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MOLAR MOTIONS IN SUPREME COURT DECISIONS

Roger Paul Peters*

Judges do and must legislate.1 This is a commonplace, but the proposition still seems scandalous to those who naively suppose that the doctrine of separation of powers demands that the legislative, executive and judicial powers must be kept in watertight compartments. The celebrated jurist who announced the proposition warns us, however, that judges can legislate only interstitially; "they are confined from molar to molecular motions." He goes on and supplies at least two examples of what he considered to be molar motions and hence not to be permitted:

A common-law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court. No more could a judge exercising the limited jurisdiction of admiralty say I think well of the common law rules of master and servant and propose to introduce them here en bloc.2

Today the charge is frequently made that the present Supreme Court of the United States has usurped the legislative function. In other words it has not been confined from molar to molecular motions. Decisions have been rendered which drastically changed the law. The clearest examples of such alleged usurpation are, of course, the decisions in the School Segregation Cases.3 That in the matter of school segregation great changes have been effected in the law cannot reasonably be denied. Indeed, many other changes of a significant nature are made in every term of the Supreme Court.

The question to be discussed is whether these changes are of so extensive a character that they are rightfully beyond the province of the judiciary. This is no easy question. The answer proposed herein is in the negative. The Court, it seems to this writer, has in the School Segregation Cases exercised its well-established historical functions. Far-reaching the decisions in those cases assuredly are, but are the motions molar in the forbidden sense? In an attempt to show that they are not, consideration will be given to certain well-known episodes in the history of the Court. These episodes relate to (1) the manner in which the First Amendment freedoms became "incorporated" in the Fourteenth Amendment, (2) the results of the so-called constitutional revolution of the 1930's, (3) certain important constitutional decisions of a highly controversial nature, particularly the Slaughterhouse Cases4 and Erie R. R. v. Tompkins.5 Finally, the resulting conclusion will be stated.

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2 Ibid.
3 Brown v. Board of Education of Topeka, 349 U.S. 294 (1955); Bolling v. Sharpe, 347 U.S. 497 (1954), holding in effect that racial segregation in public schools throughout the country must be terminated.
4 83 U.S. (16 Wall.) 36 (1873).
5 304 U.S. 64 (1938).
I

The first of these episodes, as a matter of general interest, concerns the fundamental freedoms set forth in the First Amendment: freedom of speech, freedom of the press, freedom of religion and freedom of assembly and petition. Although these freedoms are guaranteed to the individual from infringement by Congress it was not until 1925 that it was discovered that these freedoms might also be protected by law against infringement by the states. To retell the various events which led to this remarkable turn of affairs would be a work of supererogation. There are, however, certain points which should be emphasized for the purposes of the present discussion. First, mention should be made of the great stretches of time involved as compared to the life of an individual human being. The First Amendment became part of the Constitution along with other Amendments known as the Bill of Rights in the last decade of the eighteenth century. Several generations later, in 1868, after the Civil War, the Fourteenth Amendment was added to the Constitution. During this long interval only one landmark decision concerning the Bill of Rights (not even involving the provisions of the First Amendment) came down from the Court. This was Barron v. Baltimore, decided in 1833, in which it was announced that the provisions of the Fifth Amendment requiring that just compensation be awarded for property taken for a public purpose did not apply to the states or their instrumentalities. In 1919, after World War I, the Court had its unprecedented First Amendment case, Schenck v. United States. The decision in the case upheld the power of Congress to enact legislation imposing penalties on those who by speech or writing impeded the operation of the conscription laws. Congress was held to have the power, despite the seemingly absolute character of the language of the First Amendment, to pass laws inflicting punishment for speeches and publications where there is a clear and present danger of a "substantive evil" which Congress has the right to prevent, such as obstruction of the draft. The opinion of the Court by Mr. Justice Holmes was unanimous. Several cases followed in which Holmes and Brandeis, in dissenting opinions, expressed limitations on the power of Congress with respect to the application of certain wartime legislation to cases in which there appeared to the dissenters to be no "clear and present danger" of substantive evils. The culmination came in 1925 with the case of Gitlow v. New York. The Court upheld the conviction of the accused under the criminal anarchy statute of the State of New York because of the publication of the "Left Wing Manifesto" against objections to the conviction that the New York statute, as

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7 See generally CHAFFEE, THE BLESSING OF LIBERTY (1956); CHAFFEE, FREE SPEECH IN THE UNITED STATES (1942).

