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CARDOZO AND THE SUPREME COURT

By SAMUEL JACKSON*

One of the most meritorious acts of the Hoover administration and certainly one of the most far reaching in its effect upon the government was the appointment of Benjamin Nathan Cardozo to the Supreme Court of the United States to succeed its Nestor, Oliver Wendell Holmes.

Cardozo is a bachelor, a Jew, a Democrat, and a liberal. He is sixty-two years of age and a native of New York. He is a graduate with the degree of A. B. and A. M. from Columbia University, and now holds the degree of Doctor of Laws from the Universities of Columbia, Yale, New York, Michigan, and Harvard. In 1913 he was elected justice of the Supreme Court of New York for the term of 1914 to 1928. In 1914 he was designated by Governor Glynn to serve as judge of the New York Court of Appeals. In 1917 he was appointed by Governor Whitman as justice of this court, and in the same year he was elected to the full term as an associate judge. On January 1, 1927, he became Chief Justice. Many of his decisions are noteworthy in their scope and have attracted wide attention and approval throughout legal circles in the United States for the depth of his understanding and the obvious sincerity of his legal philosophy.

Whether the appointment of this distinguished New York jurist to the United States Supreme Court was the result merely of good fortune, or of political sagacity, or statesmanlike foresight, or of a sympathetic appraisal of his great liberalism and his legal philosophy has little bearing upon the subject matter treated herein. Whatever the cause or reason for his appoint-

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ment, it has been most fortunate for the people. The significance of his appointment in the economic development of the people and his place in the history of American jurisprudence can scarcely be estimated unless it is considered in the light of the recent economic trends of the Supreme Court itself; and so it is the appointment of Cardozo in the light of these recent trends that I shall consider.

I have ventured to select this subject for discussion in the hope that able practitioners may be encouraged to investigate and elucidate similar fields, fields which may be extra-legal in that they do not deal with the very working tools employed in daily court work or office consultations, but fields which, after all, are fruitful in the doctrines by which our acts as lawyers are greatly influenced. Such investigation and elucidation would inevitably, I dare to believe, enrich our legal philosophy, relieve the monotony of our usual pursuits in what sometimes appears to be an increasingly drab and unromantic profession, and open up wide and tempting avenues of consuming interest and cultural reward.

The available literature upon the subject particularly among the current periodicals, is rich in discussion of the social trends of the Supreme Court, particularly since the World War; and the patient student may travel through the reports of the Supreme Court itself for the past twelve years and find the legal basis for the results set forth in these prolific writings. It is interesting to note that almost none of the contributions to this literature have been made by busy practitioners of the law. It may be that the very fact that they are busy practitioners tends to deny them the expenditure of the time necessarily involved in such pursuits or places them too close to these subjects to permit their investigation and discussion objectively.

But I have long been persuaded that as lawyers and as a Bar Association, particularly, we could well spend more of our time, as the layman spends it, in the consideration of this and similar themes.

Roughly speaking, from the time of the World War until 1930, the decisions of the Supreme Court of the United States were such that it in a large degree merited the criticism that the Court was running the government in the interests of a favored few. The extreme conservatism which dominated the Court during these years has been punctuated almost alone by the dissenting opinions of Holmes and Brandies as they have sought,
vigorously and vigilantly, to keep alight within the pages of the official reports the fires of liberalism. At least, this was true until 1925 when Harlan S. Stone came to the Supreme bench; and for five years thereafter, that is, up until 1930, it was Holmes, Brandies, and Stone dissenting on most matters of grave social consequence. Here were three members whose interpretation of the Constitution was widely at variance with the dominating and prevailing interpretation by the reactionary majority members in favor of capital and big business. The change that has come over these opinions is primarily due, of course, to a change in personnel and the newer viewpoint on the part of those more recently appointed members; and its result has most certainly been tremendous in social effect. It seems to me that we, as lawyers, cannot give too much attention to this change, sweeping as it is in legal effect and political interest.

These three men, Holmes, Brandies, and Stone, however important because of their minority, have shown the great power of the dissenting opinion; for, at last, with the recent change in personnel, the conservative element has been driven into the corner formerly set apart for the liberal dissenters. These former dissenters now find themselves writing the majority opinions, and these majority opinions have all the liberalism that could be expected in the development of a new government basically progressive and democratic in its doctrines.

Through all these years the majority, carrying the banner of property, has been fighting upon the old battle field of the Fourteenth Amendment and under the canopy of its protection: "nor shall any state deprive any person of life, liberty or property without due process of law." These are the words, magic in their power, which the Supreme Court has been using to sweep aside state rights and regulatory measures of state legislatures. This is the clause that has nulled taxing acts, price-fixing acts, labor laws, and all manner of social legislation by the states.

