THE ARBITERS OF THE NEW DEAL

"EQUAL Justice Under Law," is the inscription carved on the pediment of the new United States Supreme Court building. Recently erected, this legal temple in white marble stands majestically on a hill near the national Capitol, a fixed reminder that the judiciary is a co-ordinate branch of the government.

For the past seventy-five years the sessions of the court were held in the small chamber that once housed the United States Senate. Its walls seemed to whisper memories and great names of the past. Here Webster, Clay, Calhoun and other famous statesmen before the Civil War battled with the nation's problems. Around the curved wall are busts of former Chief Justices. It is, no doubt, with a feeling of regret and a spirit of estrangement that the court has moved into its new quarters with its huge Sienna columns, ornate ceiling, heavy crimson hangings, and bas-reliefs.

The nine gowned men who sit on the bench of the highest judicial tribunal in the nation are not spectacular: no aura of Olympus surrounds them. Each has a deep appreciation of the dignity and responsibility of his office: and all, despite an external austerity and necessary aloofness, are very human. Their appointment, which is for life, is made by the President with the advice and consent of the Senate. They can be removed only by impeachment. During their tenure of office they cannot occupy any other position. All interests, no matter how profitable, which might possibly influence their judgment are severed. No justice sits in a case with which he has been previously connected as counsel, or in which he has any direct personal interest. Tradition also demands that they refrain from participation in political activities and from the public discussion of controversial questions. Not even former political attachments, or what would seem a sense of loyalty to the President who appoints them, have prevented these men from exercising their independence. Chief Executives have often been disappointed

https://doi.org/10.1111/j.1741-2005.1935.tb03875.x Published online by Cambridge University Press

by the apparent ingratitude of the men whom they raised to the Supreme Court bench.

The decisions of the court are final. There is no appeal, except a constitutional amendment which is a rather lengthy and complicated procedure. Their judgments have affected not only the lives and fortunes of individuals and corporations, but also altered the course of government, both Federal and State. Less frequently, but on occasion, as in the Gold Clause decision, or when the interpretation of a treaty was concerned, there have been even international repercussions.

In its new home this court will immediately be confronted with a series of litigations involving the constitutionality of much of President Roosevelt's New Deal. One of the final judgments in its last session was to declare unconstitutional the National Industrial Recovery Act. What disposition these men make of the cases now before them will have a profound effect upon future governmental policies and will test the stability or permanence of the present economic structure of the nation. They can check the growing tendency of the central government to cross State lines in time of emergency, or they can strengthen that tendency so that it will seem to be a part of the original document and consistent with a group of earlier decisions holding for the flexibility of the Federal Constitution and its precedence over local legislation.

The Constitution of the United States was designed as a practical scheme to give adequate national authority without sacrifice of what was deemed to be essential local autonomy. In this balanced apportionment lies the secret of its continued success. Federal governments were not something new. They had been tried in other countries, but their history had been one of failure, either because too little authority had been granted to the central organ and hence it perished from debility, or because it had been permitted too much authority and consequently crushed the political units. The framers of the Constitution sought to guard against both extremes. They gave large powers to the Federal Government, but not too large; they tried to assure it a

https://doi.org/10.1111/j.1741-2005.1935.tb03875.x Published online by Cambridge University Press

reasonable revenue, but avoided unlimited power of taxation; they permitted it to borrow, to regulate foreign and domestic commerce, to provide an army and navy, to coin money, and do various other things which the common welfare seemed to demand. At the same time, however, they reserved to the States the whole field of civil and criminal law, the regulation of trade within their own bounds, the "police power," in short, all authority not delegated expressly or, at least, by implication.

Expansion in territory, increased population, vastly changed circumstances and conditions of life, have reinforced, rather than weakened, this principle of duality. Contrary to the expectations of many critics and even of some authors of the Constitution, the National Government has grown steadily stronger without in any way diminishing the power of the States. Along with this physical development of the country, the Constitution itself has continued as a living force, breathing a fresh spirit, extending its protection to new activities and interests, keeping pace with current social and political trends. The reason for this can be found in the fact that the powers it gave to the Federal Government were couched in such general and undefined terms that they permitted a host of unforseen applications. In his Inaugural Address, President Roosevelt called attention to this feature when he said: "Our Constitution is so simple and practical that it is possible always to meet extraordinary needs by changes in emphasis and arrangement without loss of essential form. That is why our constitutional system has proved itself the most superbly enduring political mechanism the modern world has produced."

