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The Lawyer's Oath

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"I do solemnly swear by the ever-living God to support the Constitution of the United States."

Every American lawyer, upon his admission to practice, takes that oath, and he reaffirms his pledge to preserve, protect and defend the Constitution if he is afterwards elected or appointed to any public office.

Supporting the Constitution, therefore, is the lawyer's primary duty, and it is a solemn responsibility that he thereby assumes.

The stability of our free institutions and the security of our republic rest upon the faithful and meticulous fulfillment of this obligation by every member of the bench and bar and by every public officer, for it is obvious that unless the fundamental law of the land is reverenced and scrupulously observed by those who make a profession of its interpretation and enforcement, citizens in general cannot be expected to respect or obey it.

What are we lawyers doing, what have we done, in these latter days, in that behalf?

LANDMARKS GONE

Every one of us knows that constitutional land-marks have, during the past few years, been hammered all out of shape on the supreme judicial anvil. We lawyers, for the most part, have sat supinely by with scarcely a voice being raised in protest against the new and vicious doctrine that the Constitution is whatever the Supreme Court says it is.

Everywhere, the building of a legal system is, of necessity, a scientific process, for the reason that living together peaceably in organized society is only possible through the adoption of reasonable restraints upon human conduct which are the outgrowth of scientific method.

Order in society is only to be had through orderly rules and procedures, logically evolved from sound premises and principles—stone upon stone being carefully placed by expert masons as the legal structure is erected.

Our rules of human conduct are, therefore, not arrived at intuitively, on principles of abstract justice; but, like the physical sciences,

*The opinions expressed in this article are not necessarily those of the Denver or Colorado Bar Associations. They do, however, represent one view. The other view will be presented in an early issue.

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they are slowly, gradually and intelligently developed from observed phenomena.

Likewise, the Constitution of the United States is not wholly an inspired document. On the contrary, it is a synthetic compendium of political principles, plans for governmental organization, distribution of governmental powers, and guarantees of individual freedoms as to life and property—all built upon precedent, the sound foundation of the accumulated experience of mankind in the art of government throughout the ages.

And, though it was well described by Gladstone as "the most wonderful work ever struck off at a given time by the brain and purpose of man," it contained nothing essentially new and nothing obscure. Its novelty consisted in the fact that for the first time in history the natural rights of man were officially and fully recognized, so that, in the exercise of his individual liberty, the citizen was protected from oppression by either executive, legislative or judicial authority, and minorities were protected against the possible tyranny of majorities.

These protections derive from the system of so-called checks and balances inherent in the Constitution's framework, from the division of governmental powers among executive, legislative and judicial authorities, from the primary sovereign power of the separate states and the limited delegated powers of the federal government, and from the basic idea of deliberative action by elective representatives of the people in all their concerns.

The maintenance of these constitutional guarantees and protections is the highest duty entrusted to the courts and is no less important than the defense of the land against possible invasion by foreign powers whose ideologies differ radically from our own. But a new political philosophy has come into being with the advent of the so-called "New Deal" and in its wake there has developed a new interpretation of the Constitution, vitally affecting the rights of every American citizen, of which the people are not generally aware.

Pressing for the attainment of what are called the "social objectives" of its program, the New Deal has inspired in its followers a reckless disregard for well-established precedent in the administration of government. It has not only compelled successive subservient Congresses to invade the sovereignty of the states by a deluge of federal regulatory legislation clearly outside the powers delegated to the national legislature by the Constitution, but it has further succeeded in so reorganizing the Supreme Court of the United States that it, too, reflects and expounds this social and political philosophy.

From week to week, constitutional principles and precedents, established by the predecessors of the present members of the Court, are

being over-ruled in order that the Court may adapt the law and the Constitution to what it conceives to be changing economic and social conditions, thus destroying the barriers erected through a century and a half of judicial labor against arbitrary governmental interference with the private concerns of the individual citizen.

STARE DECISIS DISCARDED

The salutary rule of *stare decisis* has been, in this way, either in large measure discarded by the Court, or ingeniously circumvented, and it is upon that rule that the stability of our institutions rests.