If you open your Burns Revised Statutes of 1926 and turn over to the Fourteenth Amendment to the Constitution of the United States, you will find twenty pages of closely typed double column annotations. This appears nowhere else in our statute books, and forcibly reminds us of the frequency with which this constitutional provision has been employed. Particularly is this true when we find that almost all of these annotations consist of citations to the United States Supreme Court. If you will take the time to read these Supreme Court opinions, you will find
that therein the spirit of tolerance has been badly beaten; that states which were once sovereign have been stripped of their political power, or at least that their sovereignty has been greatly humbled; that the interests of humanity, as reflected in the litigated rights of the individual, or the people as a group, have been regularly over-ridden. At least, these rights have not had the consideration to which we might regard them to be entitled in a complex industrial civilization wherein men and institutions of wealth and great combinations of the same, moved by the desire for profits, have, with general approval too consistently prevailed against human welfare.

In these opinions you will find the Child Labor Law defeated because it was a violation of the Fourteenth Amendment.\(^1\) Minimum wage laws of many states have been opposed or entirely overthrown.\(^2\) Regulatory measures of states over business done therein have been greatly discouraged. Labor injunctions have been widely advanced.\(^3\) An Arizona statute limiting the use of injunctions in labor disputes was nullified.\(^4\) The Sherman Anti-Trust Act itself has been applied and invoked for the determination of labor disputes, upon the theory that activities of unions were in restraint of trade.\(^5\)

To all of these, generally speaking, Holmes, Brandies, and Stone have regularly dissented. But so persistent was the conservative trend that the people began to feel that wealth had found its greatest friend and most reliable protector in the Supreme Court; and men of progressive spirit were impatient and restive at their apparent helplessness against this reactionary disposition. In the field of price-fixing, a practice which we, as lawyers, have been taught to execrate, the Supreme Court had so completely forestalled state legislative interference in private capital and free bargaining that even the crying need of the people was of no avail in a field wherein it would appear that the people had a right to legislate for their own good.

In the city of New York, citizens were at the mercy of ticket brokers who took advantage of unnatural conditions of supply

\(^1\) W. C. Hammer v. Dagenhart, 247 U. S. 251.
\(^2\) Charles Wolff Packing Company v. Court of Industrial Relations, 262 U. S. 522.
\(^3\) American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184.
and demand; and ticket scalping in the State of New York became a scandal and a burden. The legislature passed an act prohibiting this practice, and forthwith the Supreme Court decided the act to be unconstitutional as in violation of the Fourteenth Amendment.6

In Minnesota the consumers of milk found themselves oppressed by gigantic combinations of milk producers and dairy proprietors; but when the legislature of that state sought to fix the price in an effort to insure just and equitable dealing, the Supreme Court of the United States held this act to be in contravention of the Fourteenth Amendment and therefore void.7

Likewise, in the State of Washington, employment agencies were ruthlessly imposing upon helpless workers seeking a livelihood, by a system of fee splitting and extortion; but when the State of Washington sought by its legislative enactment to relieve itself from this vicious and profiteering enterprise, the Supreme Court held that the legislature was without the power so to do on account of the provisions of their favorite constitutional amendment, even though the act had been submitted to the voters and passed by a majority.8

Justices Taft, Sutherland, Van Devanter, MacReynolds, Sanford, and Butler, reactionaries and conservatives all, held the fortress of the proprietors against the interest of the people, breaking many a lance in the name of the Fourteenth Amendment.

In the field of taxation we find a similar situation. Legislatures seeking to raise revenue for the general good have always found it difficult to make taxing measures practicable and embarrassing to make them acceptable. Yet, to their further distress, one tax act after another has been held to be unconstitutional by the Taft Court.

In the State of Wisconsin an inheritance tax provision was enacted by which it was thought that an evil of tax dodging could be corrected by bringing within the reach of assessment all gifts made within a certain time prior to the death of the donor; but the Supreme Court annulled the act as in violation of the Fourteenth Amendment.9

8 Joe Adams v. Tanner, 244 U. S. 590.
Likewise in Pennsylvania we find that the state legislature sought to impose a tax upon the gross receipts of taxicab organizations without levying a similar tax upon the owners of individual cabs.\textsuperscript{10} The act was thrown out because it worked an arbitrary discrimination in violation of the "equal protection of the laws," guaranteed by the same amendment.

A Massachusetts act imposing a tax upon royalties for use of patents issued by the United States government was held to be invalid because it was an imposition of a tax against a Federal Government agency.\textsuperscript{11} West Virginia passed an act in effect to restrain the export of its rapidly vanishing natural gas so that its own citizens might have preference to it as against non-inhabitants, but the Supreme Court held this act to be void as an improper restriction on inter-state commerce.\textsuperscript{12}

But the liberal judges, dissenting as they usually did to these holdings and friendly as they were to state legislatures, did not always uphold state regulations. Especially is this noticeable whenever legislation attempted or accomplished an invasion of the field of personal rights as intended by the Bill of Rights of the Constitution.\textsuperscript{13}

When these liberal judges saw that a legislative body curbed free speech and a free press, or when they believed that the legislation was merely governmental encouragement to proprietary oppression, or when they felt that the enactment was only protective of the selfish interests of wealth, they were quick to hold on the side of the rights of the individual.

You will remember, to go back to the World War, the great toll upon tolerance in the statutes which grew out of our fevered patriotism, particularly as evidenced by the fate of Debs and others.\textsuperscript{14} You will remember, too, that long after the World War the feeling against pacifists and socialists, for instance, was reflected in the acts of many legislatures pronouncing harsh edicts and mandates designed for their eradication and discouragement.

