Nebraska Law Review

Volume 40 | Issue 1 Article 4

1960

The Supreme Court, the Depression, and the New Deal: 1930–1941

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I. INTRODUCTION

Professor Swisher has propounded the general principle that much of the strength of the Supreme Court during the early period of our nation's history lay in its refusal to deal with abstractions and advisory opinions, and its avowal to decide a case or controversy directly within the context of an adversary proceeding; in its refusal to speak in the name of politics, and its avowal to speak only in the name of the law.[1] These fundamental guidelines may also serve as a basic context within which an analysis of the Supreme Court and its role during the depression and the New Deal may be placed. This basic context of our analysis of the depression and New Deal Court necessarily requires, as an initial matter, a consideration of the responsibilities and function of the Supreme Court in our system of government, and consideration of some of our fundamental rules of constitutional law and of the reasoning processes by which the Justices have arrived at their decisions.

II. THE NATURE OF THE JUDICIAL PROCESS

It was Chief Justice Marshall who declared, in the famous case of *Marbury v. Madison*,[2] that the Court had the power to declare void a legislative act which conflicted with the Constitution. The debates at the Constitutional Convention offer evidence that

* Presented at the Institute for Public Affairs, University of Omaha, Omaha, Nebraska, April 6, 1960.

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[1] See Swisher, *The United States Supreme Court and the Forging of Federalism: 1789-1864*, 40 NEB. L. REV. 3 (1960). Professor Swisher also portrayed how, during times of crisis, when the Court, as in Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842), and Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), has not followed this general principle, near disaster followed. See Swisher, *supra*.

[2] 5 U.S. (1 Cranch) 137 (1803). See generally POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION (1956).

the Court, as a court of law, was expected to nullify legislation only as a judicial function—by deciding a case or controversy by means of a reasoned written opinion. The Virginia Plan which proposed that the veto power be vested in a Council of Revision composed of the Executive and Judiciary was rejected at the Convention in favor of the plan vesting veto power in the President alone. The reason assigned was that such a Council of Revision allowed the Justices a double chance to veto an act of Congress, once on the ground of policy in their non-judicial capacity within the Council, and a second time on the ground of unconstitutionality when the act came before the Court in an adversary proceeding.[3]

Even within its judicial function, however, the Court was expected to declare legislation unconstitutional only within careful and narrowly prescribed limits. The judge was expected not to enlarge his authority or attempt to "legislate," for legislative power required initiative and experimentation generated by the political processes and exercised only by those elected by the citizenry and subject to replacement when unresponsive to the will of the electorate. Thus constitutional questions were not even to be determined unless the case before the Court could not be decided *on any other ground;* and when in fact a rule of constitutional law was formulated, it was not to be formulated in broader terms than required by the precise facts of the case to which the rule was to apply.[4]

In all circumstances the judiciary was to exercise self-restraint because, as Chancellor Waties maintained, ". . . the interference of the judicial power with legislative acts, if frequent or on dubious grounds, might occasion so great a jealousy of this power, and so general a prejudice against it, as to lead to measures which might end in the total overthrow of the independence of the judiciary, and with it this best preservation of the Constitution."[5] Because of such admonitions of caution, Chief Justice Marshall, in the

[3] See 1 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 73, 76, 80, 97, 98 (1st ed. 1911); WARREN, THE MAKING OF THE CONSTITUTION 187 (1928).

[4] See Ashwander v. TVA, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

[5] Administrators of Byrne v. Administrators of Stewart, 20 S.C. (3 Desaus. Eq.) 466, 476-77 (1812), quoted in Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law,* 7 HARV. L. REV. 129, 142 (1893). [The quotation in the text is taken from the *Byrne* case.—Ed.]. See also COOLEY, CONSTITUTIONAL LIMITATIONS 216 (6th ed. 1890).

case of *Dartmouth College v. Woodward*,[6] elaborated on the doctrine of constitutionality he first propounded in the *Marbury* case, "that in no doubtful case, would it [the court] pronounce a legislative act to be contrary to the constitution."[7] In all instances, the range of choice was to be left open to the legislature, and not the Court. The standard of duty of the Court in its consideration of legislative enactments was expressed with clarity by James Bradley Thayer in October 1893:

> It [the Court] can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question. That is the standard of duty to which the courts bring legislative Acts; that is the test which they apply,—not merely their own judgment as to constitutionality, but their conclusion as to what judgment is permissible to another department which the Constitution has charged with the duty of making it.[8]

Chief Justice Marshall further developed his doctrine of judicial self restraint as to legislative enactments when he maintained that:

> the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.[9]

The duty then of the judiciary is to fix the outside boundary for legislative enactments as limited by the Constitution, the boundary being a limitation of power, not wisdom. The legislature as so limited is then free to range and select a myriad of possibilities to meet the specific needs. In such a process, the judicial branch must attribute to the legislative branch virtue, sense and competent knowledge, as it must do in dealing with an equal and co-

[6] 17 U.S. (4 Wheat.) 518 (1819).

[7] *Id.* at 625. See also Hylton v. United States, 3 U.S. (3 Dall.) 171, 175 (1796); Calder v. Bull, 3 U.S. (3 Dall.) 386, 395 (1798).

[8] Thayer, *supra* note 5, at 144. Thayer illustrates his position by citing Cooley ". . . to the effect that one who is a member of a legislature may vote against a measure as being, in his judgment, unconstitutional; and, being subsequently placed on the bench, when this measure, having been passed by the legislature in spite of his opposition, comes before him judicially, may there find it his duty, although he has in no degree changed his opinion, to declare it constitutional." *Ibid.*

[9] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

ordinate organ of government. The same principles apply in construing a state legislative Act except within the sphere belonging to the national government, where the Supremacy Clause of the Federal Constitution operates. There, the power of the Nation in its fullness must be maintained against the States. Thus, along with the power to pass laws of great merit and benefit to the community legislatures also have an equal right to enact laws that, though within constitutional limits, are foolish, unwise, harmful and even damaging to our vital interests. In these cases, the remedy lies not in having the statutes declared unconstitutional but in the ballot box.

The doctrine of self-restraint, however, was never considered by Marshall to limit Judges by the "original understanding" of what the Constitution was thought to mean under the conditions prevailing when it was adopted. Constitutions cannot enumerate in detail all the means which may be used in exercising granted powers, for this "would partake of the prolixity of a legal code."[10] Constitutions must grow to be able to adjust to changing times and conditions. Otherwise there is a crystallization of the philosophy of earlier times—a tendency of the law which should be resisted, especially in the field of constitutional law with its much wider limiting effect.[11] Thus it was that Chief Justice Marshall proclaimed his historic and repeatedly quoted statement: [W]e should never forget that it is a *constitution* we are expounding."[12] Marshall continued:

> . . . The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, so far as human prudence could insure, their beneficial execution. This could not be done, by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared, that the best means shall not be used, but those alone, without which the power given

[10] *Id.* at 407.

[11] See Pound, *The End of Law as Developed in Juristic Thought*, 30 HARV. L. REV. 201, 210 (1917).

[12] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

> would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.[13]

It is true, of course, that *stare decisis,* the doctrine of precedents, has a bearing in the area of constitutional law as in other areas of the law, but there is a very real difference in constitutional law, since the Court's opinion on the construction of the Constitution "is always open to discussion when it is supposed to have been founded in error,"[14] for as Mr. Justice Field stated: "It is more important that the Court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations. Those doctrines only will eventually stand which bear the strictest examination and the test of experience."[15] Especially in constitutional law, in the interest of society, an erroneous precedent should not be allowed to control governmental action beyond the date of discovery of that error.