8 The First Amendment was adopted in 1791.


10 249 U.S. 47 (1919).

11 Id. at 52.


13 268 U.S. 652 (1925).
construed and applied in the case by the State Courts, deprived the defendant of his liberty of expression in violation of the due process clause of the Fourteenth Amendment. Mr. Justice Sanford, in his opinion for the Court, stated the following memorable words:

For present purposes we may and do assume that freedom of speech and of the press — which are protected by the First Amendment from abridgment by Congress — are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States. We do not regard the incidental statement in *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 543, that the Fourteenth Amendment imposes no restrictions on the States concerning freedom of speech, as determinative of this question.14

There is general agreement that the first sentence quoted above was momentous. Although the Court qualified its utterance by use of the phrase "for present purposes," subsequent decisions of the Court made it clear that the same assumption was to be made in other cases, not only with respect to freedom of speech and of the press but also with respect to freedom of religion and other First Amendment freedoms. Later cases speak in terms of the incorporation of First Amendment freedoms into the liberty protected by the due process clause of the Fourteenth Amendment.15 That this announcement represented a change, a motion of some sort can scarcely be denied. Noteworthy in this connection is the second sentence quoted above, referring to *Prudential Ins. Co. v. Cheek*.16 That case was decided in 1922, only three years before the *Gitlow* case. A statute of Missouri required every corporation doing business in the state to furnish, upon request, to any employee, when discharged or leaving its service, a letter signed by the superintendent or manager, setting forth the nature and duration of his service to the corporation and stating truly the cause of his leaving. The plaintiff, having resigned from employment in the service of an insurance company, demanded a letter in accordance with the statute, but the letter was refused. As a result of the refusal the plaintiff was unable to secure employment and suffered substantial damages. The Supreme Court affirmed a judgment on verdict for the plaintiff in his action for damages against the insurance company.

Mr. Justice Pitney delivered the opinion of the Court, and the famous "incidental statement" made by him for the Court was as follows:

But, as we have stated, neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about "Freedom of speech," of the "liberty of silence," nor, we may add, does it confer any right of privacy upon either persons or corporations.17

Holmes was not among the dissenters in *Prudential Ins. Co. v. Cheek*.18 He did dissent in *Gitlow*, but it is clear that he did not object to the assumption made by the Court with respect to the Fourteenth Amendment. The upshot

14 *Id.* at 666.
16 259 U.S. 530 (1922).
17 *Id.* at 543.
18 259 U.S. 530 (1922).
of all this would seem to be that neither Holmes nor many other able and learned men of the law considered the great shift in doctrine inaugurated in almost a casual fashion by *Gitlow* to be that sort of molar motion which the judges should not indulge in. It is true that the Court did not have to overrule *Prudential Ins. Co. v. Cheek* to be able to assert the famous dictum in *Gitlow*. On the other hand, the practice of overruling prior decisions should not be considered a serious objection on the score of forbidden molar motions, for such practice was established comparatively early in the history of the Court, long before Holmes uttered his caveat against molar motions.

One of the arguments frequently advanced against the decisions in the *School Segregation Cases* is based upon the fact that Congress had not acted in the matter. The proponents of this argument say that they are not concerned with the worthiness of the goal envisioned by the Court, rather they question the authority of the Court to legislate in the matter. For, they say, the matter is one of policy for the determination of Congress. They invoke the fifth section of the Fourteenth Amendment as indicating that Congress has the authority to pass legislation enforcing the provisions of the amendment. Furthermore, it is argued, Congress was fully aware of the fact that there was segregation in the schools. Congress had even provided for such segregation with respect to the District of Columbia; and, it is extremely unlikely that a bill providing for desegregation would have received enough votes in Congress to become law even if it escaped a presidential veto.

This is an argument which disturbs many well-intentioned people. It is submitted, however, that whatever merit this argument seems to have quickly evaporates, leaving no substance behind, when it is exposed to the rays emanating from the truths of constitutional history.

The truths that are especially significant in this regard are as follows: First, there is the well-established constitutional doctrine of judicial review. *Marbury v. Madison*, decided in 1803, is the leading case for this proposition. The Court there held an act of Congress unconstitutional. Since that time, the Court has repeatedly done this. In *Fletcher v. Peck*, decided in 1810, it held a state law unconstitutional and has repeatedly held state laws unconstitutional ever since. The great function of judicial review is an undoubtedly well-established element of our constitutional law. The Court may make mistakes in exercising this function. The Court itself has acknowledged that it has been mistaken, particularly on those occasions when it has overruled its own decisions. The question it seems, comes down to this: Does the fact that Congress might have lawfully acted in the matter of racial segregation (or anything else) preclude action (making new rules, legislation, if you will) on the part of the court? The correct answer in the light of history is no. Consider for a moment, the express power of Congress to regulate commerce among the several states.