In New York, Benjamin Gitlow, a socialist leader, was sen-

\textsuperscript{10} Quaker City Cab Company v. Commonwealth of Pennsylvania, 277 U. S. 389.
\textsuperscript{11} Henry F. Long v. Rockwood, 277 U. S. 145.
\textsuperscript{12} Commonwealth of Pennsylvania v. W. Virginia, 262 U. S. 553.
\textsuperscript{13} Peter Schaefer v. United States, 251 U. S. 466.
\textsuperscript{14} Eugene V. Debs v. United States, 249 U. S. 211.
tenced to prison for doing little more than expressing in public his opinion against the prevailing government.\(^5\) In California, Anita Whitney was sentenced to prison for joining the communist party.\(^6\)

These and many such convictions were sustained by the Supreme Court under the old regime, to the great applause of the people. We shall see, later on, however, how similar circumstances were handled by the new court when finally the liberals were permitted to write its opinions.

During these years the Supreme Court was glorifying also the Eighteenth Amendment. Injunctions took the place of trial by jury. Prosecutions in both State and Federal Courts for the same offense were hastily distinguished from double jeopardy. Search and seizure without warrant was sometimes permitted, and the conduct of prohibition officers in the enforcement of the Volstead Act became so flagrant, by approval of the Supreme Court, that many became ashamed of the enactments and the manner of their administration.

In the field of capital and labor the Supreme Court, Holmes dissenting, had upheld the "yellow dog" contract, an agreement exacted of workers to the effect that they would not join certain unions while in the employ of the company imposing the arrangement. By means of legislation upholding these so called "yellow dog" contracts, companies could go into the Federal Courts and by injunction restrain workmen from joining any other union than that arranged by the employer, regardless of the belief of the employee, right or wrong, that the union of his own free choice would better his station in life. States passed acts making it an offense to exact such a promise. It is not to be denied that many of these acts of the legislatures were fraught with danger and filled with error. The reactionary policy of the majority of the Supreme Court, in supporting these contracts, however, was opposed by the more liberal members who indulged in the theory that the state should have a right to make its own experiments, even experiments which they themselves, as judges, could not sanction or approve.\(^7\)

While this conservative court was reading into the Constitution personal approval of political centralization and economic

\(^{15}\) *Benjamin Gitlow v. People of New York*, 268 U. S. 652.

\(^{16}\) *Charlotte Anita Whitney v. People of California*, 274 U. S. 357.

\(^{17}\) *T. B. Coppage v. State of Kansas*, 236 U. S. 1.
industrialism, there was a growing demand on the part of progressive thinkers that something be done to inculcate into these decisions of the Supreme Court more progressive doctrines of democratic government and industrial relations. At a time when this reactionary tendency was at its height and the demand for a change most persistent, Chief Justice Taft resigned and Justice Sanford died. The Supreme Court thus lost two of its most conservative members. This occurred in February and March of 1930.

To fill these two vacancies President Hoover appointed Charles Evans Hughes and Judge Parker of North Carolina. The senatorial storm which followed is of common knowledge and recent recollection, and presents one of the most colorful tirades of that body upon any person or institution within the country.

The Senate aimed their arrows at these two appointees; but in reality they were emptying their quivers upon the Supreme Court itself and its judicial imperialism. They were in fact condemning the Supreme Court for invalidating state laws, the expressed will of sovereign people, designed and intended to correct abuses placed upon them by financial dominance, and for otherwise assuming a position patently inimical to the interests of the masses and the rights of the individual.

Such men as Borah, Brookheart, LaFollette, of course, and even Carter Glass opposed these appointments. Norris said, speaking of Hughes, "No man in public life so exemplifies the influence of powerful combinations in the political and financial world." They might have been right with reference to Judge Parker. However, as to Hughes, later developments disclosed that the Senate had fallen into the common fallacy of failing to distinguish between the lawyer and the judge. To them, Hughes was tainted with the psychology of wealth attending every big corporation lawyer. To them, he represented Big Business, and his connection with the Harding administration doubtless did not alleviate the situation. In their distrust of the Supreme Court itself, the Senators heaped upon the former candidate for the presidency a criticism both scathing and vituperative. The battle cry of the whole attack was that the appointment of these men would sound the knell of the liberties of the American people.

After the defeat of Judge Parker, Owen J. Roberts was appointed by the President; and even he met with some resistance;
but eventually the storm subsided; and both these men, Hughes
and Roberts, were confirmed by the Senate. Hughes took his
oath on February 24, 1930, and Roberts took his on the 2nd of
June thereafter.

So far as Roberts is concerned, he was practically unknown
except that he was a prominent corporation lawyer and had
shown ability and good judgment in the exposure of corruption
in the infamous oil scandals. What must have been the thoughts
of these two men as they took their places upon the bench and
reflected upon the true meaning of the senatorial protest which
they must have known was only the expression of something
much deeper in the nature of public opinion! The Senate furore
simply meant that the people themselves were becoming more
acute in their scrutiny of the opinions of the Supreme Court
and more alert in their reactions to them; that they were de-
manding a substitution of liberal tendencies for the reactionary
ones that had characterized the Court during the entire post-
war regime. They knew that either the new appointees would
work a continuance of the old policy of the administration of
government for the predatory interests and the privileged few,
or that a change in personnel and the setting up of a new court
might work a change, not only in court decisions but perhaps
as well in governmental attitudes generally.