This principle was followed by Mr. Justice Holmes who appreciated that the Constitution is "the means of ordering the life of a people."[16] "General propositions do not decide concrete cases,"[17] he maintained. The repetition of a catchword can avoid analysis for many years, with proportionate injury to the interests of society. He was suspicious of labels as solutions of knotty questions and urged that principles are rarely absolute although they always seek to establish themselves as absolute. He noted an obligation of the judiciary to allow the future to develop to the fullest extent to which it might be capable without interference, for he knew so well that judges are human and have prejudices which they share with their fellow-men.

Like Mr. Justice Holmes, Mr. Justice Brandeis also used, as his common working tool, intellectual humility. He believed that the courts were required to give moral leadership. In accordance with this belief no statement more fully describes his approach to the judicial function than that made about his work, that justice "has been given concrete expression in a long effort towards making the

[13] *Id.* at 415.

[14] The Passenger Cases, 48 U.S. (7 How.) 283, 470 (1849) (Taney, C. J., dissenting).

[15] Barden v. Northern Pac. R.R., 154 U.S. 288, 322 (1894).

[16] Frankfurter, *Mr. Justice Holmes and the Constitution,* 41 HARV. L. REV. 121, 131 (1927) [hereinafter cited as Frankfurter on *Holmes*].

[17] Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

life of the commonplace individual more significant."[18] Such efforts left him neither the time nor the inclination for a rigid philosophy.

In the judicial tradition the Court has to meet two demands. One is the requirement that the case be decided, and as soon as possible. The other is that the judges give written opinions, that is, reasoned statements of the basis of their decision. The fewness of the Justices help them to work together and Congress should be given credit along with the judicial tradition for keeping their numbers down. There is a resulting pooling of able, diverse and powerful minds in a common effort. The aim is persuasion, and not compromise on the level of the least common denominator. All of the justices who throughout the history of the Court helped to develop and apply Marshall's philosophy of the nature of the judicial process did it case by case as an evolving doctrine. They sought objective rather than subjective standards to help them decide. They tried to restrain their predelictions and use the judicial process as a pragmatic tool. Some were more successful than others. The wisest recognized, however, that, "like all human institutions, the Supreme Court must earn reverence through the test of truth."[19]

III. THE SITUATION PRIOR TO THE NEW DEAL—1930-1932[20]

The major issues before the Court during the decade of the thirties deeply involved those fundamental principles and rules of constitutional law developed during the days of Marshall. Time and again, there was called into question the constitutionality of legislative enactments which concerned the economic welfare of the

[18] Frankfurter, *Mr. Justice Brandeis and the Constitution*, 45 HARV. L. REV. 33, 105 (1931) [hereinafter cited as Frankfurter on *Brandeis*].

[19] Frankfurter on *Holmes, supra* note 16, at 164.

[20] Section III is based on the following sources: 2 MORISON & COMMAGER, THE GROWTH OF THE AMERICAN REPUBLIC cc. XXII-XXV (4th ed. 1950); SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT cc. 33-36 (2d ed. 1954). For sources strongly favoring the New Deal, see ROOSEVELT, THIS I REMEMBER (1949); 1-2 SCHLESINGER, THE AGE OF ROOSEVELT: THE CRISIS OF THE OLD ORDER, 1919-1933 (1957), THE COMING OF THE NEW DEAL (1959); SHERWOOD, ROOSEVELT AND HOPKINS (rev. ed. 1950). For the position that the economy would have recovered sooner without regimentation, see McGEE, HERBERT HOOVER (1959). For the thesis that World War II, and not the New Deal, brought prosperity, see MITCHELL, DEPRESSION DECADE, FROM NEW ERA THROUGH NEW DEAL, 1921-1941, (9 ECONOMIC HISTORY OF THE UNITED STATES) (1947).

community and the civil and political rights and liberties of the individual. Powerful forces contested before the Court; social tensions threatened to wreak havoc and grievous injury to the whole social structure; contentions became so bitter and threats so dangerous that the country almost seemed to pause audibly for the decision of a crucial issue. The situation became so desperate that serious doubt arose as to whether indeed the Constitution, in Marshall's phrase, could "endure for ages to come, and consequently be adapted to the various *crises* of human affairs."

Even prior to the stock market crash in 1929, the economic situation had become serious. War debts remained uncollectible; foreign trade had declined drastically; the interest on vast sums in private investments was in default. Throughout the decade of the twenties, there was constant unemployment. Consumer purchasing power had declined, and such old industries as coal and textiles had suffered displacement because of the technological developments in the production of competing products. Approximately one-third of the national wealth was tied up in public and private indebtedness, with installment buying, speculation and other debts having put a severe strain upon credit resources. Great numbers of citizens were living either on the margin of existence, or even on mere hopes for the future.

When the crash finally came in October 1929, stocks suffered an average decline of forty per cent in less than a month. The collapse caught people unprepared. Millions lost their savings; thousands were forced into bankruptcy. The crash in itself, however, would not have precluded a recovery if it had not been accompanied by mounting debts, reduced purchases and a general demoralization of price structures.

Substantial numbers of employees were dismissed, while those who were retained had wages and salaries slashed. By 1933, the unemployed were variously estimated from twelve to fifteen millions. Many competent persons could not find employment even as common labor. Sheltering and feeding the unemployed appeared to be an immeasurable responsibility and one that could not be adequately met.

The farmers had suffered large losses in income in an earlier period and their dire need was further aggravated by the crash. They could not pay their debts and their mortgages were being foreclosed to such an extent that substantial areas of farm lands either had or were passing into the hands of the lenders. The new owners often had difficulty in finding anyone willing to operate the properties under the conditions then prevailing. Real estate had lost much of its value and tax collections had dropped to such

a degree that many units of government were threatened with bankruptcy.

Foreign trade was cut to a third of what it had been. The whole national income fell from an estimated eighty-five billion dollars in 1929 to an approximate thirty-seven billion in 1932. By March 1933, two-thirds of the banks of the country had been closed by official proclamation shaking the economy to its foundation.

The problem of existence had become grave for vast numbers of society. Even those with the strongest positions in the economy were threatened by the violence of the financial holocaust. Thus, the entire country clamored for affirmative, forceful action, and turned to the government as the last hope for salvation. Largely through the Reconstruction Finance Corporation, the Federal Farm Board and direct aid for those made destitute by the drought of 1930, assistance in some measure was given prior to 1932. By the latter date, as evidenced by the election of Franklin Roosevelt to the Presidency, the demand was overwhelming for a program by the government to restore the economy of the country. And so the New Deal was born.

It is difficult to appraise the New Deal era even now, because the feelings and passions which were engendered during that period have not permitted sufficient time for an adequate evaluation and perspective. The greater number of historians, however, now conclude that the New Deal was more an evolution than a revolution. Despite the rapid changes which took place during that period because of the imperative need for speed in the emergency situation, the historians point out that the modification of the *laissez-faire* economy and the development of social controls had proceeded steadily from the middle eighties to the Wilson Administration, and had merely been held in abeyance by the World War and the post-war development.[21] Thus, as far back as 1880 there had been federal regulation of businesses and the railroads; in the more progressive states of Massachusetts, New York, Wisconsin, Oregon, and Kansas there had been social legislation at an early date. Furthermore, American industry and business had long accepted such practices as price-fixing agreements, codes and cartels, and the regimentation of labor in company-owned towns and company unions. In addition, the historians agree that a "new deal" in some form was inevitable because the economic conditions were certain to produce some such solution. They all disagree, however, as to the measure of

[21] On basic changes in the economy that will form a cushion to reduce effects of another depression, see ALLEN, THE BIG CHANGE (1952); GALBRAITH, THE GREAT CRASH, 1929 (1955).

effectiveness of the New Deal, but recognize that one of its chief virtues was its persistence in daring to try to find requisite solutions.

