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Tom Jones vs. The United States - Uncle Sam's Reply

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TOM JONES vs. THE UNITED STATES

Uncle Sam's reply, by PHILIP HORNBEIN, *of the Denver Bar*

MEMORANDUM

IT WILL be conceded that the National Industrial Recovery Act confers powers upon the President and imposes restrictions upon business that are altogether new in American legislation. But it must be remembered that this Act was passed in pursuance of the promise of a "new deal" by President Roosevelt. The fact that a law establishes a new rule of conduct is not sufficient to make it unconstitutional, for every law is to some extent an innovation. Progress necessarily means change. There can be no change unless the old is superseded by the new. Nor does the fact that the fundamental policy of the N. I. R. A. is a radical departure from previous policies and traditions make the law unconstitutional.

Jones was convicted in that he discharged one of his employees for refusing to join a shop association and because he, on divers occasions, sold Best-Fit shirts at less than cost for the purpose of attracting trade, all in violation of the Code of fair competition promulgated pursuant to the National Industrial Recovery Act. The fine imposed at first blush seems excessive. Under the provisions of a law sponsored by a distinguished namesake of the present appellant, the punishment would be much more severe, for under the drastic terms of the Jones law many violators were sent to the penitentiary for selling and manufacturing a pint of whiskey. Yet the Jones law was only a noble experiment. We are not making comparisons, but it should be noted that the N. I. R. A. exemplifies an ideal long cherished in the human breast—the ideal of economic justice. What better expression of that ideal than the memorable words but recently uttered by our great President: "As between profits first and humanity afterwards, and humanity first and profits afterwards, we shall not hesitate."

But it is said that this goal towards which mankind has been striving is not within the possibilities of practical attainment. It is argued that our fundamental law forbids.

To the man who is not trained in legalistic lore this argument, on the face of it at least, would seem absurd. For was not the Constitution itself ordained and established to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare and secure the blessings of liberty to ourselves and our posterity? The establishment of social and economic justice, therefore, is within not only the spirit but the very letter of the Constitution. Who will say that profits are not to be postponed to human rights? To paraphrase a famous dictum—"Profits were made for man, and not man for profits." The immediate objective of the N. I. R. A. is to secure a living wage to men and women employed in industry, and to so direct industry that men and women willing to work will have that opportunity. That a man should have an opportunity to work, and that he should obtain a living wage if he diligently performs his work, is a proposition upon which all will agree. Even those who deny the power of the Government to exert its powers toward that end are forced to admit that the right of man to a living wage rests upon ethical principles that are unassailable.

So it may safely be asserted that the objective sought to be attained by the National Industrial Recovery Act is at least within the broad general principles of the Federal Constitution. The question then narrows itself into this: whether the means designed to accomplish this concedably beneficent objective are obnoxious to the Constitution.

Of course, the appellant cannot point to any specific provision in the Constitution which guarantees to him the right to condition the continuance of his employees' employment upon their becoming members of his shop organization. Nor can he show any specific grant which gives him the right to sell his merchandise at low cost. This is mentioned because we shall presently refer to the recent decision of the Supreme Court sustaining the constitutionality of the Minnesota Moratorium Act, where it was held that the specific inhibition against the impairment of the obligations of contract was properly suspended, on account of the present emergency. But it is still open to appellant to show, if he can,

that the Fifth Amendment has been violated. This Amendment, as we all know, guarantees due process as against the Federal Government. Its counterpart, the Fourteenth Amendment, guarantees due process as against the State Government. Due process of law, as we conceive it, was never designed to obstruct the advance of social justice. The conception goes back to the days of King John and Magna Charta. It was for protection against arbitrary edicts of the King that the Barons forced King John to yield the Great Charter at Runnymede. It is a singular thing that up to the adoption of the Fourteenth Amendment the Constitutional guarantee of due process was seldom invoked as against the Federal Government. This is pointed out by Mr. Justice Miller in the case of *Davidson v. New Orleans*, 96 U. S., Vol. 6 (pages 103-104).

"It is not a little remarkable, that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the Federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum of the more enlarged theatre of public discussion. But while it has been a part of the Constitution, as a restraint upon the power of the States, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty, or property without due process of law."

Since that decision hundreds of cases have been taken to the Supreme Court of the United States for the purpose of annulling State legislation enacted, ostensibly at least, in the exercise of police power. Practically every measure designed to promote social justice has been subjected to the test of due process of law. It is in the light of these decisions that the present question must be considered.

