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THE UNITED STATES SUPREME COURT, 1936-1946*

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In order to analyze the trend of the United States Supreme Court from the beginning of its 1936 term in October, 1936, to the end of the 1945 term in June, 1946, it is first necessary to state the situation at the beginning of this period.

Before the pressure of our last great depression, the United States Supreme Court had found restrictions to exist upon the powers of the national government, and had found barriers against governmental power, both national and state. These barriers were found primarily in a small number of cases: *Ribnik v. McBride*, 277 U. S. 350 (1928), which restricted price regulation; *Hammer v. Dagenhart*, 247 U. S. 251 (1923), in which federal power was held not to extend to the shipment of child-made goods in interstate commerce; *Adkins v. Children's Hospital*, 261 U. S. 525 (1923), in which it was held that a statutory regulation of minimum wages for women was violative of due process of law; *Adair v. United States*, 208 U. S. 161 (1908) and *Coppage v. Kansas*, 236 U. S. 1 (1915), which sustained the so-called "yellow-dog" contract, and held that it was unconstitutional for either state or nation to forbid the employer's contracting that his employees should not belong to unions.

These opinions have now been overruled or explicitly disregarded and the Court has expressed the further opinions that state powers in no way restrict the powers granted to the nation; and that the national power to spend for the "general welfare of the United States" is not limited by the direct grants of legislative power found

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in the Constitution. Governmental powers have been enlarged, but at the same time federal power and control have been made dominant.

The condition of the depression led to much legislation, state and federal; and much of this legislation, particularly that of Congress, was enacted without adequate consideration. The Supreme Court sustained state legislation for price control (*Nebbia v. New York*, 291 U. S. 502, March 5, 1934), and mortgage moratorium legislation (*Home Building & Loan Association v. Blaisdell*, 290 U. S. 398, January 8, 1934). It also sustained federal gold clause legislation (*Norman v. B. & O. R. R. Co.*, 294 U. S. 240, February 18, 1935), and the Tennessee Valley Authority Act (*Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, February 17, 1936). With four dissents, the Railroad Retirement Act was held invalid (*Railroad Retirement Board v. Alton Railroad Company*, 295 U. S. 330, May 6, 1935). With three dissents, the Agricultural Adjustment Act was held invalid (*United States v. Butler*, 297 U. S. 1, January 6, 1936); and, with four dissents, the validity of the Bituminous Coal Conservation Act was denied (*Carter v. Carter Coal Co.*, 298 U. S. 238, May 18, 1936). Statutory adjustments were made with respect both to railroad retirement and bituminous coal.

But the most serious judicial blow to legislation of the depression was that of May 27, 1935, and this blow was struck by a unanimous Court. Upon that date two opinions were handed down. The opinion in *Schechter v. United States* (295 U. S. 495), with the opinion of the Court by Chief Justice Hughes and a concurring opinion by Mr. Justice Cardozo, substantially destroyed the National Industrial Recovery Act. Upon the same day, a unanimous Court joined in an opinion by Mr. Justice Brandeis which held invalid the original Frazier-Lemke Act with respect to farm mortgages (*Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555). These two cases probably had more influence than any others in bringing about President Roosevelt's recommendation of February 5, 1937, for the reorganization of the Supreme Court, although his recommendations would have had little effect upon the decisions of a unanimous Court.

The President's recommendations led to much discussion, and to hearings by the Committee on the Judiciary of the United States Senate running from March 10 to April 23, 1937, with an adverse report by that committee on June 14, 1937. It has fre-

quently been argued that the President's recommendation constituted a threat which forced a change in the attitude of the Court. No changes in the personnel of the Court occurred from January to June 1, 1937.

In addition to the adverse decisions in 1935 and 1936, the President's program was faced with two earlier decisions: *Hammer v. Dagenhart* (247 U. S. 251, June 3, 1918), and *Adkins v. Children's Hospital* (261 U. S. 525, April 9, 1923). Although *Hammer v. Dagenhart* was not specifically reversed until the Fair Labor Standards Act was sustained in *United States v. Darby Lumber Co.* (312 U. S. 100, 1941), Mr. Justice Stone was correct in saying in that opinion that the principle of the *Dagenhart* case was abandoned in *Kentucky Whip & Collar Co. v. Illinois Central R. R. Co.* (299 U. S. 334, January 4, 1937). The *Adkins* case was specifically overruled in *West Coast Hotel Co. v. Parrish* (300 U. S. 379, March 29, 1937).

