A Constitution is essentially a political document. It defines the structure, organisation and powers of various organs of Government. It also sets forth the limitations on the powers of both union and regional governments. In 1789 one of the critical questions before the framers of the American Constitution was how to enforce its various provisions defining its powers and limitations. The method finally chosen by the framers was judicial enforcement through normal process of adjudication. It was placing the Government itself under the rule of law as declared by the judiciary.

Since 1789, as the new problems faced the American people, the Supreme Court Justices found new meanings lurking in the majestic generalities of the fundamental law. Historically, the principal function of the Supreme Court has been to validate constitutional changes to update the document of 1787 in order to make it fit the exegencies of succeeding generations of American people. Through the rendition of thousands of constitutional decisions over the past 200 years, the Supreme Court has created a vast reservoir of doctrines, principles, tests, techniques and precedents and it continues to create new ones.

This paper is an attempt to analyse some of the historic judicial pronouncements delivered by the U.S. Supreme Court over the past 200 years and to show as to how the apex court interpreted the 18th century document to meet the needs and

1. See generally, Hyneman, Charles S., The Supreme Court on Trial (1963); Julius, Goebel, History of the Supreme Court of United States (1971).
preoccupations of the times. The six cases chosen for this discussion dealt with the most profound American issues like race, public will and private rights, economic rights and the dimensions of the national power.

The American war of independence lasted for eight years. The 13 states which constituted America ratified the new Constitution in 1789. Prior to this the states could not make much headway because the central government was weak. It had virtually no authority to regulate commercial activities between the states and consequently its economy remained stagnant. Though the Constitution had given ample powers to the national government to regulate such activities but the states were not prepared to acknowledge this authority or claim of the national government. They passed various laws that questioned the authority of the Congress to regulate economic matters. This brought the state governments in bitter antagonism and commercial warfare with the national government.

The first case in which the Supreme Court got an opportunity to deliberate upon this matter was *Gibbons v. Ogden*, one of the landmarks in American constitutional law. The facts were as follows: Robert Fulton, the inventor, and Robert R. Livingston had been granted an exclusive right by the state of New York to navigate its waters by steamboat. Ogden had a licence from them to engage in navigation. Gibbons on the other hand, was seeking to operate steamboats between New York and New Jersey under a licence granted to him by the national government. Ogden sought to restrain Gibbons from using vessels within the New York Waters, to which Gibbons responded that his boats being licenced under an Act of Congress could not be excluded by any state law. The New York Court restrained Gibbons from continuing his business. The

2. See Constitution of the United States of America, Article 1, Section 8, Clause (3) which gives power to the Congress to "regulate commerce with foreign nations, and among the several states, and with the Indian Tribes". The Clause is silent about the power of the states in this area.
3. 9 Wheaton 1 (1824).
court upheld the validity of the New York statute establishing the monopoly and brushing aside the argument that there was any conflict between the national and state authority. An appeal was taken by Gibbons to the Supreme Court of the United States against this ruling of the State Court.

Chief Justice Marshall delivered the opinion of the Court. It was held that the New York statute was void as it directly infringed the authority of the Congress to regulate commerce. Gibbons won the case because the national law was held as overriding the effect of the state law. The most interesting aspect of the case is Marshall C.J.'s discussion of the character and extent of the power of the Congress to regulate commerce. The learned Chief Justice expressed his views on three specific questions: First, what did the word "commerce" comprehend? second, what were the limits imposed by the words "among the states"? and, finally, what authority is conferred by the phrase "Congress shall have power to regulate"?

On the first question Marshall, C.J. said that commerce undoubtedly, was traffic, but it was something more; it was intercourse. It described the commercial intercourse between nations, and parts of nations, in all its branches, and was regulated by prescribing rules for carrying on that intercourse. He said: "All America understands, and has uniformly understood, the word "commerce" to comprehend navigation".

