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A SQUARE DEAL FOR THE COURT

AN ADDRESS BY

ROBERT H. JACKSON

ATTORNEY GENERAL OF THE UNITED STATES

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The Constitution is a short document; together with its amendments it is only about 10 pages long. This is much shorter than most of the important statutes. It is also, I fear, shorter than is my written address tonight. Since the Constitution is so short, and since the founders of our nation realized they should not attempt to deal too specifically with the problems of the distant future, its commands are cast in very general language.

As a result of the generality of the great clauses of the Constitution, different people will have different notions of their meaning when applied to particular cases. Particularly will different lawyers have different notions about this. Even among the very best of lawyers there will be violently different opinions as to the meaning of the Constitution.

So it is not surprising that on the Supreme Court itself there will be sharp divisions of opinion as to whether a particular statute is constitutional. And it is not surprising that, when the Court is composed of different men than formerly, there will be some difference as to what the Constitution means, or that changing times will make a difference in the constitutional law announced by the Court even when it is composed of the same members.

1. Respect For The Institution

This inevitable change in judicial interpretation of the Constitution has produced one very interesting result. If one were to follow the advice of the leaders of the bar and of industry, he might find it difficult to know what he should think about the Supreme Court of the United States. He would know that in 1937 it was an institution which was entitled to profound respect and no criticism, and that in 1940 it is entitled to profound mistrust and much criticism.

For example, a distinguished and learned leader of the bar said, in 1937, that the criticisms of Supreme Court decisions by the President and Secretary Wallace "did more harm in ten seconds than patriots can repair in a generation," and gave "great encouragement to the lawless element in the country."[1]

It is not, I trust, a confirmation of these predictions that in 1939 the President of the American Bar Association should himself attack the Supreme Court. He described its decisions as "the most devastating destruction of constitutional limitations upon Federal power", and indicated that the Court in its recent decisions had abdicated its role, so that the nation could look to the legislature alone "for the continuance of that security of

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[1] George Wharton Pepper, The President's Case Against the Supreme Court, 23 A.B.A.J. 247, 251.

the blessings of liberty for which the Constitution was framed."[2] And Wendell Willkie, an able lawyer as well as an outstanding executive, has solemnly warned us that the Court has substantially changed our form of government, and predicts that it will be found largely responsible, not only for the abolition of states' rights, but also for unemployment, bad business and debt.[3]

Now, as one who is anxious to respect what he should respect, and criticize what he should criticize, I don't know how these gentlemen would have me view the Supreme Court. I imagine that they would have me respect the Court when they approved its decisions, and have me join in their denunciations when they don't like the decisions. This, of course, is not respect for the Supreme Court, even in the times when they approve the decisions. It is simply an undeviating respect which these men have for their own views of constitutional law.

2. Who Are The Innovators?

I do not think it is a bad thing that constitutional law should change and keep abreast of the times. I think it is a good thing. But without doubt the leaders of the bar whom I have quoted think it is a bad thing, at least when they like the

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2 Frank J. Hogan, Important Shifts in Constitutional Doctrines, 25 A.B.A.J. 629, 630, 638.

3 Wendell L. Willkie, The Court Is Now His, Saturday Evening Post, March 9, 1940, pp. 29,76.

earlier decisions better. Let us for the moment assume that they are right. Even on that assumption, I challenge their right to attack the Supreme Court by drawing a contrast between the "new court" and the "old court", or between what they call the "Roosevelt court" and what others would call the "Harding-Coolidge-Hoover court".

Mr. Willkie has made the most energetic attack of this nature. The title of his article sufficiently indicates its tone. It is called "The Court Is Now His." To show how thoroughly this new Court has undermined our constitutional structure, Mr. Willkie refers to 14 decisions of the Supreme Court, produced, he says "by a newly appointed group of judges". I think it worth while, in the interests of simple accuracy, to look at the specific decisions and to see who actually are the justices who made them.

Six of Mr. Willkie's 14 cases were decided by the Court before a single Justice had been appointed by President Roosevelt. The first of the T.V.A. cases,[4] two of the Labor Board cases,[5] the minimum wage case[6] and the social security cases,[7] were each de-

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4 Ashwander v. Valley Authority, 297 U.S. 288 (1936).