It will not be disputed, of course, that the trend of judicial decisions has been against governmental interference with

private business, unless the operation of such private business has some direct relation to the public morality, health or safety. This tendency was exceptionally pronounced in the few cases where there was an attempt made to regulate prices. It was always conceded that a business which was quasi public was subjected to governmental regulation in the matter of price or charge. The distinction was clearly drawn between a business strictly private and one public or quasi public, because in the latter case the business or calling could not be carried on without the authorization of the Government. Therefore, it was very logically and properly concluded that such business was subject to governmental regulation. Nevertheless, the right of the State to control and regulate the price charged by a private business, under certain exceptional circumstances, was sustained by the Supreme Court of the United States. The case of *Munn v. Illinois,* 94 U. S. 113, provoked as much comment and discussion as the present case involving the constitutionality of the N. I. R. A. The agrarian population were in revolt against what they thought were extortionate charges exacted by grain elevators. The State of Illinois passed a law fixing the maximum charge of storage and handling of grain. The warehouses challenged the constitutionality of this price-fixing statute, on the ground that it was offensive to the Fourteenth Amendment. Chief Justice Waite went back to the writings of Lord Chief Justice Hale to show that it is lawful to regulate charges in certain callings. He concluded that the grain elevator business was affected with a public interest. It is interesting to note that this forward-looking Chief Justice used the term "social science" way back in 1876. Let me quote this prophetic excerpt from his decision (page 133):

"It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress."

Justice Field wrote a strong dissenting opinion, in which he declared that "the principle upon which the opinion of the majority proceeds is, in my judgment, subversive of the rights of private property, heretofore believed to be pro-

tected by constitutional guaranties against legislative interference, and is in conflict with the authorities cited in its support."

An interesting discussion of the repercussions of this decision is found in Warren's History of the Supreme Court of the United States. It was bitterly assailed by the conservative press of the East, and enthusiastically applauded by the papers in the agricultural section. The decision caused great alarm and misgivings in business circles, and the prophets of gloom predicted that the Government could not endure. The principle in Munn vs. Illinois has never been overruled. It must be admitted that its application has not been extended. It is more probable that it has been restricted. The Supreme Court of the United States refused to apply this principle in the case of the Kansas Court of Industrial Relations Act *(Chas. Wolff Packing Co. v. Court of Industrial Relations,* 43 Sup. Ct. 630. The opinion in that case was written by Chief Justice Taft. In the course of it the Chief Justice declared:

"It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the woodchopper, the mining operator, or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation."

The question of the right to establish a minimum wage was squarely before the Court in *Adkins v. Children's Hospital,* 43 Sup. Ct. 394. While the law was sought to be supported upon the theory that women were the object of special solicitude, yet both the majority opinion, written by Judge Sutherland, and the minority opinion of Judge Holmes, ignore any differentiation between men and women in reference to the right of the Government to fix a minimum wage. Judge Sutherland, in the majority opinion, maintains that on account of the political and economic emancipation of women, their legal status was the same as men. Judge Holmes observed that, "It will need more than the Nineteenth Amendment to convince me that there are no differences between men and women, or that legislation cannot

take those differences into account." However, Judge Holmes' dissent was put on the ground that it was within the inherent power of Congress to remove conditions leading to ill health, immorality and the deterioration of the race, and that if the belief could be reasonably entertained that a minimum wage would tend to create such a result, the law fixing such wage could be constitutional. So the decision in this minimum wage case is an authority against the Government in the present matter.

Notwithstanding that the trend of judicial authority has been against the constitutionality of laws which undertake to control wages or prices, we still submit that the validity of the present Act rests upon impregnable grounds of constitutional interpretation.

Chief Justice Hughes, in *Home Building & Loan Association v. Blaisdell,* 54 Sup. Court Reporter, 231-242, reiterated the memorable warning of Chief Justice Marshall that "We must never forget, that it is a *constitution* we are expounding * * * a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."

Attorney General Cummings, in an address before the American Bar Association, emphasized the point that a Constitution in its nature is dynamic and not static. He referred to Woodrow Wilson, who expressed this thought—that a Constitution is the life of a nation, and not a lawyer's document. The New Deal is out of line with ancient economic theories and traditions. But theories, however ancient, must yield to stubborn facts. It is a condition, and not a theory, that confronts us, and, as Attorney General Cummings puts it, "The Constitution must be interpreted in the light of economic realism, and not narrow legalism."

No one would seriously contend that constitutional law is an exact science. If it is a science at all, it is progressive. The true function of the constitutional jurist is to find "ground for a rational compromise between individual rights and public welfare." Let me quote the gist of the decision of Chief Justice Hughes in the Minnesota mortgage case (pp. 241-242):

"It is manifest from this review of our decisions that there has been a growing appreciation of public needs and of the *necessity of finding ground for a rational compromise between individual rights and public welfare.* The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people, and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very basis of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the state itself were touched only remotely, it has later been found that the fundamental interests of the state are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.