So the old dissenting triumverate of Holmes, Brandies and
Stone was joined by the two new appointees, Hughes and Rob-
erts. The trio knew, as the country knew, that if these two men
were liberals, the three old members with the two new ones
would make a liberal majority of five and that their view would
become the law of the land. So it turned out to be, and here the
whole policy of government turned upon the judicial qualities
of two men. We now had five liberal members, members of a
new school of social jurisprudence, with what overwhelming
results we shall observe. We see that since that time they have
voted liberally and together and that the old guard has been
overthrown and put into the place of the dissenters.

During the last year or two, these five have seemed most
eager to undo the work of the court under Taft. Read the
United States Reports beginning with 281 U. S. R. and you shall
see that Holmes, Brandies, and Stone seized every opportunity
to make effective the doctrines they had so consistently adva-
ced. And the strange part of it was that Hughes and Roberts
too were just as eager to join them. Perhaps never in our his-
tory has a change of personnel made such an abrupt change in the decisions of this most powerful of our governmental agencies. Here is a complete change in viewpoint resulting in a vastly important change in social effect, for a new light shines across the pages of the majority and controlling opinions in the decisions of the Supreme Court. The causes for this change have been variously classified. Some give credit to Holmes and Brandies, and point out that the judicial genius displayed by Holmes for twenty-nine years and by Brandies for fifteen years gradually crept into and became resident in the minds of the younger jurists from whom the new judges were to be recruited. Others say that the cause of the change was the Senate storm as it reflected public opinion. It is an interesting conjecture as to whether or not the judicial philosophy as shown for so many years by Holmes and Brandies really changed the minds of the new judges as to what the decisions of the Supreme Court ought to be, or whether the popular demand of the people through their chosen representatives in the Senate commanded the attention of the new members of the quintet and thus brought about a more liberal attitude. We are more concerned, however, with the tendency than we are with its cause.

Many of the opinions written by Hughes since his present appointment as Chief Justice are interesting in their revelation of his present leaning. He upheld a constitutional provision of Ohio which required the ruling of all but one judge of the State Supreme Court to declare an act of her legislature unconstitutional. He upheld a statute which provided for a vocational rehabilitation fund to work out the provisions of the New York Workmen's Compensation Laws. He upheld a Louisiana free school book statute. He upheld state legislation respecting the licensing of farmer's cotton gins. He upheld a very progressive Louisiana act placing a tax on oil. In Texas, further, he supported the labor unions and protected them from the substitution by coercion of a purely railroad union. This is singu-

22 Ohio Oil Company v. Conway, 281 U. S. 146.
larly interesting in the light of the court's former holding upon the "yellow dog" contract, to which I made reference.

His decisions mean that Hughes has shown that he is the kind of a Chief Justice his opponents in the Senate said he never could become. So that, after all, although ordinarily we regard the demands of the people to be a fairly accurate index of their needs, we must nevertheless recognize the great error of judgment committed by the Senate in its appraisement of Justice Hughes; and from this lesson learn to hear with caution the petitions of the people respecting purely judicial matters.

By the court as now constituted, with these five liberals, whether through the opinions of Hughes or others, human rights and the constitutional guarantees to individuals, such as freedom of the press and freedom of speech, are enlarged and protected; private property rights are more closely checked; and the powers of state governments in dealing with business greatly enlarged.

Consider the case of O'Gorman and Young v. Hartford Fire Insurance Company. Here a New Jersey statute requiring that commissions to insurance men in certain classes be uniform dealt with the right to contract, but was nevertheless upheld by Brandies, Holmes, Stone, Roberts, and Hughes. In this case Justice Sutherland led the now dissenting faction in a notable dissenting opinion. The majority opinion was a real victory for state rights and economic democracy. It was a real blow to the cause of the predatory interests long shielded by the old majority members. The upholding of the New Jersey law respecting commissions to insurance agents is interesting in the light of the former nullification of the statute of New York respecting ticket brokers, of Minnesota regulating dairy products, and of Washington restricting employment agencies.

Take, for example, further, the case of Educational Films Corporation of America v. Ward: An act was passed imposing a franchise tax upon corporations based on income from royalties procured from copyrights. The Supreme Court held that this taxation was entirely within the rights of the state legislature, notwithstanding the previous holding in the Massachusetts case, to which I made reference, which held that the state legislature had no right to impose a tax upon patent royalties. There can be little differentiation between these cases, as I see it, and no


tenable distinction in the law. This reversal is simply a ques-
tion of change of viewpoint and policy.