IV. MEMBERS OF THE COURT AT THE BEGINNING OF THE NEW DEAL

This then was the state of affairs in our country when the New Deal was inaugurated. Soon the Court was to become the battle ground in the struggle for economic and social welfare and individual civil rights and liberties.

For the most part, the composition of the Court was comparable to that of the Court from its earliest days.[22] All members had been lawyers with successful careers. All were experienced in politics. A number had had important positions in the government, and several had been on the bench before coming to the Court.

Of those generally called conservative, Van Devanter of Indiana was the oldest at seventy-seven. Prior to his coming to the Court in 1910 as a Taft appointment, he had been appointed by Theodore Roosevelt to the Federal Circuit Court in 1903, and had previously been a member of the Territorial Legislature and Chief Justice of the State Supreme Court in Wyoming, as well as a practicing lawyer.

[22] For short biographies of the Justices, on which much of the material in section IV is based, see 1 FREUND, SUTHERLAND, HOWE & BROWN, CONSTITUTIONAL LAW, cc. XXXVI-XLIX, (1954). The following is a list of the Justices on the Court from 1930-1941, initials for their designation, their periods on the bench, and the Justices whom they succeeded:

Holmes (Ho) (1902-32)
Van Devanter (V) (1910-37)
McReynolds (Mc) (1914-41)
Brandeis (Br) (1916-39)
Sutherland (Su) (1922-38)
Butler (Bu) (1922-39)
Stone (St) 1925-41)
Hughes, C. J. (Hu) (1930-41)
Roberts (Ro) (1930-45)
Cardozo (C) (1932-39), succeeded Holmes
Black (Bl) (1937-), succeeded Van Devanter
Reed (Re) (1938-57), succeeded Sutherland
Frankfurter (F) (1939-), succeeded Cardozo
Douglas (D) (1939-), succeeded Brandeis
Murphy (M) (1940-49), succeeded Butler
Byrnes (By) (1941-42), succeeded McReynolds
Jackson (J) (1941-54), succeeded Stone
Stone, C. J. (St) (1941-46), succeeded Hughes.

McReynolds from Tennessee was seventy-four. Prior to his appointment to the Court by Wilson in 1914, he had been a professor of law at Vanderbilt as well as a practitioner in New York, and had served as a member of Congress, as Assistant Attorney General, when he prosecuted the tobacco trust, and as Attorney General under Wilson.

Sutherland, the most skillful of the conservatives, was also seventy-four. In Utah, he served as a member of the State Legislature and later proceeded to Washington as Congressman and then Senator. In 1918, he was President of the American Bar Association, and in 1922, when he failed of re-election to the Senate, Harding appointed him to the Court.

Butler, a seventy-year old Irish-Catholic from Minnesota, had been a very successful railroad lawyer. Harding had appointed him to the Court in 1922, over vigorous opposition from Senator Norris.

Roberts, a Philadelphia lawyer, was the youngest at sixty-one. He had been professor of law at the University of Pennsylvania, an assistant district attorney in Philadelphia, and had prosecuted the oil cases. In 1930, Coolidge appointed him to the Court after the nomination of Judge Parker had been rejected by the Senate.

Chief Justice Hughes, seventy-four, had been appointed as Chief Justice by Hoover in 1930. He had previously been Governor of New York, after having conducted a great and most successful investigation of fraudulent insurance companies, a Taft-appointed Associate Justice of the Supreme Court, an unsuccessful presidential candidate against Wilson in 1916, Harding's and then Coolidge's Secretary of State, and President of the American Bar Association in 1924-25.[23]

Brandeis, whose confirmation to the Court in 1916 had been over fierce opposition by many members of the bar, including Root, Taft and five other past presidents of the American Bar Association, was the oldest member of the Court at eighty. He had been an active and successful practicing lawyer in Boston, the father of savings bank insurance, the originator of the factual brief and the People's Advocate.[24]

Stone, sixty-four, appointed to the Court by Coolidge in 1925, had been Coolidge's Attorney General in 1924. Before coming to Washington, he had been Dean of Columbia Law School for about

[23] For a detailed chronicle see the two-volume Pulitzer Prize biography, PUSEY, CHARLES EVANS HUGHES (1951).

[24] See generally MASON, BRANDEIS, A FREE MAN'S LIFE (1946) [hereinafter cited as MASON ON BRANDEIS].

thirteen years, and a member of the New York firm of Sullivan and Cromwell.[25]

Cardozo, sixty-six, was also a New Yorker. He had been a judge in the lower courts of New York and then from 1914 a judge of its highest court, the Court of Appeals, becoming Chief Judge of that court in 1927. In 1932 he was appointed to the Supreme Court by Hoover on the urging of Senators Norris and Borah that he was the Country's most distinguished judge and jurist.[26]

In general, the Justices on the Court were in agreement on the basic principles of constitutional adjudication which had been formulated by Marshall. As for the application of those principles, however, that was another matter; the vital issue was just where, precisely, the line of application of those principles was to be drawn. And it was this general issue which created the deep schism on the Court, dividing the Court between Van Devanter, McReynolds, Sutherland, and Butler, on one side, and Brandeis, Stone, and Cardozo on the other, with Hughes mostly siding with the latter three and Roberts as the swing man, now moving to one side and then to the other to help constitute the uneasy majority.

V. THE OLD COURT AND THE NEW DEAL

During the first two years of the New Deal, few signs of the impending Court Crisis were obvious. Indeed, there seemed to be every indication that the Court would sustain the New Deal legislation. In January 1934, the Court, in the *Blaisdell* case,[27] upheld the Minnesota moratorium on mortgage foreclosures as consonant with the due process clause of the Fourteenth Amendment. Later that same year, the Court in the *Nebbia* case,[28] similarly approved the New York Price Fixing Law, thereby recognizing the right of a State to control prices. The coming struggle within the Court, and the prophesy of the deep schism to come, was already apparent,

[25] See generally MASON, HARLAN FISKE STONE: PILLAR OF THE LAW (1956) [hereinafter cited as MASON ON STONE], critically reviewed by Kurland, 70 HARV. L. REV. 1318 (1957); Westin, Book Review, 66 YALE L. J. 462 (1957).

[26] See generally HELLMAN, BENJAMIN N. CARDOZO, AMERICAN JUDGE (1940); *Mr. Justice Cardozo,* 39 COLUM. L. REV. 1, 52 HARV. L. REV. 353, 48 YALE L. J. 371 (1939).

[27] Home Bldg. & Loan Assn. v. Blaisdell, 290 U.S. 398 (1934).

[28] Nebbia v. New York, 291 U.S. 502 (1934). Mason credits Stone's dissenting opinion with the doctrine in this case. See MASON ON STONE, *op. cit. supra* note 25, at 365-367.

however,[29] for both *Blaisdell* and *Nebbia* had been sustained by a five to four vote, Chief Justice Hughes, the author of *Blaisdell,* and Mr. Justice Roberts, the author of *Nebbia,* siding with Brandeis, Stone and Cardozo. The minority spoke out for the preservation of the *laissez-faire* economy; and it was no doubt natural that they should, for each had been successful under it and suspicious of any substitute. They hoped for recovery by the natural process of supply and demand which would relieve the economic situation and avoid any change in the economic structure.