It is through judicial decisions more than any other means that the Constitution has been adapted to changing needs and situations. The orthodox theory is that the courts merely interpret the law without adding anything or taking anything away. Yet every lawyer knows that to give a phrase a new interpretation is to give it a new meaning; and to give it a new meaning is to change it. To use a homely example, the effect is like dyeing a piece of woollen goods, the texture remains the same but the colour is different. Now the

https://doi.org/10.1111/j.1741-2005.1935.tb03875.x Published online by Cambridge University Press

Supreme Court of the United States has changed the colour of the Constitution by reading into it many things which are not there visibly, and by reading out of it many things which are there as plain as print can make them. A thorough knowledge of American Government postulates a study of the more important judicial decisions. They go to the very heart of the American system.

Many of the issues before the Supreme Court hinge upon the meaning and scope of the various provisions in the Constitution. "Congress," it is declared, "shall have power . . . to regulate commerce with foreign nations and among the several States. . . ." But what is included under the term commerce? In matters of trade and industry the United States has moved forward with a phenomenal rapidity. Each year presented new problems concerning the relations of government to business, and, in the last few decades, government in business. It has been the work of the Supreme Court to "twist and torture," as Lord Bryce puts it, the term commerce so that it will embrace them all. Hence it is that a word which to the framers of the Constitution meant communication by sailing vessel, stage coach and pony express, has by a series of judicial decisions been construed to cover transportation of passengers and goods by railroad, steamship, motor vehicle, and airplane. The sending of messages by telegraph, telephone, and radio, was also included because it was the communication of the written or spoken word. The transmission of electric power, pipe lines for carrying oil, regulation of wages and hours of employees engaged in inter-State traffic, intervention in strikes, are but a few of the broad powers now exercised by the Federal Government under this term commerce.

The same progressive construction has been applied to other clauses. Congress shall have power "to raise and support armies." These words, to the minds of the men who put them in the Constitution, meant that Congress might call up volunteers, furnish these soldiers with muskets, give them food and clothing, avoid a repetition of the sad experience of the Continental army at Valley Forge whose route of march could be traced on the snow by the blood

https://doi.org/10.1111/j.1741-2005.1935.tb03875.x Published online by Cambridge University Press

that oozed from bare and frost-bitten feet. But during the World War this same clause was comprehensive enough to justify the drafting of several million men, the enactment of an extraordinarily stringent Espionage Act, the taking over of all railroads for the transportation of troops and supplies, the control of telegraph and telephone lines as a necessary defence, the cessation of all industries on certain days of each week together with the fixing of meatless, wheatless, and heatless days for the whole civilian population with the purpose of preserving the nation's resources for the army and the cause of the Allies. Power "to raise and support armies"! The Federal Government backed by the Supreme Court derived a tremendous amount of authority from that little phrase during the years 1917-1919.

The Sixteenth Amendment gives Congress the power "to lay and collect taxes on incomes, from whatever source derived. . . ." There is a famous case of a Federal District Judge who sought to recover a sum paid as an income tax. He claimed that this clause, "from whatever source derived," did not apply to Federal Judges because the Constitution in another place expressly stated that they should receive for their services a compensation "which shall not be diminished during their continuance in office." The court held that an income tax, in effect, did diminish that compensation, interfered with a completely independent judiciary, and, therefore, was not applicable in the instant case. The same exemption is extended to State governments and their agents. To tax them might obstruct and hinder the necessary work of the State, and the purpose of the Constitution is to preserve and to protect the States as well as the National Government.

But the question of the moment is: How will the Supreme Court treat the New Deal legislation involved in litigations destined to come before it during the present session? In passing, it might be mentioned that no Federal Court of its own initiative can acquire into the validity of the actions taken by the other departments of the government in fulfilment of their powers. Neither can it give advisory opinions on the legality of proposed legislation. The question

https://doi.org/10.1111/j.1741-2005.1935.tb03875.x Published online by Cambridge University Press

must arise in a concrete case involving the rights of the parties concerned. Consequently, it is possible to have the peculiar situation in which a law passed by Congress may be contrary to a provision of the Constitution, but nevertheless is enforced until the Supreme Court has declared it invalid. Some months, at least, are required before the case can be heard. Moreover, since most cases come to the court on appeal and much time is consumed by legal procedure in the lower courts, several years might pass before the case is actually argued before the tribunal of last resort. This happened with the National Industrial Recovery Act. The Act was passed in June of 1933, and according to its own provision it was to continue in force for two years. The time was almost up before the Supreme Court rendered the decision of unconstitutionality. All during the intervening months industry was obliged to observe the codes established under the sign of the Blue Eagle. It is a unique situation and one which could not arise in England because of the supremacy of Parliament.

