other hand, Judge Nathaniel C. Read, in a bleak moment in 1848, commenting in the course of an opinion dissenting from the decision upholding the right of husbands to alienate lands without reading the deed to their wives, as the law presumably required, said, "The legislature is not the most appropriate body to determine legal questions. It is not the study and business of the lives of members of the legislature to make themselves familiar with the principles of law, nor is the mode of their organization, and the rules and principles of procedure, calculated to develop legal truth."[17]

An important factor in accounting for the incorporation of the principles of judicial review in the mores of the people of Ohio was the disposition of the courts to exercise it to meet the needs of a frontier state whose legal institutions and practices were in a state of flux. This required judges of a liberal frame of mind, less disposed to stick at technicalities than to interpret the law liberally so as to serve the people in building a new commonwealth. This meant, as Judge Ranney said in 1852, "that the presumption is always in favor of the validity of the law." Any doubt in the minds of judges as to the constitutionality of a law is "conclusive against all affirmative action." Legislators, as well as judges, take an oath to support the Constitution. "This being their duty, we are bound, in all cases, to presume they have regarded it; and that they are clearly convinced of their power to pass a law before they put it in the statute book. If a court, in such case, were to annul the law, while entertaining doubts upon the subject, it would present the absurdity of one

department of the government overturning, in doubt, what another had established in settled conviction; and to make the dubious construction of the judiciary outweigh the fixed conclusions of the General Assembly." Under such restrictions "it is only when manifest assumption of authority [*by the Legislature*], and clear incompatibility between the constitution and the law appear, that the judicial power can refuse to execute it."[18] Judge Hitchcock expressed similar views in McCormick *v.* Alexander in 1826, "So long as there is a doubt, the decision of the court should be in favor of the statute. Whenever courts, in doubtful cases, undertake to declare laws unconstitutional, they may with propriety be accused of usurpation. They lost sight of the object for which they were constituted and interfere with the rights of the people, as represented in a different branch of government."[19]

What rules determined the absence of doubt on the part of the Supreme Court? Judge Ranney, in the Cincinnati, Wilmington, and Zanesville case, said, "It is always legitimate to insist that any legislative enactment . . . is void either because it does not fall within the general grant of power to that body, or because it is expressly prohibited by some provision of the constitution." The first step in the procedure was to examine the nature of the power exercised. If it fell "fairly within the scope of legislative power," and was not prohibited by the Constitution, it was valid; if it did not qualify as a legislative act, "it is clearly void as though expressly prohibited." This was a rather flexible and general criterion, and it is not surprising that few laws were rejected under it. When a law was wrongly worded, common sense led the Supreme Court to word it correctly rather than to throw it out, as when, in 1835, a strict enforcement of the statute of frauds taking away the right of court action upon oral agreements denied by one party, would have operated to destroy the equitable right of a person to compel the enforcement of an agreement acknowledged to have been made, partially carried out, and then reneged by one party.[20] Another example of this was involved in a judicial interpretation in

1825 of the statute of frauds voiding deeds made by debtors to defraud creditors. It was determined that a deed from a debtor to a third person was void only between the creditor and the debtor. To declare such a deed valid strengthened the purpose of the law because it obliged debtors to get full value for lands sold in order to pay their just debts, thus preventing the commission of fraud.[21]

How manifold were the expressions of this willingness to give the legislature of a young state free play in law making! Occasionally it was deemed wise, in the interests of justice, for the Supreme Court to interpret a law as directive and not compulsory. The act of February 12, 1805 stated that, in the process of foreclosure of a mortgage, the lands seized should be valued by appraisers. One Allen, in Franklin County, neglected to insist on such an appraisal and years later his lessee sued Parish, the holder of the land, for possession. Judge Charles R. Sherman refused to support Allen on the ground that the law was designed to settle rather than unsettle land titles, and that it was unfair for Allen to dig up such a technicality against an innocent purchaser of the foreclosed land. "A statute should be so construed," said Judge Sherman, "that the several parts will not only accord with the general intent of the legislature, but also harmonize with each other; and a construction of a particular clause, that will destroy or render useless any other provision of the same statute, can not be correct."[22]

When the law was not specific enough to determine the validity of some practices the Court ruled that, if the decisions of the county and other local courts on the point were unfair, the law might be interpreted to permit that practice. Thus the question came up in 1830 as to whether the bond of the administrator of an estate rendered him liable in respect to more than his personal property if his maladministration of the estate required it. The court ruled, "If the terms of the statute left a doubt as to the extent of the liability of the administrator and his security upon the bond, more than twenty years uniform practice and usage have made it cover money arising from the

sale of real as well as personal property. . . ." Since occasionally the amount of personal property was not enough, "the legislature, contemplating these things, gave a discretionary power to the court to require what security they might deem proper. . . . This appears to be a reasonable exposition of the legislature's intention, and it is the same [*that*] it has uniformly received in practice."[23]

When the Legislature conferred upon the various County Courts of Common Pleas the duty to assess a five dollar fee on every attorney practicing before it, the Supreme Court showed itself far less squeamish about the judicial exercise of executive functions than did the United States Supreme Court in the Hayburn pension case. Judge Ebenezer Lane, conscious of the difference between conditions in Ohio and those surrounding the Hayburn decision, explained his action in these words, "If the common pleas had declined the assessment as a service beyond their judicial duties, as the judges of the [*United States*] judicial courts declined acting under the act conferring pensions, it would be a grave question whether the duty could have been executed. But the judges have assessed the tax, and a privilege which they do not claim, can not avail the defendant."[24]

Retrospective laws that merely changed procedural remedies and not substantive rights were uniformly upheld by the Court although they disliked the practice and it was outlawed in the Constitution of 1851. There were two types of this legislation. One of these was special legislation enabling unauthorized banking companies to sue their debtors, such as the laws of March 4 and 8, 1845 authorizing the trustees of the Cuyahoga Falls Real Estate Association and those of the Mechanics and Traders Bank of Cincinnati to collect just debts. Said Judge Allen G. Thurman in the Cuyahoga Falls case, "Retrospective laws that violate no principle of natural justice, but that, on the contrary, were in furtherance of equity and good morals were not forbidden by the constitution of 1802."[25] The other type was the general revision of the judicial system by correcting certain defects so as to enable previously unappealable cases, in the

documents of which certain clerical errors had been detected, to be appealed to the Supreme Court. When one N. Armstrong found himself haled before the Supreme Court to answer an appeal, he objected to the application of the new provisions because the case had been started before the passage of the law. Judge Lane rejected his claim declaring, "The appellee has no vested rights in the forms of administering justice that precludes the legislature from modifying them, and better adapting them to effect their great ends and objects. The new law touches no executed power. It does no more than confer a jurisdiction in a case pending and undetermined, where, without it, such jurisdiction would be declined by the court."[26]