5 Labor Board v. Jones & Laughlin, 301 U.S. 1 (1937); Labor Board v. Clothing Co., 301 U. S. 58 (1937).

6 West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

7 Steward Machine Co. v. Davis, 301 U.S. 548 (1937); Helvering v. Davis, 301 U.S. 619 (1937).

cided by what has been called the "old court". In three of the remaining cases, only one Justice who had been appointed by the President, Mr. Justice Black, participated in the decision and his vote did not affect the result.[8] In four other cases, if one were to exclude entirely the votes of the Justices appointed by President Roosevelt, the majority would still have reached the same result.[9] This leaves just one case,[10] a comparatively unimportant application of the agricultural program, which was earlier sustained as to its general validity, in which the result was in any way affected by the votes of the Justices appointed by President Roosevelt; and in that case they were joined by Mr. Justice Stone, a Republican Attorney General and I may say, an admirable one, who had been appointed to the Court by President Coolidge.

To charge the Supreme Court, then, with overturning established principles and threatening orderly constitutional government because of the temper of the newly appointed Justices is grossly inaccurate. This, you will note, is not a matter of opinion but is a simple question of looking at the opinions and noting the Justices who participated.

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8 Alabama Power Co. v. Ickes, 302 U.S. 464 (1937); Duke Power Co. v. Greenwood County, 302 U.S. 485 (1937); Tennessee Power Co. v. T.V.A., 306 U.S. 118 (1939).

9 Graves v. O'Keefe, 306 U.S. 466 (1939); Labor Board v. Fainblatt, 306 U.S. 601 (1939); Mulford v. Smith, 307 U.S. 38 (1939); O'Malley v. Woodrough, 307 U.S. 271 (1939). Without one of the junior Justices there would not have been the statutory quorum of six, but their votes were unnecessary to produce a majority.

10 United States v. Rock Royal Co-op., 307 U.S. 533 (1939).

3. Constitutional Law Has Always Produced Overruled Decisions

But, except to keep the record clear, it is quite unimportant whether the recent trend in decisions was inaugurated by Justices appointed during the present or during former administrations. The only thing of consequence is whether this trend reflects wise or misguided, good or bad, constitutional law. Certainly, there is nothing in reason or in our judicial history which would require the Court to adhere to unfortunate constitutional decisions.

Obedience to the precedents is, of course, a rule which should ordinarily be followed. The rule has obvious advantages, particularly in the fields of private law which make up our day-to-day living. In those fields, if the rule proves unworkable the legislature can easily provide a new rule. But in the field of constitutional law there can be no legislative remedy for a bad rule.

This inability of the legislature to correct a bad decision on constitutional law is the explanation for the rule announced by Chief Justice Taney as long ago as 1849.[11] He said that he was--

> quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported.

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11 Dissenting, in The Passenger Cases, 7 How. 283 (1849).

Certainly the Court has consistently acted upon the principle that it should reexamine its constitutional decisions. Mr. Justice Brandeis in 1932 listed 33 cases in which the Supreme Court had overruled or sharply modified prior decisions of constitutional questions;[12] a highly competent commentator at about the same time discusses perhaps a hundred cases which represent a sharp reversal in attitude from those found in earlier cases.[13]

A few examples may illustrate the long practice of the Court in reversing its constitutional decisions. In 1825 the Court unanimously held that the maritime jurisdiction of the federal government extended only to waters in which there was an ebb and flow of the tide;[14] in 1851 the Court unanimously reversed itself because it considered the greatly expanded river and lake navigation to require a federal jurisdiction.[15] In 1908 and 1914 the Court held it unconstitutional for a legislature to forbid a yellow-dog contract;[16] in 1930, while not in terms overruling those cases, it held this was all right.[17] For more than 50 years, the Court had said that a state legislature could regulate prices only if the business was a

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[12] Dissenting, in Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407-408, 409.

[13] Sharp, Movement in Supreme Court Adjudication, 46 Harv. Law Rev. 361, 593, 795 (1933).

[14] The Thomas Jefferson, 10 Wheat. 428.

[15] The Genesee Chief, 12 How. 443, 530.

[16] Adair v. United States, 208 U.S. 161; Coppage v. Kansas, 236 U.S. 1.