Most of the New Deal legislation is based upon the existence of a national emergency, the necessity of stimulating inter-State and foreign commerce, and of providing for the general welfare. This is true particularly of those two pillars of the New Deal, the National Industrial Recovery Act and the Agricultural Adjustment Act, more popularly known as the N.R.A. and the A.A.A. respectively. From the economic standpoint no one can question the need of such measures for there was widespread unemployment, disorganization of industry, a lack of balance between production and consumption of industrial and agricultural commodities, and, in some districts, a great home mortgage indebtedness. These and other equally grave disorders had created a general unrest, were undermining the whole economic system of the nation, and lowering the standard of living of the American people. Individual States had already exhausted the various means at their disposal to meet this crisis. The results had been feeble. It was an unprecedented situation—a situation which demanded revolutionary action, immediate action, concentrated action. President Roosevelt

https://doi.org/10.1111/j.1741-2005.1935.tb03875.x Published online by Cambridge University Press

rightly assumed leadership. Under his direction, Congress in special session enacted a mass of legislation which aimed at correcting existing evils and restoration of the national confidence. How far these laws have succeeded in fulfilling their declared objective has been greatly disputed. If, as some contend, they have not been entirely successful, the blame does not belong entirely to the President and to Congress, but it should be shared with those groups which not only refused co-operation but who, for selfish interests, designedly thwarted all attempts to effect recovery.

Legally this legislation has been attacked from every side. It seems impossible, no matter how comprehensive the interpretation, to reconcile the broad powers exercised by Congress with the terms of the Constitution. The frequent dictum of the court has been: "Emergency creates no additional power." Yet, against this, one can quote the decision upholding the Minnesota Mortgage Moratorium Law. This was a State law, purely an emergency measure, which it was conceded impaired the obligation of contracts guaranteed by the Constitution, but which, nevertheless, was sustained by the United States Supreme Court because of the existing economic crisis. Furthermore, the argument from general welfare is not very sturdy. The words "general welfare" are mentioned twice in the Constitution: first, in the Preamble, which is not the source of any substantive power, but merely a declaration of purpose: they are found again in sec. 8 of Article I which gives Congress the power to tax in order "to pay the debts and provide for the common defence and general welfare of the United States. . . ." The clause does not state that Congress has the power to promote the general welfare: if it did there would be practically no limits to its authority. It merely asserts that Congress may tax for the general welfare of the country. Consequently, neither emergency nor general welfare offer a very sound basis for constitutional validity of the New Deal legislation.

All hope must, therefore, be vested in the commerce clause. But here again optimism is clouded. For in declaring void the Recovery Act, the court pointed out that

https://doi.org/10.1111/j.1741-2005.1935.tb03875.x Published online by Cambridge University Press

Congress was not only exercising control over inter-State commerce which was its right, but that it had transcended State boundaries and was regulating local business. This was beyond its province. Laws governing the transportation of commodities from one State to another certainly fell within the jurisdiction of Congress, but when that body attempted to legislate regarding the production or the manufacture of those goods, it was interfering with a matter which belongs to the States. The court also warned against the delegation of power. The corner-stone of the American system is the separation of powers. Congress, not the Executive, is the law-making body. In the N.R.A. large powers had been delegated to the President.

That the court will take this same attitude towards the A.A.A. now before it is a matter for speculation. On the surface there seems to be a great similarity to the Recovery Act, but precedents can be found to support whatever opinion the individual choses to hold. Has the disparity between prices of agriculture and other commodities "burdened and obstructed the normal currents of commerce"? If so, does this confer on Congress the right to regulate the production of agricultural commodities? Is the processing tax justified by the Constitution? Is it a tax which aims primarily at the raising of revenue, or is its chief purpose the limitation of farm products? Is the Administration's power programme in the Tennessee Valley within the terms of the organic law? Has the Federal Government the right to condemn land for slum clearance and low-cost housing? These are a few of the problems facing the Supreme Court in its present session. Seldom have more momentous matters confronted a judicial tribunal.

Popular interest in these issues is quite general. The judgment of the court will have vital consequences throughout the nation and is sure to play a prominent part in the coming campaign for the Presidential Election. It is not surprising that a tribunal exercising such great authority and beyond the reach of the electorate should from time to time arouse widespread criticism. Men prominent in governmental and academic life have praised and condemned the

https://doi.org/10.1111/j.1741-2005.1935.tb03875.x Published online by Cambridge University Press

practice of judicial review. Proposals to curb that power have often been heard. None have been adopted. The prudent use of this power is its greatest safeguard. Public and private discussions may be frequent and furious, but serenely the court will dispose of the business before it, apparently oblivious of all criticism, and little concerned about the stir its decisions, whatever their nature, are bound to create.

CHARLES H. MCKENNA, O.P.

https://doi.org/10.1111/j.1741-2005.1935.tb03875.x Published online by Cambridge University Press