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CONSTITUTIONAL INTERPRETATION IN A TRANSITIONAL PERIOD*

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During the last two years decisions of the Supreme Court of the United States have declared unconstitutional a number of acts of Congress embodying New Deal legislation. As an immediate result criticisms and attacks have been directed at the action of the Court which has not lacked an ample number of supporters and defenders. There is every probability that the controversy will be carried into the Presidential campaign with the violence and animosity engendered in such contests. The attitude of the great majority of the participants will be determined largely by their approval or condemnation of the specific New Deal measures and they will know little if anything about the opinions that were at the basis of the decisions and their resulting implications.

Students of the social sciences, however, are concerned with social institutions and processes. For an understanding of these clear thinking, unaffected by tradition, sentiment or prejudice, is necessary. Hence in discussing constitutional interpretation during our recent transitional period it is not necessary, nor will there be any attempt, to consider the merits or defects of specific acts of legislation. It is not my purpose either to make a careful analysis of the decisions in the New Deal cases, but rather to consider some of their implications as affecting the spirit and technique of the judicial process. This will be done from the point of view of one who, though he may have had occasion to criticize certain instances of its exercise, sincerely recognizes the great

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value of judicial review as an integral part of our American system.

Teachers of the social sciences have been confronted with obstacles resulting from the fact that their field of work has been dominated by the realm of fiction and imaginary human beings. Hence they have learned the value of a realistic approach in their studies. This method will be followed in this discussion in which the attempt will be made to deal with facts rather than accept the fictions in which, perhaps for useful purposes, the courts may have found it necessary to clothe their language.

This address will be confined to judicial review of congressional acts. While the power of the Supreme Court to declare acts of state legislation unconstitutional is of great importance it is affected by different aspects from the other category. It rests upon the necessity of preventing one state from violating the rights of another state, but, more important, it prevents infringement upon the powers or limitations established by the Constitution in the interest of the people of all the states. Congress, however, represents all of the people and constitutional limitations upon its powers have been established for the protection of individual rights and the preservation of the federal system. While these are of the greatest importance they do not involve preservation of national unity which is fundamental in judicial review of state legislation.

FUNCTION OF JUDICIAL REVIEW

At the outset it is desirable to summarize briefly the essential features of the power of judicial review. This is one of the greatest and most important powers in our system of government. However large the vote by which an act may have been passed in each House of Congress and then approved by the President, it may be declared invalid by a majority of the Supreme Court. The only way in which such a decision can be overcome is by the process of constitutional amendment. This is always difficult as was shown by the struggle to secure the Sixteenth Amendment to overcome the decision of the Court in the *Income Tax Case*¹, and the more recent attempt regarding the *Child Labor*

¹ *Pollock v. Farmers' Loan & Trust Co.* (1895) 157 U. S. 429.

*Cases*². In some of the New Deal issues the task of framing a satisfactory amendment would be colossal if not an impossible one.

Vast as is the power of judicial review it is not conferred in express words by any provision of the Constitution. The charge has been made that the power was usurped by the Court under the leadership of Chief Justice John Marshall. Historical research, however, has disproven this and it appears that a majority of the Constitutional Convention believed that the Court could exercise the power on the theory that it was implied from the Constitution and precedents from the Colonial and early State periods.

The Supreme Court from the beginning has appreciated the extraordinary character of this power. Recognizing, also, that the Judiciary was in some respects the weakest of the three departments of the government, it has adopted a number of rules to restrict itself in the exercise of the power. One is that the Court will not declare an act unconstitutional unless this is necessary in order to decide a case before the Court. Another is that the judges have no right to be influenced in their decision by any question regarding the wisdom or expediency of the measure, as this is a matter solely for the legislature to determine. The Court also has made clear that if there is any reasonable doubt in the mind of the judge regarding the validity of the act he must vote in favor of its constitutionality.

