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The Supreme Court--Then and Now

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THE SUPREME COURT—THEN AND NOW

I

FEBRUARY, 1941, witnessed two events which may be said to be the final touches to one of the most stirring chapters in the life of the Supreme Court:

1. The retirement of Mr. Justice McReynolds—

The last to doff his judicial robes, of the "four dissenters" [1] who so consistently, courageously and futilely opposed the social and economic policies of the Roosevelt Administration and who so outspokenly championed the doctrine of judicial supremacy.[2]

2. The decisions [3] upholding the Fair Labor Standards Act [4]—

Although the power of the legislature to establish minimum wages for employees in industry was settled by a previous pronouncement [5] of the Court, the unanimity of the Court in so forcefully supporting the power of the Federal Government to regulate conditions of labor in the production of goods for commerce and in so unqualifiedly rejecting the limitations upon the federal power once adopted in the famous child labor case,[6] makes the decision outstanding.

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[1] Mr. Justice VanDevanter retired in June, 1937, Mr. Justice Sutherland retired in January, 1938, and Mr. Justice Butler died in November, 1939. These three Justices together with Mr. Justice McReynolds constituted the conservative bloc of the Court. Their record of dissents in each recent case brought before them which involved an extension of the governmental power—federal or state—in the field of economics admits of no exception to or compromise with their view that economics is a matter solely for private undertaking and control.

[2] Mr. Justice McReynolds stated the position of the conservative bloc with respect to the power of the judiciary to act as a superlegislature when in his dissenting opinion in *Nebbia* v. *New York*, 291 U. S. 502, 556, 54 Sup. Ct. 505 (1933) he said:

> "But plainly, I think, this Court must have regard to the wisdom of the enactment. At least we must inquire concerning its purpose and decide whether the means proposed have reasonable relation to something within legislative power—whether the end is legitimate, and the means appropriate."

[3] Darby Lumber Co. v. Administrator, C. C. H. Labor Service (3d ed.) §§ 51, 108 (1941); Opp Cotton Mills v. Administrator, 61 Sup. Ct. 524 (U. S. 1941).

[4] 52 STAT. 1060, 29 U. S. C. A. §§ 201, 202, 203 (1938).

[5] West Coast Hotel Co. v. Parrish, 300 U. S. 379, 57 Sup. Ct. 578 (1937).

[6] Hammer v. Dagenhart, 247 U. S. 251, 38 Sup. Ct. 529 (1918).

The evolution of the Court's role in the political and economic life of the country, and the Court's reversal of its long standing philosophy of the Constitution, shortly after the President's proposal in 1937 to provide among other things for the "constant infusion of new blood" into the Supreme Court, makes a narrative of prime historical importance and interest. The Attorney General of the United States has recently published a book which relates in most effective fashion this history.[7] To read it is to gain a vivid picture of the drama of the Court's capitulation to the cause of economic reform. The historical fact that is of outstanding importance is: it was not through the eventual placing of new appointees upon the bench of the Court that it became "modernized" with respect to its social and economic constitutional interpretations, but rather it was through the realization upon the part of those members of the Court who held the balance of power [8] that the Court could no longer justify a construction of the Constitution which made it a barrier to the effectuation of the desires of the majority of the people. Hence, the Court has changed many of its earlier views in a series of startling decisions and placed its blessings upon the economic measures enacted at the insistence of the Administration. The change in the personnel of the Court that came

[7] JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1941).