[17] Texas & N. O. R. Co. v. Railway Clerks, 281 U.S. 548.

public utility, elegantly described by lawyers as a business "affected with a public interest".[18] But in 1934 it decided this was a mistake, and that the legislature could regulate prices wherever this was reasonable.[19]

The cases dealing with the power to regulate hours and wages of labor deserve special mention. In 1898 the Court ruled that a state could regulate the hours of labor of miners,[20] but in 1905 it held that the hours of bakers[21] could not be regulated. Yet in 1908 it hold that the hours of women, and in 1917 that the hours of all factory workers, could be regulated.[22] These decisions overruled the baker's case, but in 1923 the Court relied upon that case to hold that the minimum wages of women could not be regulated.[23] This case, in turn, was overruled in 1937.[24] Few, if any, of the lawyers who have objected to this last reversal have placed their protest on the ground that the Court was wrong, or have urged that the Constitution does in truth forbid setting minimum wages for women. Their complaint, then, seems to be simply that three reversals

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18 Since Munn v. Illinois, 94 U.S. 113 (1876).

19 Nebbia v. New York, 291 U. S. 502, 536.

20 Holden v. Hardy, 169 U. S. 366.

21 Lochner v. New York, 198 U.S. 45.

22 Muller v. Oregon, 208 U.S. 412; Bunting v. Oregon, 243 U.S. 426.

23 Adkins v. Children's Hospital, 261 U.S. 525.

24 West Coast Hotel Co. v. Parrish, 300 U.S. 379.

are good, but that a fourth--which carries the constitutional interpretation back to the original decision--is bad.

The continued willingness of the Supreme Court to reexamine its constitutional decisions should be a source of gratification for us all. For the men who framed our Constitution were careful to leave the powers and limitations expressed in very general language. They realized only too well that, as Justice Story said, in the ornate language of 1816, the Constitution "was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence."[25] Their whole purpose would be contradicted if the decisions interpreting the Constitution were to be placed beyond reexamination, and if Judges were to impose upon the Constitution an inflexible particularity which its framers were careful to avoid.

This, it is true, makes the lawyer's task a little difficult. He cannot, as the distinguished Liberty League lawyers discovered in 1937, categorically assure his clients that a statute is unconstitutional. This may be embarrassing for the lawyer and inconvenient for the client, but would be unthinkable if our basic law were to be immutably fixed simply by the decisions of the past. This would be particularly unfortunate since most of those decisions are based not upon the words of the Constitution but upon

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25 Martin v. Hunter's Lessee, 1 Wheat. 304, 326.

economic conditions and social attitudes which have long since vanished. To illustrate, the Supreme Court in 1895 accepted at least the result of the argument from which I now quote:[26]

> The act of Congress which we are impugning before you is communistic in its purposes and tendencies, and is defended here upon principles as communistic, socialistic--what shall I call them--populistic as ever have been addressed to any political assembly in the world.

The argument was made by one of the most distinguished counsel of his day, Joseph H. Choate. The legislation which induced this philippic was nothing more than our familiar income tax.

4. The Ultimate Question

There is, then, nothing to deplore in the simple fact that the Supreme Court has changed its mind about something that it once said about the Constitution. The only important thing is whether the decision is good or bad constitutional law; it is not important whether it is precisely the same constitutional law or somewhat different constitutional law than that earlier announced.

Whether the decision is good or bad constitutional law depends upon whether the Constitution permits or forbids the challenged legislation. This depends upon what the Constitution says. It is not a difficult document to read. James Madison, who had most to do with its drafting, was a college professor rather than a lawyer.[27] I have often thought our constitutional law might be more

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[26] Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 532.

[27] He obtained a law degree and was admitted to the bar but never practiced law. Dictionary of American Biography.

satisfactory if we had not allowed the Constitution to become the property of lawyers. It is probably too late to rescue the Constitution from the legal profession, but it is not too late to insist that the ultimate test of constitutionality is what the Constitution says, and not what the Supreme Court three, ten, or fifty years ago said about the Constitution.

