THE SUPREME COURT AND THE CAPACITY TO GOVERN

Judicial review in the United States for the greater part of its adulthood has been particularly suitable for and adapted to a political conception of the laissez faire state whose optimum—even though not wholly achievable—objective was the absence of governmental restraints on private enterprise. The interpretation of the Constitution in general, and of certain clauses in particular, in such a way as to advance this ideal picture of "the good society" is by now a familiar story. It is the story of a Court expounding the law of the Constitution in terms of the nineteenth-century philosophy of the passive or negative or, at most, "umpire" state. It is the story of a Court and to some extent of a country clinging to this basic philosophy long after the conditions under which it arose and for which it was quite appropriate had disappeared. It is also the story of a severe constitutional crisis in the 1930's which destroyed that conception of the Constitution, altered the accepted theory of the Court's rôle in interpreting it, and modified public attitudes toward American political-economic relationships in general. The fact of the positive state—the state which consciously and purposefully makes economic decisions best left in private hands under earlier theories—is with us. The fact of a system of constitutional law countenancing such actions is also with us. This means that an important shift in basic political attitudes has taken place—or, better, culminated—in the past decade or so. Such a shift has brought in its train a wide effort at reshaping ideas about democracy, individual freedom, the Constitution, and the rôle of the Supreme Court as the official expositor of the nature and reach of basic governmental authority.

Much has been written about whether the positive entrance of the state into the economic realm can be reconciled with the political concepts of democratic constitutional government.
Such a reconciliation is possible only if we do not equate democracy or constitutionalism as such with some particular economic organization or structure. For argumentative purposes it may be useful to identify democracy or constitutionalism with economic laissez faire or some other theory of the best economic structure; for analytical purposes this is not helpful. The concept of constitutional democracy in its purest sense leaves the way free for conscious, controlled and responsible experimentation in the social and economic fields, subject to the qualification that, when majority opinion shifts after free and unfettered public discussion and criticism, governmental policy will shift to reflect the change. As Justice Holmes said more than forty years ago,

A constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.\(^1\)

Or, as Justice Stone put it a little more than ten years ago, the Constitution has "no more embodied... our preference for some particular set of economic beliefs than it has adopted, in the name of liberty, the system of theology which we happen to approve."\(^2\)

If, then, there is no basic inconsistency between constitutionalism and economic experimentation, the more immediate question for our consideration becomes the rôle of the courts in marking out the limits imposed by the Constitution on the method and extent of such experimentation. For this also must be stressed: in a constitutionally limited government such as ours, constructed on the firm and tough traditions which are realistically a part of the heritage with which we must deal, it is the courts which will decide this vital question. The capacity to govern, in its prime meaning, that is, in regard to the source

\(^1\) Lochner v. New York, 198 U.S. 45 (1905).

and extent of the power to act, depends and is likely to continue
to depend on what the judges will accept as coming within the
meaning of the document which they alone have the final au-
thority to interpret. A most significant development in this
connection has been the decline of the so-called "mechanical
theory" of constitutional interpretation, and its gradual re-
placement by the concept of "judicial self-restraint" as the
principle by which the judiciary will in fact allow all possible
constitutional discretion to the political branches in coping with
increasingly complex economic and social problems.3 Mechanical
jurisprudence, wedded to unquestioned postulates born of
nineteenth-century visions of an ideal political and economic
order, proved inadequate for the twentieth century either as an
acceptable explanation of the judicial process itself or as result-
ing in a viable governmental arrangement for constitutional
democracy in a rapidly changing world. The recognition of
this fact by Holmes, Brandeis, Cardozo and Stone, and later by
the majority of the reconstituted high tribunal after the
Supreme Court struggle, has led to a broad reassessment of con-
stitutional principles by a present Court devoted to the concept
of a self-conscious sociological jurisprudence and the practice of
the general precepts of judicial self-restraint.

Major Areas of Judicial Impact

How has this shift in views concerning the judicial function
affected the capacity of the United States to govern itself in
domestic and world crises? What are the major areas in which
judicial attitudes and activities affect the capacity of our democ-

cracy to cope with the perplexing problems facing it? In ad-
dressing ourselves to these questions, it seems to me that we must
indicate the relationship of judicial activity to the problem in
general and consider the broad trends in governmental develop-
ment to which judicial application of basic principles must be
related.

A preliminary distinction needs to be made between the
power to govern—that is to say, the amplitude of the legal re-
sources granting authority to act—and the efficacy of the

3 See the present writer's "Constitutional Interpretation and Judicial Self-Re-
manner in which that power is exercised. The capacity to govern includes both. So far as the first is concerned, clearly the important matters to examine are the results of the newer judicial attitude on the scope of federal legislative powers, the breadth of state authority, the consequences for the ever-recurring problem of federal-state relations, and finally the impact of the separation of powers on the scope and flexibility of administrative action. Regarding the manner in which legal powers are exercised, the two major respects in which the judicial rôle itself is primarily relevant seem to me to be the continuing requirement of fair procedure under due process of law, and the somewhat different question of the effectiveness of judicial administration itself. Another problem which deserves special attention is the dilemma posed by the doctrine of judicial self-restraint as applied to the fundamental protections accorded to civil liberties in a constitutionally limited government.