[8] Outside the conservative bloc (see note 1, *supra*) of the Court, were Chief Justice Hughes, Justice Roberts and Justices Brandeis, Stone and Cardozo. The latter three had consistently indicated a stand for the broadening of governmental powers and, in general, their opinions were such that they were regarded as a liberal group. The Chief Justice and Mr. Justice Roberts, although not as sharply divided from the liberal group as the conservative bloc was from the remainder of the Court, were less definite in their positions, and their votes were decisive in the numerous split decisions of the Court, which had retarded or nullified progressive legislation. Prior to 1937, the Chief Justice had indicated a more liberal view, but Mr. Justice Roberts sided with the conservatives of the Court until March, 1937, when, in the 5 to 4 decision of the Court in the *West Coast Hotel* case, 300 U. S. 379, 57 Sup. Ct. 578 (1937), he voted with the liberals and the Chief Justice to sustain the constitutionality of minimum wage legislation. In the 5 to 4 decision of the Court in the *Morehead* case (note 14, *infra*), 298 U. S. 587, 65 Sup. Ct. 918 (1936), which was rendered just a few months prior to the *West Coast Hotel* case, Mr. Justice Roberts had voted with the conservative bloc to nullify minimum wage legislation. In the two decisions on the AAA legislation, Mr. Justice Roberts wrote both opinions; in 1936 he denied the power of the federal government to regulate agriculture (note 35, *infra*), but in 1938 sustained that power (note 33, *infra*). In the earlier case, the legalistic issue was the power of the government to tax for the general welfare and in the latter case, the question was confined to the power of the government to regulate commerce, but the fundamental issue seems to have been the same in both cases.

about through the departure from the bench of the "four dissenters" has only served to strengthen and make secure the Court's already liberal view of the meaning of the Constitution.

What the new Court has done and is doing, is to remove the restraints that the old Court had imposed and maintained upon freedom of political action. The Court in its metamorphosis has merely permitted the legislative and executive branches of the government to effectuate the ends that apparently represent the desires of the majority of the people in the nation—those same ends could be attained and undoubtedly would have been attained, time permitting, by the more cumbersome and less practical method of constitutional amendment. It seems that the Court for the present, at least, has adopted the position taken so frequently by Mr. Justice Holmes. Perhaps his position was stated no better than in his dissenting opinion in the case of *Lochner* v. *New York* [9] which involved a question of the validity of state legislation to restrict the hours of work in the baking industry:

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes, so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics . . . Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution

[9] 198 U. S. 45, 75, 25 Sup. Ct. 539 (1905).

is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

II

To examine the conclusions reached in some of the more important issues decided by the Court will indicate the extent of the restraints which may be imposed upon "liberty and property" by the legislative power as now viewed by the Court.

There is no phase of economic life which is of greater importance or more far-reaching in its effects than that involved in the relationship of employer and employee. The right to make contracts of employment is an application of the right of personal liberty and the right of private property. This right, of course, is subject to the power of government to make reasonable regulations in the interests of the general welfare of its citizens. The extent to which the legislature could go in validly regulating the employment relationship was extremely limited by the Court in the past. Legislation seeking to improve the status of employees was regarded as unconstitutional unless the statute could be shown to the Court's satisfaction to be necessary for the protection of the health, morals or the welfare other than economic of classes of persons who, because of their especial conditions, were thought in a sense to be under disabilities which would justify a degree of paternalism by the government, as in the case of women, minors, or persons engaged in hazardous occupations.[10] While hours of labor might be limited in the interests of the health or morals,[11] the Court took the stand that

[10] Holden v. Hardy, 169 U. S. 316, 18 Sup. Ct. 364 (1897); Mueller v. Oregon, 208 U. S. 412, 28 Sup. Ct. 324 (1908); Baltimore & Ohio R. R. v. I. C. C., 221 U. S. 612, 31 Sup. Ct. 621 (1911); Bunting v. Oregon, 243 U. S. 426, 37 Sup. Ct. 435 (1917); *cf.* Lochner v. New York, 198 U. S. 45, 25 Sup. Ct. 539 (1905).

[11] See note 12, *infra*.

regulation of wages by the establishment of a minimum was beyond the constitutional powers of the legislature.[12] Basically, the pervading concept was that employers and employees were upon equal footing and that to legislate with respect to conditions of employment, for the purpose of improving the economic status of employees, was to disregard a mandate of the people as set forth in the Fifth and Fourteenth Amendments to the Constitution. In *Adair* v. *United States* Mr. Justice Harlan, speaking for the Court, said:[13]

> The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell . . . In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.