One of the most interesting recent holdings of the Supreme
Court disclosing this change of policy comes from the State of
Indiana. As you will recall, the 1929 Legislature passed an act
which provided for a tax upon stores and was popularly known
as the “chain store” law. By it, upon a single store, the owner’s
annual license fee is three dollars. As the number of stores
owned by one person or corporation increases, the amount of
the annual fee upon each store increases, until with the owner-
ship of more than twenty stores, the fee becomes twenty-five
dollars for each additional store. This was regarded by most
lawyers to be purely an act of discrimination against the chain
store. The act finally went to the Supreme Court to be tested
from the standpoint of its being a lawful taxing law, and the
Supreme Court held that as a taxing law it was perfectly proper;
that the legislature in passing it merely exercised one of its
fundamental rights, that of taxation; and that the statute was
not repugnant to the Constitution.26

The attitude of the new court with reference to individual
rights and liberty also is most interesting. California passed
what was called a “red flag” law, making it an offense to display
a red flag. The theory of the statute was that to display such a
flag was in opposition to the established government. One Yetta
Stromberg had been convicted of a violation of this act by the
display of a red flag at a communist children’s camp. Remem-
ber now the Gitlow and Whitney convictions sustained by the
old court. But this conviction the opinion of Justice Hughes
set aside. He said: “The maintenance of the opportunity for
free political discussion to the end that government may be
responsive to the will of the people and that changes may be
obtained by lawful means, an opportunity essential to the secur-
ity of the Republic, is a fundamental principal of our constitu-
tional system.”27

Respecting free speech and free press, we will recall that
notorious statute passed by the Minnesota legislature by which
the prosecuting attorney, believing that a newspaper had pub-
lished scurrilous or defamatory matter, could, upon his applica-
tion and proper proof, enjoin such newspaper as a public

26 State Board of Tax Commissioners v. Jackson, 283 U. S. 527.
nuisance in any court having jurisdiction.\textsuperscript{28} The advocates of this act asserted that whenever a judge or tribunal regarded such printed matter as hostile to the public good because of its defamatory or scandalous nature, he or it should be empowered in the interest of the government to suppress the publication responsible. The opponents of the bill, however, said that it was simply another example of that exercise of the police power which makes for governmental tyranny; that by this statute political corruption and business coercion could flourish without serious danger of exposure; and that the effort made for one hundred and fifty years in this country to keep the press free and untrammelled would go for naught. This act finally came to the Supreme Court of the United States, and the new court declared it to be null and void as in contravention of the provision of the Constitution guaranteeing the right of free press. It is further significant that to the controlling opinions of Justice Hughes on the "red flag" law and in the Minnesota case, Butler, Sutherland, Van Devanter and MacReynolds all dissent.

The State of Ohio passed an act imposing a tax upon natural gas brought into Ohio from another state.\textsuperscript{29} This act was presented to the Supreme Court of the United States for its consideration and was upheld as a valid exercise of the taxing power of a sovereign state. This can scarcely be differentiated from the West Virginia act held unconstitutional by the old court as an undue interference with interstate commerce.

When the new court addressed legal problems growing out of prohibition, such as questions of search, seizure, and forfeiture, and the collection of delinquent taxes and licenses imposed by pre-Volstead liquor regulations, the government was held more strictly to account; and the burdens formerly imposed upon the people by the reactionary court have been greatly lightened.\textsuperscript{30}

Contrary to former holdings, the court now in a recent case says that a conviction under the National Prohibition Act for unlawfully selling intoxicating liquor is a bar to a civil action based upon the same sales to recover the retail dealers' tax and special liquor tax for engaging in business contrary to law, due and payable under the old liquor laws.\textsuperscript{31}

\textsuperscript{28} J. M. Near v. State of Minnesota, 283 U. S. 697.
\textsuperscript{29} East Ohio Gas Company v. Tax Commission of Ohio, 283 U. S. 465.
\textsuperscript{30} Davies Motors Incorporated v. United States, 281 U. S. 528.
\textsuperscript{31} United States v. LaFranca, 282 U. S. 568.
Let us always remember that the Supreme Court, in construing the acts of Congress and directing administrative policies of the executive branch, from time to time, was intended by the framers of our government to possess such qualities of elasticity as might meet the changing needs of a changing people, and was designed that its rulings might be kept flexible for the protection of individual rights and thus control standards for freedom, justice, and democracy. These considerations make this complete change in the policy of the Supreme Court more interesting and acceptable than alarming. Current comment upon the recent decisions of the Supreme Court shows that the people are alert to the change and likewise to the existing need for the change. I believe that lawyers should charge their minds not only with the shifting needs of the people but also with the length to which this recent change has gone, not alone to preserve the trend where truly progressive but also to see that the inclination does not carry us too far.

While we are considering these grave matters, we come to the resignation of Justice Holmes. Four liberals were left behind and four conservatives remained. What a liberal was lost! No better quotation indicates the attitude of Justice Holmes than this: "There is nothing I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect."32 It was Justice Holmes who said that the legislature had a right to make its own social experiments so long as it was truly and reasonably working out the processes of democratic government. It was this same Oliver Wendell Holmes, son of the great doctor poet, who called wire tapping "dirty business."33 It was Holmes of whom Professor Felix Frankfurter said: "That he serenely dwelt above the sound of passing shibboleths; that he has built himself into the structure of our national life, and has written himself into the slender volume of the literature of all time."34

32 William Truax v. Corrigan, supra.
34 Mr. Justice Holmes and the Constitution, by Professor Felix Frankfurter.
In considering Holmes, we are reminded again how much depends upon the personnel of a court of last resort. When a judge sits upon a private dispute, the limits within which he may make his choice are narrow indeed; but the limits of choice of a judge sitting upon a constitutional question present a different matter. In the former case, the rights of the individual litigants are considered only; but the questions a judge of the Supreme Court must decide are questions of government and politics involving relationships between the state and the individual, between the state and the nation, and between the individual and the nation. The factors that go to contribute to the decision of a justice of the Supreme Court are many, subtle, and intangible. Yet the opinion of one man may change the course of government, precipitate a war, make history.