Side by side with these major areas in which judicial activity affects capacity to govern we should list certain clearly observable trends in the development of governmental structure and processes. The first of these is the tremendous growth in the significance, responsibilities and activities of the federal government. The second is a corresponding (though not so dramatic) growth in the breadth of state activities. These two do not necessarily conflict, and taken together they reflect the deeper trend toward a larger and larger share in the economic and social life of the nation on the part of governments at both levels. The third is the increasing importance of regionalism. As the fourth, I would stress the shift from legislation to administration as the major focus of the problem of government—not only in its classical rôle of policy execution but also more and more clearly and significantly in the rôle of policy-formulation under very broad and general guides from the legislature. Finally, there are a renewed significance and potential crisis in the rôle of fundamental civil liberties in a democracy. The reassessment of constitutional doctrines which I want to discuss in connection with these developments has come largely in the past ten years and largely as a result of the change in judicial
attitude which has been described above as the emergence of judicial self-restraint.

_Breadth of Federal Legislative Power_

It should be stated at the outset that the Constitution as now interpreted by the Supreme Court clearly provides the necessary legislative power to undertake any degree of economic planning that is likely to prove politically feasible in the foreseeable future. This is a broad statement and, if true, an extremely significant one. For it means that the emphasis in discussion of these problems will have been largely shifted from the question of whether the power exists to that of the ends for which it shall be exercised and the manner in which it shall be used. These latter questions are for legislatures and administrative bodies—the responsible policy-makers in a democracy—to debate and decide on grounds of public need and expediency rather than on grounds of legal capacity or incapacity.

This general conclusion is inescapably brought in upon anyone who will study the decisions of the Court, over the past ten years, concerning the clauses of the Constitution conferring positive power on the general government. The two main sources of such power are the commerce clause and the taxing and spending clauses. No important piece of federal legislation under these clauses (or any others, for that matter) has been held unconstitutional since the dramatic shift in Supreme Court attitudes in the spring of 1937. On the contrary, the clauses conferring positive authority on the Congress have been interpreted with a breadth hardly conceivable before 1937. I shall content myself here with a few examples taken from the recent interpretation of the commerce clause, undoubtedly the most significant of the specific grants of federal power from the point of view of this discussion.

It would perhaps be more dramatic to say that the clause giving Congress the power to regulate commerce among the several states may now be exercised in such a way as to destroy the subject matter being "regulated", to apply to transactions not "commercial" in nature, and to extend to situations wholly within a single state. Like the familiar comment about the Holy Roman Empire—that it was neither holy nor Roman nor
an empire—the commerce clause as now interpreted includes power which is not merely "regulation" applied to activities which are not "commercial" and which are not "interstate". This is too facile a way of putting it, and yet it makes a point. The power to regulate, ever since Marshall's day, had been held to include the power to prohibit; and yet in the first child labor case it was held not to include such a power with respect to interstate shipment of commodities made under labor conditions of which Congress did not approve. It now does include such a power. The extension of the power to things not "commercial" is also much older than the recent ten-year period of reinterpretation—witness the Mann Act decisions, for example—and yet this too has been given broader application in recent years. The extension of the interstate commerce power to things primarily intrastate but affecting interstate commerce is also of venerable lineage. Yet the extension of the concept in recent years to matters which earlier would certainly have been held to be "local" in character is striking and unmistakable. It is this last point which is perhaps of most importance for us, and it is here that I wish to offer a few illustrations to drive it home.

The redefinition of the power of Congress to regulate interstate commerce has resulted in the abandonment of the emphasis on physical transportation across state lines. In reversing the ancient precedent of Paul v. Virginia—holding insurance not to be interstate commerce—the Court said: "not only . . . may transactions be commerce though non-commercial; they may be commerce though illegal and sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information." The Court added, significantly: "No enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the commerce clause. We cannot make an exception of the business of insurance."  

Particularly relevant to questions of economic planning are the decisions respecting the power of Congress over the nation's water resources under the commerce clause. A leading case involved the authority of the Federal Power Commission to

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license obstructions across navigable streams. In upholding the Commission, the Court had to pass upon what was meant by the federal government’s power over “navigable streams”. The Court held that the river in this particular case was “navigable” even though not actually navigated or capable of being navigated in its existing condition. “Potential navigability” and the “effect of improvability” were the keys to the question. The river could be made navigable, said the Court, by the expenditure of a not unreasonable sum of money; and, since the stream was, in this sense, navigable, the federal authority could not be restricted to controls which related only to navigation. Flood protection, development of watersheds, and the utilization of any electric power which might result, all were within the reach of the commerce power. Since Congress could prohibit all obstructions whatever over such a “navigable” stream, it could grant the privilege under any conditions it saw fit. Despite a dissent by two justices ridiculing the test of potential navigability—asserting that every creek in the country is “navigable” under this test—the case seems to establish on a firm basis the broadest kind of federal power over the nation’s water resources.\(^5\) In the next year, the Court broadened the concept even more, holding that the power extended to nonnavigable tributaries of navigable streams. More over, if legitimate ends such as flood control and improved navigation are achieved, it is irrelevant that electric power may be generated in the process. In fact, said the Court, there may be several purposes in the over-all program; they may all be pursued so long as one of them is constitutional, and the valid objective need not even be the primary one.\(^6\)