Such apparently was still the view of the majority of the Court in its pronouncement made but a few months prior to March, 1937, in a case[14] involving the New York Minimum Wage Law for Women.

Came the dawn of a new day in March, 1937, when the Court handed down a five to four decision[15] on the constitutionality of a minimum wage law passed by the State of Washington. The majority of the Court held that "regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process" within the requirements of the Constitution. It observed that "the community is not bound to provide what is in effect a subsidy for unconscionable employers." Thus, in a complete reversal of its previous stand the Court established the power of the government to compel by direct action employers to increase labor's share of the economic product. A unanimous Court confirmed this when it recently passed upon the valid-

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[12] Adkins v. Children's Hospital, 261 U. S. 525, 43 Sup. Ct. 394 (1922).

[13] Adair v. United States, 208 U. S. 161, 174, 28 Sup. Ct. 277 (1908).

[14] Morehead v. New York *ex rel.* Tipaldo, 298 U. S. 587, 56 Sup. Ct. 918 (1936).

[15] West Coast Hotel Co. v. Parrish, 300 U. S. 379, 57 Sup. Ct. 578 (1937).

ity of the Federal Fair Labor Standards Act.[16] Both the wage and the hour provisions were regarded by the Court as minimum wage requirements but it went on to say that it is no longer open to question that the legislature has the power to fix maximum hours for both men and women.

It being settled that the legislature may set a minimum upon wages and a maximum upon hours, it is timely to consider whether the Court would sanction the imposition of a maximum upon wages and a minimum upon hours. The conditions which would give rise to the desirability of such legislation are not remote. The power of the labor groups is growing daily and it may well be that "the interests of the community" will warrant before long legislative protection from "unconscionable" employees as well as employers. Allegations are being currently heard from many sources that the rates of pay in some trades have reached a point where they are exorbitant and are inimical to the interests of the community. Aside from an emergency, the need for placing a floor under hours of work as well as a ceiling over them may not be apparent, but neither can it be said that the occasion for such a step will not arise.

The evolution of judicial approbation of the exercise of legislative powers in reference to the organization and activities of employee unions is not unlike that with regard to wages and hours. The right of employees to combine and to refrain from working is merely the simple application of the right of personal liberty, and was given early recognition.[17] In the interests of the protection of the peace of the community and the avoidance of injury to tangible property, restrictions upon these activities were upheld.[18] But, in general, the disposition of the Court was to rule out legislation which went beyond the elementary purpose of providing for the peace of the general public and the safety of persons and property. Legislation attempting to strengthen the bargaining position of labor was clearly unconstitutional. Statutes

[16] See note 3, *supra*.

[17] Adair v. United States, 208 U. S. 161, 175, 28 Sup. Ct. 277 (1908); United Mine Workers v. Coronado Co., 259 U. S. 344, 42 Sup. Ct. 570 (1922); Arthur v. Oakes, 63 Fed. 310, 320 (C. C. A. 7th, 1894); Iron Moulder's Union v. Allis Chalmers Co., 166 Fed. 45 (C. C. A. 7th, 1908).

[18] Dorchy v. Kansas, 272 U. S. 306, 47 Sup. Ct. 86 (1926).

declaring it to be illegal for employers to require as a condition of employment that employees refrain from membership in a union were voided.[19] Enactments limiting the power of the courts to grant injunctions in labor disputes were declared invalid unless they could be interpreted as being "declaratory of the law as it stood before." [20] Such measures were regarded as being, or as permitting, an undue and arbitrary interference with liberty or property, and, as such, were barred by the "due process" amendments.