Blackstone, in the introduction to his famous Commentaries, states the reasons for the rule as follows:

> "It is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion, as also because the law in that case being already declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule which it is not in the breast of any subsequent judge to alter or vary from according to his private sentiments; he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound an old one. Yet the rule admits of one exception; when the former determination is most evidently contrary to reason; much more if it be clearly contrary to the divine law. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law but that it was not law; that is, that it is not the established custom of the realm, or has been erroneously determined. . . .
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> "The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust; for though their reason may not be obvious at first view, yet we owe such deference to former times as not to suppose that they acted wholly without consideration. . . ."

To justify their disregard of former decisions, the present members of the Court would have to convince us that the constitutional interpretations of their learned and illustrious predecessors on that great bench, from John Marshall to William Howard Taft, were either absurd or unjust, and that proposition is, on its face, an absurdity in itself.

Lawyers need no longer speculate as to what the Court will decide where a New Deal issue is in litigation. No longer need they consult previous decisions in arriving at a prognosis, for precedents afford

no guide whatever in advising clients on such constitutional questions, nor, in many cases it seems, does the plain language of the Constitution itself.

Where social or economic matters are under consideration by the Court, the lawyer knows that his study of constitutional law is today of no practical value either to himself or to his clients, and that further pursuit of the subject, as it may affect these questions, is utterly futile. He knows that, in most cases, the Court will uphold the rulings of New Deal administrative agencies as against asserted constitutional property rights.

The protection of freedom of contract and the safeguard against deprivation of property without due process of law, has to a great extent gone by the board; the power delegated to the federal government by Article I, Section 8, of the Constitution, to control interstate commerce, has been so stretched by judicial construction that it has become almost meaningless, and the Congress now invades the field of *intra*state commerce with impunity. Government, state and federal, now enters the field of private business in a great variety of ways without fear of restraint, competing with private enterprise; and thus socialism, undreamed of by the framers of the Constitution, is put into practice and sustained by the Court at almost every turn. The Tenth Amendment, reserving to the states all powers not delegated by the Constitution to the federal government, is almost a dead letter; and government spending and lending, for almost any purpose, is judicially sanctioned.

PERSONNEL CHANGES

These far-reaching changes in American political and legal concepts have come about through a sudden transformation in the personnel of the Court, which, until 1930 when Chief Justice Taft resigned, was predominantly conservative. Subsequently, deaths and resignations made possible a reorganization of the Court by presidential appointment of new members whose philosophy of government agreed in general with that of the New Deal, so that we now have at least seven so-called "liberals" among the nine justices.

While the Court remained conservative, the "objectives" of the New Deal had been thwarted by judicial decision. An effort was made to reorganize the Court by enlarging its membership. When this was overwhelmingly defeated because of public protest, reorganization along "liberal" lines was achieved when the hand of Fate opened the way for packing the Court by presidential appointment.

The conservative members adhere strictly to precedent, conserving the constitutional guarantees of liberty as to both person and property; while the liberal members are inclined to disregard precedent, look upon the provisions of the Constitution as elastic and interpret

them more in accord with sociological rather than strictly legal principles.

Many believe that the elastic, sociological interpretation of the liberals is the better one but the great majority of American lawyers, watching this metamorphosis in constitutional law, are fearful that, if unchecked, it will lead to complete disintegration of our constitutional system, to the ultimate destruction of all our liberties, and to a substitution of a socialistic totalitarian scheme of government for the reliable, well-understood and ideal one established by the framers of the fundamental law of the land.

While it would require a formidable volume adequately to illustrate the changes that have been wrought in constitutional interpretation by the new style "liberal" Court, a brief consideration of some comparatively recent decisions will suffice to disclose the high-lights and the dangers inherent in the new legal "philosophy."

MINNESOTA MORATORIUM CASE

The so-called "Minnesota Moratorium" case (*Home Building and Loan Association vs. Blaisdell*, 290 U. S. 398, 54 S. Ct. 231, 78 L. ed. 413), was the beginning of a long series of judicial jolts given by the Court to American lawyers trained in the tradition of established constitutional law and in the scientific method of interpretation.