On the second question, Marshall C.J.'s opinion was quite emphatic. He said that the word "among" meant intermingled with. Commerce among the states could not stop at the external boundary line of each state, but might be introduced into the interior. It was not intended to say that these words comprehended that commerce which was completely internal, which was carried on between man and man in a state, or between different parts of the same state, and which did not extend to or affect other states. Such a power would be inconvenient, and was certainly unnecessary. He continued:

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more states than one .... The genius and character of the whole government seems to be, that its action is to be applied to all the external concerns of a nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely interval commerce of a state then, may be considered as reserved for the state itself".5

On the third question of "power to regulate", the learned Chief Justice observed that it was the power to regulate, that was, to prescribe the rule by which commerce, was to be governed. This power, like all others vested in the Congress, was complete in itself, might be exercised to its utmost extent, and acknowledged no limitations, other than prescribed in the Constitution.6

Marshall, C.J. maintained that the word "regulate" implied, in its nature full powers over the thing to be regulated, it excluded necessarily, the action of all others that would perform the same operation on the same thing.7

The above exposition of the learned Chief Justice meant that the national government was competent enough to remove barriers which any state might erect against the movement of goods from one state to another. He also questioned the notion of "strict construction" of the constitutional terms. He said:

"Why ought they to be so construed? Is there any sentence in the Constitution which gives countenance to this rule? Narrow construction .... would cripple the Government

5. Ibid.
6. Ibid.
7. Id. at p. 105.
and render it unequal for the objects for which it is declared to be instituted".  

It is submitted that the present case is one of the most popular decision which Marshall, C.J. ever handled. It was an assertion of expanded national power which freed a developing commerce from the shackles of state monopoly and established for all time the supremacy of congressional legislation in all matters effecting inter-state and foreign commerce.

Abraham Lincoln was elected as President of the United States in 1860 and soon after this the civil war broke. The main reason for the war was the question about slaves. People in northern states were opposed to slavery, people in southern states needed the slaves to work on their cotton plantations. This became the main reason for the quarrel between the north and the south. All the southern states decided to break away from the northern states and form their own country. Lincoln was very much against this and said that all the states of the Union should stay together. 80,000 people died in the civil war but this war decided many vital questions and in the process gave birth to what was really a new nation, united for the first time under a national government whose power over the states were increased tremendously by the 14th Amendment. Slavery was abolished and Blacks were recognised as citizens.

As a prelude to the civil war was the infamous case of Dred Scott v. Sandford where the judges ruled that descendant of African slaves could not be treated as citizens of the United States. The question before the court was whether a federal court, sitting in multiple jurisdiction, had the power to decide a case between parties, one of whom was not a citizen.

Scott argued that he was a citizen. It may be pointed out that Scott in fact was a slave and his owner Sandford had

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8. *Id.* at p. 101.
9. The Amendment was adopted in 1868 and incorporated the ‘due process clause’ in the Constitution.
10. 19 Howard 393 (1857).
taken him from Missouri to Illinois, a free state, in 1834, and kept him there until 1896. He contended that during his stay in Illinois he could not be treated as a slave and once having acquired that status could not be returned to slavery even though he was eventually taken back to Missouri. He filed a suit in the State court in Missouri and won the same. The decision was reversed by the State Supreme Court and against this decision Scott appealed to the Federal Court which again dismissed the case.

In these circumstances the case reached the U.S. Supreme Court where it was reversed and remanded with instructions to dismiss on the ground that Scott was not a citizen and the trial court had no jurisdiction to entertain the suit. The Court further ruled that the word “citizen” as used by the framers did not include black people. By a majority of 7:2 the Supreme Court held that statute known as “Mississippi Compromise” — which ruled slavery unlawful in certain territories of the United States deprived slave owners of their property without due process of law. Since the 5th Amendment to the Constitution stated that the national government should not deprive any person of his property without due process of law, the statute was held in violation of the Constitution and the court must view the slaves who were taken into the free territory as still slaves, despite what the statute said to the contrary. Chief Justice Taney who spoke for seven judges said:

“... it is the opinion of the Court that the act of congress which prohibited a citizen from holding or owning property of this kind (slaves) in the territory of United States... is not warranted by the construction and is therefore void”.