But the Constitution makes its great grants of power, and imposes its great limitations upon the powers of government, in very broad language. So there will always be room for argument whether a statute, for example, does in truth "regulate commerce * * * among the several states". The courts will often, therefore, be faced with a constitutional problem which does not admit of solution by looking at the words of the Constitution. In that case, it has two other guides to decision. One is the previous decisions of the Supreme Court. The other is to look at the legislation in the light of the economic and social problems out of which it grew, and then to inquire whether its purpose or its effect is such that it is contradicted by the general outline of the government which was planned in 1787. Since it is a settled principle of constitutional law that legislation may be valid under some circumstances and invalid under others,[28] this second inquiry must always be at least as important as what the Court once thought about somewhat similar legislation.

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28 Chastleton Corp. v. Sinclair, 264 U.S. 543, 547-548 (1924); Home Bldg. & L. Assn. v. Blaisdell, 290 U.S. 398, 426, 442 (1934).

In the light of these easily understood and fundamental principles of constitutional law, I propose to look briefly at a few of the decisions which have been said to spell the doom of our "established conception of government,"[29] and to compare them with the earlier cases which they overruled or qualified.

First, we may look at the cases which arise under those few words of the Constitution which give Congress authority "to regulate commerce * * * among the several states." In 1918 the Court held that Congress could not forbid the movement in interstate commerce of goods made by child labor.[30] This meant, of course, that the high standards of Massachusetts could not be protected against child labor competition from low standard states. In 1936 the Court held that Congress could not insist upon the right of collective bargaining or authorize wage and labor regulations for the coal mining industry.[31] This meant that low-wage mines would constantly threaten the higher-wage, unionized mines in other areas. If these decisions have really been overruled, as I believe they have, I think we have returned to the plain meaning of the Constitution. If the power to regulate interstate commerce means anything it would seem certainly to include the power to regulate the competitive dangers which move in interstate

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29 Willkie, op. cit., supra, note 3.

30 Hammer v. Dagenhart, 247 U.S. 251.

31 Carter v. Carter Coal Co., 298 U.S. 238.

commerce from low standard states.

The Labor Board cases are those which are said to overrule these precedents. Let us look at those. In the first of the Labor Board cases, involving the Jones & Laughlin Steel Corporation, the Court held that Congress could act to prevent unfair labor practices by the Corporation which might stop the vast activities of iron mines, coal mines, railroads, and steamships, which fed raw material to the Pennsylvania mills and marketed the finished product throughout the nation. To say that the labor conditions in the steel mill were unrelated to interstate commerce would be, as Chief Justice Hughes said, "to shut our eyes to the plainest facts of national life", and to consider the constitutional questions "in an intellectual vacuum."[32] The other Labor Board cases[33] are simply application of this same principle to smaller plants, but in which the possible stoppage of interstate commerce in the case of a labor dispute would be equally clear.

Then, it is objected that the Court is remaking the old law of intergovernmental tax immunity. What are the old decisions that have been overruled? The first case which was overruled held that states could not tax the income of oil operators who happened

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32 Labor Board v. Jones & Laughlin, 301 U.S. 1, 41 (1937).

33 Labor Board v. Clothing Co., 301 U.S. 58 (1937); Labor Board v. Fainblatt, 306 U.S. 601 (1939).

to lease lands from Indians.[34] The reasoning of this case is intricate: the Indian is a federal ward, so the states cannot tax him; the man who leases his oil lands helps the Indian; therefore the states cannot tax him either. The result was ridiculous and needlessly diminished state revenues; I have heard no lawyer say it was wrongly overruled. The second overruled case held that federal employees could not be taxed on their salaries by the states and state employees could not be taxed by the United States.[35] But we all know that our work for our employer is not affected because, like all other citizens, we must pay a tax on our income to pay the costs of government. The third overruled case is one which held that a federal judge could not be forced to pay a tax on his salary because, in order to preserve his independence, the Constitution forbade a diminution of his salary.[36] It would take a very good logician to prove to most of us that an income tax is not a tax but a salary-cut, and nobody could make me believe that the legislature threatens the independence of a judge when it asks him to make the same contribution to the costs of government that every one else is making.

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34 Gillespie v. Oklahoma, 257 U.S. 501 (1921); overruled, together with Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932), in Helvering v. Mountain Producers Corp., 303 U.S. 376 (1938).

