The Changing Rôle of the United States Supreme Court

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Dr. Friedmann has recently called attention to "the fundamental changes of legal ideology reflected in the jurisdiction of the Supreme Court of the United States during the past ten years".[1] That such changes have occurred must be evident to anyone who has observed the work of that tribunal. What is perhaps not so apparent to the British observer is the extent of the change, which has been characterized by a leading constitutional lawyer as "Constitutional Revolution, Ltd."[2]

To the outsider, the most striking feature of the American constitutional system is the doctrine of judicial supremacy.[3] Under that doctrine, it has been the Supreme Court that has determined conflicts between acts of government and the Constitution and it has done so through the technical forms of the lawsuit. "These lawsuits are the chief instruments of power in our system. Struggles over power that in Europe call out regiments of troops, in America call out regiments of lawyers".[4]

It is precisely this aspect of the American system — what has been termed "government by lawsuit"[5] — that is most difficult for the non-American to comprehend. In February 1935, the Supreme Court, by a bare majority, in effect upheld the power of the Congress to lower the gold content of the dollar.[6] The holder of a railroad bond bearing an interest coupon payable in gold of face value of $22.50, which had been issued before the gold content of the dollar had been lowered, demanded $36.10 in payment after devaluation, but the Court held that he was required to accept the face value of the coupon in the new dollars.

[1] Book Review (1948), 64 L.Q.R. 545, at p. 547.
[2] Corwin, Constitutional Revolution, Ltd. (1941).
[3] See 1 Bryce, The American Commonwealth (1889 ed.) 237.
[4] Jackson, The Struggle for Judicial Supremacy (1941) xi.
[5] *Idem.*, at p. 286.
[6] *Norman* v. *Baltimore & O. R. Co.* (1935), 294 U.S. 240.

When Robert H. Jackson, now a member of the Supreme Court, went abroad that summer, he was asked by Swedish lawyers and bankers: "How could you Americans let your national monetary and economic policy be dependent on the outcome of a lawsuit between private parties over a difference of $15.60? How could American business intelligently function while such basic questions were pending in the Court? Why could you not learn the answer earlier? Why should within one of a majority of your court hold that a private contract between two citizens should deprive the nation of power to change its monetary policy? And why, anyway, should lawyer-judges be supreme over the national parliament, the President, the Treasury, and the whole government in a matter so vital to economic life?"[7]

The doctrine of judicial supremacy did not come into being full-grown upon the establishment of the American Republic. Through most of the first century under the Constitution, important questions of national governmental power were settled in the Cabinet and on the floors of Congress. "The fact of the matter is that judicial review as exercised by the United States Supreme Court did not become an important factor of national legislative power till about 1890 and to a lesser degree this is so even as to state legislative power. And in both instances the augmentation of the Court's role was the outgrowth of its acceptance of the laissez-faire theory of governmental function."[8]

The classic case illustrating the approach of the Supreme Court during the period from 1890 to 1937 in cases involving judicial review of legislative action is *Lochner* v. *New York*,[9] in which the constitutionality of a statute fixing maximum hours for bakers furnished the issue. In holding the statute invalid, Mr. Justice Peckham, speaking for the majority of the Court, stated the question to be determined in this class of cases as follows:

> In every case that comes before this court . . . where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?[10]

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[7] Jackson, *op. cit.* footnote 4, at p. 103.
[8] Corwin, *op cit.* footnote 2, at p. 10.
[9] (1905), 198 U.S. 45.
[10] *Idem.*, at p. 56.

In applying a test as vague and indefinite as this — *i.e.*, is the statute unreasonable, unnecessary, and arbitrary?— was not the Court virtually exercising the functions of a "super-legislature",[11] in effect determining upon its own judgment whether particular legislation was desirable? This was, however, vigorously denied by the Court in the *Lochner* case. "This is not a question of substituting the judgment of the court for that of the legislature."[12] The Court's function was seen to be simply that of interpreting the law.[13] "It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty,— to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."[14]

How does this view of the Court's function square with the result in the *Lochner* case? There is nothing in the Constitution which provides that there shall be no power to regulate hours of labour. Such a prohibition is, however, deduced from the due process clause of the Fifth and Fourteenth Amendments. "The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment. . . . Under that provision no state can deprive any person of life, liberty, or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment."[15]

The statute at issue in the *Lochner* case was thus held invalid on the ground of deprivation of freedom of contract. "What is this freedom?" asks Mr. Chief Justice Hughes in a later case. "The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Con-