The general scope of the commerce power as now interpreted by the Court, although indicated broadly in the decisions upholding the constitutionality of such legislation as the Wagner Act, the Fair Labor Standards Act, the revised A.A.A. program, and others, is probably even more strikingly indicated in the subsequent decisions dealing with the applicability of these acts to specific situations. The Wagner Act, for example, was held

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applicable to a power company which did not sell power for resale outside New York State and nearly all of whose electric power was consumed within the state. Stressing the economic facts of life rather than the abstract conceptualism which characterized many of the older commerce decisions, the Court relied on the "impressive evidence of the dependence of interstate and foreign commerce upon the continuity of the service..."\textsuperscript{7}

Several cases involving the application of the Fair Labor Standards Act are particularly revealing. The Act applies in terms to all employees engaged in the production of goods for interstate commerce, including anyone "employed in any process or occupation necessary to the production thereof, in any state." The Court has held the Act validly applicable to the operating and maintenance employees of the owner of a building who rented space to producers selling largely in interstate commerce; to employees of a newspaper with a daily circulation of 11,000, one half of one percent of which was out of state; to employees of a company engaged in cleaning the windows of buildings the occupants of which were producing goods for an interstate market; and to employees engaged in repair and maintenance of vehicles which were rented out normally for interstate hauling operations. As Frankfurter said in one of these cases, "To search for a dependable touchstone to determine whether employees are 'engaged in commerce or the production of goods for commerce' is as rewarding as an attempt to square the circle." What the Court now looks at, therefore, is simply whether there is in fact a "close and immediate tie" with interstate commerce. If there is, the Act has been held applicable.\textsuperscript{8}

Interpretation and application of other federal acts reveal similar trends. The Court ruled, for example, that the Agricultural Marketing Agreement Act of 1937 could be applied to a firm distributing milk produced locally, none of which

\textsuperscript{7} Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938).

\textsuperscript{8} This discussion is summarized from the present writer's "The Power to Regulate Commerce", in the symposium "Ten Years of the Supreme Court: 1937-1947", edited by R. E. Cushman, in \textit{41 American Political Science Review} 1170 (December 1947).
was sold in interstate commerce. Since Congress could regulate the price of milk sold in interstate commerce, it could also, as necessary to the broader power, regulate the price of locally produced and locally sold milk which competed with that sold in interstate commerce. This was not because the local milk was itself in interstate commerce, but because the control here exerted was indispensable to the protection of interstate commerce. "The commerce power", said the Court, "is not confined in its exercise to the regulation of commerce among the states. It extends to those intrastate activities which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end."  

Even more sweeping language was used in opinions in 1945 and 1946 upholding the "death sentence" clause of the Public Utility Holding Company Act of 1935. "Congress of course", said the Court, "has undoubted power under the commerce clause to impose relevant conditions and requirements on those who use the channels of interstate commerce so that those channels will not be conduits for promoting or perpetuating economic evils." Hence, continued the opinion, 

to the extent that corporate business is transacted through such channels, affecting commerce in more states than one, Congress may act directly with respect to that business to protect what it conceives to be the national welfare. It may prescribe appropriate regulations and determine the conditions under which that business may be pursued. . . . In short, Congress is completely uninhibited by the commerce clause in selecting the means considered necessary for bringing about the desired conditions in the channels of interstate commerce. Any limitations are to be found in other sections of the Constitution.  

The abandonment of abstract formulae and the adoption of a realistic view of national economic interdependence is illustrated in one other opinion. In upholding the Agricultural Adjustment Act of 1938 as applied to a farmer raising only 23 acres of wheat, all of which he consumed or fed to his own stock, 

and none of which was intended for interstate commerce, the Court denied the inapplicability of the Act merely because none of this particular wheat actually crossed state lines. The familiar contention that agricultural production is a purely "local" matter—the major basis of the first A.A.A. decision in 1936—was specifically rejected. Commenting directly on such formalistic distinctions of earlier commerce decisions, the Court said:

We believe that a review of the course of decisions under the Commerce Clause will make plain, however, that questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as "production" and "indirect" and foreclose consideration of the actual effects of the activity in question upon interstate commerce.11

Such formulae, continued the Court, cannot prevent the commerce power from being validly used to control intrastate activities having an actual effect on interstate commerce, even though under earlier decisions they might have been defined as "local" or "indirect" and therefore beyond the reach of Congress.