Old formulas of a general nature, such as the bill of rights in the Ordinance of 1787, were not allowed to cover too many sins. The Ordinance, among other things, guaranteed the right of trial by jury, the benefit of judicial proceedings according to the common law, and the freedom of navigation of the navigable waters of the State. Thus Judge John C. Wright in 1832, in the case of Lessee of G. N. Hunt *v.* John McMahan said that the guarantee of a jury trial did not prevent the Legislature from allowing a commission of three to value the improvements of a dispossessed squatter. There were many instances in which commissions were legal, such as cases of eminent domain, lunacy, and the like.[27] In 1849 Judge Hitchcock made it clear that the procedure for the seizure of property under the attachment laws did not violate the Ordinance because it changed the common law procedure.[28] As for the navigation of streams lying exclusively within the state, the Ordinance did not prevent the Legislature from building bridges and dams across navigable streams. Said Judge Frederick Grimke, in 1840, in a case involving the building of a bridge in Cleveland across the Cuyahoga River below the warehouse of one S. R. Hutchinson, "That a state should wantonly clog the navigation of its streams, to the permanent injury of its own people, is not to be supposed. It is one of those events which no legislator would think of providing against any more than he would

against suicide." Even if a legislature did such a thing "the restraint can not be imposed in this instance, without invading the appropriate sphere of state jurisdiction."[29] To the question as to just what was a navigable stream in Ohio, Judge Matthew Birchard in 1848 answered, "It is a stream great or small, which they have thus christened." Persons, including judges, were to be governed by such a dictum instead of by their opinion as to the navigability of streams. To go into the engineering aspects of the problem was a legislative function not a judicial one.[30]

It is to be expected that, at the slightest sign of the entry into Ohio of the anachronistic practice of entailing estates, the Legislature would interpose its opposition and receive the strong support of the Supreme Court. About the year 1812 Aaron Olmsted of East Hartford, Connecticut, willed 30,000 acres of land in Lake County, Ohio, to his three sons "and their heirs forever." On January 7, 1813, on the application of Aaron's widow, Mary, and of Caleb Goodwin, executor of the will, the Ohio Legislature passed an act appointing Mary Olmstead, Caleb Goodwin, and Levi Goodwin trustees to sell the land and invest it for the three minor sons. The act was based on the assumption that, since the entailment prevented sales, the land would remain unproductive, and the sons would be unable to pay the taxes. The years passed, and when the young Olmsteds came of age and discovered the meaning of their father's will, they brought suit against the occupiers, claiming that the act took "the property of one person, and without or against his consent, gave it to another." When the case came before the Supreme Court, Judge Edward Avery supported the Legislature, pointing out that the act was passed at the behest of the sons' friends, that "it took care to secure fidelity in the agents appointed to make the sale" by requiring ample bond and the review of the proceedings of the trustees before the proper courts. Moreover, the sons got the proceeds and acquiesced in all the proceedings for many years.[31]

In 1860 a case involving frontier Ohio's version of the law of replevin was upheld. It seems that in 1849 one Adolphus H.

Smith of Cincinnati got himself involved in litigation in the course of which the sheriff took possession of 438 hogs belonging to Smith. Bond was given by Smith's adversaries for security in the event of the suit going in Smith's favor—an eventuality which, in the course of time, occurred. But by that time the hogs had gone the way of all flesh, and so had the assets of the bondsmen. Smith, therefore, sued Robert McGregor, to whom the hogs had been sold, alleging the latter's liability and the unconstitutionality of the replevin law which, he said, violated the constitutional guarantee that "private property shall ever be held inviolate." Judge William V. Peck, in deciding against Smith, pointed out that the Legislature of Ohio was within its rights in deciding, unlike some other states, that some properties had to be disposed of quickly in order to avoid the expense of storage. Moreover, litigants were fully protected by the bond provisions, and it was the Legislature's expectation that parties to a case should not accept bonds about which there would be any question.[32]

A case evincing a remarkable degree of cooperation with the Legislature was that involving the deposit in 1849, by the Ohio Canal Commissioners, of $100,000 of public funds in the Ohio Insurance Company of Columbus at 7 per cent interest. The Company issued bonds, due on December 28, 1851, upon which date the State obtained its money. The executors of Joel Buttles, one of the company's trustees, declined to acquiesce in the transaction, claiming that the contract between the Company and the Commissioners was unauthorized. The executors were sustained in the Franklin County District Court. The Supreme Court, however, took the ground that there was no way of determining whether or not the contract was valid. At the time of the deposit in 1849 the contract was unauthorized, "but the state by becoming a party in court suing upon the contract without any suggestion that it is prosecuted without authority, the presumption is, as is the case in private individuals, that the state has ratified." However, there was no final proof of the fact. The Legislature passed no law of authorization, but that was

not necessary if the Legislature approved of it "in other ways." But the evidence of such other ways "may be obtained in the journals of the two houses, of which it is well settled, we can not take notice."[33]

A strong statement of the disposition of the Supreme Court to cooperate in the vacillating efforts of a frontier legislature to fashion legal foundations for property rights is found in the decision in the case already cited of McCormick *v.* Alexander in Clark County in 1826.[34] This involved the laws of 1820, 1822, and 1824 which made conflicting rules as to the procedure to be followed by creditors in obtaining judgments against debtors and in levying on the properties of the latter. Joseph Evans obtained a judgment involving a piece of property in March, 1821, but did not begin execution proceedings under the act of 1820 for over a year. On February 1, 1822 the Legislature decreed that execution proceedings must be begun within a year after judgment to give the judgment holder a lien, but persons already holding judgments were given a year from the passage of the act. Before Evans got around to execution proceedings on his judgment, McCormick, in March, 1822, got a judgment involving the same piece of property and began execution proceedings the following May. Evans finally began his proceedings in November, 1822, and the Clark County court, under the act of 1822, awarded the land to Evans. But on February 4, 1824 the Legislature decreed that no judgments heretofore rendered, on which execution had not been taken out within a year from the date of judgment, should establish a prior lien. This repealed the Act of 1822, deprived Evans of his lien, and gave McCormick the right to sue Sheriff Alexander of Clark County for his rights. The Sheriff claimed the law of 1824 unconstitutional because it violated an alleged contract made by the State with Evans.