Now, however, the pendulum has swung in the other direction. Under the National Labor Relations Act,[21] employers are prevented from discriminating with regard to hire or tenure of employment for the purpose of discouraging membership in a labor organization and from interfering, restraining or coercing employees in their union activities. The rights of employees to picket and to conduct boycotts, as long as the picketing is unaccompanied by a breach of the peace and as long as the boycotting is legitimate and not merely a device to restrain trade or commerce, are established.[22] Anti-picketing statutes are declared void as an unwarranted interference with freedom of speech and assembly; [23] injunctive relief in labor disputes is obtainable only under very limited circumstances; [24] and criminal prosecution under the anti-trust statute is practically nullified.[25]

There is a growing concern not altogether without unbiased support that the scales may have been tipped too far in favor of employees and against employers. But if this be so, it is not the concern of the Court. Speaking of the National Labor Relations Act, the Chief Justice said,[26] "The

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[19] Adair v. United States, 208 U. S. 161, 28 Sup. Ct. 277 (1908); Truax v. Corrigan, 257 U. S. 312, 42 Sup. Ct. 124 (1921).

[20] Duplex Printing Co. v Deering, 254 U. S. 443, 41 Sup. Ct. 172 (1920); American Steel Foundries v. Tri-City Trades Council, 257 U. S. 184, 42 Sup. Ct. 72 (1921).

[21] 49 STAT. 449, 29 U. S. C. A. § 151 (1935).

[22] Lauf v. Shinner & Co., Inc., 303 U. S. 323, 58 Sup. Ct. 578 (1938).

[23] Thornhill v. Alabama, 310 U. S. 88, 60 Sup. Ct. 736 (1940); Carlson v. California, 310 U. S. 106, 60 Sup. Ct. 746 (1940).

[24] Lauf v. Shinner & Co., Inc., 303 U. S. 323, 58 Sup. Ct. 578 (1938); Progressive Miners Corp. v. Peabody Coal Co., 75 F. (2d) 460 (C. C. A. 7th, 1935); Milk Wagon Drivers Union v. Meadowmoor Dairies, 61 Sup. Ct. 552 (U. S. Feb. 10, 1941).

[25] United States v. Hutcheson, — U. S. —, 61 Sup. Ct. 463 (1941).

[26] Labor Board v. Jones & Laughlin, 301 U. S. 1, 33, 57 Sup. Ct. 615 (1937).

Act has been criticised as one-sided in its application; that it subjects the employer to supervision and restraint and leaves untouched the abuses for which employees may be responsible; that it fails to provide a more comprehensive plan,—with better assurances of fairness to both sides and with increased chances of success in bringing about, if not compelling, equitable solution of industrial disputes affecting interstate commerce. But we are dealing with the power of Congress, not with a particular policy or with the extent to which policy should go."

If any example need be cited to show the application in practice of the newly acquired power of labor, there is none better than that of the contract being currently negotiated between the labor organization and the employers in the clothing industry in New York City. Under its provisions, the employers would be required to expend a named amount of money for promotional and sales effort, and the standards of efficiency in the operations in the shops are to be determined in conjunction with the union. This is believed to be the first attempt to place in the hands of employees definite authority over matters generally held to be prerogatives of the owners and the management of a business.

The regulation of the employer-employee relationship with its alleged inherent conflict of interests is but one phase of the comprehensive, if not all-embracing, activity of the government in ordering the economic affairs of the nation. Legislative enactments providing for the regulation of prices, for the regulation of production, and for the attainment of that elusive goal, economic security for the individual, illustrate further the extent to which freedom of action by the individual is being restrained.

The constitutionality of regulation of prices and production by state and federal government is fairly well established. In *Nebbia* v. *New York*,[27] the Court said, "There can be no doubt that upon proper occasion and by appropriate measures, the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells." So far as the requirement of due proc-

[27] 291 U. S. 502, 54 Sup. Ct. 505 (1934).

ess is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose." In cases decided in 1938, it was held that the constitutional power of the Federal Government to regulate interstate commerce includes the power to fix prices.[28]

The judicial attitude of limiting price regulation to businesses which are thought by the Court to be "affected with a public interest",[29] is abandoned and the determination of the businesses to be so regulated, apparently will be left largely to the legislative discretion in providing for the general economic welfare.[30] It may not be amiss to observe that the efforts of the Government to improve the economic status of the lower income groups by legislation are incomplete if confined to the objective of increasing their wages. The effect of legislation leading to this result can be nullified unless control is exercised over the cost of living. The real wages of labor are measured by a combination of money wages and the cost of living. Aside from its importance in relation to current national defense problems, the activity of the Department of Justice in enforcing the anti-trust statutes is of basic significance.