The President's labor program was also faced by *Adair v. United States* (208 U. S. 161, 1908) and *Coppage v. Kansas* (236 U. S. 1, 1916). These decisions were disregarded in the Norris-LaGuardia and National Labor Relations Acts, which were sustained, but the force of the *Adair* and *Coppage* opinions was first said to be "sapped" in *Phelps Dodge Corporation v. National Labor Relations Board* (313 U. S. 177, 1941).

With reference to interstate commerce, the spring of 1937 produced two cases of importance, in addition to that of the *Kentucky Whip & Collar Co.* In *Virginian Ry. Co. v. System Federation* (300 U. S. 515, March 29, 1937), the Court held that the Railroad Labor Act applied to railway shop employees. And in *National Labor Relations Board v. Jones & Laughlin Steel Corporation* (301 U. S. 1, April 12, 1937), the Court, with four dissents, sustained the National Labor Relations Act. The opinion of Mr. Chief Justice Hughes constitutes the basis for a widened scope of national power over interstate commerce, although there were four dissents. On March 29, the Court unanimously sustained a revised Frazier-Lemke act as to farm mortgages, this act having previously been held invalid by a unanimous Court because of constitutional defects which were now removed (*Wright v. Mountain Trust Bank*, 300 U. S. 440, March 29, 1937).

On May 24, 1937, the Court sustained the Social Security Act with respect to unemployment compensation and old age benefits

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

There is no basis for the assertion that favorable opinions by the Court from January to June of 1937 were occasioned by the President's action, and there seems to be a fair degree of certainty that they were independent of such influence during the period when the membership of the Court remained unchanged. Such favorable decisions were before June, 1937, and laid the basis for subsequent developments in the extension of governmental power over industry, and in the expansion of federal authority through unlimited spending and interstate commerce powers. The foundation was fully established for the recognition of federal power to prescribe quotas of farm production for the farmer's use on his own farm (*Wickard v. Filburn*, 317 U. S. 111, 1942), and for federal control of insurance (*United States v. South Eastern Underwriters Association*, 322 U. S. 533, 1944).

The tendencies toward greater governmental regulation and toward greater federal regulatory power find basis in changed economic and social conditions which make greater regulation necessary, and which make national problems which were once local. The trend toward unrestricted national power finds basis primarily in the commerce clause and in the taxing and spending powers.

Federal dominance has been strengthened also by the Court's emphasis upon the power of Congress to exempt from state and local taxation the business of a federal agency common to private capital (*Pittman v. Home Owners' Loan Corporation*, 308 U. S. 21, 1939; *Maricopa County v. Valley National Bank*, 318 U. S. 357, 1943); and the power of Congress to tax the business of a state agency engaged in "enterprises generally pursued" (*State of New York v. United States*, 66 S. Ct. 310, January 14, 1946). The position of the Supreme Court lays the foundation for the much-urged federal taxation of state and local bonds, while continuing the exemption of federal bonds from state and local taxation. It is argued that the states are protected from abuse by virtue of their representation in the two houses of Congress, but this ignores the fact that our political system is organized on a federal basis.

With reference to state taxation of intangibles, the Supreme Court has made a vital change, which purports to be for the advantage of the states. Beginning in 1929, the Supreme Court took the view that for two or more states to tax intangibles was violative

of due process of law (*Safe Deposit & Trust Co. v. Virginia*, 280 U. S. 83). Although he did not dissent in this case, Mr. Justice Stone opposed the principle, and, with changed personnel of the Court, he was able, in 1939, to obtain the adoption of the principle that every state could tax the same intangibles if "within the reach of the tax-gatherer there" (*Curry v. McCannless*, 307 U. S. 357, 1939). This principle was strengthened in *State Tax Commission of Utah v. Aldrich*, 316 U. S. 174 (1942), and was in 1944 substantially adopted as to moveable tangibles, with strong dissent by Mr. Chief Justice Stone (*Northwest Airlines v. State of Minnesota*, 322 U. S. 292). Multiple taxation gives more than one state an opportunity to tax the same property, but creates a confusion which the national government must meet, or which the states must adjust by reciprocal legislation. With respect to intangibles, such legislation is now in force in a number of states.