That case, which was decided January 8, 1934, sustained a Minnesota statute giving the courts of that state the right to extend the time for foreclosing a mortgage beyond the period permitted by the terms of the mortgage contract, notwithstanding the inhibition of the United States Constitution (Art. I, Sec. 10), against laws in violation of the obligation of contract.

The dissenting opinion of Mr. Justice Sutherland declares forcibly that the majority ruling is in direct conflict with *all* previous considered opinions of the Court and ignores nearly a century and a half of well-established precedent, adding that "if the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned."

With the decision in the Minnesota Moratorium case, the Court first sanctioned the doctrine of expediency in an alleged economic emergency as an escape from constitutional limitation on legislative action, and from that momentous moment the protection afforded the property rights of the citizen by the fundamental law of the land commenced to break down.

March 5, 1934, the Court announced its decision in the case of *Nebbia vs. New York*, 291 U. S. 502, 54 S. Ct. 532, 78 L. ed. 940,

in which it sustained the right of the state of New York to set up a milk control broad and, through it, to regulate the retail price of milk.

Never before had the Court permitted governmental regulation of prices except in the case of public utilities which, because of their monopolistic character, were "affected with a public interest."

In all previous cases, the Court had held unconstitutional every attempt at price regulation outside the public utility field, either as contrary to the Fifth Amendment when attempted by the federal government, or as contrary to the Fourteenth Amendment when attempted by state governments.

In a learned and forceful dissenting opinion, Mr. Justice McReynolds denounces the majority opinion as a "facile disregard of the Constitution" and points out that "it not only takes away the constitutional rights of the little grocer to conduct his business according to standards long accepted, but at the same time takes away the liberty of twelve million consumers to buy a necessity of life in the open market."

GOLD CLAUSE CASES

February 18, 1935, the opinion of the Court in the celebrated "Gold Clause Cases" was handed down (*Norman vs. Baltimore and Ohio Railroad Co.*, 294 U. S. 240, 55 S. Ct. 407, 79 L. ed. 885).

In that decision the Court ingeniously justifies repudiation of stipulations in bond contracts to pay in gold, or its equivalent in value when gold payments were made illegal by act of Congress prohibiting circulation of the metal. The theory of the decision is that the bond contracts were not agreements to pay in gold coin but promises to pay in United States currency dollars, which had been depreciated by government fiat from $1.00 to 69c, and the Court took the position that the constitutional power conferred upon Congress to "coin money, regulate the value thereof, and of foreign coin" was so broad and comprehensive as to give the national legislature the right to invalidate provisions of existing contracts to pay in gold.

The four conservative justices then on the Court (McReynolds, Van Devanter, Sutherland and Butler) did not, however, mince words in condemning the majority ruling. They declared the decision contrary to all previous decisions of the Court and predicted that "loss of reputation for honorable dealing will bring us endless humiliation" and added that "the impending legal and moral chaos is appalling."

The Congressional Resolution authorizing the payment of previously incurred gold-clause obligations in depreciated currency was indeed a sorry example in business perfidy set by government itself, and, as the dissenting opinion predicted, it did bring in its wake "endless humiliation." How far it affected general standards of private business integrity, it is difficult to appraise, but many intelligent observers

have pointed out since that there has been a laxity in that regard which corresponds generally to the "legal and moral chaos" referred to in the dissenting opinion and is directly traceable to that unprecedented act.

T. V. A. CASES

In the T. V. A. cases (*Ashwander vs. T. V. A.*, 297 U. S. 288, 56 S. Ct. 466, 80 L. ed. 688, decided Feb. 17, 1936, and *Tennessee Electric Power Co. vs. T. V. A.*, 306 U. S. 118, 59 S. Ct. 366, 83 L. ed. 543, decided Jan. 30, 1939), the Court gives judicial approval to government operation of electric light and power systems in competition with private enterprise, the excuse for the ruling being that the generation and sale of electric light and power there is merely incidental to the lawful acquisition of the Wilson Dam for the production of nitrates under the war powers conferred upon Congress by the Constitution.