"Coöperative Federalism" and the Disappearance of the "Twilight Zone"

The new attitude of the Court with respect to the rôle of the judiciary—characterized by a tolerance for legislative and administrative action on both the national and state levels—has also resulted in the death of "dual federalism", the virtual disappearance of the "twilight zone" between federal and state powers, and the emergence of what might be called "coöperative federalism". The older attitude as reflected in constitutional interpretation often led to the existence of a "twilight zone" within which neither state nor federal agencies could act to meet pressing economic and social problems. As Professor Corwin has pointed out for example, before the decision in U. S. v. Darby overruling the first child labor case, "both Congress and the States were forbidden to prohibit the

free flow of the products of child labor from one State to another—the former on the ground that it would be usurping power reserved to the States; the latter on the ground that they would be usurping Congress’s power to regulate commerce!"  

This general attitude toward the exercise of federal power in the social and economic realm—the position that such federal action was invalid because of the mere existence of the states—came to be known, in Corwin’s phrase, as “dual federalism”. This doctrine held, in brief, that Congress could not use even its specifically delegated powers in such a way as to regulate matters deemed to be inherently “local”. The Tenth Amendment (although itself referring clearly to those powers “not delegated”) was used to buttress this peculiar and logically untenable position.

Two general developments have destroyed the “twilight zone” for the most part and have authoritatively disposed of “dual federalism”. One is the extension of the principle of what might be called federal “enabling legislation”, under which Congress passes an act in effect validating state action in a field where the states would otherwise be held unable to act. This is the principle made familiar in the Webb-Kenyon Act, allowing states to control shipment of liquor from out of state in the interests of local prohibition, before the Eighteenth Amendment. It has been applied to the control of shipments of convict-made goods, and, more recently, to state laws controlling insurance companies operating in interstate commerce. In these instances it is clear that the exercise of federal power does not detract from state power, but in fact adds to it. After Paul v. Virginia had been overruled in 1944, and interstate insurance transactions were held to be interstate commerce, the question was immediately raised whether all the numerous long-standing state laws controlling such activities were therefore void as interferences with interstate commerce. Congress hurriedly passed the McCarran Act in 1945 providing that this interstate insurance business should continue to be subject to state laws except as Congress might specifically provide otherwise. This legislation was sustained by the Supreme Court,

leaving the states and the federal Congress in partnership, as it were, in the control of interstate insurance activities. This is truly "cooperative federalism" rather than "competitive federalism"—and dispels the older tendency to consider that whatever increased national power ipso facto diminished the range of state activities.

The other major development in destroying or minimizing the "twilight zone" between the two levels of government was the flat rejection in the Darby case of the doctrine of "dual federalism". For the purposes of the specifically granted powers, said the Court in sustaining the Fair Labor Standards Act, the United States has the plenary authority of a unitary government, and the existence of the states does not operate to limit or diminish these powers. The basic ambiguity of holding that the reservation of powers not granted somehow operated even to limit those which were granted was at last disposed of. The Darby opinion brusquely abandoned the entire concept. "The [Tenth] Amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the Amendment."  

The dubious argument that the reserved powers of the states could operate as limitations on the specifically granted powers of the federal government was rendered no longer constitutionally respectable.

A corollary to this development is the gradual emergence of what has been called a "leave-it-to-Congress trend" in the review of state legislation alleged to interfere with the unexercised power of Congress over interstate commerce. Without going into detail, it is perhaps sufficient to say that the present Court is more and more taking the attitude that state laws affecting interstate commerce are to be upheld if Congress has not acted, and that the resulting problem of harmonizing state actions and evolving a general policy in these areas is a legislative—not a judicial—function. This means that the era of

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14 U.S. v. Darby Lumber Co., 312 U.S. 100 (1941).
judicial application of the dormant commerce power may be drawing to a close; except in extreme cases, the Court is coming more and more to the view that it is the duty as well as the power of Congress to protect interstate commerce through a positive exercise of national authority where that seems required. The general view is best expressed in a dissent which, like other dissents, is gaining increasing acceptance by the new majority.

Judicial control of national commerce—unlike legislative regulations—must from inherent limitations of the judicial process treat the subject by the hit-and-miss method of deciding single local controversies upon evidence and information limited by the narrow rules of litigation. Spasmodic and unrelated instances of litigation cannot afford an adequate basis for the creation of integrated national rules which alone can afford that full protection for interstate commerce intended by the Constitution. . . . Unconfined by "the narrow scope of judicial proceedings" Congress alone can, in the exercise of its plenary constitutional control over interstate commerce, not only consider whether such a tax as now under scrutiny is consistent with the best interests of our national economy, but can also on the basis of full exploration of the many aspects of a complicated problem devise a national policy fair alike to the States and our Union. Diverse and interacting state laws may well have created avoidable hardships. . . . But the remedy, if any is called for, we think is within the ample reach of Congress.15

Despite exceptions and a considerable degree of continuing uncertainty in some areas, it is probably accurate to say that the newer attitude toward the judicial function has resulted in more and more discretion for state legislatures to exercise tax and police powers which impinge on interstate commerce, and to adopt the general view that where such legislation results in problems in the realm of interstate trade those problems are properly left for the federal Congress to resolve by a positive exercise of the commerce power.

Thus the total result of the Court's attitude toward its own function in the field of federal-state relations has been to strengthen the scope of the granted powers of Congress, at the same time to broaden state powers over interstate matters in

the absence of federal action, and, in effect, to replace "competitive federalism" with a newer concept of practical "cooperative federalism".