But Judge Hitchcock, speaking for the Supreme Court, ruled otherwise. To declare the law of 1824 unconstitutional, he said, "would be to curtail very much the power of legislating. It is believed that no laws, especially in new states, are more fre-

quently revised and amended than those relating to judgments and executions. In the short space of eight years, there have been no less than four different statutes on this subject in our own state, each succeeding one repealing the former. Whether such frequent changes are dictated by sound policy, it is not for the court to say; and we are not prepared to say that these several statutes are or were in whole or part unconstitutional."

The grounding of judicial decisions in frontier conditions and not in mere literary expression is shown to be necessary in the case of Kerr and others *v.* Mack[35] decided in 1823 involving rules to be followed in determining property boundaries in the Virginia Military District. Judge Jacob Burnet was obliged to apply the rule that because of the unsystematic method of surveying and recording titles, a first enterer, in order to substantiate his claim, was obliged to make the bounds of his claim as widely known as possible to prevent future conflict. Not to have done so was presumptive evidence against the claim. "The indefinite import of these expressions," said Burnet, "has opened a wide door for judicial construction, and has led to the establishment of a variety of rules, which approach very near to legislation, but which seems to have been necessary to sustain a large portion of the early entries. . . . It is better to have an imperfect rule than to be without any. If a rule be often departed from, it ceases to be such, and each case is left to be decided by the impression which some imaginary distinction or peculiar circumstance of apparent hardship may make on the mind of the judge."

A source of one of the most heated judicial controversies under the Constitution of 1802 was the conflict between legal purists and liberal constructionists over the question of requiring the reading of deeds to wives in order to make them legal. The law in question, that of January 30, 1818,[36] required that a justice of the peace in authenticating a deed of land belonging to a married couple should examine the wife separately, "read or otherwise make known to her the contents of such deed, and certify that she acknowledged her voluntary acquiescence with-

out fear of or coercion by her husband." It is clear that these requirements were not strictly adhered to in practice, that deeds were rarely, if ever, read to wives, and justices of the peace usually merely certified that the wife acknowledged the deed to be her free act.

This negligence was revealed in the first test of the law in the Supreme Court in 1828 in the case of Catherine Brown who sought to take advantage of it by seeking an assignment to her of her dower rights from property formerly deeded by her deceased husband. According to Mrs. Brown she had not been made acquainted with the contents of the deed. Judge Burnet overruled her claims in a striking decision upholding the common practice against adherence to the strict letter of the law. "If it would have been proper at any time," he said, "to require such adherence, it is certainly too late to require it now. A different practice has prevailed since the first establishment of the territorial government, which can not be corrected, without incalculable mischief. . . . No law can require the correction of an error in its construction, which has long existed, and has been generally acquiesced in, Lord Coke says, not even *Magna Charta.*"

Seven years later, in 1835, the Ohio bar was astounded when Judge Lane reversed Judge Burnet's opinion in the case of Eleanor Connell *v.* Samuel Connell.[37] According to Judge Matthew Birchard, in the case of William Chestnut *v.* Margaret Shane's Lessee[38] in 1848, "some, if not all three of the judges" who supported the Connell decision suggested to the Legislature that an act be passed validating all previous deeds the acknowledgments to which failed to certify that the contents were read or otherwise made known to the wife. The act was accordingly passed on March 9, 1835.[39] "This act," said Judge Birchard, "quieted the public mind, received the public approbation, and for eight years was sustained by all the inferior courts, and sanctioned repeated decisions of the Supreme Court upon the circuit." And then the bar was shocked again when Judge Nathaniel C. Read, in the case of the Lessee of Christian Good *v.*

Elizabeth Zercher (1844), declared the act of 1835 unconstitutional and an unwarrantd interference with the rights of private property.[40] Judge Birchard, however, did not miss the opportunity to issue an emphatic dissent, claiming that the law of 1835 did not interfere with cases, but simply established a new rule of evidence for cases involving old titles. Birchard said that if Read's opinion was law, "sad indeed is the fate of thousands who now repose in peace under the delusive belief that they are *bona fide* owners of their homes with complete record evidence of good title thereto. Probably not one deed in ten, executed in this State since 1820, is good under this decision; and, from my own knowledge of titles in the State of Ohio, I think . . . that not less than fifty millions in value of real estate will be affected by it."

The disruptive effect of Read's decision lasted only four years because, by 1848, the complexion of the Supreme Court had so changed that a majority was able to reverse Read and support the *status quo* of Ohio's land customs. This time Judge Birchard spoke for the majority of the Court and Judge Read for the minority.[41] At the same session of the Court another group of cases arising under the same law but through the channel of claims of dower were decided by Judge Hitchcock whose decision related the cases to the early history of Ohio in a remarkably lucid way.[42] Hitchcock said that the particular form of certifying the wife's acknowledgment of a deed required by the law of 1818 was rarely followed, nor was any other single form adhered to by all conveyors. Certifying officers were "more likely to be controlled by the forms adopted in the states from whence they came, than by the particular law under which they were called to act." The basic reason or excuse for this, said Hitchcock, was the frequency of land transfers in frontier Ohio. Land passed from hand to hand "with as much facility as goods and chattels." He recounted that in some parts of the state land was considered of less value than goods, and that a defaulting debtor felt relieved if the sheriff passed by his personal property and levied on his lands. "In the Ohio Com-

pany's purchase, in the military districts, and in the Connecticut Western Reserve, lands in the hands of the original proprietors were considered as mere articles of merchandise or traffic."