Socialism on a truly grand scale is approved by these decisions but in the first case Mr. Justice McReyonlds protested the majority opinion in a vigorous dissent, pointing out that the clear, expressed purpose of the T. V. A. was the taking over by the government of the entire electric power industry throughout the nation. In pronouncing the act in his opinion unconstitutional, he said:

> "The record leaves no room for reasonable doubt that the primary purpose was to put the Federal Government into the business of distributing and selling electric power throughout certain large districts, to expel the power companies which had long serviced them, and to control the market therein. A government instrumentality had entered upon a pretentious scheme to provide a 'yardstick' of the fairness of rates charged by private owners, and to attain 'no less a goal than the electrification of America.' 'When we carry this program into every town and city and village, and every farm throughout the country, we will have written the greatest chapter in the economic, industrial and social development of America.'
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> "I think the trial court reached the correct conclusion and that its decree should be approved. If under the thin mask of disposing of property the United States can enter the business of generating, transmitting and selling power as, when and wherever some board may specify, with the definite design to accomplish ends wholly beyond the sphere marked out for them by the Constitution, an easy way has been found for breaking down the limitations heretofore supposed to guarantee protection against aggression."

In the second T. V. A. case, decided in 1939, the power company had challenged the right of the federal government to duplicate or com-

pete with the private electric service of the power company and sought to enjoin the T. V. A. from doing so on the ground that the government was not authorized by the Constitution to enter the field of private enterprise and that it would deprive the company of its property without due process of law, contrary to the provisions of the Fifth Amendment. The Court held, however, that the power company had no standing to question the constitutionality of the T. V. A. Act merely because it resulted in competition; in other words, that when the Federal government goes into business in competition with private industry, even though clearly beyond its well-defined constitutional powers, and thus threatens the industry with destruction, the courts can afford the private industry no protection.

But Mr. Justice Butler and Mr. Justice McReynolds again courageously denounced the majority ruling in a dissenting opinion, in which they declared that:

> "Except with respect to power available at Wilson Dam prior to the acts complained of, the program is one of creating an outlet for power deliberately produced as a commercial enterprise to be sold in unlawful and destructive competition with power now available in adequate quantities.
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> "The program contemplates ultimately the development of all power sites on the Tennessee River and all its tributaries as an integrated electric power system, the construction and operation of hydro-electric plants at these sites, the use of auxiliary steam plants, the interconnection of all plants, and the elimination of existing privately owned utilities. . . . If, because of conflict with the Constitution, the Act does not authorize the enterprise formulated and being executed by defendants, then their conduct is unlawful and inflicts upon complainants direct and special injury of great consequence. Therefore, they are entitled to have this Court decide upon the constitutional questions they have brought here. See *Massachusetts vs. Mellon*, 262 U. S. 447, 67 L. ed. 1078, 1085, 43 S. Ct. 597; *Frost vs. Corporation Commission*, 278 U. S. 515, 521, 73 L. ed. 483, 488, 49 S. Ct. 235."

It is indeed a sorry state of affairs when, as this decision holds, property owners whose property is about to be confiscated by an agency of the federal government acting in violation of the Constitution cannot appeal to the federal courts for redress of their just grievances against the exercise of unlawful powers by the government.

REGULATION OF WAGES

Until the advent of the present "liberal" Court, wage-fixing by government boards, commissions and bureaus had always been held

unconstitutional, as interfering with freedom of contract in violation of the "due process" clause of the Fifth and Fourteenth Amendments. But on March 29, 1937, in the case of *West Hotel Co. vs. Parish,* 300 U. S. 379, 57 S. Ct. 578, 81 L. ed. 703, the Court overruled its previous decisions by declaring constitutional a wage-fixing statute of the State of Washington, on the theory that a different construction of the Constitution is justified by changed economic conditions.