We have seen that the Constitution is broad and general in its design and was intended by the framers of our government so to be. It has therefore come to be whatever the judges say it is. We have a maxim that this is a country of laws and not of men. But when we view the manner in which the Supreme Court has really made the law, we see that this is to a large extent a government of men more than of laws. The whole direction of our legislation, the policy of our executive administration, the doctrines of our jurisprudence have been based, and rightly so, upon the construction placed upon the Constitution by the Supreme Court. The Senate storm was but a reflection of a more complete and shrewd realization of this fact by the people.

At this time, at any rate, the dissatisfaction on the part of the progressives seems to have abated materially. But there have been no decisions whatever during the last two years upon many great questions in many important phases of jurisprudence. In none of these cases which I have cited to you and none which have been decided by the new court with its new personnel have utility regulations, for example, been truly passed upon; radio control presents a wide field of possible litigation affecting the rights of individual, state, and nation; strikes have been at the minimum during these past two years; and the whole question of redrafting and readapting whatever new prohibition regulations we may have in the next few years is yet to be passed upon. This is no time for us to become careless as to what the future trend shall be. In the past two years agencies for social control and state legislatures have been able
to go ahead with new and progressive programs within and concerning states, free from the tyranny of the Fourteenth Amendment as interpreted by the old school. The present near collapse of our economic structure and industrial system, the strain upon our present social order, and the widespread depression show that business enterprise entirely free from governmental control does not guarantee happiness and prosperity within this country. We must also recognize that liberality may go too far, and that in endeavoring to pull ourselves out of this depression we must not go farther than experience would warrant in this direction.

The selection of a man to fill Holmes' place was equally as important as the selection of a president, over which we spend so much time and energy every four years. Liberality alone was no qualification for this man. The Supreme Court needed not a man who could be labeled this or that but a man with great legal ability, statesmanship, and an open mind, a man who would be willing to be educated to fresh points of view from time to time. This was not the time to undertake either to chastise the reactionary element on the one hand or unduly encourage the liberals on the other.

A justice of the Supreme Court has to operate within the framework of a judicial system. There are some limits, of course, upon the powers of a judge; and he cannot make himself a master of the legislative or executive branch of our government. With the sudden vacancy came many considerations: The successor of Holmes must be a man scrupulous to respect the implication of our system of balances in our governmental powers. He must be respectful to the great meaning of the Constitution, familiar with the history of our country and the traditions of our people. He might have certain fixed notions as to the law and what it ought to be, but he would certainly have no right to permit his own private convictions to be the measure of legality, unless he conscientiously believed that the Constitution had been flagrantly violated.

In the embodiment of this attitude, Justice Holmes had perhaps his greatest merit. Yet he believed that in a government such as ours, liberality was not an original sin. Professor Harold J. Laski, in his foreword to the Representative Opinions of Mr. Justice Holmes, says of him: "He disliked formulæ of any kind because he had learned that the truth which we are
inclined to accept as obviously true is not the inescapable law of the universe."

To a court with such needs, with such a history, and with such a changing background, to succeed a man of such outstanding judicial capacity, to take up this balance between the four reactionaries and the four liberals, came Benjamin Nathan Cardozo. Upon the stage of American life as thus set and against such a rich and significant background, with the delicate play of popular demand upon the one hand and judicial appraisal upon the other, and in a light deeply tinted by a renewed consciousness of human needs, walked the personality of this new justice of the Supreme Court. Only time will tell, of course, the manner in which he shall conduct himself under these circumstances.

This we do know: That Cardozo is a great student of Holmes and a very close follower of his methods of reasoning. He has quoted him copiously, not only in his opinions but in his extralegal writings as well. He has much of the same literary dominance in his makeup as Holmes. He reads Greek and Latin for pleasure, and finds great joy in the pursuit of knowledge. He has the respect of the ablest corporation lawyers of the country, notwithstanding his repeated rejections of the claims of wealth against the humblest citizens.

If you want to find the source for his reputation among lawyers and in the universities, you need but take the Northeastern Reports, from one hundred four on, and read his opinions in the decisions of the New York Court of Appeals. The striking thing about his opinions is the purity and excellence of the English with which he clothes them and the manner in which he sets forth the fundamentals of the law and the principles of his own philosophy.