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[11] The characterization of Brandeis J., dissenting, in *Burns Baking Co.* v. *Bryan* (1924), 264 U.S. 504, at p. 534.
[12] 198 U.S. at p. 56.
[13] See 1 Bryce, The American Commonwealth, 247.
[14] *United States* v. *Butler* (1936), 297 U.S. 1, at p. 62.
[15] 198 U.S. at p. 53.

stitution does not recognize an absolute and uncontrollable liberty."[16] It would appear that the *Lochner* Court was reading its own notion of freedom from government restraints into the due process clause — a notion derived from the then-dominant laissez-faire theory of governmental function. That notion is, to say the least, somewhat outmoded at the present day. "There is grim irony in speaking of the freedom of contract of those who, because of their economic necessities, give their service for less than is needful to keep body and soul together."[17] As stated by a Justice of the High Court of Australia, the doctrine of modern economists of all schools is that "freedom of contract is a misnomer as applied to a contract between an employer and an ordinary employee".[18]

Even at the time of the *Lochner* case, Mr. Justice Holmes, dissenting, could assert: "This case is decided upon an economic theory which a large part of the country does not entertain".[19] Today, that theory has been repudiated by the entire Supreme Court. But the present Court has done more than reject the economic doctrine behind the *Lochner* decision. It has, in effect, shifted the balance which had previously existed between the Court and the other branches of the Government. The primacy of the Supreme Court which had prevailed under the 1890-1936 interpretation of the doctrine of judicial supremacy has been replaced by a more subdued position. In this respect, the present court has more or less adopted the view of Mr. Justice Holmes as to what its function should be *vis-à-vis* the legislature. The Holmesian view is pithily expressed in his comment to Chief Justice Stone: "About seventy-five years ago I learned that I was not God. And so, when the people of the various states want to do something I can't find anything in the Constitution expressly forbidding them to do, I say, whether I like it or not, 'Goddammit, let 'em do it!'"[20]

In this comment is expressed the essence of the doctrine of judicial self-restraint which prevails among the present Court. Unless the statute in issue violates an express constitutional provision, it will be held constitutional. Clearly, under such a view, there is no place for extreme concepts such as absolute freedom of contract, about which the Constitution says nothing.

[16] *West Coast Hotel Co.* v. *Parrish* (1937), 300 U.S. 379, at p. 391.
[17] Stone J., dissenting, in *Morehead* v. *New York ex rel. Tipaldo* (1936), 298 U.S. 587, at p. 632.
[18] Higgins, A New Province for Law and Order (1915), 29 Harv. L. Rev. 13, at p. 25. Compare (1949), 65 L.Q.R. 293.
[19] 196 U.S. at p. 75.
[20] Quoted in Curtis, Lions under the Throne (1947) 281.

According to Justice Holmes, a statute should not be held invalid "unless it can be said that a rational and fair man necessarily would admit that the statute proposal would infringe fundamental principles as they have been understood by the traditions of our people and our law".[21]

In the Holmesian view, the test to be applied is whether a rational legislator — the Congressional version of the "reasonable man"— could have adopted a statute like that at issue. Is the statute as applied so clearly arbitrary or capricious that legislators acting reasonably could not have believed it to be necessary or appropriate for the public welfare?[22] But, under this approach, which the present Court has adopted, the Court has very rarely had occasion to declare statutes unconstitutional. Under the *Lochner* decision, it will be recalled, the test was whether the Court itself thought the statute was reasonable. Now, the Court looks only to see whether there was a rational basis for the legislative action. The difference here is similar in kind, though not in degree, to that between the "objective" and "subjective" tests as to existence of reasonable cause which were at issue in *Liversidge* v. *Anderson*.[23] Under the *Lochner* case, the reasonableness of a statute was determined as an objective fact by the Court on its own independent judgment. Today a more subjective test is applied — though not nearly as extreme as that in the *Liversidge* case — *i.e.*, could rational legislators have regarded the statute as a reasonable method of reaching the desired result?[24]

A court which applies the more subjective test of constitutionality should, as a practical matter, not invalidate statutes very often, for there is almost always some rational basis for a statute. If such a basis is found, the statute must be upheld unless it contravenes an express prohibition of the Constitution. And the latter case is not a common occurrence, especially in so far as federal statutes are concerned.

This analysis is confirmed by the manner in which the present Supreme Court has dealt with cases of claimed unconstitutionality. Perhaps the outstanding characteristic of the Court today is the restraint with which it exercises judicial review in dealing

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[21] 198 U.S. at p. 76.