Here, again, Mr. Justice McReynolds, in his dissenting opinion, rightly insists that "the meaning of the Constitution does not change with the ebb and flow of economic events," and wisely points out that the power to fix minimum wages implies a like power to fix maximum wages; and that if both powers were exercised the right to make any contract with respect to wages would be completely abrogated. As he says,

> "The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation. To miss the point of difference between the two is to miss all that the phrase 'supreme law of the land' stands for and to convert what was intended as inescapable and enduring mandates into mere moral reflections."

Implicit in every wage-fixing scheme is the right of government agencies to substitute their arbitrary judgment for that of the parties to the contract—employer and employe—who would otherwise be free to exercise their constitutional right as American citizens to make whatever arrangement seems advantageous to each of them in the circumstances.

Governmental regulation of wages and hours of employment presupposes a wisdom on the part of the board or bureau having control of the matter which is nothing short of omniscient, because of the thousand-and-one economic factors entering into the problem of fair adjustment. The possibilities of abuse in the exercise of this power are so great and so eminent that sooner or later the whole scheme will probably have such a boomerang effect that labor leaders themselves will be the first to seek its repeal, when the shoe is on the other foot in some national crisis and maximum wages and minimum hours of employment are prescribed. The framers of the Constitution, in guaranteeing the right of freedom of contract, were indeed wiser in their generation than the children of the New Deal, as time will demonstrate.

SALARY TAX CASES

In tax cases, the Court has reversed its former rulings on constitutional law questions many times in recent years. In *Graves vs. New York,* 306 U. S. 466, 59 S. Ct. 595, 83 L. ed. 927, decided March 27,

1939, the Court upheld the right of the State of New York to tax salaries of employes of a federal agency, thereby overruling a long line of well-established precedents and upsetting the century-old doctrine of reciprocal tax immunity of state and federal governments under the Constitution. The only excuse given by the Court for reversing itself was that the former decisions "cannot stand appeal to the Constitution and its historic purposes," which can only be justified by stultifying former members of the Court.

On the same day, the Court announced its opinion in the case of *State Tax Commission vs. Van Cott,* 306 U. S. 511, 59 S. Ct. 605, 83 L. Ed. 950, where it upheld the right of the State of Utah to tax the salary of an employe of another federal agency, likewise again nonchalantly overruling a constitutional principle firmly established by former decisions for a century and a half.

May 22, 1939, in the case of *O'Malley vs. Woodrough,* 307 U. S. 277, 59 S. Ct. 838, 73 L. Ed. 1289, the Court, again contrary to all precedent, upheld the right of the federal government to tax the salary of a Nebraska federal judge, thereby diminishing his compensation contrary to the Constitution. The only reason assigned by the Court for overruling its former decisions, that such a tax was unconstitutional, was that "they cannot survive," and, strange to say, decisions of British courts in Saskatchewan and Australia were cited to justify the new interpretation.

Then, on January 29, 1940, in the case of *McGoldrick vs. Berwind-White Coal Mining Company,* 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565, the Court again upset all precedent in upholding the right of the City of New York to impose a sales tax on coal shipped into the city from Pennsylvania mines.

The dissenting opinion of Chief Justice Hughes declares the tax unconstitutional because it imposes a burden on interstate commerce. "The case is one of interstate commerce in its most obvious form," says the Chief Justice. "We have the duty," he declares, "of maintaining the immunity of interstate commerce as contemplated by the Constitution. That immunity still remains an essential buttress of the Union, and a free national market, so far as it can be preserved without violence to state power over the subjects within state jurisdiction, is not less now than heretofore a vital concern to the national economy. The tax as here applied is open to the same objection as a tariff upon the entrance of the coal into the State of New York, or a state tax upon the privilege of doing an interstate business, and in my view it cannot be sustained without abandoning principles long established and a host of precedents soundly based."

IMPLICATIONS OF N. L. R. B. CASES

The long series of National Labor Relations Board decisions perhaps best illustrate how long-established precedents have been ignored and provisions of the Constitution have been amplified by the present "liberal" Court in sustaining New Deal legislation.

These cases turn largely upon the interstate commerce clause of the Constitution and the right of freedom of contract guaranteed by the Fifth Amendment.