Time and space will not permit a personal discussion of this distinguished jurist, and indeed such personal analysis would not be germane to this subject. I am unable, however, to conclude my attempted appraisal of this great man, as a lawyer and as a judge, without calling your attention to the well-merited claim for distinction which he has in yet another phase of life and letters. America, as a nation and as a people, has produced few philosophers to take eminence with the respected philosophers of other nations. We, as a people, are too rushed, too

35 Representative Opinions of Mr. Justice Holmes, by Alfred Lieb, Vanguard Press. (Companion volume to The Dissenting Opinions of Mr. Justice Holmes.)
dynamic, physically and emotionally, to give ourselves up to the peace and the meditation requisite for the conception and development of any well-rooted philosophy. But Cardozo has been, since earliest manhood, intent upon just such study and reflection; and his commentaries upon men and institutions, be they legal or otherwise, are imbued with that rare practical wisdom which is an indication of the true philosopher. It might hastily be thought that such immersion in the realm of abstract thought would serve to weaken his clarity of vision as a jurist. Cardozo has himself splendidly justified his philosophic bent by saying: “You think perhaps of philosophy as dwelling in the clouds. I hope you may see that she is able to descend to earth. You think that in stopping to pay court to her, when you should be hastening forward on your journey, you are loitering in bypaths and wasting precious hours. I hope you may share my faith that you are on the highway to the goal * * * you think there is nothing practical in a theory that is concerned with ultimate conceptions. That is true, perhaps, while you are doing the journeyman’s work of your profession. You may find in the end, when you pass to higher problems, that instead of its being true that the study of the ultimate is profitless, there is little that is profitable in the study of anything else.”

In order to determine what his probable conduct and reactions will be in the scope of his new appointment, we must look to his past opinions and other writings. I wish to refer specifically to many of the matters we have regarded, dealing with important economic trends, upon which Cardozo has written opinions in his years as justice of the New York Court of Appeals. For instance, when the question of the “yellow dog” contract was passed upon in his state, Cardozo joined in the opinion which repudiated it. In the matter of the provisions of the workmen’s compensation act, Cardozo’s tendency has been to broaden the scope of injuries said to be suffered during the course of employment. In the Gitlow case, which was passed upon by the

38 Babington v. Yellow Taxi Corp., 250 N. Y. 14, 164 N. E. 726.
New York Court of Appeals, and in which, as you will recall, the conviction was sustained, Cardozo dissented. 39

A quotation frequently employed to show his great feeling for freedom of thought is this: "Only in one field is compromise to be excluded or kept within the narrowest limits; there shall be no compromise of the freedom to think one's thoughts and speak them, except at those extreme borders where thought merges into action." This is very like the favorite remark of Holmes upon the same subject: "If there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought, not free thought for those who agree with us but freedom for the thought that we hate."

Cardozo's attitude toward state rights and the power of state legislatures and the constitutionality of their acts, in legislating in the field of business, is set forth in an outstanding opinion written in 1915, shortly after he assumed his place on the New York Court of Appeals, wherein he says: "This statute must be obeyed unless it is in conflict with some command of the Constitution, either of the State or of the Nation. It is not enough that it may seem to us to be impolitic or even oppressive. It is not enough that in its making great and historic traditions of generosity have been ignored. We do not assume to pass judgment upon the wisdom of the legislature." 40

One of the qualities of Justice Cardozo that has endeared him to the people generally is the mercy with which he has ministered justice in criminal cases. His opinion in the case of People v. Schmidt is a masterpiece in the discussion of the consideration to be given by a court of last resort to the convicted murderer, 41 and in it you can see the practical application of a bit of his philosophy set forth in an academic treatise upon the law and social well being: "Logic and history and custom have their place. We will shape the law to conform to them when we may; but only within bounds. The end which the law serves will dominate them all. There is an old legend that on one occasion God prayed, and his prayer was 'Be it my will that my justice be ruled by my mercy.' That is a prayer which we all

41 People v. Schmidt, 216 N. Y. 324, 110 N. E. 945.
need to utter at times when the demon of formalism tempts the intellect with the lure of scientific order."\textsuperscript{42}

This is further shown in a celebrated case decided by Cardozo in which he passed upon the rights of an alien to inherit property and in which it would have appeared to a man of lesser wisdom that he should be controlled by certain treaties; but Cardozo has this to say: "One looks in vain either for uniformity of doctrine or for scientific accuracy of exposition. There are wise cautions for the statesmen. There are few precepts for the judge. All the more, in this uncertainty, I am impelled to the belief that, until the political departments have acted, the courts, in refusing to give effect to treaties, should limit their refusal to the needs of the occasion; that they are not bound by any rigid formula to nullify the whole or nothing; and that, in determining whether this treaty survived the coming of war, they are free to make choice of the conclusion which shall seem the most in keeping with the traditions of the law, the policy of the statutes, the dictates of fair dealing, and the honor of the nation."\textsuperscript{43}

In all of Cardozo's contributions to jurisprudence we are impressed with the fact that he does not take himself too seriously and that he realizes to the fullest the futility of the quest for absolute truth. He says: "I was much troubled in spirit, in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile. I was trying to reach land, the solid land of fixed and settled rules, the paradise of a justice that would declare itself by tokens plainer and more commanding than its pale and glimmering reflections in my own vacillating mind and conscience. I found 'with the voyagers in Browning's "Paracelsus" that the real heaven was always beyond'."\textsuperscript{44}

He appreciates, too, the many things that creep into the minds of judges which are quite as controlling as they are subconscious; for he says: "There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges

\textsuperscript{42} The Nature of the Judicial Process, by Benjamin N. Cardozo, Yale University Press, page 66.