19 268 U.S. 652 (1925).
21 Sec. 5. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."
22 5 U.S. (1 Cranch.) 137 (1803).
23 10 U.S. (6 Cranch.) 87 (1810).
Congress has enacted a vast amount of legislation in accordance with this power, yet, long before Congress did this, and right down to the present, the Court has struck down taxes imposed by states and other laws enacted by the states as invalid under the Commerce Clause. It has done this even though in most instances Congress had enacted no legislation in the matter then before the Court. This practice likewise began early in our history.

It should be noted that the judges of the Supreme Court are not completely exempt from constitutional control. It is true that in angry dissent, Mr. Justice Stone once made the famous remark that the only restraint on their actions was their own self-restraint. But is this strictly so? Congress has the power of impeachment, the power to authorize change in the size of the Court, and the power to propose Constitutional amendments. It is not generally considered advisable for Congress to attempt to use the first two powers; and, the third is very cumbersome. Nevertheless, the powers are there for use in an extreme situation, and they might well be exercised.

Besides this rather technical constitutional control there is the more practical control illustrated by our history. It is an accepted principle of sociological jurisprudence that the positive law which conflicts with the "living law" of the people will prove ineffective unless the people can be persuaded to change their "living law". The stock example is of course the Eighteenth Amendment and the Volstead Act which were miserable failures because they were contrary to the living law of the American people. There can be no question that the change in law effected by the School Segregation Cases would similarly become a "dead letter" were a majority of the people of the United States opposed to it. Serious disturbances would occur not only in Arkansas, Louisiana and other southern states but also, perhaps, in all fifty. The fact, however, seems to be that the overwhelming majority of Americans believe in condemning the inequality of treatment condemned by the Court in the School Segregation Cases. Inasmuch as the people of all states and localities are also Americans and committed, one hopes, to the basic principle of equality of all men before law; they must conform to the law as laid down by the Court until such time as they can persuade it to reverse itself. That eventuality is, of course, extremely unlikely. It is unlikely too that the vast majority of Americans will change their minds. Two considerations lead to this conclusion: 1) The decisions are in accord with the basic American principle of equality of all men before the law; and 2) the position of the United States in the world of today composed of countries most of which have overwhelming non-white populations will as a practical matter compel (if such a thing were necessary) Americans to hold fast to their fundamental principle of equality.

Cases before 1954 in which state laws were invalidated under the Fourteenth Amendment are very numerous, and the Court in those cases decided as it did without benefit of enabling legislation on the part of Congress. Ironically enough,
the early legislation passed by Congress, presumably thought by it to conform
to the Fourteenth Amendment, was held invalid by the Court in the Civil
Rights Cases. This fact may well have discouraged Congress to enact legislation
in this area of race relations. Indeed, no "civil rights" legislation came out of
Congress until 1952—after the lapse of nearly a century.

In short, if the Court is exercising a well-established function, that is, if its
decision is not molar in the forbidden sense, it is acting lawfully and therefore
cannot be truthfully said to have usurped a congressional function. If it is in
its own yard (or on the common), it cannot be said to be trespassing.

Some critics of the court say that the decisions which (1) permitted
extended exercise of the power of Congress to regulate commerce, (2) allowed
greater latitude to the states with respect to social and economic legislation,
and (3) afforded protection to individuals against governmental power in the
broad field of personal liberty are to be condemned as contrary to our con-
stitutional principles. In effect it is argued that the Court has repeatedly over-
stepped the bounds of its proper jurisdiction. Is there no other way of de-
termining the validity of the Court's action than through the Court's decisions?

As is pointed out herein, the Court has frequently confessed error. Some
have argued that even when it confessed error it was in error. The severest
criticism along such lines comes from members of the Court itself in dissenting
opinions. The Court is composed of human beings and accordingly makes
mistakes. However, the members of the Court have always been lawyers trained
in our system of law. They are persuaded by argument and one of the most
persuasive forms of argument in our system of law is that of judicial precedent.
How else can the Court determine whether a proposed motion is molar rather
than molecular? It is no longer a question of first impression. For generations
now the Court has been legislating; sometimes minutely (clearly interstitially),
at other times quite drastically. In doing so, it has usually served us well. The
other branches, legislative and executive, have protested from time to time but
have eventually consented. Generally the people of the United States have also
consented. When the people have not consented, the Court has gracefully
bowed.