Little difficulty has been experienced in the exercise of judicial review where the legislative act is claimed to be in conflict with a specific provision of the Constitution, e. g. "ex post facto law" or "bill of attainder." Certain provisions of the Constitution, however, are general in character, such as "due process of law," "equal protection of the laws," etc. The Court has never found it possible or desirable to give exact definition to phrases of this nature. It has undertaken to give meaning to them as cases involving such terms arise from time to time.

The justices, however, are human and some of them, despite sincere purpose, have found it difficult and at times impossible to avoid having their decisions regarding the meaning of these

² *Hammer v. Dagenhart* (1918) 247 U. S. 251; *Bailey v. Drexel Furniture Co.* (1922) 259 U. S. 20.

vague and general terms influenced by their personal opinion of the wisdom of the particular statute which is claimed to be in conflict with them. It should be emphasized that this is the exception rather than the rule. In numerous cases the justices have upheld the constitutionality of acts where it has been clear that many if not all of them doubted or disapproved of the wisdom or expediency of the legislation. The TVA decision³ on February 17th is an outstanding example, at least so far as some of the justices who joined in the majority opinion are concerned.

Nevertheless it is clear that traditional views on social, economic or political matters have exercised influence upon judicial decision. While these cases may be relatively few in number the effect of the principle recognized in one case may have far reaching effect upon legislative powers in many other matters. To give a single example, the Court in its interpretation of "due process of law" gave to that phrase a meaning which greatly enlarged its scope. When it was adopted in the Eighteenth Century as a restriction upon the National Government and, equally, in 1868, as a limitation upon State power, the prevailing opinion was that it applied only to matters of governmental procedure. Later, however, judicial interpretation extended this restriction to legislation regulating social and economic matters. While there is wide difference of opinion regarding the desirability of such limitation upon legislative power, numerous cases in which this principle has been applied make it apparent that the enlarged scope of due process of law has enormously complicated legislative problems.

JUDICIAL INTERPRETATION AND CONSTITUTIONAL EXPANSION

The notion that the Supreme Court through judicial interpretation actually expanded provisions of the Constitution relating to due process of law would not be accepted by those who believe that instrument to be fixed and immutable except as changed by formal amendment. They have to support their position expressions of the Court itself, such as this one given by Justice Brewer in a case decided in 1905,⁴ and quoted with approval by the dissenting justices in the *Minnesota Moratorium Case* in 1934:⁵

³ Ashwander et al. v. Tennessee Valley Authority et al. (1936) U. S. Law Week, Feb. 18, 1936, p. 12.

⁴ South Carolina v. U. S. (1905) 199 U. S. 437, 448, 449.

⁵ Home Bldg. & Loan Assoc. v. Blaisdell (1934) 290 U. S. 398, 450.

“The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now.”

Justice Brewer was careful to point out that changes in social life may create new conditions which will come within the scope of the powers granted by the Constitution so far as these are applicable. But he added:⁶

“This in no manner abridges the fact of its changeless nature and meaning. Those things which are within its grants of power, as these grants were understood when made, are still within them, and those things not within them, remain still excluded.”

When it is recalled that we are pursuing a realistic approach to our problem, this language, even in an opinion of the Supreme Court, must be characterized as largely fiction. The opposite and correct point of view is that of Chief Justice Hughes in an address delivered when he was Governor of New York and quoted by Professor Thomas Reed Powell in a recent article, as follows:⁷

“We are under a Constitution, but the Constitution is what the judges say it is.”

Two years ago, as Chief Justice, in delivering the opinion of the Supreme Court in the *Minnesota Moratorium Case*⁸, he said, in answer to the above indicated position of the dissenting justices in that case:

“If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning: ‘We must never forget, that it is a *constitution* we are expounding’ . . . ‘a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs’. When we are dealing with the words of the Constitution, said this Court in *Missouri v. Holland*, . . . ‘we must realize that they have called into life a being the development of which could

⁶ *Ibid.*

⁷ Thomas Reed Powell.