Another striking example of judicial deference to the facts of life is to be found in the Supreme Court's handling of the divorce of Mrs. Esther Bingham from her husband in the case of Bingham *v.* Miller in 1849.[43] Miller had succeeded in the Common Pleas Court of Athens County in establishing the fact of an individual breach of contract by Mrs. Bingham, and claimed her to be solely liable because of her divorce by the Ohio Legislature. Mrs. Bingham chose to challenge the Legislature's right to grant the divorce in an effort to prove that she was still a *feme covert,* i.e. a married woman incapable of being sued. The Athens County Court refused her request. On her appeal to the Supreme Court, Judge Read sustained the decision of the lower court but made his decision a complete exposition of the doctrine that the granting of divorces is a judicial and not a legislative function. In other words, the statement was really not a judicial decision but a warning that the practice of legislative divorce must cease in the future even though past ones would be allowed. Judge Read explained his action in these words, "To deny this long-exercised power, and declare all the consequences resulting from it void, is pregnant with fearful consequences. If it affected only the rights of property, we should not hesitate; but second marriages have been contracted, and children born, and it would bastardize all these, although born under the sanction of apparent wedlock. . . . On account of these children and for them only, we hesitate. And in view of this, we are constrained to content ourselves with simply declaring that the exercise of the power of granting divorces on the part of the legislature is unwarranted and unconstitutional, an encroachment upon the duties of the judiciary, and a striking down of the dearest rights of individuals without authority or law. We trust we have said enough to vindicate the constitution, and feel confident that no department of the state has any disposition to violate it, and that the evil will cease."

When litigiously minded persons sought to obstruct the operation of legislation on important new subjects, the Court took the ground that legislatures should be expected to pass some imperfect laws. Thus, the law of February 26, 1840 in regard to claims against steamboats was defended by Judge Hitchcock in 1846, "There may be, and undoubtedly will be, cases found where it will be extremely difficult to apply this statute so as to do perfect justice. By it a new principle was introduced into the existing system of jurisprudence; and it would be strange if, in the first effort to introduce this principle, a law should be framed free from defects. The statute undoubtedly requires amendments, but such amendments must be made by the proper tribunal, not by this Court."[44] When leaseholders complained that it was unconstitutional to determine the value of their properties in a different manner from that of freeholders under the new general property tax law of 1846, Judge Edward Avery replied, "To tax property according to its individual and true value, as a basis for our system, is a principle of rather modern date; and it will not follow that the law is unconstitutional, for the reason alone that the principle is not perfectly carried out."[45]

In the course of the building of its "internal improvements" including roads, sidewalks, canals, and railroads the State of Ohio required the benevolent interposition of its judicial system in transforming the necessary private property rights to public uses. The right of towns and cities to assess damages and special taxes for such purposes was established with no difficulty.[46] With the advent of the railroads it became the custom for a time for the Legislature to permit counties to subscribe to the stocks and bonds of the corporations building these improvements. There was much public opposition to this practice, and the Constitutional Convention of 1850 saw fit to forbid it after 1851.

But this did not prevent the Supreme Court from supporting the Legislature under the Constitution of 1802, even to the point of reversing itself. In 1852 Judge Rufus P. Spalding, in sustaining an injunction against the subscription of $100,000

by the Commissioners of Crawford County to the Ohio and Indiana Railroad, denied that the "incidental benefit" to a community was a sufficient "public use" to warrant the appropriation of private property for the construction of the road.[47] A few months later, however, the complexion of the court had changed so that Judge Ranney was able to sustain the practice in the Cincinnati, Wilmington and Zanesville case. Ranney based his reasoning on the right of the State itself to "construct roads, canals, and other descriptions of internal improvements, calculated to facilitate the social and business intercourse of the people, and to develop its resources and add to its strength and security." The judgment of whether or not the State was to build these itself or to delegate a corporation to do so, with or without public aid in the form of county subscriptions of stock, was a legitimate feature of the process of legislation, "the work, when constructed, being public in its character and purpose." "Who should settle this question?" Ranney asked, "the General Assembly, clothed with the most ample discretion with the assent of the locality to be taxed, or this Court invested with no discretion whatever?" And he provided his own answer, "The General Assembly and the people of Clinton County, upon full information, as is to be presumed, have decided it. How is it to be expected that we [*the Supreme Court*], without the means of information, or the power, should reverse that decision, we are unable to comprehend."[48]

With the opening of the railroad era the practice of private construction was found more desirable than that of public construction. This meant that the doctrine of eminent domain, as applied to the public construction of the canals, was transferred to the private construction of the railroads. The principles, as developed by the court for the use of the State, during the canal period, and for the use of private corporations during the first years of the railroad era, include the following:

1. Natural justice required compensation to property owners for loss of, or damage to, their property.[49]
2. Under such conditions the state had the right to take or

damage property, not only for direct construction of projects, but also for such things as repairs.[50] In the railroad era this was expanded to include indispensable auxiliary features such as acquiring land for depots.[51]

3. Compensation could be made by commissions instead of juries.[52]
4. Assessment of damages and compensation therefor need not be made before the actual appropriation of the land.[53]
5. The Legislature might permit commissions to deduct from the losses or damages the estimated benefits accruing to the property not taken or damaged.[54]
6. In compensating a person for a loss, such as the diversion of water from a mill, the State had no right to appropriate or damage the property of another person.[55]
7. The Legislature had the power to determine whether the right taken from a private person was an outright title in fee simple, or merely an easement. If the right acquired was an easement, the property reverted to the original owner in the event of abandonment of the project.[56] If the right acquired was a title in fee simple, the property should not revert to the owner in the event of abandonment.[57]

It is significant that, as the Supreme Court developed its exercise of judicial review, it also drew into its orbit certain important types of cases in which they exercised original, and not appellate, jurisdiction. These involved the issuance of writs of mandamus to compel an executive to enforce the law, and writs of *quo warranto* questioning the legal right of public or semi-public officials and bodies to perform certain functions. The exercise of mandamus proceedings has already been discussed in the Hardesty Walker case in 1848. As for *quo warranto* proceedings, the Constitution of 1802 was silent, but that did not prevent the Supreme Court from exercising such jurisdiction even before the Legislature on March 17, 1838[58] first set up the procedure to be followed. In 1832 the Court refused an application by a private attorney for a writ against the Bank of

Mount Pleasant for alleged misfeasance, but only because, according to the common law, the writ must be requested by a public official such as the prosecuting attorney.[59] After a similar refusal in 1833 in the case of an improperly commissioned Ashtabula county judge,[60] the Court, in 1838, on the application of the prosecuting attorney of Athens County in behalf of Jacob Linley, trustee of Ohio University, refused to recognize the right of the Legislature to appoint a successor without having first, by legal proceedings, created a vacancy for the successor to fill. The Legislature had simply assumed that the removal of Linley from the State automatically vacated the office.[61] The power was very infrequently used by the Court which seemed more desirous of using it against banks for unauthorized acts than against the Legislature.[62]