II

The second great change in the course of decisions by the Supreme Court
which should be mentioned in considering what is molar in the forbidden sense
is the great change which occurred in 1937, often referred to as a constitutional
revolution. If anything should be considered a molar motion one would think
a revolution would qualify. What was this revolution? During the late nineteenth
century and early twentieth century the Court struck down from time to time
many state laws regulating economic affairs because in the Court's opinion such
laws violated the Fourteenth Amendment. Attempts to impose limitations by

state statutes on hours of labor, for example, were regarded as meddlesome interference by reason of the due process clause of the Fourteenth Amendment. During the same era the Court frequently struck down laws enacted by Congress, purporting to be exercising the commerce power or the taxing power, on the theory that Congress was also interfering in a meddlesome manner in matters which were no concern of Congress, but merely of local concern. The Tenth Amendment was invoked as a limitation on the power of Congress to regulate commerce among the several states. Congress was held to have invaded the reserved rights of the states. All this seems a long time ago. In 1937, as is well known, a great shift in the attitude of the Court occurred with respect to both state and federal power in the matters of regulation of business and other economic affairs. The crucial cases are *West Coast Hotel Co. v. Parrish*, concerning state power and *N.L.R.B. v. Jones Laughlin Steel Corp.*, concerning congressional power. These cases inaugurated a series of decisions, some of which expressly overruled prior decisions of recent vintage and older decisions as well. These later cases had the effect of giving the Court's blessing to almost any likely exercise of the commerce power in that practically any such exercise would involve matters "affecting" commerce among the several states. Likewise, as to the power of the states to regulate economic affairs, it would appear that no longer does the due process clause of the Fourteenth Amendment impose serious limitations on the substantive as distinguished from the procedural aspects of state legislation regarding such affairs. This great shift happened in a time of economic crisis. There were vociferous protests at the time. Today, however, it would seem that most commentators agree that the shift was necessary and proper. The Court, it is argued, corrected its own mistakes. It had read laissez-faire into the Constitution (which it should not have done) and later felt obliged to read laissez-faire out of the Constitution. Would Holmes have condemned the Court for this so-called revolution? It is not likely that he would have done so, for a good deal of the argument for the great change under discussion was based on views expressed by Holmes in his famous dissenting opinions, particularly his great dissent in *Lochner v. New York*.  

34 N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); decided just 2 weeks after *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) on April 12, 1937.  
35 See Wickard v. Filburn, 317 U.S. 111 (1942). Use of wheat grown on one's own farm for farm purposes can be federally regulated because such home consumption affects commerce.  
36 Corwin, Introduction, Constitution of the United States Annotated, XXII-XXVI (1952) "... the substantive doctrine of due process of law does not today support judicial intervention in the field of social and economic legislation in anything like the same manner that it did..."  
38 198 U.S. 45, 76 (1905).
The historic changes in the law effected by the Supreme Court decisions discussed above have had a salutary influence on the people of the United States. Protecting personal freedom by legal processes and regulating economic affairs in the public interest have promoted the American ideals of equality and freedom. On the other hand other momentous decisions of the Court have at worst been contrary to these ideals. Others have been regarded by many judicious commentators as at best unfortunate in their effects. Most of the decisions in the former category have been corrected either by the Court itself or by constitutional amendment. Examples are the *Dred Scott* case and the great *Income Tax Case*, both corrected by constitutional amendment, and cases previously alluded to concerning regulation of economic affairs, corrected by the Court itself. But a number of uncorrected decisions remain on the books. Of course, it is argued with respect to these that they correctly state the law. We are said to be satisfied with them. But are we really? The reader may supply his own instances. Here let us consider at least two, which because of their drastic nature are germane to a consideration of alleged molar motions. The first of these is known as the *Slaughterhouse Cases*, the other, *Erie R.R. v. Tompkins*.