⁸ *Supra* note 5, l. c. 442.

not have been foreseen completely by the most gifted of its begetters. *** The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.'”

The Supreme Court while John Marshall was Chief Justice made the Constitution what it is in many of its most important features. Since his day, from time to time, the Court has been expanding the Constitution and, on occasion, has given some of its provisions a different meaning from that which was obviously originally intended. This is not said by way of criticism but rather of commendation. It would have been enormously difficult by any other method to change the Constitution to meet the imperative needs created by rapidly changing conditions.

Most important is the fact that the possession of such a vast power by the Court imposes upon that body the corresponding responsibility for the greatest care in its exercise and for intelligent and unbiased interpretation of the new conditions and needs. It is of course entirely proper to criticize changes in our constitutional law brought about by such interpretation, but the necessity for the existence of this judicial process is manifest and its actual exercise should be frankly recognized.

SIGNIFICANCE OF TRANSITIONAL PERIOD AFTER WORLD WAR

This is particularly true in a transitional period such as that with which we have been confronted since the World War. During the War there had been a great expansion of national power. The natural reaction at the close of the war to governmental interference and to the increase in national regulations was only temporary in character. Cataclysmic changes in business, industry, agriculture and labor soon led to new problems that were incapable of solution by local and state authorities. With the depression and its tremendous social and economic incidents the cycle was complete and there were irresistible demands for national legislation and administration to remedy the situation.

Wide differences of opinion have naturally prevailed regarding the New Deal legislation and the methods adopted in carrying this into execution. As previously indicated these do not come within the scope of this discussion. It is of importance for our purpose, however, to note the widespread conviction that national power should be exerted to deal with the situation regard-

less of traditional conceptions concerning the limitations upon such power. Nor was this the first example of such demand. Similar, though not as great pressure, had been manifested on many occasions and Congress had responded with legislation regulating lotteries, health, pure foods and drugs, intrastate commerce in intoxicating liquors and narcotics, theft of automobiles, etc. Moreover, the Supreme Court was able to find principles of constitutional law to sustain most of such legislation, notwithstanding the fact that Congress had been granted no power of regulation in these fields and that such matters were clearly within the reserved powers of the states.

In 1933, moreover, the demand was for immediate action which meant that Congress had not the time even if it had been able to carry on investigations by experts regarding the methods and machinery to be utilized in carrying its policies into effect. Hence, it resorted to vast delegation of power to the President and other executive officials to provide these details relying upon the fact that the Supreme Court had never held any such previous delegations unconstitutional as a violation of the principle of the separation of powers.

THE NEW DEAL DECISIONS

While this discussion is concerned with the cases in which the Court held New Deal acts unconstitutional, it must be noted that it has sustained such legislation in other cases. As previously stated there have been adequate grounds for believing that in the latter some of the justices who concurred in the opinions did not agree with the policies embodied in the acts. In accordance with the proper rule of construction, however, they recognized that the determination of such matters was within the field of legislative and not of judicial competence. In cases in which New Deal legislation has been declared invalid the Court, or the majority opinion, has been careful to emphasize that the same principle has been adhered to. It remains to consider whether the opinion supports this contention.

It is not necessary to discuss all of the cases. Of the five that are of major importance,⁹ three¹⁰ were decided by a Court that

⁹ *Panama Refining Co. v. Ryan* (1934) 293 U. S. 388; *Schechter Poultry Co. v. U. S.* (1935) 295 U. S. 495; *Railroad Retirement Board et al. v. Alton Railroad Co. et al.* (1935) 295 U. S. 330; *Louisville Joint Stock Land*

was unanimous or nearly so. Of these, no question arises in the case involving the Frazier-Lemke Act,¹¹ and brief attention only will be given to the other two cases in this class. In the first of these, the *Panama Oil Case*¹², which held that there had been an unconstitutional delegation of legislative power, the immediate difficulty was overcome by a new Act of Congress. Justice Cardozo in his dissenting opinion felt that it was possible for the Court to discover the intent of Congress from the declaratory preamble and other sections of the Act and he makes it clear that the majority opinion advanced an entirely new test of validity in requiring a statement of findings by the President.

