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THE sorrow with which the entire nation learned of the death of Mr. Justice Cardozo bears witness to the sense of loss felt by the great body of his fellow citizens. Few of the people who mourn him had personal opportunity to know the high qualities of his mind or his saintly character. Yet they truly feel that between him and the thought and spirit of his time there was fundamental sympathy and understanding. In a real sense the cast of his thinking was the product of his age.[1] This awareness of his time was coupled in him with sensitiveness to the aspirations of his fellow men and with restraint born of an inherent humility. Such qualities could not fail to find expression in his judicial acts. Wholly apart from the expressed judgments supporting them, these acts had their impact upon the daily life of his fellows and registered their meaning clearly. So clearly, that thousands of men and women who never knew him and who never read his opinions, feel rightly that the nation has lost a great judge.

It is not strange that an age when every moment of men's lives from birth to death is profoundly affected by the consequences of applied

* An address from the proceedings of the bar and officers of the Supreme Court of the United States in memory of Mr. Justice Cardozo, held November 26, 1938, at Washington, D. C.

I wish to express my obligation and gratitude to my friends Thomas Austern, William Graham Claytor, Jr., William Du Bose Sheldon, and J. Harry Covington, III, for invaluable help in the preparation of this address.—*D.G.A.*

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1 " 'We feel him to be great in that he clarifies and brings to expression something that was potential in the rest of us, but what we, with our burden of flesh and circumstance, have not been able to utter.' " Shientag, "The Opinions and Writings of Judge Benjamin N. Cardozo," 30 COL. L. REV. 597 at 650 (1930). See also Aronson, "Cardozo's Doctrine of Sociological Jurisprudence," 4 JOURNAL OF SOCIAL PHILOSOPHY 5 (October, 1938).

science should be an age of pragmatic and tentative thinking. Such an age echoes the words of the father of science: "It cannot be," said Francis Bacon,[2] "that axioms established by argumentation should avail for the discovery of new works, since the subtlety of nature is greater many times over than the subtlety of argument."

> "Although the roads to human power and to human knowledge," he said again,[3] "lie close together, and are nearly the same, nevertheless on account of the pernicious and inveterate habit of dwelling on abstractions, it is safer to begin and raise the sciences from those foundations which have relation to practice, and to let the active part itself be as the seal which prints and determines the contemplative counterpart."

We learn from Mr. Justice Cardozo himself how deeply he distrusted the ability of the human mind to resolve human problems by logical reasoning from assumed premises.[4] "This case,"[5] he said, a decade before his appointment to this Court, "is a striking instance of the dangers of 'a jurisprudence of conceptions' . . . the extension of a maxim or a definition with relentless disregard of consequences to 'a dryly logical extreme.' The approximate and relative become the definite and absolute." In his Yale lectures, he struck again at the "pernicious and inveterate habit of dwelling on abstractions"—this time with no button on his foil:

> "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."[6]

[2] BACON, NOVUM ORGANUM, bk. I, par. 24 (1620); 4 WORKS OF FRANCIS BACON, Spedding, Ellis & Heath ed., 51 (1870) (translation).

[3] Id., bk. II, par. 4.

[4] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 47 (1921), quotes 1 GÉNY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF 127, § 61 (1919): "The abuse consists, if I do not mistake, in envisaging ideal conceptions, provisional and purely subjective in their nature, as endowed with a permanent objective reality. And this false point of view, which, to my thinking, is a vestige of the absolute realism of the middle ages, ends in confining the entire system of positive law, *a priori*, within a limited number of logical categories, which are predetermined in essence, immovable in basis, governed by inflexible dogmas, and thus incapable of adapting themselves to the ever varied and changing exigencies of life."

[5] Hynes v. New York Cent. R. R., 231 N. Y. 229 at 235, 131 N. E. 898 (1921).

[6] CARDOZO, THE GROWTH OF THE LAW 66 (1924). The same thought appears in his dissenting opinion in Reed v. Allen, 286 U. S. 191 at 209-210, 52 S. Ct. 532

He has told us of those "times when the demon of formalism tempts the intellect with the lure of scientific order,"[7] and has pointed the way to resist. "Choice between these meanings," he said,[8] speaking for the Supreme Court, "must avoid a doctrinaire adherence to abstract definitions. It must keep in view the realities of administrative practice, for its effect will be to regulate the conduct of administrative officers. Definitions and analogies borrowed from pleadings in a lawsuit will have their place and recognition, but in due subordination to differences of end and aim." "If a barren literalism were to guide us," he said on another occasion,[9] "subdivision could be carried down to the dimensions of an atom. We are not to push the mandate to 'a dryly logical extreme.'"