The former was decided a long time ago and was the first occasion for an authoritative interpretation of the Fourteenth Amendment. As the Court itself acknowledged in *Twining v. New Jersey*, the decision has often been criticised, and many modifications have been made with respect to much that was said in that case; but, despite all that, the case has had lasting effect in making a dead letter of the privileges and immunities clause of the Fourteenth Amendment. Whether such a result is desirable or not, is not the point. What is remarkable is the fact that words added to the Constitution by formal amendment were construed in such a way as to leave them without practical effect. Justice Miller, who delivered the opinion of the Court in the *Slaughterhouse Cases*, ironically enough, had previously spoken for the Court in *Crandall v. Nevada*, a case which arose prior to the adoption of the Fourteenth Amendment. In the *Crandall* case it was held that a tax imposed by Nevada was invalid because it was levied with respect to persons leaving the state, which act (leaving the state) was a federal right, privilege or immunity arising from the very nature of our federal union. In the *Slaughterhouse Cases*, Miller stated...
that privileges and immunities of citizens of the United States were only those which exist by reason of the citizen's relation to the federal government. This was, in other words, the same sort of thing that was protected according to the Crandall case without the privileges and immunities clause of the Fourteenth Amendment. The Court further held that the privileges and immunities of a citizen of the United States do not include fundamental rights such as the rights of life, liberty and property.46 If the Court ever indulged in a molar motion one would think their decision in the Slaughterhouse Cases would serve as a horrible example of such molar motion. It is, however, seldom criticized on that score.

The second instance of drastic treatment of prior law (or what was thought to be prior law) occurred in the case of Erie R.R. v. Tompkins.47 This is a modern case. The decision came down after Holmes had left the Court and hence a number of years after he had made his pronouncement concerning molar motions. Brandeis, speaking for the Court, overruled Swift v. Tyson.48 a case that had stood for nearly a hundred years,49 but like the Slaughterhouse Cases decision, had been the subject of severe criticism.50 Brandeis stated that the Court had in the interval been engaging in unconstitutional activities in that during the intervening years it had misconstrued the provisions of an Act of Congress that had been on the books since 1789, namely, that in observing the laws of the several states in federal courts it had confined itself to the statutes of the states without considering itself bound by the decisions of the state courts, particularly in commercial matters. The drastic effect of this decision is well known. Endless difficulties and anomalies have arisen as a result of it. Surely this decision is a candidate for the molar category. There is, however, little popular agitation about it.

IV

In the light of this rapid review of instances in the history of the Supreme Court of momentous changes in the law which took place for the most part considerably before 1954, what can we say with reasonable confidence about the alleged molar changes of that memorable year? Were they of such a nature as to fall within the forbidden category? If we condemn them as usurpations of legislative power are we not also bound to condemn most if not all of the prior instances previously discussed? Many of these, as well as other decisions of lesser significance, came as a surprise. They were a shock to many people, even to lawyers, as unexpected. With respect to the School Segregation decisions, however, the profession and the public were well prepared, as is brought out by Blaustein and Ferguson in their admirable book on Desegregation and the Law.51 What those authors say will not be repeated here, except to point out that a series of decisions concerning Negroes in graduate and professional schools

46 Slaughterhouse Cases, 16 Wall. 36 (1873).
47 304 U.S. 64 (1938).
48 16 Peters 1 (1842).
49 From 1842 until 1938.
50 See 2 CROSSKEY, POLITICS AND THE CONSTITUTION 865-874 (1953) (where Erie case discussed).
maintained at public expense definitely prepared the way for the decisions of 1954. However, most important of all — and naturally so — were considerations of truth, justice and common decency. The purpose of this article was not to explore this more profound level but merely to assess the forbidden molar character of the School Segregation decisions in historical perspective, or in more traditional language, in the light of the precedents. It is submitted that the precedents do not indicate that the Court overstepped the bounds of legitimate judicial power. On the contrary, the precedents and the course of decision generally seem to make the decisions in the School Segregation cases inevitable. The unanimity of the judges is remarkable. For lawyers familiar with the views expressed, for example, by Mr. Justice Frankfurter concerning judicial restraint the unanimity is trebly remarkable. It seems evident that the burden rests upon opponents of the unanimous Court to establish that it invaded the congressional domain. Those who acknowledge the substantive correctness of the decisions (may their tribe increase) may rest assured that oblique attacks, alleging judicial usurpation, are without merit. The Court courageously carried out its historic function.


In overruling the Wolf Case, the Court, in my opinion, has forgotten the sense of judicial restraint which, with due regard for stare decisis, is one element that should enter into deciding whether a past decision of this Court should be overruled.