The "full faith and credit" clause was put into the constitution for the benefit of the states, and this is properly so stated in *Magnolia Petroleum Co. v. Hunt* (320 U. S. 430, 1943); but the statement is accompanied by an opinion prejudicial to the administration of state workmen's compensation laws. Such results encourage a movement to have workmen's compensation transferred to the federal government. However, with respect to divorces, an opinion favorable to the states was rendered in *Williams v. State of North Carolina* (325 U. S. 226, 1945).

With reference to federal and state relations, expansion of federal authority in the period under review is also found in *Screws v. United States* (325 U. S. 91, 1945), which takes the view that federal control applies to state officers acting in their capacities as state officers; and in *United States v. Classic* (313 U. S. 299, 1941) and *Smith v. Allwright* (321 U. S. 649, 1944) with respect to the conduct of primary elections.

The Second World War constituted an essential element in the work of the Supreme Court, and it may be said that the Court exercised its authority efficiently, being less restrictive than in the First World War in its construction of the Espionage Act and in its view as to freedom of speech. Although the Court sustained all necessary actions in support of the war, including price control, the use of court martial, and the use of Japanese concentration camps, it took a liberal view in the first definition of treason, and in protecting civil rights, although there may be some doubt as to its

view with respect to the punishment of Japanese military officers.

Freedom of the press, of speech, and of religion have occupied a large part of the Court's time during the past ten years, the freedom of speech and religion centering on "Jehovah's Witnesses," and the most striking element being the sustaining of salute to the flag in *Minersville School District v. Gobitis* (310 U. S. 586, 1940), and the reversal of the *Gobitis* case in *West Virginia State Board of Education v. Barnette* (319 U. S. 624, 1943). Aside from this, the most striking development is that which permits the exercise of these freedoms upon private property (*Murdock v. Commonwealth of Pennsylvania*, 319 U. S. 105, 1943; *Marsh v. State of Alabama*, 66 S. Ct. 276, 1946). With respect to freedom of the press, the Court has recently adopted a wide view in regard to criticisms of the courts (*Pennekamp v. State of Florida* (66 S. Ct. 1029, 1946)). Freedom of labor has also been broadly recognized, although at least one member of the Court doubts whether equal freedom has been given to employers.

The present Court is liberal with respect to civil rights and federal powers, although the foundation for its present position was largely laid before the change in the Court's personnel, which began with the October term of 1937. With its new personnel, it has performed its duties, but with little that requires great attention here. But the numerous concurring and dissenting opinions exceed those of other days, often add nothing to the case, and imply ignorance of a possible paper shortage upon the part of members of the Court.

It is of importance for us to consider the influence of opinions during the past ten years upon the scope of governmental powers and upon the respective powers of the national government and of the states. With the development of present social and economic conditions and modern methods of transportation and communication, the functions of government have steadily increased. From before birth until after death, each individual is today subject to governmental regulation in almost every detail, either for his own protection or for the protection of others.

Judicial constructions have removed constitutional restrictions once determined to exist. Changed conditions bring a changed application, and this is essential in our national constitution, which deals with generalities and not with details. This development is not new. In 1825, Justice Story, one of the ablest of our legal scholars, held that admiralty jurisdiction applied only to tidal waters

(*The Thomas Jefferson*, 10 Wheat. 428), and in 1851, Chief Justice Taney held that it applied to navigable waters, including the Lakes (*Genesee Chief v. Fitzhugh*, 12 How. 443). Essential changes with respect to price regulation, the problems of labor, and the scope of interstate commerce have come during the past ten years and in periods slightly before.

The functions of the nation and of the states and municipal bodies are greater than ever before, and are constantly increasing. With respect to the manner in which these functions are to be performed, and the extent to which they are to be performed or controlled by the national government, we must look to the constitution of the United States, and also to the conditions which may determine whether the national government will undertake duties which may now be in the hands of state or local governments. Many of the functions which may be assumed by national authority are of a character better administered by more local authority. Many require joint action.