[22] Brandeis J., dissenting, in *Burns Baking Co.* v. *Bryan* (1924), 264 U.S. 504, at p. 534.

[23] [1942] A.C. 206. See Schwartz, Law and the Executive in Britain (1949) 330.

[24] Holmes J., dissenting, in *Meyer* v. *Nebraska* (1923), 262 U.S. 390, at p. 412.

with acts of Congress.[25] As stated by Mr. Justice Frankfurter: "It is not for us to find unconstitutionality in what Congress enacted although it may imply notions that are abhorrent to us as individuals or policies we deem harmful to the country's well-being. . . . Particularly when Congressional legislation is under scrutiny, every rational trail must be pursued to prevent collision between Congress and Court. For Congress can readily mend its ways, or the people may express disapproval by choosing different representatives. But a decree of unconstitutionality by this Court is fraught with consequences so enduring and far-reaching as to be avoided unless no choice is left in reason."[26]

Since 1937, in only one case — *United States* v. *Lovett*[27] — has an act of Congress been declared unconstitutional. The respondents in the *Lovett* case were three federal employees who had been working for the Government for several years. The government agencies which had lawfully employed them were fully satisfied with the quality of their work and wished to keep them employed on their jobs. They had, however, been reported as "unfit" to continue in government service and guilty of "subversive activities" by a committee of the House of Representatives. When the two agencies employing these men refused to discharge them, the House adopted a rider to the 1943 deficiency appropriation act forbidding the use of money appropriated in the statute to pay respondents' salaries. The Senate refused to adopt this rider six times, but finally under pressure of the close of the fiscal year concurred in a compromise which provided that after November 15th, 1943, no salary or compensation should be paid respondents out of any moneys then or thereafter appropriated, unless the President again appointed them to jobs and the Senate confirmed them. President Roosevelt, unable to veto the rider without killing the entire act, signed it with the following statement: "The Senate yielded, as I have been forced to yield, to avoid delaying our conduct of the war. But I cannot so yield without placing on record my view that this provision is not only unwise and discriminatory, but unconstitutional."

The Supreme Court agreed with the President on this point. "We hold that §304 falls precisely within the category of congressional actions which the Constitution barred by providing that 'No Bill of Attainder . . . shall be passed'."[28] A bill of attainder,

[25] Fellman, Recent Tendencies in Civil Liberties Decisions of the Supreme Court (1949), 34 Corn. L.Q. 331, at p. 332.
[26] *United States* v. *Lovett* (1946), 328 U.S. 303, at p. 319.
[27] (1946), 328 U.S. 303.
[28] *Idem.*, at p. 315.

said the Court in an earlier case which was cited with approval, "is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties." [29] According to Mr. Justice Black, who delivered the opinion in the *Lovett* case, the instant rider to the appropriations act came within this definition.

"Section 304 . . . clearly accomplishes the punishment of named individuals without a judicial trial. The fact that the punishment is inflicted through the instrumentality of an Act specifically cutting off the pay of certain named individuals found guilty of disloyalty, makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal. No one would think that Congress could have passed a valid law, stating that after investigation it had found Lovett, Dodd and Watson 'guilty' of the crime of engaging in 'subversive activities', . . . and sentenced them to perpetual exclusion from any government employment. Section 304, while it does not use that language, accomplished that result. The effect was to inflict punishment without the safeguards of a judicial trial and 'determined by no previous law or fixed rule'. The Constitution declares that that cannot be done either by a State or by the United States. . . . Much as we regret to declare that an Act of Congress violates the Constitution, we have no alternative here." [30]

As has been stated, the statutory provision at issue in the *Lovett* case is the only Congressional act which has been declared unconstitutional by the present Supreme Court. And that provision, as interpreted by the Court, was seen to violate the express constitutional prohibition against bills of attainder. Unless there is an express constitutional prohibition of this character which is contravened, the present Court will not invalidate challenged legislation. It may be going too far to conclude from this, as one commentator did, that "the scope of national authority has become a question of governmental policy, and has substantially ceased to be one of constitutional law". [31] But the attitude of the Court today with regard to its power to declare

[29] *Cummings* v. *Missouri* (U.S. 1866), 4 Wall. 277, at p. 323. It should be noted that this differs from the common-law concept of attainder, under which a judgment of death was necessary to attaint and the consequences of attainder were forfeiture and corruption of blood. See 1 Chitty, Criminal Law (1836 ed.) 724.

[30] 328 U.S. at pp. 316, 318.