"It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning: 'We must never forget, that it is a *constitution* we are expounding' (McCulloch v. Maryland, 4 Wheat. 316, 407, 4 L. Ed. 579); 'a constitution intended to endure for ages to come, and, consequently to be adapted to the various *crises* of human affairs.' "

This pronouncement is destined to enjoy judicial immortality. It is an authoritative, judicial expression of the essence of the New Deal.

The exact limits of due process of law have never been exactly circumscribed. Upon numerous occasions the Su-

preme Court has declined to prescribe a specific formula which must always be adhered to. On the contrary, it has left the ascertainment of due process, like its counterpart, the police power, to the judicial process of exclusion and inclusion.

Speaking of the constitutional prohibition against the impairment of the obligation of contracts, Chief Justice Hughes, in the case already referred to, said:

"The prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula." This observation is even more true in respect to due process of law. It has long been acknowledged by all political scientists and jurists that a State may actually destroy private property under certain extreme conditions. This may be done and always could be done to prevent the spread of fire or the ravages of pestilence. This acknowledged right has sprung from the overwhelming law of necessity and from the inherent right of the State to preserve itself. We fail to discern any essential difference between the power of the State to prevent physical destruction, and its power to prevent economic and social destruction. If the State has the constitutional potency to challenge and conquer, if it can, the hostile forces of nature, why is it not equally potent to overcome social maladjustments that are man-made? Undoubtedly this situation entered into the judgment of the Supreme Court in the Minnesota case, because that Court quotes with approval a portion of the opinion of Justice Olsen of the State Court of Minnesota, in the course of which that judge said (p. 234):

"The present nation wide and world wide business and financial crisis has the same results as if it were caused by flood, earthquake, or disturbance in nature."

But it will be said that this is merely an emergency; that an emergency does not create power; that constitutional guarantees are meaningless and illusory if they function only in normal times; that their very purpose is to withstand the stress and strain of abnormal and extraordinary times. But the effective and conclusive answer to this contention is expressed by Chief Justice Hughes (p. 235):

"While emergency does not create power, emergency

may furnish the occasion for the exercise of power. Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed. * * * Thus, the war power of the federal government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme co-operative effort to preserve the nation."

"But even the war power does not remove constitutional limitations safeguarding essential liberties." Apparently it was concluded by the Supreme Court that the right of a mortgagee to foreclose and take possession of mortgaged property according to the letter of his contract was not one of the essential liberties of the citizen, for it was held that this strict contractual right must yield to the greater public right and to the common welfare. Up to the time of this decision there was nothing more sacred in business life than a mortgage. The very term denoted something held with a death-like grip. If it be not one of the essential liberties or rights of the citizens to have immediate foreclosure of his mortgage, how can it be said that it is his essential right or liberty to engage in industry for profit and to deny to his employees a living wage? A man's right to live carries with it the necessarily incidental right to obtain such material rewards and profits as will make that life full, enjoyable and happy. But this inherent natural and constitutional right is subject to the necessary limitation that the other fellow also live. "Live and let live" is a doctrine that has always been accepted as sound in morality and in ethics. It is the purpose of the New Deal to give vitality to that doctrine in law and under the Constitution.

But let us return to the decisions. We feel that we can construct from their reasoning a sufficient constitutional foundation for the N. I. R. A. Ever since the commencement of the present century it has been judicially recognized that it was within the law-making power to limit the hours of employment in certain industries. Formerly it was the prevailing juristic thought that the Legislature could not fix the

hours of employment because a man's health and his right to reasonable longevity was a matter of his own private concern, and it was meddlesome on the part of the State to interfere. But that doctrine was repudiated by the Supreme Court in *Holden v. Hardy,* 169 U. S. 366, wherein the constitutionality of the Utah eight-hour law was sustained. Answering the generally accepted position of that time, the Supreme Court said (p. 397):

"The State still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the State must suffer." There was a brief recrudescence of the discredited doctrine that the State is powerless in the matter of hours of employment, in the case of *Lochner v. New York,* 198 U. S. 45. In that case the Court held a ten-day law for bakers unconstitutional. It will be remembered that it was that decision and a decision of the New York Court of Appeals, which held a Workmen's Compensation Act as unconstitutional because it was socialistic, that provoked the wrath of the first Roosevelt. It was those decisions that impelled his famous pronouncement for the recall of judicial decisions that held unconstitutional social legislation.