Under our constitution, states will continue their importance as units in a political organization, although their importance as individual units is controlled by national party organizations. Their share in electing the president and members of the two houses of Congress, and in the adoption of constitutional amendments, together with their equality of power, are fundamental in our constitutional system. It is required that they maintain a republican form of government, but preservation of such a form does not rest with the courts (*Coleman v. Miller*, 307 U. S. 433). This is indicated in recent cases from Illinois and Georgia (*Colegrove v. Green*, 66 S. Ct. 1198, 1946; *Cook v. Turman*, 67 S. Ct. 21, 1946). But primary elections have been held to be within judicial protection (*United States v. Classic*, 313 U. S. 299, 1941); *Smith v. Allwright*, 321 U. S. 649, 1944); and the Fourteenth Amendment has recently been construed to authorize a federal statute punishing a state officer for violation of a state law (*Screws v. United States*, 325 U. S. 91, 1945). Moreover, the United States Supreme Court has so construed the Fourteenth Amendment as to bring freedom of religion, of speech, and of the press, and of assembly and petition, within the standards set by that Court. Such a position could not have been taken before the Fourteenth Amendment (1868); and, in 1907, in a case involving freedom of speech and of the press, Mr. Justice Holmes said for the Court: "We leave undecided the question

whether there is to be found in the 14th Amendment a prohibition similar to that in the 1st" (*Patterson v. Colorado*, 205 U. S. 454). The last effort to leave an issue of civil liberties to the states was unsuccessfully made by Mr. Justice Frankfurter with respect to the salutation of the national flag in public schools (*Minersville School District v. Gobitis*, 310 U. S. 586, 1940). The states are important units in the federal system, but the standards of their political action are now largely subject to federal control.

During the whole period of our constitutional history, there has been an increasing activity by our national government, and an expansion of judicial construction of the powers of that government. During the past ten years, we have had judicial decisions which give a supremacy to the national government, primarily through the instrumentality of the commerce, taxing, and spending powers of that government.

The power of Congress to regulate interstate commerce has now come to be applied to the farmer's feeding of cattle upon his farm (*Wickard v. Filburn*, 317 U. S. 111, 1942); industrial homework in the embroideries industry (*Gemsco v. Walling*, 324 U. S. 244); and window-washing in a building producing goods for interstate commerce (*Martino v. Michigan Window Cleaning Co.*, 66 S. Ct. 379). And such transactions now have a relation to commerce.

The federal taxing power presents a means of controlling state policy, not frequently used, but used in issues of importance. By permitting a credit not exceeding eighty per cent of a federal estate tax for the amount of a similar tax actually paid to any state, the national government forced inheritance taxes in all states (*Florida v. Mellon*, 273 U. S. 12, involving an act of 1926). The Social Security Act of 1935 imposed a federal tax for unemployment compensation, with a credit not exceeding ninety per cent to the taxpayer for payment of a state tax under a state law approved by the national authority. Unemployment compensation soon became an institution in all states—Mr. Justice Cardozo saying for the Court, with the approval of Mr. Justice Sutherland, that it was by persuasion, not coercion (*Steward Machine Co. v. Davis*, 301 U. S. 548, 1937).

The most controlling power of the national government is that of expenditure for the "general welfare of the United States." The national government has financed the cost of administering state unemployment compensation acts, and has supervised that administration.

Although the case of *United States v. Butler* (297 U. S. 1, 1936) was adverse to the Agricultural Adjustment Act, it did hold that "the power of Congress to authorize the expenditure of public money for public purposes is not limited by the direct grants of legislative power found in the constitution." Discretion rests with Congress as to what is the general welfare (*Helvering v. Davis*, 301 U. S. 619, 1937); and neither a state nor an individual has a sufficient interest to contest the validity of expenditures by the United States (*Massachusetts v. Mellon*, 262 U. S. 447, 1923).

The powers granted to the national government are broadly granted and are unrestricted. During the past ten years, the United States Supreme Court has removed substantially all restrictions that previously existed. Efforts had been made for a number of years to find the existence of restrictions in the Tenth Amendment, but such efforts have ended by Mr. Justice Stone's statement for a unanimous Court in *United States v. Darby Lumber Co.* (312 U. S. 100, 1941) that "the amendment states but a truism that all is retained which has not been surrendered." The scope of national authority has become a question of governmental policy, and has substantially ceased to be one of constitutional law.