It remains to consider the relation of the State Supreme Court's exercise of judicial review to the powers of the Supreme Court of the United States. Although the two came into sharp conflict on more than one occasion, the contacts were for the most part reasonable and constructive. The clearest enunciation of the normal relation of state and federal law was made by Judge Grimke in 1839 when the State law to tax the stock of steamboat companies was challenged as interfering with interstate commerce. Grimke made it plain that the first consideration in cases of this sort was to discover a reasonable harmony and not to look for points of petty discord. When two jurisdictions stand side by side, he said, "the occasional inconvenience which this produces is only the accidental result of the general genius of the system. Health laws, inspection laws, wreck laws, and harbor regulations are only a few of those instances in which state legislation may appear to interfere with the acknowledged power of Congress to regulate commerce; and yet these laws are universally conceded to be valid because they act upon a subject matter which is within the appropriate sphere of state legislation."[63]

In this spirit of mutual accommodation many phases of the relation of state and federal government were settled. Thus, in

1831, it was decided that a patent issued by the United States for the exclusive use of a medicine did not authorize the patentee to use it without a state license to practice medicine.[64] In 1854 a state law providing for collection of claims against steamboats was upheld as not infringing upon federal admiralty jurisdiction because such jurisdiction was concurrent.[65] At the same term of court Judge Ranney held the sheriff of Wood County responsible for a claim of wages against a steamboat which he had allowed the federal marshal to seize in a federal case begun while the wage case was still in process of adjudication in a state court. Ranney pointed out how dangerous such federal usurpation was to the entire state judicial system.[66] In still another case in the same term the Court decided in favor of the federal court. The case involved competing creditors' judgments against a defaulting debtor in state and federal courts. The latter was given precedence because, although the state judgment preceded the federal judgment, the actual levy on the debtor's property was made first by the federal court.[67]

But in two instances the two judicial systems were unable to effect a working agreement without coming into open disagreement. In both of these situations a decision of the State Supreme Court was reversed and its interpretation of the constitutionality of Ohio law declared erroneous. In the one case the State Court quietly surrendered; in the other it defiantly refused to surrender.[68]

The first case involved State legislation imposing a toll of three cents at each toll gate on passengers in mail stages on the National Road. Judge Reuben Wood in 1836 denied that the tolls impeded the carrying of the mails. The contract with the Post Office Department involved only the mails and the postmaster general had no right to expect an exemption of passengers from tolls.[69] When the case came before the United States Supreme Court, it appeared in quite a different light. Justice Roger B. Taney, in giving the opinion of the Court, laid stress on the fact that the State of Ohio levied no tolls on passengers travelling in stages not carrying the mails. The effect of this was

to drive passengers to other stage lines and to oblige the proprietors to reimburse themselves for the loss by enlarging their demands on the government. Taney also pointed out that in 1831 the state of Ohio, in contracting with the National Government to keep the Cumberland road in repair, agreed to a set of tolls on all sorts of vehicles and specifically exempted tolls on mail stages. No passenger tolls were specified. Taney said that, if conditions made it necessary to levy a toll on passengers, the levy should be in accordance with the spirit of the contract of 1831, i.e. uniformly on all stage passengers.[70]

Although the Ohio Supreme Court chose to accept the reversal in the tolls case without a question, quite the opposite attitude was taken a few years later in the question of state taxation of state banks.[71] Because of the peculiarly inelastic nature of Ohio's early general tax laws, which were directed solely against land according to its grade, it became the custom of the Legislature, when chartering a bank, to reserve a certain percentage of the bank's profits or dividends for the use of the State. A controversy soon arose as to whether the clause of the banks charter setting the tax percentage was a contract and as such unalterable in accordance with the clause of the United States Constitution forbidding states to pass laws impairing the obligation of contract. When the issue first came before the Ohio Supreme Court in 1835 it was decided that the law of 1831 levying 5% on the dividends of the Commercial Bank of Cincinnati violated the 1829 charter of the bank which levied only 4%.[72]

For almost 20 years this decision remained unchallenged in the Supreme Court, when suddenly in 1853 it was overthrown, not once, but four times in a series of cases in which banks in Cincinnati, Piqua and Toledo denied the right of the Legislature to include them in the general property tax on grounds similar to those used in the case of the Commercial Bank of Cincinnati. For eight years the issue was argued in the highest courts of the State and of the Nation, with the State Court adding three more anti-bank decisions and the United States

Supreme Court issuing six reversals of State Supreme Court decisions, and two affirmations of Federal Circuit Court rulings. Long, learned, and sometimes eloquent were the opinions in these cases, as the legal arbiters of State and Nation probed some of the most vital questions of American jurisprudence.

Each of the seven anti-corporation decisions of the Ohio Supreme Court was given by a different judge.[73] Each had for its central theme the claim that the sovereign nature of the taxing authority made it impossible for one legislature to deprive its successor of the right of amendment. Judge William B. Caldwell even went so far as to call such an act as "treason of the blackest kind." No legislature could contract or barter away the taxing power by levying a bank tax rate that could not be changed without the bank's consent. Banks themselves were expected to know this at the time their charters were issued, and in no case were the words used that explicitly stated that the rate named in the law was to be in lieu of all other taxes at all times in the future. Banks were of such public nature that they were subject to public regulation in behalf of public policies and should not seek to take advantage of privileges assumed to belong to private individuals.

The Ohio judges went even farther. They presumed to deny the existence of the so-called Dartmouth College doctrine of John Marshall by which a charter was declared a contract and therefore unchangeable except by mutual consent of both parties to it. In the Bank of Toledo case Judge Thomas W. Bartley's lengthy opinion—mostly obiter—characterized this doctrine as "law taken for granted" based on the syllabus of the case written by the United States Supreme Court reporter and not on the words of Marshall. Bartley demonstrated that there was no majority opinion in the case and that Marshall, contrary to general understanding, did not use the term contract "to comprehend the laws of the States, adopted for motives of public policy." The term was used "in its more limited signification, and as embracing no other contracts than those of the ordinary kind, respecting property or some right which is an object of

value, capable of being asserted in a court of justice, and of the nature of the right of property." In analyzing the circumstances of the Dartmouth case he stated that the action was brought for the wrongful conversion of the books of the College, not for the infringement of a corporate franchise. The state law "transferred the private property held by the trustees to another corporation in violation of the terms of the contract." Bartley attributed the perversion of Marshall's meaning to "that short-sighted timidity of capitalists which distrusts the integrity and stability of the government."[74]