[31] Dodd, The United States Supreme Court, 1936-1946 (1947), 41 Am. Pol. Sci. Rev. 1, at p. 9.

statutes unconstitutional certainly represents a drastic change from that of its predecessors. No longer can the Court be accused of exercising the functions of a super-legislature, which passes upon the desirability of legislation according to its own notions of reasonableness. If anything, the pendulum has swung to the opposite extreme. As expressed by a member of the present Court, the determination of whether particular legislation is desirable is not for the Court. "A century and a half of constitutional history and government admonishes this Court to leave that choice to the elected legislative representatives of the people themselves, where it properly belongs both on democratic principles and the requirements of efficient government." [32]

As a practical matter, then, the Supreme Court has largely abandoned its rôle as controller of Congress. The reluctance to exercise the most striking feature of its jurisdiction does not, however, mean that the Court does not still exercise important constitutional functions. With regard to certain of its functions, indeed — notably those involving the safeguarding of civil liberties — the present Court has gone much further than any of its predecessors in the direction of asserting its jurisdiction. Much of the Court's work in this respect has involved a supervisory power over the action of state legislative and executive officials.

American constitutional law, as Lord Bryce pointed out, is complicated by the fact that "the United States is a federation of commonwealths, each of which has its own constitution and laws. The Federal Constitution not only gives certain powers to Congress, as the national legislature, but recognizes certain powers in the States, in virtue whereof their respective peoples have enacted fundamental State laws (the State constitutions) and have enabled their respective legislatures to pass State statutes. However, as the nation takes precedence of the States, the Federal Constitution, which is the supreme law of the land everywhere, and the statutes duly made by Congress under it, are preferred to all State constitutions and statutes; and if any conflict arises between them, the latter must give way." [33] It is the Supreme Court which determines whether there is such a conflict in particular cases. The importance of the Court's rôle as arbiter of the federal system was well-stated by Mr. Justice Holmes:

> I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be

[32] Black J., dissenting, in *Southern Pacific Co.* v. *Arizona* (1945), 325 U.S. 761, at p. 789.

[33] 1 Bryce, The American Commonwealth, 242.

> imperiled if we could not make that declaration as to the laws of the several states. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end.[34]

The cases involving the exercise of the Court's function of striking a balance between national and state authority which have arisen before the present Court have in the main involved claimed interferences by the states with interstate commerce. These have been of two kinds, those concerned with state taxes which were unduly burdensome upon interstate commerce and those dealing with state regulatory measures which hindered the free flow of commerce between the states. It should not be forgotten that one of the principal reasons for the growth and continued prosperity of American industry has been the existence of a continental market, unobstructed by local tariffs and customs regulations. The work of the Court in this respect ensures that national commerce will continue free from crippling state interference. "It is essential today, as at the time of the adoption of the Constitution, that commerce among the States and with foreign nations be left free from discriminatory and retaliatory burdens imposed by the States."[35]

As an illustration of the Court's vital task of preserving interstate commerce from state obstructions, we can take *Southern Pacific Co.* v. *Arizona.*[36] That case involved an Arizona train limit law which made it unlawful for any person or corporation to operate within the state a railroad train of more than fourteen passenger or seventy freight cars in length. This statute, said the Court, "imposes a serious burden on the interstate commerce conducted by appellant. It materially impedes the movement of appellant's interstate trains through that state and interposes as ubstantial obstruction to the national policy proclaimed by Congress to promote adequate, economical and efficient railway transportation service."[37] It should be obvious that such state statutes would seriously impede interstate rail traffic, for the carrier might have to conform to "a crazy-quilt of State laws"[38] which imposed different regulations in each state. "Compliance with a state statute limiting train lengths requires interstate trains of a length lawful in other states to be broken up and reconstituted as they enter each state according as it may impose

[34] Quoted in Pritchett, The Roosevelt Court (1948) 82.
[35] *Gwin*, etc., *Inc.* v. *Henneford* (1939), 305 U.S. 434, at p. 455.
[36] (1945), 325 U.S. 761.
[37] *Idem.*, at p. 773.
[38] Frankfurter J., concurring, in *Morgan* v. *Virginia* (1946), 328 U.S. 373, at p. 388.

varying limitations upon train lengths. The alternative is for the carrier to conform to the lowest train limit restriction of any of the states through which its trains pass, whose laws thus control the carriers' operations both within and without the regulating state."[39]