35 Collector v. Day, 11 Wall. 113 (1870); overruled, together with N.Y. ex rel. Rogers v. Graves, 299 U.S. 401 (1936) in Graves v. O'Keefe, 306 U.S. 466 (1939).

36 Miles v. Graham, 268 U.S. 501 (1925) overruled, and Evans v. Gore, 253 U.S. 245 (1920) discredited, in O'Malley v. Woodrough, 307 U.S. 277 (1939).

Again, it is feared that the Court is plucking at the roots of our nation because it has sustained several types of social legislation. I have already explained how the Court has again concluded that a state legislature does not "take life, liberty, or property, without due process of law" when it says that women cannot be employed for less than a living wage.[37]

Another object of alarm to the men who prefer an older day is the Social Security cases.[38] These sustained the power of the United States to impose a tax to pay old-age pensions and to induce states to set up unemployment insurance funds. It was abundantly proved that the states, because of insufficient resources and because of competition from low standard states, could not accomplish these ends by acting separately. The constitutional problem was whether the federal action was justified by the constitutional power to tax and to spend for the "general welfare." The Court, I think, could not have decided that this was not for the general welfare without making the words absolutely meaningless.

I cannot believe that these decisions mean that we now have a new body of constitutional law. But, if the older decisions really meant that all legislation of this nature was unconstitutional, then it seems to me high time that we disregard a

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37 West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

38 Steward Machine Co. v. Davis, 301 U.S. 548 (1937); Helvering v. Davis, 301 U.S. 619 (1937).

little of what earlier judges have said and return to the Constitution itself. Nothing in that great charter forbids the United States to deal with problems of commerce which are plainly national and not local; none of its provisions require that discriminatory exemptions from taxation be made; and I can find nothing in its clauses which says that the federal and state legislatures are to be incompetent to deal with their most urgent social problems. To object that the Supreme Court now, in contrast to its earlier decisions, recognizes these elementary propositions of constitutional law seems to me only to reflect on the Supreme Court decisions of a decade or two ago. If there has in fact been so great a change in our constitutional law, it is an occasion for profound thanks.

The right to criticize trends in the decisions of the Court I have claimed for myself and concede to all others. I wholly agree with Justice Brewer who said: "It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. * * * True, many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all."[39]

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39 Quoted in Frankfurter, Mr. Justice Holmes and the Supreme Court, p. 94.

It is probably impossible to write sensational articles for popular magazine with any very great regard for accuracy. It is probably also expedient, if one desires to discredit a court, to make a labored attack on cases in which he has no visible selfish interest. This is more appealing than to emphasize the critic's disappointment in cases in which he had an interest which the Court refused to sustain. But one may suspect that the utility holding company publicists are more largely embittered by the attitude of the Court on the utility cases. The Supreme Court has sustained the requirement of the Public Utility Holding Company Act that these companies register and reveal their financial operations.[40] It has sustained the constitutionality of the Tennessee Valley Authority and has rejected the contention that power generated by the Authority should be distributed only through privately owned and fancifully capitalized systems.[41] And the Court has sustained the right of the federal Public Works Administration to lend money in aid of municipal light plants.[42] All of these acts of Congress were sustained through the votes of Chief Justice Hughes, Mr. Justice Stone and Mr. Justice

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40 Electric Bond Co. v. Commission, 303 U.S. 419 (1938).

41 Ashwander v. Valley Authority, 297 U. S. 288 (1936); Tennessee Power Co. v. T. V. A., 306 U.S. 118 (1939).

42 Alabama Power Co. v. Ickes, 302 U.S. 464 (1937); Duke Power Co. v. Greenwood County, 302 U. S. 485 (1937).

Roberts, three eminent Republicans whose struggle for decent government long antedates the New Deal and who must be surprised to find the utility interests in a campaign to label them as creatures of President Roosevelt.

But the American people will not misunderstand the occasion for or the nature of this sudden attack upon the Supreme Court by spokesmen for the public utility interests. They will realize that the Court has never been more diligent in protecting the public interest and in preserving individual civil liberties. The people will give the Supreme Court a square deal. For it speaks again as the voice of a Constitution which, as Woodrow Wilson said "is not a mere lawyer's document; it is a vehicle of life, and its spirit is always the spirit of the age."