But the United States Supreme Court would have none of it. Justice John McLean, in reversing the State Court's decision in the Piqua case, categorically denied that the charter tax impaired the sovereignty of the State by preventing subsequent legislatures from amending the charter. For a state to be deprived of the right to make a contract is in itself a denial of sovereignty. He said, "There is no constitutional objection to the exercise of the power to make a binding contract by a State. It necessarily exists in its sovereignty, and it had been so held by all the courts in this country. A denial of this is a denial of State sovereignty. It takes from the State a power essential to the discharge of its functions as sovereign." And he was warmly seconded in this by Chief Justice Taney.[75]

It would seem that this would have settled the matter. It did for a few years. The complexion of the State Supreme Court having changed temporarily, Judge Josiah Scott expressed the majority opinion in the December 1856 term by sustaining the Ross County Bank's petition for tax exemption, and at the same time accepted the mandate issued by the United States Supreme Court in the Piqua case.[76] But again the complexion of the State Court changed, and this gave rise to a judicial defiance of the United States Supreme Court unparalleled in Ohio history because it came from the highest court in the state. When, in 1859, the same bank tax issue came before the Ohio Supreme Court, in the case of the Jefferson Bank in Perry County,[77] Judge William Y. Gholson made the case the occasion for the declara-

tion that opinions of the United States Supreme Court were not to be considered as binding precedents on the State Courts. Said Judge Gholson, "There is no constitutional nor legislative provision which makes the decision of the Supreme Court of the United States, in one case, binding, as a precedent for the decision of a similar case." Indeed, in order to preserve the right of appeal to that highest tribunal, the State Supreme Court would have to decide against the precedents previously established on the Ohio state bank tax issue in four solemn decisions. According to Section 25 of the Judiciary Act of 1789 there was an appeal from State courts only when the State decision declared a State law in conformity with the Federal Constitution or a law of Congress not in conformity with it. Thus for the Ohio court to accept the United States Supreme Court's decree that the State bank tax law was unconstitutional would bar forever to Ohio citizens the opportunity to have the decision reversed in case the highest tribunal in the land desired to do so. This would mean, warned Gholson, that "judge made law would find its only parallel in the famed laws of the Medes and Persians." It thus became the Ohio Supreme Court's responsibility to keep the question open by rejecting past precedents and once again asserting the states-rights version of the public nature of a bank charter and the inability of legislature to contract away the taxing power.

But it was to no avail. When the Jefferson Bank case was appealed to Washington, the Supreme Court again emphatically reversed the Ohio doctrine.[78] Justice James M. Wayne declared that the Ohio Supreme Court, in asking the highest court in the land to reverse its own decision in the Piqua case, offered no further reason to do so "than it had when we first were called upon to review it." A mandate of reversal of the Gholson decision was therefore ordered to be sent to the district court in Perry County, where the case had originated.

Thus had the pendulum of judicial review in Ohio executed a full swing. From the days when the right had been denied by a majority of Ohio's legislators, the pendulum had swung to the

opposite extreme when the Supreme Court of Ohio, made up of a majority of Democrats, chose to put itself on a par with the Supreme Court of the United States in interpreting the supreme law of the State and of the Nation. Such is the irony of history. Never again was judicial supremacy so popular in the State of Ohio. From the time of the Jefferson Bank decision down to the Constitutional Convention of 1912 the pendulum was to swing back until the abuses of judicial review led the people of the State again to place its exercise under the most severe and explicit restrictions. But that is another story.

NOTES

1. *Ohio Reports,* 20: Appendix, 4. The term *"Ohio Reports"* refers to the reports of cases decided in the Ohio Supreme Court from the August term, 1821 to the December term, 1851. The citations throughout are to the pages of the edition printed by Robert Clarke & Co. of Cincinnati in 1872-73. The pagination used is the standard one showing the total pages from the beginning of the volume. Sometimes this is at the top of the page and sometimes at the bottom. There are so many editions and formats that it would be too confusing to try to distinguish them in these footnotes. The term *"Ohio State Reports"* refers to the reports of cases decided in the Ohio Supreme Court after 1851.
2. William T. Utter, *The Frontier State, 1803-1825* (Ohio State Archaeological and Historical Society, Columbus, Ohio, 1942), 54; see also William T. Utter, "Judicial Review in Early Ohio," in *Mississippi Valley Historical Review,* XIV (1927), 3-24.
3. The unqualified 1802-1851 judicial vetoes were of the authorization of the town corporation of Gallipolis to lease part of the public square, Francis Le Clerq et al. *v.* The Trustees of the Town of Gallipolis, *Ohio Reports,* 7: 218 (December 1835); of the law enabling the city of Cincinnati to seize lands for public use without compensation to long term leaseholders, John P. Foote *v.* The City of Cincinnati, *ibid,* 11:408 (December 1842); and of the law of 1848 extending the operation of a law facilitating the collection of debts against steamboats for labor performed outside the state. The Schooner *Aurora Borealis v.* Thomas Dobbie, *ibid,* 17:125. The court in 1836 nullified the appointment of a new trustee to Ohio University before the expiration of the term of the incumbent, State of Ohio on the Relation of Jacob Linley *v.* Thomas Bryce, *ibid,* 7:367. In the December 1848 term of the Ohio Supreme Court, the right of legislatures *in the future* to grant divorces was denied. Past divorces were not affected, Esther Bingham *v.* Amos Miller, *ibid.,* 17:445. In the December 1844 term the court questioned the constitutionality of a law authorizing a quorum of county common pleas judges to hold special sessions for probate cases, non-capital criminal cases, and other matters, but the case was decided on other issues, The State of Ohio *v.* Rowland Johnson, *ibid.,* 13:176. After 1851 the judicial vetoes of laws passed before that date were of the law giving squatters the option of demanding payment for improvements on the land or of offering to buy the land, Robert W. McCoy et al. *v.* William Grandy et al., *Ohio State*

Reports 3:463 (December 1854); and of the law taxing lands originally granted by the federal government to Ohio University, John Matheny for Himself and Others *v.* William Gordon, Treasurer of Athens County, *ibid.*, 5:361 (December 1856). All other judicial vetoes were subsequently reversed by later courts and are treated in the body of this article.