The threat to the New Deal became apparent the next year. In what became known as the "hot oil" case,[30] the first New Deal legislation to come before the Court—a section of the National Industrial Recovery Act—was declared void by an eight to one opinion because of an unconstitutional delegation by Congress of the power to legislate. Only Mr. Justice Cardozo dissented. One factor which no doubt led at least Justices Stone and Brandeis to join in the opinion was the failure of the government even to publish or authenticate the Executive Order involved in the case, the violation of which had been made a crime.[31] Nevertheless, the basis for voiding the statute shocked the administration. The practice of delegation had been followed and recognized from colonial days. How could the government conduct its affairs without a large measure of authority to delegate power? If the limited power of the President to prohibit shipments of "hot oil" was considered unconstitutional, what would be the effect of that decision on the President's more general authority under the Recovery Act to approve codes of fair competition for various unspecified industries? Was the legislative statement of policy in the Act sufficiently definite to prevent the exercise on the President's part of free, untrammeled discretion under the broad powers of administrative rule-making delegated to him so that the rest of the act would be upheld as constitutional? These questions soon were to be answered.

In the *Schechter Poultry* case,[32] involving the validity of the

[29] See JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 82-83 (1941).

[30] Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

[31] MASON ON STONE, *op. cit. supra* note 25, at 387-88. For the explanation of the error in drafting the executive order and the subsequent changes in publication procedures see JACKSON, *op. cit. supra* note 29, at 89-91. See also Stern, *The Commerce Clause and the National Economy, 1933-1946,* 59 HARV. L. REV. 645, 656-58 (1946).

[32] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). See Powell, *Commerce, Pensions, and Codes, II,* 49 HARV. L. REV. 193 (1935).

code regulating the shipment of dressed poultry in interstate commerce, the Court was not even satisfied to hold the delegation of power unconstitutional, as could have been anticipated from the "hot oil" case, but went on to declare unanimously that the National Industrial Recovery Act was beyond the power of Congress to enact under the commerce clause, because the intrastate transactions involved in the case had only an indirect effect on interstate commerce[33] and were thus within the domain of state power guaranteed under the Tenth Amendment. The decision raised again the issue of the distribution of power between the states and national government, and revived the concept of Dual Federalism, originally developed by Madison,[34] which was to come back to haunt the Court in the years to come. It was bad enough that the Court felt compelled to reach the constitutional question of delegation of power. But having decided that issue previously in the "hot oil" case, the Court reinforced its "violation" of one of its basic tenets by reaching the second constitutional question of the extent of Congress' power under the commerce clause, instead of allowing the case to be decided on the other ground. The decision caused great consternation as to the limits of Congress' powers which the Court would allow Congress to exercise. But even more far reaching was the effect of the decision in the lower federal courts. Single federal trial judges thereafter proceeded to grant hundreds of injunctions to restrain officers of the federal government from carrying out the acts of Congress. Fortunately, in 1937, this practice was halted by the statute requiring a three-judge court to pass upon applications for such injunctions.[35]

In the *Carter Coal* case,[36] the Supreme Court in a six to three decision once again struck down an act of Congress—this time the Guffey Coal Control Act, which provided for a code of fair competition for the coal industry—on the ground that Congress had unconstitutionally delegated its power to the producers and miners in the industry to fix maximum hours of labor and minimum wages.

[33] For a discussion of the various theories of commerce in the case, see CURTIS, LIONS UNDER THE THRONE 119-20 (1947).

[34] THE FEDERALIST NO. 39 (Madison). It was Madison's contention that the Commerce Clause was not a grant of power "to be used for the positive purposes of the general government." 4 LETTERS AND OTHER WRITINGS 14-15. See CORWIN, CONSTITUTIONAL REVOLUTION, LTD. 19, 50-51 (1941); CORWIN, THE TWILIGHT OF THE SUPREME COURT c. 2 (1934).

[35] Judiciary Act of 1937, § 3, c. 754, 50 Stat. 752 (now 28 U.S.C. § 2282 (1958)).

[36] Carter v. Carter Coal Co., 298 U.S. 238 (1936).

In contrast to the misdemeanor provisions of the National Industrial Recovery Act, the provisions of the Guffey Act provided for an excise tax on the sale price of coal unless the producer accepted the code and acted in compliance with the Act. The Court, relying on *Schechter,* further declared that the Act was beyond the power of Congress under the Commerce Clause. Then the Court turned to certain price-fixing provisions for coal under the Act, and declared that they were invalid because they were inseparable from the rest of the Act despite the fact that Congress had specifically declared the various provisions of the Act separable, the separate provisions for prices and wages to go into effect at different times and to be regulated by different bodies. Chief Justice Hughes in his concurrence and Mr. Justice Cardozo in his dissent, insisted that the provisions of the act were separable. In 1940, the Bituminous Coal Conservation Act of 1937 was upheld by the new Court on grounds advanced by Chief Justice Hughes and Mr. Justice Cardozo in *Carter Coal.*[37]

In the meantime the Court was striking down legislation in other areas. In 1934, the Court, with Mr. Justice Roberts as the swing-man and author, invalidated by a vote of five to four the Railroad Retirement Act of 1934 which had established a uniform and compulsory system of pensions for all railroad workers on interstate lines.[38] The Court not only found that the Act placed an arbitrary burden on the railroads and thereby took away the railroads' property without due process of law, but it also once again decided to reach a second constitutional question by declaring that Congress had no power under the Commerce Clause to provide for the social welfare of the worker on the grounds that by engendering contentment and a sense of personal security the workers will provide more efficient service. Chief Justice Hughes in the dissent contended that the legislation was supported by the fundamental consideration "that industry should take care of its human wastage, whether that is due to accident or age." Thus the issue was drawn on whether Congress had the power under the Commerce Clause to pass social legislation. The pronouncement of the majority—so unnecessary to the decision—was in effect an advisory opinion and raised serious question as to whether the Court was not speaking in the name of politics rather than in the name of the law, and fixing the outer boundary for legislative enact-

[37] Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940).

[38] Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330 (1935). See Powell, *supra* note 32.

ments by the criterion of wisdom, rather than by the criterion of legislative power.

On the same day that the Court invalidated the National Industrial Recovery Act, the Court, either unaware of the storm brewing or hoping that it would blow over, had also proceeded to hold the Frazier-Lemke Act of 1934 invalid,[39] and the removal by the President of a member of an independent agency without cause as being in excess of the Executive power.[40] Later in that year, the Court held the Federal Home Owners' Loan Act of 1935 permitting the conversion of state saving and loan associations into federal associations without State approval to be unconstitutional as an encroachment upon the reserved powers of the States;[41] declared a Vermont Income and Franchise Tax Act which taxed money at a higher rate when loaned outside the State than when loaned within it, to be invalid on the ground that it was a denial of equal protection and an abridgment of the privileges and immunities of citizens of the United States,[42] and also invalidated the Municipal Bankruptcy Act.[43]

In 1936, the validity of the Agricultural Adjustment Act came before the Court. This legislation provided for parity payments on certain crops grown on limited acreage. The payments were to be obtained from the consumer but collected from the processor as a tax. The Court, by a vote of six to three, in an opinion written by Mr. Justice Roberts, held the Act unconstitutional on the theory it was not really a tax but coerced crop regulation by economic pressure since the Act required the farmer to reduce acreage to get his payment. Since such regulation was a power reserved to the states, Congress could not indirectly accomplish its ends by the tax power.[44]

Mr. Justice Stone, joined by Justices Brandeis and Cardozo, dissented, proclaiming that the Court's proper interest should be only in Congress' power to enact statutes, not in the wisdom of the legislation, and that although the exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check on the Court's exercise of power was its

[39] Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935).