**Judicial Review of Administrative Determinations**

So far we have been talking mostly about the Court's rôle with respect to legislation. But if one of our earlier generalizations as to modern governmental trends is correct—if the focus is shifting from legislation to administration as the vital element in the process of governing—then it becomes important to look at least briefly at changing conceptions of the judicial function in the review of administrative determinations.

The most striking fact in this connection is perhaps that while the Supreme Court itself has in recent years taken a much more modest view of its rôle in controlling the procedural as well as the substantive aspects of administrative activities, the Congress has (after several years of acrimonious controversy) attempted by legislation to impose the standards of ordinary judicial proceedings on administrative action. Until the passage of the Administrative Procedure Act of 1946, the major area of interest in this connection was the question of what the Court thought the concept of "due process of law" imposed on the judiciary in the way of control of administration. And the trend in recent years was toward a greater recognition by the Court of the peculiar nature of the administrative process, of the inapplicability of the rules of ordinary judicial procedure to that process, and of the need for judicial review to limit itself largely to questions of "law"—leaving to expert administrative bodies a wide range of discretion in modes of proceeding and in conclusiveness of findings of fact. This in itself was a substantial modification of earlier judicial attitudes, which held that courts must under due process not only satisfy themselves that the minimum requirements of fair procedure were being met, but must also review questions of fact as well as law. This latter concept resulted in practice in the courts' reviewing administrative findings *de novo*, and reduced administrative proceedings to the status of mere preliminary investigations to be reconsidered afresh in the event litigation reached the courts. Two brief comments must therefore be added in
this connection. One has to do with the newer attitude of the Court itself toward the administrative process; the other has to do with prospective effects of the Administrative Procedure Act.

On the first point, the major emphasis has been on the degree of finality the courts will accord to administrative findings of fact. It is generally accepted that the due process clause requires the courts to insist on the elements of fair procedure—although there has always been a lively controversy as to just what these are. It is not generally accepted that the same clause requires courts to reexamine findings of fact, and indeed the official theory for some time has been that administrative findings, if supported by "substantial evidence", are final and conclusive on the courts. Like some other such theories, however, it was honored in the breach almost as much as in the observance for a number of years. In the past decade or so the Court has recognized the need for reliance on expert administrative bodies and the inapplicability of many of the older ideas drawn from judicial proceedings to the functioning of the administrative process.

A few examples will serve to indicate the general feeling. In upholding state administrative action in the complicated field of conservation of petroleum resources, for instance, the Court speaking through Justice Frankfurter observed:

When we consider the limiting conditions of litigation—the adaptability of the judicial process only to issues definitely circumscribed and susceptible of being judged by the techniques and criteria within the special competence of lawyers—it is clear that the Due Process Clause does not require the feel of the expert to be supplanted by an independent view of judges on the conflicting testimony and impressions of expert witnesses.\(^16\)

And in the course of the lengthy litigation in the well-known Morgan cases involving the federal Packers and Stockyards Act and administrative determinations of the Secretary of Agriculture thereunder, the late Chief Justice Stone expressed the emerging view of the Court in these terms:

In construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through co-ordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if it must be, but never to be encouraged or aided by the other in the attainment of the common aim.17

This was clearly a rebuke to the general judicial attitude toward administrative action exhibited in the past by the Supreme Court as well as other courts. It reflects an important change in attitude on the part of the Supreme Court which can also be found in the writings of other men now on the bench. Justice Jackson has said:

The creation of these fact-finding tribunals has been one of the significant legal movements of the twentieth century. . . . The administrative fact-finding tribunal has been the heart of nearly every social or economic reform of this century. Workmen's compensation systems, regulation of railroad and utility rates, the Securities Act, the Labor Relations Act, and many other regulatory plans would fail if the administrative body charged with enforcement could be smothered in litigation similar to that in the Morgan case.18

And Justice Douglas reinforced this view when he said:

Effective control calls not for the slower and heavier method of judicial decision but for the more subtle and more sensitive control of daily administrative action. This is not to say that

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studied efforts should be made to prevent parties from having their rights established by the courts of the land. Rather it means that adequate and effective methods of administration have never been and can never be fashioned through the judicial process. . . . The battle will be lost through the fearfully cumbersome and indirect processes of the courts, even assuming judicial approval or indulgence.19

Awareness of these general attitudes, together with recognition of the fact that in the past ten years the overwhelming proportion of administrative actions challenged in the Supreme Court have been upheld, would lead one to the general conclusion that even the highly dubious provisions of the Administrative Procedure Act will be interpreted, if possible, so as not to strait-jacket the administrative process. The ultimate interpretation of the Act, after all, will be in the hands of a Court which has demonstrated that it is realistically aware of the limitations of the judicial process and reluctant to force administrative proceedings to mirror these defects.20