4. *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio, 1850-1851* (Columbus, 1851), 1:685.
5. Henry Debolt, Treasurer of Hamilton County *v.* The Ohio Life Insurance and Trust Company, *Ohio State Reports,* 1:563. This decision was in turn overruled by the United States Supreme Court, *U. S. Supreme Court Reports* (Howard), 16:416.
6. William Lewis, Trustee of the Mechanics and Traders Bank of Cincinnati *v.* Robert R. McElvain, *Ohio Reports,* 16:354. In his dissent in the Ohio and Indiana Railroad case just cited (*ibid.,* 20: Appendix, 2, 3) Judge Hitchcock said, "In this particular a great change has come over the public mind . . . since the adoption of our constitution of 1802." See also Judge Rufus P. Ranney reversing the doctrine of the majority decision of the preceding case by sustaining a similar law (The Cincinnati, Wilmington, and Zanesville Railroad Company *v.* The Commissioners of Clinton County, *Ohio State Reports,* 1:77).
7. Alexander Skelly *v.* The Jefferson Branch of the State Bank of Ohio, *Ohio State Reports,* 9:606.
8. *Debates of the Convention for the Revision of the Constitution, op. cit.,* 1:680.
9. *Ohio Local Laws,* 43:456.
10. *Ohio General Laws,* 45:85-110.
11. *Ohio Local Laws,* 49:321.
12. James Griffith et al. *v.* The Commissioners of Crawford County and the Ohio and Indiana Railroad Company, *Ohio Reports,* 20:609; see also John Carey et al. *v.* The Commissioners of Wyandot County, *ibid.,* 624.
13. The State on Relation of the Directors of the Eastern and Western Districts of Cincinnati *v.* The City of Cincinnati and Others, *Ohio Reports,* 19:178.
14. The Cincinnati, Wilmington and Zanesville Railroad Company *v.* The Commissioners of Clinton County, *Ohio State Reports,* 1:77.
15. See chapters on politics in Francis P. Weisenburger, *The Passing of the Frontier, 1825-1850* (Ohio State Archaeological and Historical Society, Columbus, 1941), chapters 8-16.
16. Stiles, ex dem. Miller & McDonald *v.* W. S. Murphy, *Ohio Reports,* 4:98.
17. William Chestnut *v.* Margaret Shane's Lessee, *Ohio Reports,* 16:631-632.
18. The Cincinnati, Wilmington and Zanesville Railroad Company *v.* The Commissioners of Clinton County, *Ohio State Reports,* 1:82-83.
19. *Ohio Reports,* 2:76.
20. George D. Sites *v.* Keller and Skinner, *Ohio Reports,* 6:484.
21. Lessee of Daniel Burgett *v.* Elizabeth Burgett, *Ohio Reports,* 1:469.
22. Lessee of Allen *v.* Parish, *ibid.,* 3:193, 194.
23. David Wade *v.* Thomas Graham et al., *ibid.,* 4:128.
24. State of Ohio *v.* James W. Gazley, *ibid.,* 5:22. For the Hayburn Cases see Homer Carey Hockett, *The Constitutional History of the United States 1776-1826* (New York, 1939), 279, 280.
25. Trustees of Cuyahoga Falls Real Estate Association *v.* McCaughey and Others, *Ohio State Reports,* 2:155; William Lewis, Trustees of the Mechanics and Traders Bank of Cincinnati *v.* Robert R. McElvain, *Ohio Reports,* 16:348.

26. J. Hays *v.* N. Armstrong, *ibid.*, 7:249.
27. *Ibid.*, 5:132.
28. Lessee of Thomas Cochran's Heirs *v.* David Loring, *ibid.*, 17:409.
29. S. R. Hutchinson and Others *v.* S. Thompson and Others; C. M. Giddings and Others *v.* S. Thompson and Others, *ibid.*, 9:66.
30. Hardesty Walker and Robert Fulton *v.* The Board of Public Works, *ibid.*, 16:546.
31. Noah Carroll and Another *v.* Lessee of Aaron G. Olmsted and Others, *ibid.*, 16:255-263.
32. Adolphus H. Smith *v.* Robert McGregor, *Ohio State Reports,* 10:467-475.
33. The State of Ohio *v.* the Executor of Joel Buttles, *ibid.*, 3:313-325.
34. *Ohio Reports,* 2:66, 77. This judgment was sustained in Michael Patton *v.* Sheriff of Pickaway County, *Ohio Reports,* 2:396.
35. *Ibid.*, 1:161
36. *Ohio General Laws,* 16:152-157.
37. *Ibid.*, 6:353.
38. *Ibid.*, 16:602.
39. *Ohio General Laws,* 33:49.
40. *Ohio Reports,* 12:365, 371. See also Deborah W. Silliman *v.* Samuel Cummins and David Cummins, *ibid.*, 13:116.
41. William Chestnut *v.* Margaret Shane's Lessee, *ibid.*, 16:599.
42. Margaret Ruffner *v.* Bernard McLeman and Others; Rhoda Phillips *v.* David T. Disney; Rachel Meddock *v.* William Tift; Parmelia Vattier *v.* Gerard R. Chesseldine, *ibid.*, 16:649-651.
43. *Ibid.*, 17:448-449.
44. Kellogg, Kennel and Crane *v.* Joseph Brennan and Others, *ibid.*, 14:90-91.
45. David Loring *v.* The State of Ohio; Joseph Talbert *v.* The Same; Harvey Hall *v.* The Same, *ibid.*, 16:597.
46. The basic cases in this respect were Abraham Hickox *v.* City of Cleveland, *ibid.*, 8:544; Thomas Bonsall and Wife *v.* The Mayor, Recorder and Trustees of the Town of Lebanon, *ibid.*, 19:418; Philo Scoville *v.* The City of Cleveland and Others, *Ohio State Reports,* 1:126; Charles Butler *v.* The City of Toledo, *ibid.*, 5:225.
47. *Ohio Reports,* 20:620-624.
48. *Ohio State Reports,* 1:94, 104. This doctrine was expanded to include county subscriptions to bond issues as well as stocks in 1864 in the case of The Commissioners of Knox County *v.* Amos Nichols and Wife, *ibid.*, 14:260.
49. D. Z. and D. C. Cooper *v.* Micajah T. Williams, *Ohio Reports,* 4:253.
50. Isaac Bates *v.* Thomas Cooper, *ibid.*, 5:115.
51. John U. Geisy *v.* The Cincinnati, Wilmington and Zanesville Railroad Company, *Ohio State Reports,* 4:308.
52. Frederick Willyard *v.* William Hamilton, *Ohio Reports,* 7:112 (Part II).
53. *Ibid.*
54. Morris Symonds and Joseph Symonds *v.* The City of Cincinnati, *ibid.*, 14:147; The Columbus, Piqua and Indiana Railroad *v.* Martin Simpson, *Ohio State Reports,* 5:251; Henry Kramer *v.* The Cleveland and Pittsburgh Railroad Company, *ibid.*, 5:140.
55. D. McArthur *v.* A. Kelly and M. T. Williams, Acting Canal Commissioners, Henry Neville and Others, *Ohio Reports,* 5:140.
56. Platt *v.* Pennsylvania Company, *Ohio State Reports,* 43:228.
57. Malone *v.* The City of Toledo, *ibid.*, 34:541. The framers of the Constitution of 1851 reflected the popular feeling of the day about internal improve-