[40] Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

[41] Hopkins Fed. Sav. & Loan Ass'n v. Cleary, 296 U.S. 315 (1935).

[42] Colgate v. Harvey, 296 U.S. 404 (1935).

[43] Ashton v. Cameron County Water Improvement Dist., 298 U.S. 513 (1936).

[44] United States v. Butler, 297 U.S. 1 (1936).

own sense of self-restraint. Unwise statutes could be removed by the ballot. Thus, the possibility of abuse of the spending power was no justification for curtailing it. The only limits on the taxing power, averred Mr. Justice Stone, are that the purpose be truly national, that the power not be used to coerce action left to state control, and that the exercise of the power be consonant with the conscience and patriotism of the Congress and Executive.

The majority had apparently forgotten Mr. Justice Holmes' dictum that "legislators are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."[45] Soon thereafter Congress promptly passed a Soil Conservation Act, and in 1938, when it passed another Agricultural Adjustment Act, the Act was upheld on the basis of the Commerce Clause rather than the taxing power by a new Court with Justices Black, Reed, Frankfurter and Douglas having replaced Justices Van Devanter, Sutherland, Cardozo and Brandeis.[46]

During the first three years of the New Deal, the only major respite which the Court allowed in its ceaseless invalidation of New Deal legislation was in the "gold clause" cases[47] and in *Ashwander v. Tennessee Valley Authority*.[48] In the "gold clause" cases, the Court held that such a clause, which required the payment of contractual claims in gold rather than paper money, was unenforceable in a private contract because otherwise the clause would interfere with the power of the Congress to control the fiscal policy of the country. When such a clause was present in a government contract, however, in this case a bond, the obligation was binding, but unenforceable because actual damages could not be proved. By so holding, the Court, as Charles P. Curtis, Jr., said, mixed bad constitutional vinegar with good legal olive oil,[49] or as Mr. Justice Stone maintained in his separate concurring opinion, it was "unnecessary" and "undesirable for the Court to undertake to say that the obligation of the gold clause in government bonds is greater than in the bonds of private individuals," since the issue could have been decided solely on the ground that no damage had been shown. Though the cases were thus decided in favor of the government's power, they clearly indicated the precarious nature

[45] Missouri, Kan., & Tex. Ry. v. May, 194 U.S. 267, 270 (1904).

[46] Mulford v. Smith, 307 U.S. 38 (1939).

[47] Norman v. Baltimore & O.R.R., 294 U.S. 240; Nortz v. United States, 294 U.S. 317; Perry v. United States, 294 U.S. 330 (1935). See Hart, *The Gold Clause in United States Bonds*, 48 HARV. L. REV. 1057 (1935).

[48] 297 U.S. 288 (1936).

[49] CURTIS, *op. cit. supra* note 33, at 100.

of the Court's undertaking to pass continually on the constitutionality of a legislative act. Mr. Justice Jackson pointed out the danger of the Court exercising its power in such grave economic circumstances and cited the difficulty Europeans had to understand the role of the Court in these cases and in their amazement that monetary and economic policy could seriously have been thought to be able to be controlled by such gold clauses.[50]

In *Ashwander,* the Tennessee Valley Authority's right to acquire electric transmission lines for power was upheld by an eight to one decision, but Mr. Justice Brandeis in his concurring opinion, joined by Justices Stone, Roberts, and Cardozo, maintained that the constitutional question of whether the Wilson Dam and its power plant were constructed on the Tennessee River in the exercise of the constitutional function of Congress under the Commerce Clause should not have been reached because the plaintiffs, who were not stockholders of the company selling the transmission lines, had no standing to sue. Thus even in the cases in which the power of Congress to legislate was upheld, the Court went beyond what was necessary and decided constitutional questions.

The Court's failure to exercise self-restraint, and its frequent and dubious interference with legislative acts was beginning to generate, in Chancellor Waties' words, "a prejudice against it, as to lead to measures which might end in the total overthrow of the independence of the judiciary, and with it this best preservation of the Constitution."[51] The pattern of that development may best be viewed by a review of the Court's decisions in the area of maximum hours and minimum wages.

The issue of the power of a legislature to enact laws regulating maximum hours and minimum wages first came before the Court as early as 1905 in the now famous *Lochner* case.[52] The Court by a five to four vote held the New York statute fixing minimum hours for bakers unconstitutional as an interference with the liberty of contract, thus depriving the parties of their liberty without due process of law under the Fourteenth Amendment. Mr. Justice Holmes, in one of the great dissents in our Constitutional history, urged that the Court had no right to impose its economic theory on the country. He pointed to the fact that over the years the Court had decided that the States, by such means as the Sunday laws, the school and postal laws, usury laws and the

[50] JACKSON, *op. cit. supra* note 29, at 103-04.

[51] See note 5 *supra,* and accompanying text.

[52] Lochner v. New York, 198 U.S. 45 (1905).

prohibition of lotteries, may regulate life in many ways which interfere with the freedom of contract and which, therefore, the Justices if legislators might not approve. Since a constitution is made for a people of fundamentally differing views, "the word liberty in the fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."[53]

In 1923, the Supreme Court shifted its attention from maximum hours to minimum wages, in *Adkins v. Children's Hospital*[54] in which the minimum wage statute of the District of Columbia was brought into question. The majority held the act invalid on the ground that the payment was exacted from the employer on a basis having no causal connection with his business or the contract or the work which the employee had engaged to do.

Twice during the next twelve years, once in 1925 and again in 1926, the Supreme Court, citing *Adkins*, invalidated acts which simply fixed a minimum wage for women—one, an Arizona statute forbidding the employment of females in certain occupations at a weekly wage of less than sixteen dollars, the other, an Arkansas statute declaring it unlawful to pay female employees with six months' experience less than one dollar and a quarter per day, and inexperienced females less than one dollar a day.[55]

Then in 1936, the Supreme Court by a five to four decision in the *Tipaldo* case[56] declared the New York Minimum Wage Law for Women to be unconstitutional. The New York Court of Appeals had held the act invalid on the basis of *Adkins*. Before the Court, New York sought to distinguish *Tipaldo* from *Adkins*, but did not urge the Court to overrule *Adkins*. Apparently, Mr. Justice Roberts by this time was beginning to have doubts about the trend of the Court's decisions and, although he could find no basis to dis-

[53] *Id.* at 76 (Holmes, J., dissenting). Apparently Lochner v. New York was to be confined to its facts since, three years later, a ten-hour law for women in Oregon was held valid, Muller v. Oregon, 208 U.S. 412 (1908), and, in 1917, time-and-a-half for overtime beyond ten hours was upheld, Bunting v. Oregon, 243 U.S. 426 (1917).

[54] 261 U.S. 525 (1923).

[55] Murphy v. Sardell, 269 U.S. 530 (1925); Donham v. West-Nelson Mfg. Co., 273 U.S. 657 (1927). See also Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587, 617, n.4 (1936).