The Redefinition of Individual Rights

Along with this revision of the constitutional gloss concerning the powers of state and national governments has come also a redefinition of those individual rights and liberties which the Constitution protects from government interference. This redefinition has proceeded in two directions. The first has been the tacit acceptance of a fundamental distinction between economic rights, so called, and civil and political rights, together with a drastic reassessment of the former in the direction of reading them out of the Constitution as limits on experimental legislation in the economic realm. This is, of course, consistent with the other trends mentioned above. It is most conspicuous in connection with the virtual abandonment of the concept of "liberty of contract", which, as read into the Fifth and Four-


20 For a development of this view, see the present writer's essay-revivel "Some Observations on the Effort to Judicialize the Administrative Process", in the Spring 1948 issue of the Public Administration Review.
teenth Amendments, stood as a major obstacle to any legislation affecting such vitally important matters as wages, hours, labor conditions, or prices. In other respects as well, "liberty" in the due process clauses has been interpreted as a less rigorous restriction on state and federal social and economic legislation. This is perhaps simply another way of saying what has been said already: that the rule of the presumption of legislative validity tends to circumscribe the restrictions on legislative action to the relatively small area of those clearly and specifically set forth in the document itself.

The other direction in which the redefinition of individual rights has proceeded is not, at first glance, so easy to reconcile with these general trends toward "laissez faire for legislatures"; for concurrent with the above development has been a sharp broadening of the restrictions on legislative and administrative bodies in matters affecting basic civil and political rights. Constitutional limitations of this sort have been greatly expanded by judicial interpretation in the past ten years. Here at least there is no disposition to exercise self-restraint in such a way as to leave greater range to legislative discretion. The burden of proof in these areas is not put upon those attacking the statute, but upon those who support its necessity.

This development, seemingly contrary to the general trend toward judicial self-restraint, is again a projection of elements inherent in the dissents of Justice Holmes. The whole concept of judicial self-restraint took its decisive impetus from the Holmes approach; the basic distinction between economic and political liberties is implicit in Holmes; and the refusal to follow the concept of laissez faire for legislatures all the way to its seemingly logical conclusion of judicial hands off even in civil liberties cases is also to be found in Holmes. The point that it was Holmes who drove home to us the importance of leaving the popular branches of the government legal leeway for experimentation in social and economic matters need not be labored. The basic distinction between economic and political liberties, though not so explicit, is there also. As Frankfurter put it in his little book on Holmes:

[21] Much of the following treatment is summarized from the present writer's "Mr. Justice Murphy, Civil Liberties, and the Holmes Tradition", 32 Cornell Law Quarterly 177 (November 1946).
The Justice deferred so abundantly to legislative judgment on economic policy because he was profoundly aware of the extent to which social arrangements are conditioned by time and circumstances, and of how fragile, in scientific proof, is the ultimate validity of a particular economic adjustment. He knew that there was no authoritative fund of social wisdom to be drawn upon for answers to the perplexities which vast new material resources had brought. And so he was hesitant to oppose his own opinion to the economic views of the legislature. But history had also taught him that, since social development is a process of trial and error, the fullest opportunity for the free play of the human mind was an indispensable prerequisite.

Naturally, therefore, Mr. Justice Holmes attributed very different legal significance to those liberties of the individual which history has attested as the indispensable conditions of a free society from that which he attached to liberties which derived merely from shifting economic arrangements.22

Hence, while insisting on deference to legislative judgment and indulgence of all possible presumptions in favor of legislation in social and economic matters, at the same time he devised and installed in our constitutional law the concept of "clear and present danger" as the prime test against which any attempt to infringe civil liberties must be measured. The effect of such a test was to reverse the ordinary presumption of validity, and to shift the burden of proof in such cases to those who supported the statute. Without going into detail in the individual cases, it is perhaps enough to say here that the Court has in the past ten years taken the "clear and present danger" test—which was until then primarily a dissenting view—and has made of it the chief touchstone in the judgment of cases involving civil liberties. This, then, means a sharp modification of the general doctrine of "laissez faire for legislatures" whenever civil liberties are involved.

Those who take this view are charged by some writers and by dissenting colleagues on the Court with logical inconsistency and, indeed, with misinterpreting Holmes. Oddly enough, Frankfurter himself has best expressed this view at great length.

22 Felix Frankfurter, Mr. Justice Holmes and the Supreme Court (Cambridge, 1938), pp. 50-51.
in his dissent in the second flag salute case. In brief, his plea is that democracy means democracy, that judicial review is *ipso facto* a limitation on democracy, that therefore the judicial function must be limited to a fairly narrow rôle not only in social and economic legislation but also in legislation dealing with civil liberties, and that legislatures themselves must be relied on not only for coping with complex economic and social difficulties but also fundamentally for the protection of our civil liberties.