The principal purpose of the Bituminous Coal Conservation Act [31] was to regulate prices and production in the coal mining industry. The question of the validity of the Act was presented to the Court in 1936, and the Act was declared invalid [32] not because of any judicial limitation upon the power of Congress to regulate prices and production but only because the Court at that time felt that labor practices in the mining industry did not affect interstate commerce.

In upholding [33] the constitutionality of the Agricultural Adjustment Act of 1938,[34] the Court affirmed the power of

[28] United States v. Rock Royal Co-op., 307 U. S. 533, 59 Sup. Ct. 993 (1938); H. P. Hood & Sons v. United States, 307 U. S. 588, 59 Sup. Ct. 1019 (1938).

[29] Munn v. Illinois, 94 U. S. 113 (1876); *cf.* Tyson v. Banton, 273 U. S. 418, 47 Sup. Ct. 426 (1927).

[30] See note 9, *supra.*

[31] 49 STAT. 991, 41 U. S. C. A. § 24a (1935).

[32] Carter v. Carter Coal Co., 298 U. S. 238, 56 Sup. Ct. 855 (1936).

[33] Mulford v. Smith, 307 U. S. 38, 59 Sup. Ct. 648 (1939).

[34] 52 STAT. 31, 7 U. S. C. A. § 423 (1938).

the Government to regulate production. Unlike the first Agricultural Adjustment Act,[35] which was based on the power to tax for the general welfare, this Act concerned the power of the Congress to restrict the marketing of a product to a volume to be determined by the Department of Agriculture. Obviously, a restriction upon marketing acts as a restriction upon production.

The question of price fixing and production regulation in these cases was being considered as part of a plan for the stabilization of an industry which was suffering from economic distress. However, there can be little doubt that the legislative power would be held to be no less present were the regulation of prices and production part of a plan with a different purpose, so long as the objective and the effect are to promote the public welfare. It is significant to observe that only recently the United States Department of Agriculture in a report to the Temporary National Economic Committee, has suggested government control of food distributing organizations in a "manner somewhat like that in which public utilities are regulated."

The adversities of life, even when the economy is supervised by governmental action, continue to exist for the individual. Old age, death and sickness are no respecters of a planned economy and apparently in modern industrialism there will always be the spectre of unemployment to haunt the individual. A means for ameliorating the financial hardships caused by the occurrence of these adversities may be found in the use of the principle of insurance. Private initiative has gone far in providing the facilities to combat financially the uncertainties. The opportunity is there for individuals who have the perspicacity and the economic position to avail themselves of it. However, for the majority of individuals, adequate protection is not available and the widespread economic insecurity gives rise to the need of social action. Hence, resort is had to a system under governmental authority of compulsory contributions from private resources to a public fund from which payments can be

[35] 52 STAT. 31, 7 U. S. C. A. § 423 (1938). Declared invalid in United States v. Butler, 297 U. S. 1, 56 Sup. Ct. 312 (1936).

claimed as a matter of right by individuals who become victims of the hazards contemplated.

There were many doubts expressed as to whether the powers conferred upon the Government through the Constitution would permit the establishment of a plan of social insurance. Those doubts have been dispelled by the decisions of the Court in upholding the validity of the legislation creating a system of unemployment compensation and old age and death benefits.[36] These measures were sustained on the basis of the existence of a public need and in the interest of the advancement of the general public welfare. It is interesting to note that, with respect to the Federal Old Age legislation, it is the first time that the Court found it necessary to rule upon the implications of the general welfare clause of the Constitution. The Court overruled the contention that the power of the Government to provide for the general welfare is limited to activities which are specifically enumerated in the Constitution.[37] The power of the legislature to enact measures for the general welfare to the extent that it deems such action necessary is established. Legislation providing for a system of health insurance is already under active consideration and it may be expected that Social Security will be extended in its application to meet other specific needs. Recent suggestions by governmental officials to the effect that the privately-owned insurance companies might well give consideration to the establishment of a system of insuring businesses against failure indicates the extent to which the principle of insurance may be employed by the Government in its efforts to attain an improved economy.