[56] Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936).

tinguish *Adkins* from *Tipaldo,* was willing to go on to overrule *Adkins.* Since Chief Justice Hughes was not willing to overrule *Adkins,* however, but wanted to distinguish it instead in a separate opinion along lines which New York had suggested, Mr. Justice Roberts decided to vote with the majority on the narrow ground that since New York had not asked to have *Adkins* overruled, the majority would not reach that question.[57] Since then the New York Court of Appeals could find no material difference between the New York statute and the one involved in *Adkins,* the majority of the Court held that it was bound by the construction of the New York Act made by the highest court of that state. The dissenters in an opinion by Mr. Justice Stone argued for overruling *Adkins.* Again the warning was made that the Court should not consider the wisdom of the minimum wage regulation. Chief Justice Marshall had warned that so long as the end was legitimate, all legitimate means for the adaptation to that end should be allowed, and Mr. Justice Cardozo had maintained that once the power was found in the Constitution, that power must be recognized to be "as broad as the need that evokes it."[58] Thus in his dissent Mr. Justice Stone admonished that "the legislature must be free to choose unless government is to be rendered impotent."[59]

Following the *Tipaldo* case, and the election of 1936, pressures began to build up for measures designed to curb the Court in its thwarting of New Deal legislation, for if nothing was done, the Social Security Act, the National Labor Relations Act, and within the next year the Wages and Hours Act, with its minimum wage and maximum hour, as well as child labor, provisions, would also be destined to be invalidated. The old idea of a constitutional amendment to give Congress the power to override the Court's decision was revived. An amendment to give the Congress a further grant of power over all matters of "general economic welfare" was suggested. But as Professor Corwin asked, "What would be the point in adding 'new' powers to Congress by constitutional amendment * * * if these powers were to be exposed to the same principles of construction that made them necessary?"[60]

On February 5, 1937, President Roosevelt, having lost patience,

[57] See Frankfurter, *Mr. Justice Roberts,* 104 U. PA. L. REV. 311, 314-15 (1955); Griswold, *Owen J. Roberts as a Judge,* 104 U. PA. L. REV. 332, 342-43 (1955).

[58] Carter v. Carter Coal Co., 298 U.S. 238, 328 (1936).

[59] Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587, 636 (1936).

[60] Corwin, *National-State Cooperation—Its Present Possibilities,* 8 AM. LAW S. REV. 687, 688 (1937).

announced his Court packing-plan, which allowed a Justice to retire at full pay after he had served ten years on the Court and had passed the age of seventy; if the Justice did not retire, however, a new justice could be appointed, until a maximum of fifteen justices on the Court was reached. Of course this was an invitation to six of the Justices to retire, leaving only Justices Roberts, Stone and Cardozo.

Opposition to the plan was immediate. The American Bar Association organized its forces; even those who were the strongest supporters of the New Deal felt that President Roosevelt had overplayed his hand; the Chief Justice himself, joined by Mr. Justice Brandeis, wrote a letter in opposition to the plan to the Senate Committee which was holding hearings on the plan. In many respects the opposition was more than justified, for the court plan was a threat to the independence of the judiciary, bringing pressure to bear on the Court as to the cases pending before it. The plan also signified an effort to change the basic structure of the government by subordinating the Court to the political branches.

The opposition, however, had hardly a chance to build up before the Court itself suddenly seemed to reverse itself, and on March 29, 1937, in a five to four opinion by Chief Justice Hughes, it handed down the *Parrish*[61] decision overruling *Adkins,* distinguishing *Tipaldo,* and upholding the Washington Minimum Wage Law for Women. Mr. Justice Roberts was now found firmly on the side of the majority upholding the law. His shift was described as "a switch in time saves nine."[62]

There are those who maintain that Mr. Justice Roberts "switched" because of the pressure of the 1936 election and the Court plan.[63] Others vehemently deny this, maintaining that such men as Chief Justice Hughes and Mr. Justice Roberts would not have accepted and followed the "changed" views had they not believed them justified under sound principles of constitutional law.[64] They point to Mr. Justice Roberts' position in *Nebbia,* and his original intention in *Tipaldo,* to demonstrate that his vote in *Parrish* reflected the natural extension of his previous thinking. Mr. Justice Frankfurter, by documentation, and Dean Griswold and Mr. Pusey, by careful and independent study of the materials,[65]

[61] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[62] Mason, *Harlan Fiske Stone and FDR's Court Plan,* 61 YALE L. J. 791, 809 (1952).

[63] See, *e.g.,* POWELL, *op. cit. supra* note 2, at 81-82.

[64] See, *e.g.,* 2 PUSEY, *op. cit. supra* note 23, at 757, 771-72.

[65] See notes 57 and 64, *supra.*

point out that the decision in *Parrish* was not prompted by the Court plan even though handed down on March 29, 1937, a month and two-thirds after the plan had been proposed. *Parrish* had been filed on August 17, 1936, well before the election. The original vote in *Parrish* came on December 19, 1936, several months before the Court plan was proposed. The vote was four to four with Mr. Justice Stone not participating because of illness. Thus Mr. Justice Roberts at this point had carried through with his original desire in *Tipaldo* to overrule *Adkins*. The Court then waited until Mr. Justice Stone returned before handing down the decision in *Parrish* by a five to four vote.

A third group considers the change in the Court as both a natural extension of the prior views and a product of the political pressures on the Court,[66] and some ascribe the change to better legislative drafting and other compelling reasons unrelated to the political pressure.[67]

The changing mood of the Court assured the final defeat of the President's Court-Packing plan. The defeat symbolized one of the great victories for our form of constitutional government in preserving the independence of the judiciary, just as the failure of the attempt to impeach President Andrew Johnson after the Civil War had been a major victory in preserving the independence of the Executive.

From May 1937 on, the old Court began to sustain all the New Deal legislation brought before it. At the end of the October Term, 1936, the personnel of the old Court began to change. Justices Van Devanter and Sutherland had wanted to resign long before the end of the term, but because Congress had refused to vote a pension for Justice Holmes when he retired, the other Justices had been reluctant to retire and lose their income. During the Court fight, a retirement bill was finally passed and the Justices began to retire without fear of losing their income.[68] The new Court continued to sustain New Deal legislation in a long list of cases dealing with key statutes designed to resuscitate the economy.[69]

[66] *E.g.*, CORWIN, CONSTITUTIONAL REVOLUTION, LTD. 72 (1941); HENDEL, CHARLES EVANS HUGHES AND THE SUPREME COURT 253 (1951). See also *Id.* at 236-40, 264-66.

[67] See, *e.g.*, ERIKSSON, THE SUPREME COURT AND THE NEW DEAL 202-03 (1941); 2 PUSEY, *op. cit. supra* note 23, at 768.

[68] See *Id.* at 760; CURTIS, *op. cit. supra* note 33, at 202-04.