In the *Schechter NRA Case*¹³ the Court was unanimous. It found that the code involved in this case represented an unconstitutional delegation of legislative power. This was sufficient to decide the case before the Court and in accordance with the rule of construction it was not necessary nor perhaps proper for the Court to consider any other aspect. Nevertheless the opinion proceeded to find that the Act also constituted a violation of the reserved power of the state to regulate its own internal affairs. In arriving at this conclusion the Court applied, in a different way than had been customary, a distinction between intrastate transactions that "directly" affect interstate commerce and those that have only an "indirect" effect. These vague terms are not expressed in the Constitution but were invented by the Court and must be interpreted by it. Today most commerce has become of some national concern. Whether that which is intrastate has sufficient "direct" effect upon interstate commerce to authorize congressional regulation, will have to be determined by the justices who must struggle to prevent their personal opinions from influencing their decision upon matters for which there may be no other objective test.

The two remaining cases were decided by a divided Court. In the first, the *Railway Pension Case*¹⁴, the majority found certain

Bank v. Radford (1935) 295 U. S. 555; U. S. v. Butler (1935) 56 Sup. Ct. 312.

¹⁰ Louisville Joint Stock Land Bank v. Radford, supra, note 9; Panama Refining Co. v. Ryan, supra, note 9; Schechter Poultry Corp. v. U. S., supra, note 9.

¹¹ Louisville Joint Stock Land Bank v. Radford, supra, note 9.

¹² Panama Refining Co. v. Ryan, supra, note 9.

¹³ Schechter Poultry Corp. v. U. S., supra, note 9.

¹⁴ Railroad Retirement Board et al. v. Alton Railroad et al., supra, note 9.

provisions of the Act in conflict with due process of law and as the Court held these parts to be inseparable from other sections the entire Act was unconstitutional. This was sufficient for the decision of the case before the Court, but the opinion proceeded to declare that the Act was also unconstitutional for the reason that a compulsory pension law for interstate railroads was not a regulation of interstate commerce and hence could not be validly enacted by Congress.

The Chief Justice, speaking for himself and three other dissenting justices, held that certain sections of the Act violated due process, but that they were severable, so that the remaining sections could stand. His chief criticism, however, was directed at the holding that a compulsory pension law was not a regulation of interstate commerce so far as interstate railroads are concerned. He marshals an imposing list of prior opinions upholding congressional acts which regulate interstate railroads regarding safety, employer's liability and other relations with their employees. He states that the power of Congress to pass a workman's compensation act to govern interstate carriers does not seem to be questioned and he insists that "compensation and pension measures for employees rest upon similar basic considerations."¹⁵ While he naturally refrains from a direct statement, it may be implied from his language that considerations of the wisdom or expediency of the act must have affected the majority opinion. Thus, he says:¹⁶

"At best, the question as to the extent of superannuation, and its effect, is a debatable one, and hence one upon which Congress was entitled to form a legislative judgment."

And in his concluding paragraph, he says:¹⁷

"The power committed to Congress to govern interstate commerce does not require that its government should be wise, much less that it should be perfect."

While the decision holds that Congress can not pass a compulsory pension law for employees engaged in interstate commerce, it may be argued that it is legal for the state to enact such legislation. While this is true theoretically, from a practical

¹⁵ *Ibid.* l. c. 383.

¹⁶ *Ibid.* l. c. 379.

¹⁷ *Ibid.* l. c. 391.

point of view it offers no solution to the problem. Today, our railroad system is national in character and in all important matters demands and receives uniformity in regulation. Such uniformity can not be secured through separate state pension laws any more than in rate schedules or employer's liability. The law as announced by the Court does not correspond with the realities of modern commerce or railroad transportation.