If the dryly logical extreme had already been reached, he followed the path of practical judgment back to safe ground. "To refuse to give heed to these distinctions," he wrote,[10] "will lead us into a morass of practical difficulties as well as doctrinal refinements. . . . Already the net of these complexities has entangled the decisions. . . . A halt must be called before the tangle is so intricate that it can no longer be unraveled." Always he must know the facts and test the rule by its consequences in the case at bar. "To know 'the justice of the particular case,'" he said, "one must know the case in its particulars. . . . A decision balancing the equities must await the exposure of a concrete situation with all its qualifying incidents. What we disclaim at the moment is a willingness to put the law into a strait-jacket by subjecting it to a pronouncement of needless generality."[11]

(1932): "A system of procedure is perverted from its proper function when it multiplies impediments to justice without the warrant of clear necessity. By the judgment about to be rendered, the respondent, caught in a mesh of procedural complexities, is told that there was only one way out of them, and this a way he failed to follow. Because of that omission he is to be left ensnared in the web, the processes of the law, so it is said, being impotent to set him free. I think the paths to justice are not so few and narrow. A little of the liberality of method that has shaped the law of restitution in the past . . . is still competent to find a way."

[7] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 66 (1921).

[8] United States v. Memphis Cotton Oil Co., 288 U. S. 62 at 69, 53 S. Ct. 278 (1933).

[9] Interstate Commerce Commission v. New York, N. H. & H. R. R., 287 U. S. 178 at 192, 53 S. Ct. 106 (1932).

[10] General Motors Acceptance Corp. v. United States, 286 U. S. 49 at 61, 62, 52 S. Ct. 468 (1932).

[11] Lowden v. Northwestern National Bank & Trust Co., 298 U. S. 160 at 165, 166, 56 S. Ct. 696 (1936). Cf. Cardozo, J., in Brooklyn Eastern District Terminal v. United States, 287 U. S. 170 at 173-174, 53 S. Ct. 103 (1932): "Our decision may not overleap the limitations of the record. To dispose of the case before us we do not

His distrust of generality—of the pernicious and inveterate habit of dwelling on abstractions—was not based alone on the inadequacy of ideal conceptions to comprehend "the ever varied and changing exigencies of life." It rested also on an awareness of the tricks which our minds play upon us[12] and of the degree to which they are controlled in the choice of values by "inherited instincts, traditional beliefs, acquired convictions . . . a sense in James's phrase of 'the total push and pressure of the cosmos'. . . ."[13]

To Mr. Justice Cardozo logic and analysis were tools to lay out the problem, not forces which coerced the answer.[14] The answer came from the creative faculty of his imagination,[15] set free by his passion for understanding and disciplined by a rigid self-restraint. He was able to bring to the aid of judgment an appreciation of phases of life which he had not experienced and respect for the values and ideas of other men which he understood, even if he did not share. It is significant that when he thinks of the complexity of human interests he calls to

need to hold that through the use of the other vessels the possibility of all demurrage has been excluded by an inexorable rule of law."

[12] In CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 175 (1921), he quotes Robinson, "The Still Small Voice of the Herd," 32 POL. SCI. Q. 312 at 315-316 (1917): "Our beliefs and opinions, like our standards of conduct, come to us insensibly as products of our companionship with our fellow men, not as results of our personal experience and the inferences we individually make from our own observations. We are constantly misled by our extraordinary faculty of 'rationalizing'—that is, of devising plausible arguments for accepting what is imposed upon us by the traditions of the group to which we belong. We are abjectly credulous by nature, and instinctively accept the verdicts of the group."

[13] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 12 (1921).

[14] "We go forward with our logic, with our analogies, with our philosophies, till we reach a certain point. At first, we have no trouble with the paths, they follow the same lines. Then they begin to diverge, and we must make a choice between them. History or custom or social utility or some compelling sentiment of justice or sometimes perhaps a semi-intuitive apprehension of the pervading spirit of our law, must come to the rescue of the anxious judge, and tell him where to go." CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 43 (1921).

[15] "If you ask how he is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself." CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113 (1921).