[69] The following is a list of cases in which New Deal legislation was upheld. After each citation, there is an indication of the decision of the Court, the writer for the majority, concurrences, and dissents (by ini-

Thus the Court returned to the standards laid down by Chief Justice Marshall, and which had guided it throughout the greater part of its life. The old theory of the Due Process Clause as a bar to social legislation was superseded and the Commerce Clause was expanded or at least returned to the standards propounded by Chief

tial designation indicated in note 22 *supra),* as well as the particular law considered:
United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (7-1) (Su) (Mc dissents) (St not participating) (Powers of President over Foreign Affairs)
Kentucky Whip & Collar Co. v. Illinois Cent. R.R., 299 U.S. 334 (1937) (8-0) (Hu) (St not participating) (Ashurst-Sumners Act of 1935)
Kuehner v. Irving Trust Co., 299 U.S. 445 (1937) (7-0) (Ro) (Br, St not participating) (National Bankruptcy Act)
United States v. Hudson, 299 U.S. 498 (1937) (8-0) (V) (St not participating) (Silver Purchase Act of 1934)
Wright v. Vinton Branch Bank, 300 U.S. 440 (1937) (9-0) (Br) (Frazier-Lemke Act of 1935)
Sonzinsky v. United States, 300 U.S. 506 (1937) (9-0) (St) (National Firearms Act of 1934)
Virginian Ry. v. System Fed'n 40, Railway Employees, AFL, 300 U.S. 515 (1937) (9-0) (St) (Railway Labor Act of 1926, as amended by the Act of June 21, 1934)
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1; NLRB v. Fruehauf Trailer Co., 301 U.S. 49; NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937) (5-4) (Hu) (Mc dissents, V, Su, Bu) (National Labor Relations Act)
Associated Press v. NLRB, 301 U.S. 103 (1937) (5-4) (Ro) (Su dissents, V, Mc, Bu) (National Labor Relations Act)
Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937) (5-4) (St) (Mc dissents) (Su dissents, V, Bu) (Alabama Unemployment Compensation Act)
Steward Mach. Co. v. Davis, 301 U.S. 548 (1937) (5-4) (C) (Mc dissents) (Su dissents, V) (Bu dissents) (Social Security Act of 1935)
Helvering v. Davis, 301 U.S. 619 (1937) (7-2) (C) (Mc, Bu dissent) (Social Security Act of 1935)
Santa Cruz Fruit Packing Co. v. NLRB, 303 U.S. 453 (1938) (5-2) (Hu) (Bu dissents, Mc) (C, Re not participating) (National Labor Relations Act)
United States v. Bekins, 304 U.S. 27 (1938) (6-2) (Hu) (Mc, Bu dissent) (C not participating) (Municipal Bankruptcy Act)
Currin v. Wallace, 306 U.S. 1 (1939) (7-2) (Hu) (Mc, Bu dissent) (Tobacco Inspection Act of 1935)
Mulford v. Smith, 307 U.S. 38 (1939) (7-2) (Ro) (Bu dissents, Mc) (Agricultural Adjustment Act of 1938)
Sunshine Coal Co. v. Adkins, 310 U.S. 381 (1940) (8-1) (D) (Mc dissents) (Bituminous Coal Act of 1937)
United States v. Darby, 312 U.S. 100 (1941) (9-0) (St) (Fair Labor Standards Act of 1938)
Wickard v. Filburn, 317 U.S. 111 (1942) (9-0) (J) (Agricultural Adjustment Act of 1938)

Justice Marshall and to the doctrines of *Gibbons v. Ogden*[70] and *McCulloch v. Maryland*.[71]

The Court sought to avoid a Constitutional question when it could.[72] When the Constitutional issue had to be reached the Court searched for and found the power in the Constitution and left it to the Congress to "select the means." Only where the legislative mistake was so clear that it was not open to rational question did the Court invalidate the statute. Thus, in the economic realm no statute was to be held invalid, or no decision of an administrative agency was to be held void, if the Court was able to find some rational basis for the statute or decisions.[73]

Economic planning for resources and labor was recognized as a power the Constitution allotted to the Congress to be exercised in accordance with the political processes. The court no longer sought to impose its will against that of the people; nor did it try to prevent the political branches of the government from providing the maximum social welfare and economic benefits to the people. The Court found that under the Constitution Congress had the power to tax and spend for the nation's welfare and to do all that was necessary and proper to carry the commerce power into execution.

The Due Process Clauses were no longer to be a barrier to legislation protecting unions in their efforts to organize workers and prevent interference with them by employers. The Court showed its understanding of the principle that the more complex the problem, the greater the amount of discretion that must be delegated if the legislative policy is to be effectively administered. Therefore, where the legislative policy was defined and standards adequately provided, the Court no longer struck down the delegation of wide discretion.

[70] 22 U.S. (9 Wheat.) 1 (1824).

[71] 17 U.S. (4 Wheat.) 316 (1819). See Stern, *supra* note 31, at 947. See also Barnett, *Constitutional Interpretation and Judicial Self-Restraint,* 39 MICH. L. REV. 213 (1940); Hamilton & Braden, *The Special Competence of the Supreme Court,* 50 YALE, L. J. 1319, 1369-74 (1941); Powell, *Changing Constitutional Phases,* 19 B. U. L. REV. 509 (1939); Stern, *The Problems of Yesteryear—Commerce and Due Process,* 4 VAND. L. REV. 446 (1951).

[72] The violation of this principle had been one of the major factors which led to the Court crisis. See, *e.g.,* Frankfurter & Hart, *The Business of the Supreme Court at October Term, 1934,* 49 HARV. L. REV. 68, 100 (1935); Frankfurter & Landis, *The Business of the Supreme Court at the October Terms, 1935 and 1936,* 51 HARV. L. REV. 577, 626-37 (1938).

[73] See Frankfurter, *Mr. Justice Cardozo and Public Law,* 52 HARV. L. REV. 440, 456-58 (1939).

The Court had overcome an attack upon its independence which had been so serious a threat that the whole nation had risen up in the Court's defense to preserve that independence. The disregard of basic principles of Constitutional law produced an acute crisis for the Court and Nation. It created an abrasive in the complex governmental machinery and interfered with Congress developing a responsible legislative policy.

The lesson of the New Deal period was that the insistent demands of society for legislation to meet economic collapse cannot be stayed but temporarily, by the Court. And when the Court passes upon the wisdom of a legislative enactment rather than on the power of the legislature to pass that enactment the Court breaks the dam of decision and the Court itself may be engulfed.

The decisions rendered before 1933 furnished the Court with ample tools to develop the meaning of the Constitution so as to facilitate the power of Congress to cope with modern problems. In fact a large part of the adaptation was accomplished by merely extending the application of long accepted principles and only in rare instances were former decisions overruled.

The Court had only to look back to the warnings of Chief Justice Marshall, Mr. Justice Field, and other earlier luminaries in its past and to listen to the "great dissenters" in its present, to avoid most of the pitfalls which overtook it. Grave risks were unnecessarily taken in disregarding this counsel which threatened the very foundations of the governmental structure.

VI. CIVIL LIBERTIES LEGISLATION

It is important to note, however, that during this period of strife in the life of the Court, when the Court was curtailing economic freedom, the Court's sensitivity to interference with civil liberties and political rights was nevertheless heightened. Never has freedom of speech, of press and of religion been more adequately protected. The expression of the importance of preserving First Amendment freedoms for civilization and all democratic processes achieved an unexcelled profundity. The declaration that "there is no freedom without choice, and there is no choice without knowledge—or none that is not illusory"[74] will stir all thoughtful free men. The treasure at stake was laid bare by Mr. Justice Cardozo when he said: "We may not squander the thought that will be the inheritance of the ages."[75]

[74] Cardozo, *Mr. Justice Holmes*, 44 HARV. L. REV. 682, 688 (1931).
[75] *Ibid.*

During the period from 1925-1940, the First Amendment liberties, as well as certain procedural guarantees in the Bill of Rights, were placed in a "preferred position" vis-à-vis the economic rights by being gradually incorporated into the Fourteenth Amendment.[76]