The last case to be considered involved the AAA and is the latest in which a New Deal act has been declared invalid.¹⁸ Here the division in the Court is 6 to 3, the Chief Justice now being with the majority in the *Pension Case*. This case does not turn on matters of due process or interstate commerce as the Court held that the great and controlling question was the power of Congress to levy taxes and appropriate the income thereof to promote the general welfare. Congress declared the existence of an economic emergency which affected agricultural commodities with a public interest, levied taxes on the processors of certain commodities, and appropriated the proceeds thereof for rental or benefit payments to producers for reduction in acreage or production for market of certain agricultural commodities.

The powers of Congress to levy such taxes and to appropriate money for a large variety of purposes had been so consistently upheld that it had been anticipated that any attack based on the claim that the purpose of this Act was not within the "general welfare" clause would fail. This phrase is one of those vague and general provisions in the Constitution to which reference has been made previously. The majority, however, practically side-stepped this issue. Justice Roberts, who delivered the opinion, said that it was not necessary to determine whether an appropriation in aid of agriculture falls within general welfare as another principle of the Constitution prohibits the enforcement of the AAA. Thus he reversed the position taken in the *Pension Case* when after holding the Act invalid because of violation of "due process" he nevertheless proceeded to consider and condemn it as not within the power to regulate interstate commerce. This seeming inconsistency has been seized upon by opponents of judicial review who assert that in the *Pension Case* the majority

¹⁸ U. S. v. Butler, supra, note 9.

sought to make it impossible for Congress to pass a new pension law free from any defects regarding due process, while in the AAA case they wished to avoid a decision that aid for farmers was not within "general welfare."

What then is this principle of the Constitution that the majority found prohibitory of the AAA? It is that of the reserved rights of the states which was invaded by national regulation of agricultural production. The Court held that as farmers were required to enter into contracts with federal agents for a reduction in production in order to secure the benefit payments, the plan at best "is a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the states."

This interpretation is another example of the failure to recognize the realities of our modern life. It is intelligible so far as four of the justices who joined in this opinion are concerned as they dissented in the *Minnesota Moratorium Case* on the theory that what the Constitution "meant when adopted it means now." But the Chief Justice who wrote the opinion in that case expressly repudiated this doctrine and Justice Roberts who wrote the opinion in this AAA case concurred in the Chief Justice's opinion in the *Moratorium Case*. The Court in effect says that Congress may not tax for the purpose of appropriating money for the regulation of agricultural production as the latter is a power that may be exercised only by the states. This position is taken notwithstanding the fact that no state has ever undertaken any serious exercise of such power, and, what is far more important, under modern conditions, could not possibly make any such regulation effective. Imagine Missouri entering upon a plan to promote the interests of its growers of corn by a system of crop reduction or benefit payments while Illinois, Iowa, Kansas and other neighboring states did nothing or something different from the Missouri plan. The statement that only the states can control agricultural production means then, in effect, that no governmental control can be exercised over this matter. Perhaps this is wisest, but the Court is careful to reiterate in its opinion in this case that: "This Court neither approves nor condemns any legislative policy."¹⁹

¹⁹ Ibid. l. c. 318.

The implications of this interpretation are far more serious than its immediate effect upon farmers. Indeed, as regards the latter, pending legislation in Congress, supported by large majorities made up of Pro and Anti New Dealers, gives promise of nullifying any evil results. But the great powers of levying taxes and appropriating money have been subjected to new and significant limitations. The three dissenting justices, speaking through Justice Stone, make this abundantly clear. After quoting the classic statement of Chief Justice Marshall regarding the proper principle of constitutional interpretation he says:²⁰

“This cardinal guide to constitutional exposition must now be rephrased so far as the spending power of the federal government is concerned.”