Prior to the National Labor Relations Board cases, the Court had not permitted the federal government to intrude at all in commerce conducted wholly within state borders, and had thus maintained the original constitutional separation of federal and state sovereignties. It had upheld the right of freedom of contract. But, with the National Labor Relations Board decisions, these provisions of the Constitution are given a new, different and elastic interpretation.

The first of these decisions was handed down April 12, 1937, in the case of *National Labor Relations Board vs. Jones and Laughlin Steel Corporation,* 301 U. S. 1, 57 S. Ct. 615, 81 L. ed. 893. In that opinion, the Court so interpreted the interstate commerce clause of the Constitution as to endow the National Labor Relations Board with control over collective bargaining in a steel plant whose manufacturing operations were wholly confined within the State of Pennsylvania, upon the theory that because the finished product was eventually shipped out of that state the manufacturing process was an essential part of the "stream" of interstate commerce and, therefore, subject to federal regulation. Thus, a long line of precedents, firmly established by the Court, was completely upset, not only in respect to the interstate commerce clause but also as to the constitutional principle of freedom of contract. A wholly new scheme of things, never contemplated by the framers of the Constitution, was inaugurated and judicially approved by this decision.

December 15, 1938, in the case of *Consolidated Edison Company vs. National Labor Relations Board,* 305 U. S. 197, 59 S. Ct. 206, 83 L. ed. 126, the Court held that, although the operations of a public utility system were limited to a single state, yet, because it supplied electric energy to others operating in interstate commerce, it thereby became subject to regulation by the National Labor Relations Board. Here, again, the Court overrules established precedent with respect to the independence of the states in the exercise of their constitutional power to control their own internal affairs; it confers upon the federal government authority to interfere in the concerns of purely intrastate industry; and, in effect, renders the interstate commerce clause meaningless. Gone, then, is state sovereignty, for all practical purposes,

if this interpretation of the Constitution, which takes us a long step in the direction of totalitarianism, is adhered to.

In *Apex Hosiery Company vs. Leader*, 310 U. S. 469, 60 S. Ct. 982, 84 L. ed. 1311, decided May 27, 1940, an employer sought redress in damages, under the Sherman Anti-Trust Act, against a labor union which had taken possession of a plant in the course of a "sit-down" strike, held it for some weeks and wantonly damaged or demolished its machinery and equipment. The Court there held that the employer could not recover damages, even though, under other decisions of the Court, the company would have been subject to control by the National Labor Relations Board. Chief Justice Hughes, in a dissenting opinion in that case, vigorously protests against the incongruity of the result and the incompatibility of the majority opinion with former decisions. "This Court," he declares, "has never heretofore decided that a direct and intentional obstruction or prevention of the shipment of goods in interstate commerce was not in violation of the Sherman Act. In my opinion it should not so decide now."

WHAT PRICE A. A. A.?

Another illustration of the new interpretation of the Constitution is afforded by the case of *Mulford vs. Smith*, 307 U. S. 38, 59 S. Ct. 648, 73 L. ed. 1092, decided April 17, 1939, in which the Court upheld the constitutionality of the Agricultural Adjustment Act of 1938 in so far as that statute fixed marketing quotas for flue-cured tobacco in order to permit the supply to be maintained at the so-called "reserve supply level." Crop quotas were fixed by the Secretary of Agriculture under the authority of the Act and penalties amounting to 50% of the market price of excess crop were to be deducted by warehousemen from the grower's selling price, if the grower exceeded the crop quota allotted to him.

The growers, in that case, were not advised by the Secretary of Agriculture, in advance of planting, of the quotas allotted to them, and went into court to restrain the warehouseman from making the deductions, contending that, under the Tenth Amendment reserving to the states all powers not delegated by the Constitution to the federal government, the Act was beyond the power of Congress; that the Act delegated unconstitutional power to the Secretary of Agriculture; and that it took the property of the farmer without due process of law. But the Court, against all precedent, overruled each of these contentions, and thus, in effect, approved a form of dictatorship over American agriculture no less oppressive than that exercised by the totalitarian states, and laid further groundwork for national socialism.