Thus the effect of the Dred Scott case was that Scott, though he had become a free man during his stay in Illinois, where slavery did not exist, on his return to Missouri became

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subject to its local policy as stated in its laws and judicial decisions, and so reverted to slave status. It is submitted that the decision in fact, lowered the image of the apex court at a time when the nation was making up its mind to wage a war against slavery. The case aroused a bitter denunciation of the court and blackened Chief Justice Tany's reputation. President Lincoln declared publically that there was a moral duty to resist Supreme Court decisions that were clearly wrong. Not only this, the Congress revealed its contempt for the court by changing its size three times in seven years for obvious political purposes.\textsuperscript{12}

The civil war destroyed among other things slavery and confederacy. But the war marked the beginning of an industrial revolution in America. It established industries in iron and steel and textile and shipping. In this process a feeling generated that some people were being forced to work unreasonably for long hours in unhealthy jobs. Consequently, in 1897 the New York Legislature enacted a law that regulated working conditions and hours in state's bakeries. The law provided that no employee should be required or permitted to work in a biscuit, bread or cake bakery or confectionary establishment more than 60 hours in any one week, or more than 10 hours in any one day. The law further required employers to maintain proper ventilation and plumbing, and provided for periodic inspection by state officials. Though the law could have gained no special significance but at the turn of the century its constitutionality became a significant question in \textit{Lochner v. New York}\textsuperscript{13} where Lochner was convicted of violating the statute. The Supreme Court held that the law violated rights of contract and economic liberty guaranteed by the 14th Amendment. Justice Peckham who delivered the opinion of the Court held:

"The statute necessarily interferes with the right .... of purchase or sell labour is a part of the liberty protected

\footnotesize{13. 198 U.S. 45 (1905).}
by this amendment, unless there are circumstances which exclude the right.\textsuperscript{14}

The learned judge conceded that the state had power to prevent the individual from making certain kinds of contracts, such as those “to let property for immoral purposes, or to do any other unlawful act”.\textsuperscript{15} The judge clarified that there was nothing in any of the opinion delivered in that case which construed the word “required” as referring to any physical force being used to obtain the labour of an employee.\textsuperscript{16} This meant that the bakery employees were free to leave if they did not like their hours of work. He maintained that in this case the question for determination was the right of the individual to labour for such time as he might choose, or the right of the state to prevent the individual from labouring, or from entering into contract to labour beyond a certain time prescribed by the state.

Justice Peckham explained that the present law involved neither the safety morals, nor the welfare of the public. It was pointed out that clear and wholesome bread did not depend upon whether the baker worked for ten hours per day or only sixty hours a week. The limitation of the hours of work did not come within the police power on that ground.

Thus the Supreme Court found that the statute directly interfered with the right of the individual to liberty and freedom of contract and the state could not establish that such contract have caused material damage to the public health or the health of the employees as such.

Justice Holmes who wrote a forceful dissent accused the majority of pushing its economic theory on New York despite what he called “the right of a majority to embody their opinion in law”\textsuperscript{17} He pointed out the various decisions of the Supreme

\textsuperscript{14} Id. at p. 53.
\textsuperscript{15} Ibid.
\textsuperscript{16} Id. at p. 52.
\textsuperscript{17} Id. at p. 75.
Court had acknowledged the State's power to "regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract". He continued:

"The word "liberty", in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless its can be said that a rational and fair man necessarily would admit that the statute propose would infringe fundamental principles as they have been understood by the traditions of our people and our law".

The dissenting opinion of Justice Holmes shows a more liberal judicial attitude towards question of the validity of social and economic legislation under the 14th Amendment. Probably no other decision of the Supreme Court is so frequently cited as proof that judges, by making due process requirement, a limitation on the goals or purposes of legislation, have transgressed the boundaries of the judicial functions and invaded a realm assigned exclusively to the representatives of the people.

Benjamin Gitlow was a member of the left wing section of the Socialist Party. He was indicted under the New York Criminal Anarchy Act of 1902 for publishing and distributing a pamphlet entitled, 'The Left Wing Manifesto' wherein he had allegedly advocated the necessity of overthrowing organized government by force, violence and unlawful means. The aforesaid law made it a crime to advocate, advise or teach the necessity of overthrowing organized government by force or violence. It was the case of *Gitlow v. New York* in which the New York Supreme Court convicted him of the above offence and

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19. *Id.* at p. 76.
20. Section 160 of the Act defined criminal anarchy as under: "Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive official of government by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony".
the Court of Appeal affirmed the conviction and the U.S. Supreme Court agreed to review the case.

It was contended that the statute in question was repugnant to the due process clause of the 14th Amendment and abridged his right to say what he wished on matters of public interest. It was admitted that the defendant signed a card subscribing to the Manifesto and programme of the Left Wing and advocated its adoption by visiting different parts of the states. It was also acknowledged that he knew of its publication and accepted full responsibility for its circulation. Therefore the sole question before the court was whether the statute, as construed and applied in this case, by the State courts, deprived the defendant of his liberty or expression, in violation of due process clause of the 14th Amendment.