And referring to the new test of validity in the majority opinion he says:²¹

“Such a limitation is contradictory and destructive of the power to appropriate for the public welfare, and is incapable of practical application . . . The government may give seeds to farmers, but may not condition the gift upon their being planted in places where they are most needed or even planted at all.”

The dissenting opinion, moreover, leaves little ground for doubt that the three justices believed that the decision was influenced by considerations of the wisdom of the legislative policy embodied in the AAA. After referring to the great extent of the governmental power of the purse Justice Stone says:²²

“The suggestion that it must now be curtailed by judicial fiat because it may be abused by unwise use hardly rises to the dignity of argument.”

And,²³

“A tortured construction of the Constitution is not to be justified by recourse to extreme examples of reckless congressional spending . . . Such suppositions are addressed to the mind accustomed to believe that it is the business of courts to sit in judgment on the wisdom of legislative action. Courts are not the only agency of government that must be assumed to have the capacity to govern. Congress and the

²⁰ *Ibid.* 1. c. 327.

²¹ *Ibid.*

²² *Ibid.* 1. c. 328.

²³ *Ibid.*

courts both unhappily may falter or be mistaken in the performance of their constitutional duty.”

When language as strong as this is used by members of the Court, it is not surprising to find that those who are disappointed with the immediate effect of decisions of the Court in constitutional cases, have launched attacks upon its power of judicial review. Moreover, as previously indicated, an answer that a constitutional amendment can always overcome a wrong decision is not entirely satisfactory.

The difficulties in the way of such a remedy are great and at times so enormous as to make it useless. Former Governor Caulfield in an address delivered on Tuesday of this week in referring to a proposal for an amendment giving Congress power over social, economic or working conditions said:²⁴

“The mere framing of such an amendment is appalling to any one with the slightest regard for our present form of government.”

While he was probably chiefly concerned with the invasion of the rights of the states his language could be properly applied to the difficulty of framing an amendment that would accomplish what was desired without involving other things that were not in the mind of the framers.

In conclusion it must be remembered that under the Constitution as it now exists the Supreme Court is not immune from control by other departments of government. There has developed an increasing understanding of the realities of the power of judicial review. This has been shown in the changed attitude of the Senate in passing upon presidential nominations for the position of Justice of the Supreme Court. The scrutiny to which the nominees have been subjected has not been confined to their character and judicial attainments but to their previous professional employment and even their judicial decisions that involved social and economic matters.

Congress has power to restrict the appellate jurisdiction of the Supreme Court and to increase the number of its members, so that, with the cooperation of the President, the Court could be packed. The former power was used by the Republican majority

²⁴ See *St. Louis Globe Democrat*, Feb. 19, 1936.

in Congress to pass a law over the veto of President Johnson in order to take away the appellate jurisdiction of the Supreme Court in a case involving the constitutionality of the Reconstruction Acts. The second power was used in Grant's administration to increase the number of justices after that number had been reduced in the previous administration to prevent President Johnson from making any appointment. President Grant nominated two new justices on the same day the Supreme Court by a divided vote held the Legal Tender Act unconstitutional. Soon afterwards the Court ordered a rehearing of the case and the two new justices with the three who had dissented made a majority in favor of the validity of the Legal Tender Act. While there is no evidence that this was an effort to pack the Court it shows the dangerous possibility of such a situation.

Attacks upon the Supreme Court and its power of judicial review are not new in our history and have come from different political parties. Various proposals have been made to modify or abrogate all or a part of its power to declare legislative acts unconstitutional. The institution of judicial review is not perfect and its exercise at times has been faulty. Nevertheless it is an historical product of American constitutional development. As it is also probably the best plan that could be devised for dealing with the problems arising out of our system of federal government and limited powers it should be preserved. This desirable result can be secured, however, only if the members of the Court will rigorously follow the rules of constitutional construction that the Court has laid down and will make their interpretation of the Constitution conform to the realities of our modern world.