It is interesting to note that the doctrine of the *Southern Pacific* case was applied the next year to a Virginia statute which required all motor vehicle carriers, both interstate and intrastate, to separate the white and colored passengers in their motor buses travelling in the state. "It seems clear to us", said Mr. Justice Reed, "that seating arrangements for the different races in interstate motor travel require a single, uniform rule to promote and protect national travel. Consequently, we hold the Virginia statute in controversy invalid."[40]

Cases like the *Southern Pacific* case are illustrative of the Supreme Court's function in holding state authority within the limits of the federal system. Of even more importance, perhaps, has been the Court's rôle in the safeguarding of civil liberties. It is in its performance of this function more than in any other respect that the present Court has differed from its predecessors. While most of the work of previous Courts had concerned the protection of *property* rights as against what were conceived of as legislative and executive violations of due process, in the present Court the emphasis has shifted to *personal* rights. If, in 1921, a federal judge could assert "that of the three fundamental principles which underlie government, and for which government exists, the protection of life, liberty, and property, the chief of these is property",[41] the judicial emphasis today has shifted in favour of the other two. Thus, the Court has stressed the "preferred place given in our scheme" to the personal liberties protected by the Bill of Rights. "That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions."[42]

The civil liberties cases which have been decided by the present Court have generally involved the protection of the specific rights safeguarded in the Bill of Rights which are contained in the first eight amendments to the Constitution. Those amendments prohibit Congress from making any law respecting an establishment of religion, or prohibiting the free exercise thereof;

[39] 325 U.S. at p. 773.
[40] *Morgan* v. *Virginia* (1946), 328 U.S. 373, at p. 386.
[41] *Children's Hospital* v. *Adkins* (1921), 284 Fed. 613, at p. 622 (App. D.C.)
[42] *Thomas* v. *Collins* (1945), 323 U.S. 516, at p. 530. But compare Frankfurter J., concurring, in *Kovacs* v. *Cooper* (1949), 336 U.S. 77, 89. See Freund, On Understanding the Supreme Court (1949) 10-16.

or abridging freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. They prohibit violation of the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizure. They preserve the right to be held to answer for an infamous crime only on indictment by a grand jury, prohibit double jeopardy for the same offence, and compulsory self-incrimination. They prevent deprivation of life, liberty, or property without due process of law, and taking of private property for public use without just compensation. They give an accused the right to a speedy trial by an impartial jury in the district where the offence was committed, the right to be informed of the nature of the accusation, to be confronted with the witnesses against him, to have compulsory process for witnesses in his favour, and to have the assistance of counsel for his defence. Trial by jury is preserved in civil cases, and excessive bail or fine, or cruel and unusual punishments, are prohibited.[43]

It should be noted that the Bill of Rights contains limitations upon the Federal Government. After the Civil War, the Fourteenth and Fifteenth Amendments to the Constitution provided federal protection for the citizen against his state government as well. States were forbidden to "abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws". Nor could the right of United States citizens to vote be denied or abridged on account of race, colour, or previous condition of servitude.

From the point of view of the average citizen, the danger of abridgement of his civil rights arises largely on the level of state or local government. The interpretation by the Supreme Court of the Fourteenth and Fifteenth Amendments which limit the power of the states has therefore been of great importance. In this respect, two significant developments which have occurred with the present Court should be mentioned. One of these has been the controversy over whether the Fourteenth Amendment extends the specific guarantees of the Bill of Rights into the areas of state and local government.[44] If it does, it means a great expansion in the jurisdiction of the Supreme Court in the field of civil liberties, for any state action which violates one of

[43] See Jackson, *op. cit.* footnote 4, at p. 22.
[44] See *Adamson* v. *California* (1947), 332 U.S. 46.

the first eight amendments can be set aside by that tribunal. To take a specific example, the Fifth Amendment requires that the accused in criminal prosecutions shall enjoy the right to have the assistance of counsel for his defence. If this provision is made applicable to the states by the Fourteenth Amendment, then the Supreme Court can set aside convictions in the state courts, although only a small minority of the states provide for the right to counsel in their own constitutions.[45] The tendency of at least a strong minority of the present Court is towards the view that the Fourteenth Amendment was intended "to extend to all the people of the nation the complete protection of the Bill of Rights".[46] That is one of the reasons why the present Court has intervened in so many cases involving state abridgements of civil liberties.