See also Cardozo, J., in Clark v. United States, 289 U. S. 1 at 13, 53 S. Ct. 465 (1933): "The social policy that will prevail in many situations may run foul in others of a different social policy, competing for supremacy. It is then the function of a court to mediate between them, assigning, so far as possible, a proper value to each, and summoning to its aid all the distinctions and analogies that are the tools of the judicial process. The function is the more essential where a privilege has its origin in inveterate but vague tradition and where no attempt has been made either in treatise or in decisions to chart its limits with precision."

mind Spinoza's statement[16]—"I have labored carefully not to mock, lament or execrate the actions of men; I have labored to understand them"; and that when he thinks of the place of history in the judicial process, he thinks of it in Maitland's words[17]—"Today we study the day before yesterday, in order that yesterday may not paralyze today, and today may not paralyze tomorrow." This inner grace enabled a shy and gentle scholar, for a quarter of a century in the comparative isolation of courts of last resort, to speak with understanding and tolerance of all conditions of men and ideas, and, at the same time, with a rugged practicality and common sense.[18]

No field offers a judge a greater opportunity for the exercise of these qualities than that where he touches on the workings of governments.[19] It is peculiarly appropriate to speak of Mr. Justice Cardozo's work in this field since the first opinion which he wrote for the Court of Appeals of New York, the first published decision in which he participated in the Supreme Court of the United States, and his first and last opinions delivered from that bench were in cases in it.[20]

Mr. Justice Cardozo approached the operations of government, not as a theorist or perfectionist, but as a practical man. In discussing a state taxing statute, he spoke[21] of it as "a pursuit of legitimate ends by methods honestly conceived and rationally chosen," and added,

[16] Cardozo, "Mr. Justice Holmes," 44 HARV. L. REV. 682 at 687 (1931).

[17] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 54 (1921), quoting 3 MAITLAND, COLLECTED PAPERS 439 (1911).

[18] As to the last, see, for instance, Cardozo, J., in Woolford Realty Co., Inc. v. Rose, 286 U. S. 319 at 327, 52 S. Ct. 568 (1932): "There are two fundamental objections to this method of computation. In the first place, an interpretation of net income by which it is also a net loss involves the reading of the words of the statute in a strained and unnatural sense. The metamorphosis is too great to be viewed without a shock. Certainly the average man suffering a net loss from the operations of his business would learn with surprise that within the meaning of the Congress the amount of his net loss was also the amount of his net income."

See also Cardozo, J., in Pokora v. Wabash Ry., 292 U. S. 98 at 104, 54 S. Ct. 580 (1934): "Standards of prudent conduct are declared at times by courts, but they are taken over from the facts of life. To get out of a vehicle and reconnoitre is an uncommon precaution, as every day experience informs us. Besides being uncommon, it is very likely to be futile, and sometimes even dangerous."

[19] Compare CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 75-94 (1921).

[20] Peterson v. Martino, 210 N. Y. 412, 104 N. E. 916 (1914); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 52 S.Ct. 443 (1932); Coombes v. Getz, 285 U.S. 434 at 448, 52 S. Ct. 435 (1932); Palko v. Connecticut, 302 U. S. 319, 58 S. Ct. 149 (1937); Smyth v. United States, 302 U. S. 329, 58 S. Ct. 248 (1937) (opinion of the Court by Mr. Justice Cardozo, announced by the Chief Justice).

[21] Cardozo, J., dissenting in Stewart Dry Goods Co. v. Lewis, 294 U. S. 550 at 577, 55 S. Ct. 525 (1935).

"more will not be asked by those who have learned from experience and history that government is at best a makeshift, that the attainment of one good may involve the sacrifice of others, and that compromise will be inevitable until the coming of Utopia." To him rules must be designed to work in an imperfect world; that they may be rough and ready did not condemn them.[22]

As a practical man he insisted on seeing the problem free of its wrapping of words. It must be stated in terms truly descriptive of its reality. Labels and catch phrases, which confuse by historical and emotional connotations the choice to be made, must be stripped away. He refused, for instance, to allow such words as "original package,"[23] "property tax,"[24] "class,"[25] "property,"[26] "hearing,"[27] "double jeopardy,"[28] "contractual,"[29] or "trial" or "evidence"[30] to interpose themselves between the judge and the problem which he is deciding. He

[22] On another occasion he said, in Norfolk & Western Ry. v. North Carolina, 297 U. S. 683 at 685, 56 S. Ct. 625 (1936): "Taxpayer and state would be swamped with administrative difficulties if left to struggle through every case without the aid of a formula of ready application. In the perplexities besetting the process of assessment the statute is the outcome of a reasonable endeavor to arrive at a proportion of general validity."