The basic question here is whether there is any support in law, logic or democratic philosophy for the segregation of cases involving acts of legislators and administrators into two categories—those concerning social and economic matters and those concerning civil liberties—and proceeding to apply to the first the tenets of judicial self-restraint while reversing the usual presumption of validity with respect to the second. Among those who attack the proposition is a keen student of American constitutional history, Professor Henry S. Commager, who argues that the true Jeffersonian liberal should favor judicial self-restraint in all cases—whether involving civil liberties or not. Although a strong "emotional case" can be made for judicial protection of civil liberties, he says, once we

grant the desirability or necessity of calling in the judiciary to protect civil liberties... we concede that the majority is not to be trusted in what is perhaps the most important field of legislative activity. If we are compelled to make that concession here, in a matter so vitally affecting the liberty and happiness of every member of society, then we might indeed despair of democracy.23

This position is based ultimately on the belief that "majority will does not imperil minority rights, either in theory or in operation." Thus we would reach mature democracy only in placing full reliance in the acts of the majority, unrestrained by judicial censorship.

The other view would hold basically that judicial protection of civil liberties not only was not restrictive of

democracy, but was in fact, in the setting of American traditions, an essential part of it. In evaluating these two contrary views, it would seem helpful to distinguish between the substance of democratic decisions (which should not be subject to judicial invalidation on the basis of vague constitutional clauses) and the procedure by which the dominant opinion in a democracy is formulated and expressed (which must be kept as pure and free as judicial alertness in enforcing the specific freedoms set forth in the First Amendment can contrive). Indeed, for the substance of the decisions to be truly democratic, the process by which they are reached must give as much free play as possible for the transmutation of present minorities into future majorities by the unencumbered operation of freedom of thought, communication and discussion. From this point of view, the uninhibited freedom to argue and discuss (limited only by grave and immediate danger to the state) is in fact an integral part of, although antecedent to, the democratic legislative process itself. Thus to uphold the restrictions on freedom of thought and communication which may be placed in effect by a temporary majority would be actually to reduce the facility with which the democratic process of transforming that transient majority into a minority—a process essential to the very concept of democracy—could take place. If this is true, then democracy is improved every time such obstructions to the full operation of the procedural prerequisites to mature popular decisions are removed or reduced, just as it is by the adoption of a policy of honoring the substantive results of such mature popular judgments embodied in general social and economic legislation.

The outstanding American authority on free speech supports this view. Professor Zachariah Chafee notes the familiar fact that the justices who uphold wide legislative control over business are often the very same men who want to invalidate any wide legislative control over free discussion. These justices "know that statutes, to be sound and effective, must be pre-

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24 For concurrence in this general view, and a striking analogy to illustrate it, see A. W. Macmahon, "Conflict, Consensus, Confirmed Trends, and Open Choices", 42 American Political Science Review 1 (February 1948), at p. 10.
ceded by abundant printed and oral controversy. Discussion is really legislation in the soft.” Laws which would prevent the questioning of present economic institutions would tend to freeze the status quo in much the same way as a rigid judicial interpretation of “liberty of contract” sought to do.

Therefore [he says], the critical judicial spirit which gives the legislature a wide scope in limiting the privileges of property owners will also tend to allow speakers and writers a wide scope in arguing against those privileges. So it is not really surprising that Justice Holmes dissented in both Lochner v. New York and Abrams v. United States. Liberty for the discussion which may lead to the formulation of a dominant opinion belongs side by side with the liberty of lawmakers to transform this dominant opinion into the statute that is its natural outcome.25

This, like most other problems of government, remains in the last analysis a question of degree. Hence justices on the present Court, a majority of whom adopt this general position, continue to disagree as to its application to particular sets of facts. Some recent decisions suggest that even the present Court is not willing to go as far in protection of civil liberties as many would wish. Recent governmental actions and proposals suggest that civil liberties are not safe from assault in the immediate future. Any complacency on this score will be sharply jarred by a perusal of the recent report of the President’s Committee on Civil Rights. Again, as in the past, it is likely to be the courts to which the people must turn—in the first instance, at least—for the protection of basic political and civil rights without which the machinery of democracy becomes meaningless. The Supreme Court in the recent past has broadened the reach of the protection of civil liberties very substantially. The healthy functioning of our democracy, and its ability to solve the critical problems of our times in a democratic manner, will depend in great measure on the constancy of the Court in pursuing and extending this attitude.

The Rôle of the Judiciary: Conclusions and Prospects

What conclusions then can we draw with respect to the consequences of this newer judicial attitude for America's capacity to govern and to meet the pressing problems of the day in a democratic fashion? It seems to me that, expressed in very broad terms, the results of judicial reëxamination of our constitutional structure in the past ten years or so are roughly the following. There has been a vast strengthening of the power to govern, on the part of both the nation and the states, where that power is appropriately exercised. There has been a notable willingness to view the Constitution, not as a set of specific and detailed legal rules, but as an effective charter of government, broad in outlines and flexible in application to changing social and economic conditions. There has been a readiness to abandon a formalistic and conceptualistic approach to the problems of constitutional interpretation, and to look rather at the practical "facts of life" in an economic sense as the setting in which the fundamental law is to be applied. There has been essentially a recognition of the right of experimentation in the reshaping of social and economic institutions as basic to the very concept of democracy. And there has been, at the same time, a renewed awareness of the vital rôle of civil and political liberties in the functioning of the democratic process.