Illustrations might be multiplied in showing the extent to which governmental action with the sanction of the Court is imposing standards and regulations upon the economy and is restraining individual action to a set pattern. The day of the business man's *laissez faire* is definitely gone and the influence of government upon the activities of production, trade and finance is mounting almost daily. It reaches di-

[36] Carmichael v. Southern Coal Co., 301 U. S. 495, 57 Sup. Ct. 868 (1937); Steward Machine Co. v. Davis, 301 U. S. 548, 57 Sup. Ct. 883 (1937); Helvering v. Davis, 301 U. S. 619, 57 Sup. Ct. 904 (1937).

[37] Helvering v. Davis, 301 U. S. 619, 57 Sup. Ct. 904 (1937).

rectly into the affairs of every business and every home. Control over the economic life of the nation is no longer vested exclusively or even principally in those whose source of power is the ownership of wealth. It is rapidly passing into the hands of those whose source of power is political and popular and every indication is that the trend will be accelerated rather than retarded. Whether political control over the economy will be more successful than private control in improving the material well-being of the people can be determined only by time and event.

III

If restraints through social legislation upon liberty and property are sanctioned by the Court whenever and to the extent that the popular will desires, the ultimate effect will be to nullify the guarantees of the Constitution without direct action of the people. So thought Mr. Justice Sutherland, as expressed in his dissent [38] from the majority holding in the revolutionary minimum wage law decision of 1937:

> If the Constitution, intelligently and reasonably construed * * * stands in the way of desirable legislation, the blame must rest upon that instrument, and not upon the Court for enforcing it according to its *terms*. The remedy in that situation—and the only true remedy —is to amend the Constitution.

It is hardly debatable that adherence to orderly processes requires that the voiding of any of the provisions of the Constitution be only by direct action of the people. But what are these *terms*, that the Justice referred to in his statement, which dictate that property rights and liberty involved therewith shall be impervious to qualification in the interests of the common good. The Constitution will be searched in vain for any statement which specifies that property rights are immune from limitation or even abolition. Aside from the provision for just compensation where private property is taken for public use, there is only the restriction that no per-

[38] See note 15, *supra*, 300 U. S. at 404. This dissent was concurred in by the three other members of the minority bloc.

son shall be deprived thereof "without due process of law." [39] The doctrine that this phrase was other than a specification as to procedure—that it applies "to matters of substantive law as well as to matters of procedure" is a creation of the Supreme Court itself.[40] For the Court now to limit the application of that doctrine, insofar as it was thought to guarantee a maximum of individual self-assertion and freedom of action with relation to economic activity can hardly be said to effect a nullification of the Constitution. The most that can be validly said is that, under its recent decisions, the Court has revised its previous interpretations of the instrument embodying the fundamental law of the land.

Compare, however, the position of the Court on economic matters with its attitude on issues involving the civil liberties of individuals. The Court has not overruled since 1937 a major legislative enactment of an economic nature. However, with respect to issues involving the civil liberties, there has been no hesitancy on the part of the Court in overruling legislative and administrative action which would prevent the exercise of the rights specifically guaranteed by the Constitution. Handbill ordinances, anti-picketing laws, and bans on public meetings have consistently been denounced by the Court as a deprivation of constitutional liberties.[41] The Court did deny, however, the validity of a plea that to require school children to salute the flag, when such an act was contrary to the religious scruples of the children is an unwarranted invasion of the guarantee of religious freedom.[42] The Court's declination to weigh the legislative judgment in this matter is difficult to reconcile with its action in other cases involving civil liberties, particularly the cases involving the anti-picketing statutes.[43] However, the decision in this particular case of itself can hardly be taken, in the light of

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[39] U. S. CONST. AMENDS. 5 and 14.