[23] Baldwin v. G. A. F. Seelig, Inc., 294 U. S. 511 at 526-527, 55 S. Ct. 497 (1935).

[24] Concordia Fire Ins. Co. v. Illinois, 292 U. S. 535 at 550-552, 54 S. Ct. 830 (1934).

[25] Mayflower Farms, Inc. v. Ten Eyck, 297 U. S. 266 at 277-278, 56 S. Ct. 457 (1936).

[26] Interstate Commerce Commission v. New York, N. H. & H. R. R., 287 U. S. 178 at 192, 53 S. Ct. 106 (1932).

[27] Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294 at 317, 53 S. Ct. 350 (1932).

[28] Palko v. Connecticut, 302 U. S. 319 at 323, 58 S. Ct. 149 (1937).

[29] Coombes v. Getz, 285 U. S. 434 at 449, 52 S. Ct. 438 (1933).

[30] Snyder v. Massachusetts, 291 U. S. 97 at 114-115, 54 S. Ct. 330 (1934): "A fertile source of perversion in constitutional theory is the tyranny of labels. Out of the vague precepts of the Fourteenth Amendment a court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence. A defendant in a criminal case must be present at a trial when evidence is offered, for the opportunity must be his to advise with his counsel . . . and cross-examine his accusers. . . . Let the words 'evidence' and 'trial' be extended but a little, and the privilege will apply to stages of the cause at which the function of counsel is mechanical or formal and at which a scene and not a witness is to deliver up its message. In such circumstances the solution of the problem is not to be found in dictionary definitions of evidence or trials. It is not to be found in judgments of the courts that at other times or in other circumstances the presence of a defendant is a postulate of justice."

insisted on making plain "the underlying reality rather than the form or label." [31]

But most characteristic of the Justice was his attitude toward statutory law and the decisions of state courts interpreting their constitutions, statutes, or common law. This attitude was one of welcoming the wisdom and efforts of other men as an aid in judging the problem before him.[32] To him the statute was not an alien factor in the judicial process. He met it at the threshold with a presumption of validity, which in his mind was "more than a pious formula, to be sanctimoniously repeated at the opening of an opinion and forgotten at the end." [33] From this attitude came another—well-worn canons of construction were relegated to their proper use in cases of doubt and not permitted to be the instruments of emasculation. "True indeed it is,"

[31] W. B. Worthen Co. v. Kavanaugh, 295 U. S. 56 at 62, 55 S. Ct. 535 (1935).

[32] Typical of his deference to the decisions of state courts is the following: "To define a 'perpetuity' for a young and developing community there must be recourse to something more than the pages of a dictionary. The word to be defined, in common with words generally, will have a color and a content that will vary with the setting. . . . It comes down to its interpreters freighted with subtle implications, with the 'tacit assumptions,' the 'unwritten practices,' the 'thousand influences' and 'values' that 'logic and grammar never could have got from the books.' . . . Out of two or more meanings that were possible and plausible, the State of Oklahoma has picked the one comporting best in the thought of her official spokesmen with the 'genius' of her history. The mists of our own uncertainties are scattered when pierced by this authentic evidence of the law of the locality." Hawks v. Hamill, 288 U. S. 52 at 57, 53 S. Ct. 240 (1933).

And again: "The choice of any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review not the wisdom of their philosophies, but the legality of their acts. The State of Montana has told us by the voice of her highest court that with these alternative methods open to her, her preference is for the first. In making this choice, she is declaring common law for those within her borders. The common law as administered by her judges ascribes to the decisions of her highest court a power to bind and loose that is unextinguished, for intermediate transactions, by a decision overruling them. As applied to such transactions we may say of the earlier decision that it has not been overruled at all. It has been translated into a judgment of affirmance and recognized as law anew. Accompanying the recognition is a prophecy, which may or may not be realized in conduct, that transactions arising in the future will be governed by a different rule. If this is the common law doctrine of adherence to precedent as understood and enforced by the courts of Montana, we are not at liberty, for anything contained in the constitution of the United States, to thrust upon those courts a different conception either of the binding force of precedent or of the meaning of the judicial process." Great Northern Ry. v. Sunburst Oil & Refining Co., 287 U. S. 358 at 365-366, 53 S. Ct. 145 (1932).