ments and eminent domain by forbidding state and county subscriptions to corporations (Article VIII, Section 4, 6), by requiring a jury to assess damages, and by forbidding the set-off practice (Article I, Section 19).

58. *Ohio General Laws,* 36:68-73.
59. In the Case of the Bank of Mount Pleasant, *Ohio Reports,* 5:250.
60. State of Ohio, ex rel. Uriah Loomis *v.* Lemuel Moffitt, *ibid.,* 5:359.
61. State of Ohio, on the Relation of Jacob Linley *v.* Thomas Bryce, *ibid.,* 7:82 (Part II).
62. State of Ohio *v.* Granville Alexandrian Society, *ibid.,* 11:1.
63. S. and E. W. Perry *v.* George P. Torrence, *Ibid.,* 8:523-524.
64. Daniel Jordan *v.* The Overseers of Dayton, *ibid.,* 4:295.
65. Isaac P. Thompson, Survivor of C. C. Robey *v.* Steamboat *Julius D. Morton, Ohio State Reports,* 2:26.
66. Asa C. Keating *v.* Shibnah Spink, *ibid.,* 3:106.
67. Lessee of Corwin et al. *v.* Benham, *ibid.,* 2:36.
68. The contest between the State of Ohio and the Bank of the United States, 1819-1821, does not figure in this story because the State Supreme Court was not involved. See Utter, *The Frontier State, op. cit.,* 304-312.
69. The State of Ohio *v.* Neil and Moore, *Ohio Reports,* 7:132-134 (Part I).
70. Neil, Moore & Company, Plaintiffs in Error *v.* State of Ohio, *United States Supreme Court Reports* (Howard), 3:740-746. Justice Daniel wrote a dissenting opinion upholding the Ohio Supreme Court. *Ibid.,* 746-750.
71. The issue should not be confused with the one involved in state taxation of the United States Bank.
72. State of Ohio *v.* Commercial Bank of Cincinnati, *Ohio Reports,* 7:125 (Part I). In 1853 Judge Ranney said, in referring to the opinion of Judge Hitchcock, "This decision has not been regarded by at least one-half the court that made it, as a correct exposition of the law." Henry Debolt, Treasurer of Hamilton County *v.* The Ohio Life Insurance and Trust Company, *Ohio State Reports,* 1:577. It was apparently a 2-1 decision, Judge Collet dissenting, and one member of the court absent.
73. Henry Debolt, Treasurer of Hamilton County *v.* The Ohio Life Insurance and Trust Company, *Ohio State Reports,* 1:563; The Mechanics and Traders Branch of the State Bank of Ohio *v.* Henry Debolt, *ibid.,* 591; Jacob Knoup, Treasurer of Miami County *v.* The Piqua Branch of the State Bank of Ohio, *ibid.,* 603; The Bank of Toledo *v.* The City of Toledo and John R. Bond, *ibid.,* 622; The Milan and Richland Plank Road Company *v.* Edward E. Husted, Treasurer of Huron County, *ibid.,* 3:578; The Sandusky City Bank *v.* John B. Wilbur, *ibid.,* 7:481; Alexander Skelly *v.* The Jefferson Branch of the State Bank of Ohio, *ibid.,* 9:606.
74. It should be pointed out that in 1857 the Ohio Supreme Court, through Judge Jacob Brinkerhoff, declared a law taxing the lands of Ohio University as a violation of the contract clause of the United States Constitution. John Matheny for Himself and Others *v.* William Golden, Treasurer of Athens County, *Ohio State Reports,* 5:361. This decision reversed an earlier decision by Judge Hitchcock upholding the legislative right to tax the University lands. Thomas Armstrong and Others *v.* The Treasurer of Athens County, *Ohio Reports,* 10:235.
75. The Piqua Branch of the State Bank of Ohio, Plaintiff in Error, *v.* Jacob Knoup, Treasurer of Miami County, *U. S. Supreme Court Reports* (Howard), 16:389, 392-393. Other cases decided on the same principle were The Ohio Life Insurance and Trust Company, Plaintiff in Error, *v.* Henry Debolt,

Treasurer of Hamilton County, Defendant in Error, *ibid.*, 416; The Mechanics and Traders Bank Branch of the State Bank of Ohio, Plaintiffs in Error, *v.* Henry Debolt, Late Treasurer of Hamilton County, *ibid.*, 18:380; The Mechanics and Traders Bank Branch of the State Bank of Ohio, Plaintiff in Error, *v.* Charles Thomas, Treasurer of Hamilton County, *ibid.*, 384.

76. The Ross County Bank in Chillicothe *v.* Henry S. Lewis, *Ohio State Reports*, 5:447; The Piqua Branch of the State Bank of Ohio *v.* Jacob Knoup, Treasurer of Miami County, *ibid.*, 6:342.
77. Alexander Skelly *v.* The Jefferson Branch of the State Bank of Ohio, *ibid.*, 9:609.
78. Jefferson Branch Bank *v.* Skelly, *U. S. Supreme Court Reports* (Black), 1:436, 450. At the same term a judgment in the Franklin County district court against the Franklin Branch of the State Bank was reversed, *ibid.*, 474. Other cases that reached the U. S. Supreme Court by way of the federal district courts were George C. Dodge, Appellant, *v.* John M. Woolsey, *ibid.* (Howard), 18:331; and Wright et al. *v.* Sill, *ibid.* (Black), 2:544.