So then, even in the light of the most conservative interpretation of the Constitution, it is perfectly proper to limit the hours of employment if such limitation is reasonably calculated to promote any of the accepted objects of police power, public health, morals, etc. If that be true, why is it not equally competent to limit the hours of employment with the idea of creating more jobs? Will it be said that such objective is not within the accepted purview of the police power? Who will argue that the unemployment of millions of our people is not a matter of the most serious concern to the entire nation? Never in its history was the police power invoked to check a greater menace, greater danger than that created by the inability of millions of men and women willing and anxious to find a job. There is no more distressing spectacle in the universe than a child pulling at its father's coat, begging for bread, the father being unable to furnish that bread because he can't get a job.

So, if it is constitutional to limit the hours of employment, it would seem to follow that it was equally so to establish a minimum wage. We are aware that Justice Sutherland, in the minimum wage case, drew a distinction between the hours of employment and the wages of employment. He insisted that wages were the heart of the contract. We feel the reasoning of Chief Justice Taft in that case is more persuasive. He said (p. 403):

"I assume that the conclusion in this case rests on the distinction between a minimum of wages and a maximum of hours in the limiting of liberty to contract. I regret to be at variance with the court as to the substance of this distinction. In absolute freedom of contract the one term is as important as the other, for both enter equally into the consideration given and received, a restriction as to one is not any greater in essence than the other, and is of the same kind. One is the multiplier and the other the multiplicand."

But what is the alternative if this law is unconstitutional? Shall we return to the economic philosophy of Malthus? It was his idea that the pressure of population upon the means of subsistence, as he termed it, would solve itself through natural processes. When wages were low there was no work, and hence no bread. The wage earner would be starved out. At least, he would not reproduce. But when work was plentiful and wages were good, the worker would again perpetuate the species. In this way the law of supply and demand would eventually produce the proper adjustment. There may have been some justification for such a doctrine when Malthus, Adam Smith and John Stuart Mill propounded their economic philosophy, because nature was niggardly and the means of subsistence was limited. But now the contrary is true. Nature has been lavish; Providence has been beneficent, and there is an over-abundance of material things. There is an under-consumption, and not overproduction. That under-consumption is due directly to unemployment. To restore the consuming capacity of vast masses of the people—the immediate objective of the N. I. R. A.—who will say that that is not a consummation devoutly to be desired? A law so intimately interwoven with

the welfare of the people—indeed, a law so indispensable not only to the welfare but to the very safety of the people—cannot be unconstitutional. If it is, then the purpose of the Constitution, as expressed in its preamble, is merely sham and pretext.

The offense of Jones in this case was serious. His conduct was anti-social. This law, in substance and effect, says to industry: "You are your brother's keeper." Jones insists that he is not. This is the issue. In determining this issue it must not be forgotten that the duty so enjoined does not rest upon merely altruistic or idealistic reasons. Indeed, an obligation resting on such reasons alone would be incapable of enforcement. Mankind has not progressed thus far. But back of it there are intensely practical and material reasons that are so far-reaching that they even affect Jones' own selfish interests. The notion that an ever-increasing portion of the population may continue to enjoy material happiness and prosperity, and an ever-increasing portion of the population may continue to barely exist and even suffer from want and privation, is not sensible. The history of human events prove its pathetic fallacy. Yet in a last analysis the objection to the N. I. R. A. is grounded upon that very proposition.

The contention that the appellant's activities were strictly intrastate commerce is a mere incident to the vital questions involved. Strictly speaking, and in the ordinary acceptation of the term, his business would undoubtedly have been beyond the power of Congress. The declaration of the policy of the National Industrial Recovery Act states: "It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the

consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources."

Everybody appreciates that interstate, as well as intrastate commerce, has been approaching the vanishing point. We have shown, we believe, that lack of employment and low wages are directly responsible for this diminution of commerce. Hence it follows that Jones' violation of the Act directly affected interstate commerce and is within the jurisdiction of the Federal Government.

LAW DAYS

THE first of a series of annual conferences for the improvement of law in Colorado will be held at the University of Colorado in Boulder on Saturday, May 19, 1934. The guest of this year's conference will be the Hon. Earle W. Evans, president of the American Bar Association.

Known as "Law Days," these conferences will be held yearly at the University and will be devoted to some particular state problem in jurisprudence. The subject of this year's conference is the Rule-Making Power of the State Supreme Court. The conference has been divided into two sessions. The morning session will consider the question of the Rule-Making Power of the Supreme Court looking forward to possible improvements in civil and criminal procedure. The subject of the afternoon session will be the Rule-Making Power as it may pertain to Bar Organization and Discipline.

All lawyers and jurists in the state are urged to attend this Law Day. Inasmuch as the Law Day is to be an annual event, a complete registration of all those attending is to be made and kept as part of the annals.

Law Day is being sponsored by the School of Law of the University of Colorado in cooperation with the Boulder County Bar Association. Members of the committee in charge of the program are: James Grafton Rogers, Dean of the School of Law; Stevens Park Kenney, Treasurer of the