The Court assumed without looking into the fact that the freedom of speech and of the press were among the fundamental personal rights and liberties protected by the due process clause of the 14th Amendment from impairment by the State. However, Justice Sanford noted that freedom of speech even as applied against the state "does not confer an absolute right to speak or publish without responsibility whatever one may choose". The learned judge stressed the principle that State was primarily the judge of regulations required in the interest of public safety and welfare, and concluded that a state might punish utterances endangering the foundations of organised government and threatening its overthrow by unlawful means. Holding the statute as constitutional, he observed:

"By enacting the present statute the state has determined, through its legislative body, that utterances advocating the overthrow of organised government by force, violence, and unlawful means, are so inimical to the general welfare, and involve such danger of substantive evil, that they may be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favour of the validity of the statute..."

22. Id. at p. 666.
That utterances inciting to the overthrow of organized government by unlawful means present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion is clear. Such utterances by their very nature, involve danger to the public peace and to the security of the State... And the immediate danger is nonetheless substantial because the effect of a given utterances can not be accurately foreseen"23

Thus the Court affirmed the decision of the Court of Appeal and held that in the present case the statute has not been applied in derogation of any constitutional right.

Justice Holmes again dissented. The question, according to him was not whether Gitlow's published ideas were inflammatory but whether they posed a, "clear and present danger" to the Government. He said:

"It is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views".24

May be not, but Gitlow spent three years in prison in any way though the indictment alleged publication and nothing more (regardless of the interest of the speaker or publisher).

The Great Depression of the 1930's was like the civil war, an interval in which the court's interpretation of the Constitution changed dramatically. If the war brought greater federal control over the states the Depression brought greater federal control over the economy. President Roosevelt who became President in March 1933 came out with a number of economic reforms to combat the Great Depression. The important legislation like the National Industrial Recovery Act, the Agricultural Adjustment Act were enacted by the Congress. The administration's response to the Depression was swift and sweeping.

23. Id. at pp. 668-69.
24. Id. at p. 673.
However, Roosevelt's New Deal policies were halted by the judicial process. The judges invalidated virtually all his economic reforms on the ground that they were inconsistent with the spirit of Lochner. Roosevelt was so frustrated that after his electoral triumph in 1936 he proposed to “pack the court” with justices of his choice.25 The court packing plan was defeated in Congress. But there was a shift in the attitude of the court which began to uphold New Deal measures.26 For example, the justices ruled that the Congress had the power, under the commerce clause, to ban the shipment in inter-state commerce of lumber manufactured by workers who were not being paid the federal minimum wages.

In United States v. Darby,27 the court upheld a number of federal laws which directly affected local policies. In 1938 the Congress enacted the Fair Labour Standards (Wages and Hours) Act, which provided the first comprehensive regulation of the working standards of persons engaged in inter-state commerce or producing goods for that commerce. The Act provided (the first year) for a minimum wage of 25 cents an hour and a maximum 44 hours per week without overtime pay, and required employers subject to the Act to keep records of the hours and pay of their workers. The employment of children under the age of 16 was also prohibited in manufacturing and mining, and under hazardous occupations. The Act not only made it a crime to ship in inter-state commerce goods manufactured in violation of these standards but, in addition, made it a crime to employ persons in manufacturing of goods for commerce under conditions which did not meet the prescribed standards. Darby was the President of a Lumber Company in Georgia. He sold much of his products to customers in other

25. Actually there were no vacancies to be filled up during his first term and hence brought a proposal to increase the strength of the court to fifteen justices. However, this proposal could not receive acceptance of the Congress.
26. Between 1937 and 1943 President Roosevelt appointed eight judges to the court who were basically economic liberals.
27. 312 US 100 (1941).
states. His employees earned less than the minimum wage provided by the Act, and he was indicted for violating the wages laws and record keeping provisions of the Act. The District Court quashed the indictment holding that the law was unconstitutional because it regulated inter-state manufacturing. But the Supreme Court in an opinion by Justice Stone reversed the judgement. Stone, J. said:

"While manufacture is not of itself inter-state commerce the shipment of manufactured goods inter-state is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce".28

Stone, J. relied on *Gibbons v. Ogdon*29 for the proposition that "the power of Congress over inter-state commerce was complete in itself",30 which could be exercised to its utmost extent, and acknowledged no limitations other than those prescribed in the Constitution.