Of the national powers, the one most closely related to state and local governments is the power to expend for the "general welfare of the United States;" and this power has naturally been most important since the use of the flexible income tax. The states, both directly and through their representation in Congress, are most anxious to obtain federal subsidies, and are the most critical of such subsidies; for the hand that rules the purse-strings rules the nation.

The use of federal money in aid of what are regarded as state and local problems will increase rather than lessen. Congress has recently passed the National School Lunch Act, and this is but a step toward federal aid in establishing uniform efficiency in the public school system throughout the country. In a case involving the city of Cleveland (323 U. S. 329, 1945), the Court has recently sustained the federal low-rent housing program; but much greater support of the national government is necessary if there is to be a clearance of slums in our cities. With reference to federal expenditures for such purposes, it is complained that federal taxes in one state are much heavier than in another; but something of financial balance is obtained by the fact that the states whose cities need aid in slum clearance are not the ones which need public school aid, or which now receive greater aid in the financing of old-age assistance.

Coöperation is essential between the national government and states and local governments. More satisfactory coöperation among the several states is also necessary if they are to continue to exercise certain powers.

Commercial discriminations by one state against another forced the adoption of the Constitution, with its grant of power to Congress to regulate interstate and foreign commerce, and with its numerous specific restrictions upon state discriminations. But, in the absence of federal action, some possibilities of discrimination have remained, and it is natural that a state has sought to discriminate to its own advantage. For example, dairying states have promoted state and federal legislation to discourage the use of margarine. Cotton oil, the chief ingredient of margarine, is a product of cotton states, which naturally seek to retaliate. New York sought unsuccessfully to control the wholesale price of Vermont dairy products that were to be sold in New York. Local freight rates were sought to be established in Texas much lower than the rates to competing cities just beyond the borders of the state. Today many states have laws which hinder the free movement of farm products from other states; and state trucking legislation is in many respects discriminatory against trucks from other states.

State governments and their local units do more now than ever before, and cost more in proportion. But they have not developed an efficiency in accord with their increased functions and increased costs. In the field of local government, this efficiency can be accomplished only by a reduction in number and improvement in organization of local governing units which today largely find basis in conditions of more than one hundred years ago.

Where national coöperation or national supervision is necessary, it can be so arranged that it will not dominate state or local administration. But if this is to be done, state and local governments must show that they can perform their duties equally as well as, or better than, a single centralized governmental agency. In some cases, transfers of administrative control to Washington have been forced by state inefficiency. The citizen, who is at the same time a citizen of local governments and of state and nation, must exercise his rights as a citizen so as to obtain efficiency in state and local governments. If he succeeds, he can have little fear of reduction in importance of state and local governments. The most intimate duty

is that of the citizen in the community in which he lives, but that duty is equally one as a citizen of the United States.

The citizen's most intimate contact is with regulation by his local governments, and by his state acting to a large extent through local governments. Regulation by the national government is more remote, as is contact with the agencies which enforce such regulation, although in some respects such contact has become and still remains intimate. Popular control must, however, to a large extent, operate upon the governments which are nearest to the individual, and the preservation of such control is dependent upon the maintenance of a substantial degree of independence in the state and local governments. Popular influence upon such governments is of little weight if they are dominated by instructions from the national capital.

The citizen can preserve a democratic national government through the preservation of efficient and democratic state and local governments, but he cannot preserve efficient and democratic state and local governments through the more remote influence which he may exercise as a citizen of the nation. A democratic system must rest primarily upon intimate relations with governments which are nearer to the home and more subject to intimate contact and control as a part of the citizen's daily life. He must and will have a sense of responsibility with respect to local policies and their accomplishment; and this feeling of individual responsibility must be preserved as a part of our governmental system. Such a relationship may be retained without interfering with the duties of national citizenship or with the functions of our national government, and without restricting the continued growth of such functions in fields which become national with the more intimate contacts from ocean to ocean through our still-developing methods of transportation and communication.

State and local governments must survive if we are to preserve our form of government; and they will survive if efficiently organized and administered, and if the states cooperate efficiently instead of seeking to discriminate against each other.