\textsuperscript{43} Tecth v. Hughes, 229 N. Y. 222, 128 N. E. 185.

\textsuperscript{44} The Nature of the Judicial Process, supra, page 166.
cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherted instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James's phrase of 'the total push and pressure of the cosmos,' which, when reasons are nicely balanced, must determine where choice shall fall."

Although these latter quotations are contained in his extra-legal writings, they find equal declaration in his opinions. Lawyers will have in mind the age-old question as to whether or not the manufacturer of a commodity owes a duty of inspection to anyone other than the immediate purchaser of the commodity, to those not within the privity of contract. In the famous Buick automobile case, Cardozo had this to say: "These early cases suggest a narrow construction of the law. Later cases, however, evince a more liberal spirit. Precedents drawn from the days of travel by stage coach do not fit the conditions of travel today. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in the developing civilization require them to be."

In a more recent case, in a discussion of the Bulk Sales Law, Cardozo shows elasticity and responsiveness to changing needs by affirming: "The needs of successive generations may make restrictions imperative today which were vain and capricious to the vision of times past."

In a still later opinion written by him, upholding the New York arbitration law, he has expressed in very practical language, when speaking of the right of the legislature to legislate in this field—"The ancient rule with its exceptions and refinements, was criticized by many judges as anomalous and unjust. It was followed with frequent protest in deference to early precedents. Its hold even upon the common law was hesitating and feeble. We are now asked to declare it so embedded in the very foundations of our jurisprudence and the structure of our courts

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that nothing less than an amendment of the Constitution is competent to change it. We will not go so far."\textsuperscript{48}

So complete has been his determination to be free from unyielding prejudices, so humble has he been in the application of his own philosophy, that he has appeared sometimes to be skeptical of his own convictions. He has declared, "Judges march at times to pitiless conclusions under the prod of a remorseless logic which is supposed to leave them no alternative. They deplore the sacrificial rite. They perform it, none the less, with averted gaze, convinced as they plunge the knife that they obey the bidding of their office. The victim is offered up to the gods of jurisprudence on the altar of regularity."\textsuperscript{49}

Certainly a man of such outstanding genius and such commanding philosophy, even though he take a place most trying, cannot but lend security to our country. To what other man could we more confidently trust the task of taking up the delicate balance between the reactionaries and the liberals of the Supreme Court? The Supreme Court will, during the immediate future and for many years to come, play a part of ever increasing prominence in the progressive development of the country. With our faith diminishing, perhaps, in both the executive and legislative branches of our government, in these times of economic and social trial, Cardozo's appointment has given us the balance and stability we need. We are indeed fortunate to have added to the personnel of the Supreme Court a man who is humble and wise enough to say: "My duty as judge may be to objectify in law, not my own aspirations and convictions and philosophies, but the aspirations and convictions and philosophies of the men and women of my time."\textsuperscript{50}

We shall say to him, paraphrasing the words with which he himself concluded a series of lectures to the Law School of Yale University: "The future, Justice Cardozo, is yours. You have been called upon to do your part in an ageless process. Your part, be it remembered or forgotten, is to carry the torch forward. We know that the flame will burn bright while the torch is in your keeping."

\textsuperscript{49}The Growth of the Law, supra, page 66.
\textsuperscript{50}The Nature of the Judicial Process, supra, page 173.
BIBLIOGRAPHY

Note: The following bibliography of current writings is respectfully presented in the thought that it may direct the reader to material now available in his own library.

"Our Supreme Court Goes Liberal," Forum, October, 1931.
"Dissenting Opinions," Harper, April, 1930.
"Senate Speaks Out," Outlook, February 26, 1930.
"War on Supreme Court," Literary Digest, March 1, 1930.
"Is Justice Roberts the Real Ruler of the United States?" Christian Century, July 10, 1931.
"Justice Sutherland Dissents," Outlook, August 19, 1931.
"Liberal Supreme Court," Outlook, October 7, 1931.
"Supreme Court's Shift to Liberalism," Literary Digest, July 13, 1931.
"Supreme Court Says 'Good-bye' to its Nestor," Literary Digest, January 23, 1932.
"Hughes Rebellion," Nation, February 26, 1931.
"Justice Holmes at Ninety," Review of Reviews, April, 1931.
"Back Stage in Washington—Liberal leanings of the Supreme Court," Outlook, January 14, 1931.
"Hughes and Supreme Court," World's Work, April, 1930.
"Martyrdom of Mr. Justice Brandies," Nation, February 11, 1931.
"Legal Philosophy of Justice Holmes and Brandies," Current History, February, 1931.
"Supreme Court Moves to the Left," World Tomorrow, October, 1930.
"Cardozo on Third Degree," Outlook, November 19, 1930.
"America Judges Her New Judge," Literary Digest, February 27, 1932.
"Judge Cardozo Appointed to Supreme Court," Christian Century, February 24, 1932.
"Justice Holmes' Successor," Outlook, January 27, 1932.