As Mr. Justice Butler, in his dissenting opinion, forcibly points out:

"If Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government may be practically destroyed."

The Supreme Court, on April 28th, 1941, handed down a still more startling decision in the case of *Phelps Dodge Corporation vs. N. L. R. B.*, 61 S. Ct. 845, 85 L. ed. 753.

In that case, there was a strike, during June, July and August, 1935, by the International Union of Mine, Mill and Smelter Workers, at the Phelps Dodge Copper Queen Mine, in Bisbee, Arizona.

Two men, members of the union, but not in the employ of the company during the strike, sought employment after its close. The company refused to hire them and the National Labor Relations Board held it thereby was guilty of an unfair labor practice and ordered the company to offer the men jobs and to make them whole for loss of pay resulting from its refusal to hire them.

Mr. Justice Frankfurter, who writes the majority opinion, holds that under the National Labor Relations Act there is "no greater limitation in denying him (the employer) the power to discriminate in hiring than in discharging."

The Court further says:

"Congress explicitly disclosed its purposes in declaring the policy which underlies the Act. Its ultimate concern, as well as the source of its power, was 'to eliminate the causes of certain commercial obstructions to the free flow of commerce.' This vital national purpose was to be accomplished 'by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association.' Sec. 1. Only thus could workers ensure themselves economic standards consonant with national well-being. Protection of the workers' right to self-organization does not curtail the appropriate sphere of managerial freedom; it furthers the wholesome conduct of business enterprise. . . . It is no longer disputed that workers cannot be dismissed from employment because of their union affiliations. Is the national interest in industrial peace less affected by discrimination against union activity when men are hired? The contrary is overwhelmingly attested by the long history of industrial conflicts, the diagnosis of their causes by official investigations, the conviction of public men, industrialists and scholars. . . . Discrimination against union labor in the hiring of men is a dam to self-organization at the source of supply."

Thus the "stream of interstate commerce" becomes a mighty roar, engulfing the citizen in almost every petty concern; the shadow of the long arm of the federal government darkens nearly every mine, mill and factory; and our once-prized freedom of contract is by judicial fiat read out of the Constitution, which will prove as tragic for the laborer as it is for the employer.

CHANGING LAW AND MORES

The demoralizing effect of these decisions and of other similar ones, upon the morale of our people, is as obvious as it is contrary to the inspirational spirit of independence and self-reliance inherent in the Constitution.

With the new order, has come a change in the attitude of the citizen from the old-fashioned one of obligation toward government to the new-style one of demand and dependence upon government. And that new attitude of dependency has been encouraged and fortified by the Court's judicial approval of the paternalistic program put forward by the New Deal.

With all due credit for integrity and sincerity of purpose being given the present members of the Supreme Court of the United States, nevertheless it remains true that the Court has written a new and entirely different Constitution from that conceived and penned by the framers; and that, in the process, by its disregard of considered precedent, it has brought about an instability in the social and economic order which threatens the very existence of our free institutions. As a check upon unconstitutional activities of state and federal legislative and executive departments, it has, therefore, lost much of its usefulness.

When rights and liberties guaranteed by the plain unequivocal language of the Constitution are either jettisoned or jeopardized by the courts in the name of emergency; when expediency controls decisions upon the theory that changing economic and social conditions justify disregard of sound, carefully-considered and long established precedent; when the structure of government is turned upside down and inside out by these same courts without regard to the orderly prescribed procedure of amending the Constitution; when legislative and judicial functions are delegated to executive and administrative officials in defiance of the provisions of the Constitution clearly defining the separation of powers of the three branches of government; when the federal government walks all over the independent constitutional rights and sovereignty of the state governments without judicial restraint; when a nod of a governmental head seems to be all that is necessary to afford justification for knocking freedom of contract into a cocked hat, disregarding due process of law as it has always been understood, voiding the interstate commerce clause for all practical purposes, making it necessary for free men to join a labor union before they can obtain

the right to work and for free American employers to contract with some labor union before they can carry on their legitimate business, spending and lending the taxpayer's money for almost any purpose without regard to constitutional limitations, subsidizing favored population groups at the expense of the others, controlling crop production, prices, wages and hours of work by governmental fiat, setting up government in business in competition with private enterprise already established, invalidating the solemn contract obligations of government, even giving away warships of the United States Navy without authority from Congress or the people—when all these things are done, in most cases with highest judicial approval, it is high time for the lawyers of the United States unitedly and vigorously to protest against such flagrant disregard of the fundamental law.