Just as the Court was to maintain a position of self-restraint in regard to economic legislation, so the Congress and the state legislatures were to be held to a position of self-restraint in regard to civil rights and liberties.[77] The reason why the Court was to be usually hesitant in opposing its view against that of the legislature on economic and social policies was that social adjustments were ephemeral and no authoritative sources for social wisdom existed. Social development was a process of trial and error, and the greatest possible opportunity for the free play of the human mind was to be allowed for the search after truth. The search for truth, however, was different from economic dogmas, and without freedom of expression, there could not be any formulation of reasonable economic legislation. For this reason the Court took the position that it should have more power to find a legislative invasion in

[76] For a discussion on this process of incorporation, see Frankfurter on *Brandeis, supra* note 18, at 87-94, 94-98; HENDEL, *op. cit. supra* note 66, at 95-96, 116-18, 137-58; MASON ON STONE, *op. cit. supra* note 25, at 511-31; 2 PUSEY, *op. cit. supra* note 23, at 717-28. For an early study of this trend, see Warren, *The New "Liberty" Under the Fourteenth Amendment,* 39 HARV. L. REV. 431 (1926). The following is a list of the major cases in which the trend developed:
Schenck v. United States, 249 U.S. 47 (1919)
Abrams v. United States, 250 U.S. 616 (1919)
Gilbert v. Minnesota, 254 U.S. 325 (1920)
Gitlow v. New York, 268 U.S. 652 (1925)
Whitney v. California, 274 U.S. 357 (1927)
Fiske v. Kansas, 274 U.S. 380 (1927)
Stromberg v. California, 283 U.S. 359 (1931)
Near v. Minnesota, 283 U.S. 697 (1931)
Grosjean v. American Press Co., 297 U.S. 233 (1936)
De Jonge v. Oregon, 299 U.S. 353 (1937)
Herndon v. Lowry, 301 U.S. 242 (1937)
Lovell v. City of Griffin, 303 U.S. 444 (1938)
United States v. Carolene Prod. Co., 304 U.S. 144, 152-53, n.4 (1938)
Hague v. CIO, 307 U.S. 496 (1939)
Schneider v. State, 308 U.S. 147 (1939)
Thornhill v. Alabama, 310 U.S. 88 (1940)
Cantwell v. Connecticut, 310 U.S. 296 (1940)
Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940); see Jones v. Opelika, 316 U.S. 584 (1942), *rev'd on rehearing,* 319 U.S. 103 (1943); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)
Cox v. New Hampshire, 312 U.S. 569 (1941).

[77] See CURTIS, *op. cit. supra* note 33, at 264.

the field of civil liberties than in the area of debatable economic reform.[78]

The doctrines which had been given expression by Justices Holmes, Brandeis and Cardozo were accepted by Mr. Justice Stone and converted into a more precise theory in the famous footnote 4 of the *Carolene Products* case,[79] based on the recognition of the need for the Court to preserve the vital political processes. Mr. Justice Stone, of course, did agree with Mr. Justice Holmes' formulation of the clear and present danger test. He agreed that the state should not tolerate opposition which had a real tendency to aid the external enemy, and he recognized the right of opposition should not include a toleration for violent opposition. But, he believed, political activity should not be interfered with unless it sought to by-pass or threaten the existence of the regular corrective political processes. If that happened, then the Court as a non-political agency had to intervene or else the interference with the normal corrective processes might well perpetuate itself.[80] Similarly he thought the Court was obligated to protect minorities if the normal political processes could not be relied upon to protect them—even where a regulation falls principally upon those outside the state, for in such a case a legislative action "is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state."[81] The "protection of minorities" aspect of Mr. Justice Stone's theory has only been given full expression in cases where racial or religious minorities have been involved. But even here, the protection has been extended primarily because of the specific constitutional provisions of the First, Thirteenth, Fourteenth, and Fifteenth Amendments, and not because of the theory of the safeguarding of corrective political processes. As for other minority groups, such as those outside of a state, there has been little development of the theory. The doctrine when limited to racial and

[78] See Cardozo, *supra,* note 74, at 687-88; Frankfurter, *supra* note 73, at 461-62.

[79] United States v. Carolene Prod. Co., 304 U.S. 144, 152-53, n.4 (1938).

[80] For a discussion of Stone's views, see Braden, *The Search for Objectivity in Constitutional Law,* 57 YALE L. J. 571, 579-81 (1948); Dowling, *The Methods of Mr. Justice Stone in Constitutional Cases,* 41 COLUM. L. REV. 1160, 1171-79 (1941); Hand, *Chief Justice Stone's Conception of the Judicial Function,* 46 COLUM. L. REV. 696 (1946); Lusky, *Minority Rights and the Public Interest,* 52 YALE L. J. 1 (1942), Wechsler, *Stone and the Constitution,* 46 COLUM. L. REV. 764 (1946).

[81] South Carolina Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 184-85, n.2 (1938).

religious minorities is supported by the special protection for such groups provided in the Constitution. If there is an attempt, however, to extend such a theory to other minorities it is not in accord with the Constitution which contemplates that their claims shall be resolved by democratic processes.

Mr. Justice Frankfurter also has accepted as a minimum the protection of the democratic political processes, but he has constructed an "objective or impersonal" doctrine of self-restraint, tempered and influenced by a respect for the federal system. Thus, the First Amendment freedoms have been incorporated within the Fourteenth Amendment because they are specific prohibitions in the Constitution, and not because of their supposed "preferred position."[82] But Mr. Justice Frankfurter has embodied the rest of the Bill of Rights into the Fourteenth Amendment only on a selective basis of "those which are implicit in the concept of ordered liberty." Such an objective standard is sometimes difficult to discern for it is not always easy for men to recognize what the consensus of the community is even when they dwell amongst those who are busy fashioning it over the years. But Mr. Justice Frankfurter has been guided in reaching his consensus by the belief that unless recognized, human liberty or justice would not long exist. He has known that he who serves the law must appreciate the forces in society that are molding the law. Above all he has treated as his axis the knowledge that the life of today is the history of tomorrow.[83]

Mr. Justice Black has also sought an impersonal standard, but has rejected the "ordered liberty" concept, preferring to incorporate the Bill of Rights *in toto* into the Fourteenth Amendment. His insistence on going to the precise words of the Constitution itself, has been in the furtherance of his search for an objective standard and an abhorrence for any personal, subjective standard. His recognition, however, that it is impossible to be completely literal in this incorporation implicitly brings in subjective consideratons.[84]

[82] See dissent in West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 646-48 (1943); and the concurrence in Kovacs v. Cooper, 336 U.S. 77, 89 (1949).

[83] See Braden, *supra* note 80, at 582-89; Jaffe, *The Judicial Universe of Mr. Justice Frankfurter,* 62 HARV. L. REV. 357 (1949); Pollack, *Mr. Justice Frankfurter: Judgment and the Fourteenth Amendment,* 67 YALE L. J. 304 (1957).

[84] See Barnett, Jr., *Mr. Justice Black and the Supreme Court,* 8 U. CHI. L. REV. 20 (1940); Braden, *supra* note 80, at 590-93.

Thus we are still left with the question as to what precisely is the power of the Court. Who can exercise the self-restraint, and have a workable objective standard of judicial review, when such a standard has to pass necessarily through the minds of men, with all that life has taught them being carried along as an influence on that standard? Must we then be compelled to rely on the strengths and weaknesses of men?

The answer is yes, at least in part. We also have the protection of the combination of minds on the Court, working together in the judicial process. However, in the creation of any fundamental organ of government the choice is always whether to grant a power, and after that what controls to try to impose on that power. If the limitations become too extensive the power cannot be used to accomplish the desired objectives. The secret of avoiding the abuse of power lies in the selection of men of ability, humility and understanding to exercise that power.