This, in sum, means a recognition of the limitations of judicial procedure and a willingness to leave to responsible legislative and administrative bodies the major discretion in the solution of problems with which they are selected to deal. It means a corresponding disposition not to overrule the acts of national and state governmental organs except in accordance with the most specific limitations in the Constitution. It means, therefore, to a large extent, a judicial withdrawal from the realm of policymaking as such. If followed out, it would mean, not that the problems facing our democracy would thereby necessarily be solved, but that the solutions would be sought by the agencies best fitted to find them.

What would it leave to the judiciary? It would leave it the primary duty of protecting civil liberties—freedom of speech, press, assembly, religion, as well as the requirements of fair trial
procedure—together with the function of reviewing the acts of administrative agencies to be sure they were within their grants of statutory authority and were fulfilling the procedural requirements of due process. It would mean that the courts would still play an extremely significant rôle in our governmental machine—and the rôle for which by nature they are best fitted. It would also mean, however, in a very real sense, judicial self-limitation with regard to the determination of the substance of policy. The results in the last ten years of such judicial self-limitation constitute the most significant aspect of constitutional development today. And, as Justice Frankfurter said before he ascended the bench,

Such self-limitation is not abnegation; it is the expression of an energizing philosophy of the distribution of governmental powers. For a court to hold that decision does not belong to it, is merely to recognize that a problem calls for the exercise of initiative and experimentation possessed only by political processes, and should not be subjected to the confined procedure of a lawsuit and the uncreative resources of judicial review.26

If we are to take seriously the emphasis on constitutionalism—or limited government—we must ask ourselves a few further questions. The most familiar one is: are there any enforceable limits left on governmental power? To some the present tendency of the Court is toward abdication of its functions and perversion of our republican form of government in the direction of an omnipotent legislature. To others, the newer view means only a reëstablishment of the powers of democratic government heretofore unduly restricted by a mass of judicial precedents woven in a period of political and economic laissez faire. Which view one takes is likely to depend on whether one views with alarm the increased power of the political branches of government to act with respect to broad social and economic problems. Whichever view is adopted, however, it is clear that the answer to our question is emphatically that there are still important and meaningful limits on the political branches which will continue to be enforced by the judiciary.

In the first place, many of the prohibitions in the Constitution are in clear and specific terms (although the most controversial ones have been the vague and ambiguous provisions), and there can be no doubt that courts will continue to enforce them as vigorously as ever. In the second place, the denaturing of substantive due process has still left the important limitation of fair procedure in full strength, and has made this area an even more significant one for judicial action. And, finally and most importantly, if our previous discussion has any validity, a most vital area for the judiciary will continue to be the problem of protecting basic civil and political liberties. None of these limitations can be precisely defined in advance. This will remain a continuous and flexible process, and will continue to depend primarily on the personalities and attitudes of the justices themselves.

Does there seem to exist at the present time adequate power under the Constitution to deal with immediate economic problems and to embark on whatever measure of longer-range economic planning is likely to recommend itself to the people? As I have indicated earlier, I think that the answer to this question is yes. Both state and national powers are being broadly defined; the alleged delegation of legislative power to administrative agencies is viewed much less narrowly than before; considerably greater weight is placed on administrative discretion in fact-finding and rule-making; and the constitutional elements are therefore present for the development of effective administrative bodies making possible the emergence of a group of truly professional public administrators. Barring a very rapid popular movement toward the Left (which seems not likely under present circumstances), I would repeat that there seems to be in the Constitution as now interpreted by the judiciary ample resource in terms of legal power for any degree of economic planning that is likely to prove politically feasible in the foreseeable future.

Someone will certainly ask, however: is there any guarantee that these judicial attitudes will continue to prevail? The answer is clearly no. So long as it is the judiciary itself which exercises the power to define what the limits are, there is the
possibility, and indeed the probability, that the future will bring again the familiar lag between what is judicially acceptable and what the dominant opinion of the majority is seeking. This is, of course, part of the price we pay for "constitutionalism" or limited government. The only guarantee of enlightened judicial attitudes is an alert and effective public opinion, which has freed itself from the mythology of judicial supremacy and, understanding both the value and the cost of the institution, is constantly on guard to maximize the value and minimize the cost.

What this means, I suppose, is that continued scrutiny of the courts and of the judicial process is therefore a prime obligation of informed citizenship. Positive powers of the government now seem very broad. The major area for concern at the moment is in the realm of civil liberties; and most of us are looking toward the judiciary as a bulwark of these vital democratic rights. But with time this may well shift. The mechanism to enforce the principles of "constitutional democracy" may, like all mechanisms, cease to do its job well. It may enforce limitations where there should be none; it may neglect to enforce the most vital of limitations. Since it is the judiciary which provides this mechanism in American government, there is some likelihood that it will continue, as in the past, to find itself out of touch from time to time with the main currents of popular thought. This is perhaps not too high a price to pay for constitutionally limited government if we believe that the general body of citizens can be trusted to see the process for what it is, and to bring courts and judicial doctrines back in line with the needs of the community. The experience of the last ten years has shown dramatically how this can be done, and is a prime reason for hope that it will be done again in the event it proves necessary in the uncertain years ahead.

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