JUDICIAL LEGISLATION

If the people of the United States really want to transform their tried and true system of government into a socialistic scheme, they have the right to do so by amendment of their Constitution, but until they authorize such a metamorphosis in the approved and prescribed constitutional manner, judicial revolutionists have no right to effect such a change through the misinterpretation of the Charter of our liberties.

What lawyer, upon admission to the Bar of the Supreme Court of the United States, has not felt a thrill of pride in his country and its institutions; has not been moved to his very depths by the experience of coming into contact with the heart and soul of the nation in that great Court?

But, by the same token, where is the lawyer today, who has studied even casually the recent decisions of that great Court, and who has not been equally disturbed and impressed with a sense of futility concerning the vindication of constitutional rights in the courts; who has not plainly seen the judicial handwriting on the wall indicating that the law is becoming both unscientific and unstable?

This is surely one of the great tragedies of our era—the abandonment of the sound eternal principles of individual liberty embodied in the Constitution for the sake of bringing that great document into harmony with prevailing so-called "liberal" doctrine, which is as transitory as it is contrary to all the lessons of history.

Reverence for the law and for the courts is indispensable to the preservation of our form of government but it cannot be maintained without a spirit of reverence in the judicial mind toward the fundamental law of the land. How to reestablish that spirit of reverence is the most pressing problem confronting the Bench and Bar of the United States today.

If what is loosely and inaptly called "democracy" is to be saved, we had better start salvaging what is left of our particular brand right here at home, where for the past several years executive, legislative and judicial branches of our government seem to have been cooperating wholeheartedly, if unwittingly, to destroy its free institutions.

To the pessismists of the profession, our constitutional system may seem hopelessly lost, but I, for one, do not share their pessimism. Though the pendulum has swung much too far to the left, it will right itself in due time and sane opinion will once more control.

I do not impugn the good faith of those who have misled us, but I do assail their judgment in the process, and I believe that our only hope of salvation is for the whole Bar, pulling together with all its might, to prevail upon the Courts once more to reverse themselves, as they have recently so glibly done, so that this nation can go forward to the fulfillment of its destiny of leadership in liberty and progress.

Justice Hugo Black to Speak at Annual Meeting

Associate Justice Hugo Black, of the United States Supreme Court, will be the principal speaker at the Forty-fourth Annual Convention to be held at the Broadmoor Hotel in Colorado Springs on September 12, 13, 1941. Justice Black will speak on Friday evening in the Little Theatre. The topic of his address has not been selected, but it will be of a non-political nature, William E. Hutton, President of the State Bar announced.

The Committee on Judicial Selection announces that they have a tentative acceptance from John Perry Wood of Los Angeles as a speaker at the Saturday luncheon meeting. Mr. Wood is a nationally known authority on judicial selection and will speak on the possibilities for approved methods of judicial selection and tenure in Colorado. He is chairman of the American Bar Association Committee on Judicial Selection and Tenure, and is a long and ardent advocate of improving methods of selecting judges in state courts. Attorneys who plan to attend the meeting are requested by Edward L. Wood, Chairman of the Convention Committee, to make immediate reservations at the Broadmoor Hotel in Colorado Springs. The rates will be the same as last year, and full information concerning the convention and hotel accommodations will be contained in the advance program which will be mailed to attorneys in a few days.

Three vital projects will come before the association for action at this meeting. These are: (1) the adoption of a complete probate code, (2) the adoption of a water procedural code, and (3) a plan for an improved method of judicial selection. Committees from the Junior Bar and the State Bar have worked on the probate code for nearly two