The other development worthy of note concerns the abandonment by the present court of the normal presumption of constitutionality of governmental action in personal liberty cases. Through the years, the Court has followed the rule that legislation which is challenged as to constitutionality must be presumed to be valid unless its violation of the Constitution is proved beyond all reasonable doubt. "In the last decade, however, the Court has announced a new doctrine that when a law appears to encroach upon a civil right — in particular, freedom of speech, press, religion, and assembly — the presumption is that the law is invalid, unless its advocates can show that the interference is justified because of the existence of a 'clear and present danger' to the public security."[47]

The protection of civil liberties by the present Supreme Court has been strengthened by its use of the so-called "clear and present danger" test of Mr. Justice Holmes. "The question in every case", wrote Justice Holmes in a case involving freedom of speech, "is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the legislature] has a right to prevent."[48] In the present Court, the Holmes doctrine is applied as the test in determining the validity of infringements upon civil liberties. "Any attempt to restrict those liberties must be justified by clear public interest, threatened not

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[45] See Pritchett, *op. cit.* footnote 34, at pp. 138-41.

[46] Black J., dissenting, in *Adamson* v. *California* (1947), 332 U.S. 46, at p. 89. See, To Secure These Rights, The Report of the President's Committee on Civil Rights (1947) 113.

[47] *Ibid.* See *Thomas* v. *Collins* (1945), 323 U.S. 516, at p. 530.

[48] *Schenck* v. *United States* (1915), 249 U.S. 47, at p. 52.

doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." [49]

The solicitude of the Supreme Court for civil liberties has resulted in a striking increase in the number of cases involving them which have been heard by that tribunal. Thus, in more than a score of cases since 1938 the Court has dealt with charges that states or cities have violated the religious liberty of the sect known as Jehovah's Witnesses. In the great majority of these cases the Court held that the action complained of was invalid.[50] Truly, as the President's Committee on Civil Rights concluded, "It is not too much to say that during the last 10 years, the disposition of cases of this kind has been as important as any work performed by the Court. As an agency of the federal government, it is now actively engaged in the broad effort to safeguard civil rights." [51]

What has been said should indicate sufficiently how the rôle of the Supreme Court in the American scheme of government has been changing in the past decade. From an organ that had been concerned mainly with property rights and the preservation of a system of laissez-faire, it has become one that is primarily interested in safeguarding the personal rights guaranteed in the Bill of Rights. In addition, as we have seen, there is the vital work which the Court performs as arbiter of the federal system.

A question that naturally arises relates to the permanence of the changes we have been discussing. More specifically, is the change in rôle one that has been caused only by a change in Court personnel, so that there may be another swing back to the pre-1937 view of the Court's functions should the Roosevelt-Truman Court give way to one appointed by a more conservative President?

It is believed that the change in the rôle of the Court is one that rests on something more permanent than the political beliefs of the President who has appointed a majority of its personnel.

[49] *Thomas* v. *Collins* (1945), 323 U.S. 516, at p. 530.
[50] See Pear, The U.S. Supreme Court and Religious Freedom (1949), 12 Mod. L. Rev. 167.
[51] *Loc. cit. supra* footnote 46.

The changing jurisdiction of the Supreme Court reflects changes in legal ideology which are common to the legal profession as a whole. It must not be forgotten that the pre-1937 Court had been brought up under the influence of an extreme individualist philosophy, whose foundations have been severely shaken in the present century. Spencerian laissez-faire has given way on the bench to the judicial pragmatism of Mr. Justice Holmes. It is not to be assumed that a new Court will easily abandon the judicial self-restraint in cases other than those involving civil liberties which was Justice Holmes' principal tenet. If that is the case, the doctrine of judicial supremacy as it was applied by the pre-1937 Court is now a thing of the past. The Court's chief functions in the future will continue to be, as they are today, to hold the balance between national and state authority and to serve as the judicial guardian of the Bill of Rights.

The Lawyer

Here we are, in fact hard headed and I hope soft hearted men, professing a good profession before many witnesses. There are gathered in these rooms famous men whose leadership we acknowledge, masters of forensic speech, law-makers, writers of law-books (who I hope always remember the definition of a law-book as 'chaos with an index'). Here are celebrated draftsmen of complicated contracts; here are leaders of the people by their counsels; there are scattered here and there amongst us scholars who have been content to teach, knowing I hope that by the alchemy of Providence their work and influence will live on to inspire and teach generations of men. But the great majority of us are plain, ordinary men, trying to maintain our standards and to serve our community, walking our humble paths beneath what Bacon calls 'the gladsome light of jurisprudence'. (Leonard W. Brockington, C.M.G., K.C., LL.D., to the Thirty-first Annual Meeting of the Canadian Bar Association, September 2nd, 1949)