The decision also overruled *Hammer v. Dagenhart*31 in which the court had held that the Congress had no power to exclude the products of child labour from inter-state commerce. That case, said Stone, J. "was a departure from the principles which have prevailed in the interpretation of the commerce clause both before and since the decision and now is overruled".32

28. Id. at p. 113.
29. Supra, n. 3.
30. Supra, n. 28.
31. 247 U.S. 251 (1918).
32. Supra, n. 27 at p. 115. Also see Maryland v. Wirtz, 392 U.S. 183 (1968) and Fry v. United States, 421 U.S. 42 (1975). In the earlier case the court upheld an amendment to the Fair Labor Act which extended maximum wages to non-professional and non-administrative employees of state public schools, hospitals and related institutions. In the second case the federal wage and salary controls imposed under the Economic Stabilization, Act of 1970 were held applicable to state employees. But in *National League of Cities v. Usery*, 426 U.S. 833 (1976), wages and overtime law was held to violate state sovereignty and Wirtz was overruled.
It is submitted that *Darby* represents not only rejection of *Lochner* style hostility to economic regulation, but an endorsement of the federal government expanding presence in American life. In fact, it was a long journey of 23 years when the court could reach a clear and surer understanding of the responsibility which the commerce clause places upon the Congress. The decision also establishes the fact that commerce clause could be used for public injury as well as for the public good. Further, the commerce clause makes Congress the guardian of interstate commerce and the only guardian. It was, therefore, not only the right of Congress but its clear duty to see to it that facilities of inter-state commerce were not used by any one, in any manner, to do any kind of harm. This is the basic doctrine on which *Darby* rests. This express recognition of congressional power continued with little interruption for nearly 40 years.

In 1958 the State of Connecticut enacted law that prohibited the use of birth control devices. Seven years later the Supreme Court in *Griswold v. Connecticut* struck-down the law as violating the constitutional right of privacy. Thus the court found the right of marital privacy sufficient to strike down the said anti-contraceptive law. Again in *Eisenstadt v. Baird*, the Court said:

“If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child”.35

The Court further held that equal protection required that unmarried women, too, to be allowed birth control information and articles. The more significant cases, *Doe v. Bolton* and

33. 381 U.S. 479 (1965).
34. 405 U.S. 438 (1972).
35. Id. at p. 453 *per* Brennan, J.
Roe v. Wade\textsuperscript{37} decided on January 22, 1973 again enlarged the scope of the right to privacy and resulted in invalidation of statutes of some 30 States which forbid abortions except to save the life of mother after going through a number of procedural conditions. Justice Blackmun who delivered the opinion of the Court said:

"The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, ... the Court has recognized that a right of personal privacy or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying context, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, ... in the Fifth Amendment ... in the Fourteenth Amendment ... in the penumbras of the Bill of Rights ... in the Ninth Amendment, ... or in the concept of liberty guaranteed by the First Section of the Fourteenth Amendment".\textsuperscript{38}

Since the ranking of these rights is a matter of value judgment, it has been criticized by those who disapproved the particular ranking as "judicial legislation" and a "lack of proper judicial restraint. It is submitted that in the above noted\textsuperscript{39} abortion cases, the Supreme Court having been influenced by the societal and cultural pressures has articulated the policy of voluntary population limitation in the name of privacy.

The cases discussed in the foregoing pages show that the United States Constitution is not a stale piece of parchment, but an idea as alive, and unpredictable, as the society around it. The question that may be asked in the present context is: would the nation be different today had these cases been decided differently or had not been decided by the Supreme Court at all? Suppose the social problems inherent in these judicial de-

\textsuperscript{37} 410 U.S. 113 (1973).
\textsuperscript{38} Id. at p. 152.
cisions had been decided politically, as they would have been in other democratic nation, would the net result be fundamentally different? In many respects the question is idle and impossible to answer. The court did exist, and did make decisions. The nation has changed from situation A in 1789 to situation B in 1990. The court’s journey has been an endless process of interpreting the constitutional guarantees in the changed socio-legal milieu. Thus during this long journey of over 200 years the Supreme Court has emerged as a major rationalizing and stabilizing force, with the awesome responsibility of preserving the great structure and liberating principles of the Constitution as a guide for the rulers and the ruled.

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