[40] Mr. Justice Brandeis dissenting in the *Oklahoma Ice* case, 285 U. S. 262, 52 Sup. Ct. 371 (1932).

[41] Lovell v. Griffin, 303 U. S. 444, 58 Sup. Ct. 666 (1938); Hague v. C. I. O., 307 U. S. 496, 59 Sup. Ct. 954 (1939); Schneider v. State, 308 U. S. 147, 60 Sup. Ct. 146 (1939); Thornhill v. Alabama, 310 U. S. 88, 60 Sup. Ct. 736 (1940); Carlson v. California, 310 U. S. 106, 60 Sup. Ct. 746 (1940).

[42] Minersville Sch. Dist. v. Gobitis, 310 U. S. 586, 60 Sup. Ct. 1010 (1940); (1940) 15 ST. JOHN'S L. REV. 95.

[43] Thornhill v. Alabama, 310 U. S. 88, 60 Sup. Ct. 736 (1940); Carlson v. California, 310 U. S. 106, 60 Sup. Ct. 746 (1940).

the Court's pronouncements in other cases, as cause for concern with respect to the Court's disposition to protect civil liberties.

Even the most reactionary person cannot deny with reasonableness the need for changes in the social organism. The need arises not out of any theories of the equality of man or the practice of altruism but is because of the immeasurable achievements of science and modern industrialism in the quest for the greater satisfaction of the material wants of human beings. This success has created a condition of human interdependence which requires readjustment in economic affairs.

Those readjustments can be made and are being made within the framework of our American institution as established by the fundamental law of the nation. Law in a constitutional democracy is founded upon and should be responsive to the needs and desires of society. The true judicial function, with respect to those matters upon which legislative representatives have acted, is not to formulate or negate the statutory rules of action, but primarily is to safeguard the orderliness of the legislative process and the compatibility of the resulting rules with the basic ideals and principles of the nation. In determining upon the limitations which, consistent with those ideals and principles, may be imposed upon liberty and property, the Court, if it is to perform well its true function, must take cognizance of contemporary conditions and the desires of an informed and enlightened public opinion as it evolves with the changing conditions.

The observations of Mr. Justice Cardozo, in his addresses on the nature of the judicial process, are pertinent. In characteristic fashion he said: [44]

> I speak first of the constitution, and in particular of the great immunities with which it surrounds the individual. No one shall be deprived of liberty without due process of law. Here is a concept of the greatest generality. Yet it is put before the courts *en bloc*. Liberty is not defined. Its limits are not mapped and charted. How shall they be known? Does liberty mean the same thing for successive generations? May restraints that were arbitrary yesterday be

[44] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1925).

useful and rational and therefore lawful today? May restraints that are arbitrary today become useful and rational and therefore lawful tomorrow? I have no doubt that the answer to these questions must be yes. * * * Courts know today that statutes are to be viewed, not in isolation or in vacuo, as pronouncements of abstract principles for the guidance of an ideal community, but in the setting and the framework of present-day conditions, as revealed by the labors of economists and students of the social sciences in our own country and abroad.

The degree of restraint upon liberty in relation to property sanctioned by the present Court is undeniably much greater than that sanctioned by the old Court. How much of this is due to a change in the economic predilections and an increase in the sociological sensibilities of the members of the Court and how much of it is due to self-imposed limitations upon the exercise of judicial authority to invalidate the action of the legislative bodies is difficult to ascertain. The language of the Court in some cases would indicate a growing disposition upon the part of the Court to refrain from acting as a superlegislature. On the other hand, the evidence, when viewed in the light of the nature of the judicial process and the history of the Court, is insufficient to sustain a conclusion that the Court has permanently and completely abandoned its long-assumed prerogative of acting as final arbiter with respect to the wisdom of the policy of legislative enactments. The record does show, however, that the new Court is ascribing to the meaning of the Constitution a quality of flexibility in place of the old Court's concept of rigidity.

EDWIN P. WOLFE.