Compare also Clark v. Willard, 294 U. S. 211, 55 S. Ct. 356 (1934).

[33] CARDOZO, THE PARADOXES OF LEGAL SCIENCE 125 (1928).

he said,[34] "that courts are wont to lean to the construction of a statute that will avoid serious doubts of its validity. . . . Even so, they will not carry hesitation to the point of devitalizing the essence to preserve the husk alone." And again, as the spokesman of the Court, he made the point even plainer;[35] avoidance of a difficulty will not be pressed to the point of disingenuous evasion. Here the intention of Congress is revealed too distinctly to permit us to ignore it because of mere misgivings as to power. The problem must be faced and answered." With him construction itself takes on the eagerness of one anxious to catch another's purpose:

> "There are times when uncertain words are to be wrought into consistency and unity with a legislative policy which is itself a source of law, a new generative impulse transmitted to the legal system. . . . Its intimation is clear enough in the statutes now before us that their effects shall not be stifled, without the warrant of clear necessity, by the perpetuation of a policy which now has had its day."[36]

Much of the legislation which came before the Court during Mr. Cardozo's membership in it had its roots in the great changes in economic and social organization which gathered momentum after the Civil War[37] and made themselves pressingly apparent during the depression which closed the nineteen-twenties. At the very beginning of that decade he made plain his understanding of the direction of change, and of the inadequacy, as a basis of legal philosophy toward it, of the economic fundamentalism so deeply ingrained in Anglo-American jurisprudence.

> "'The movement,'" he said in 1921,[38] "'from individualistic liberalism to unsystematic collectivism' had brought changes in the social order which carried with them the need of a new formulation of fundamental rights and duties. In our country, the need did not assert itself so soon. Courts still spoke in the phrases of a

[34] Cardozo, J., dissenting in Interstate Commerce Commission v. Oregon-Washington R. R. & Navigation Co., 288 U. S. 14 at 49, 53 S. Ct. 266 (1933).

[35] George Moore Ice Cream Co., Inc. v. Rose, 289 U. S. 373 at 379, 53 S. Ct. 620 (1933). See also United States v. Shreveport Grain & Elevator Co., 287 U. S. 77, 53 S. Ct. 42 (1932); Hopkins Federal Savings & Loan Assn. v. Cleary, 296 U. S. 315 at 334-335, 56 S. Ct. 235 (1935).

[36] Van Beeck v. Sabine Towing Co., Inc., 300 U. S. 342 at 351, 57 S. Ct. 452 (1937). See also Cardozo, J., dissenting in Carter v. Carter Coal Co., 298 U. S. 238 at 336, 56 S. Ct. 855 (1936).

[37] See FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT, c. 1 (1938).

[38] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 78 (1921).

philosophy that had served its day. Gradually, however, though not without frequent protest and intermittent movements backward, a new conception of the significance of constitutional limitations in the domain of individual liberty, emerged to recognition and to dominance."

In his discussion of the constitutionality of this mass of legislation, two streams of tendency emerge. First, the existence of a problem or a need predisposed him in favor of the effort by the legislature to meet it. Regardless of the chances of success or the wisdom of the attempt, there was in his mind no constitutional presumption against the effort—such, for instance, as that liberty of contract is the rule and restraint the exception—no assumption of a mechanistic economics which, left to itself, would work out the solution.

"At the time of our decision in *Wright v. Hart*," he wrote in 1916, "such laws were new and strange. They were thought in the prevailing opinion to represent the fitful prejudices of the hour. . . . The fact is that they have come to stay, and like laws may be found on the statute books of every state. . . . In such circumstances we can no longer say, whatever past views may have been, that the prohibitions of this statute are arbitrary and purposeless restrictions upon liberty of contract. . . . The needs of successive generations may make restrictions imperative today which were vain and capricious to the vision of times past. . . . Back of this legislation, which to a majority of the judges who decided *Wright v. Hart* seem arbitrary and purposeless, there must have been a real need." [39]

This acceptance of and respect for the basic instinct of mankind to struggle against its apparent fate led him to approach a statute, not with a challenge that it justify itself by some conceptual tag, but with the desire to accept it unless it plainly ran counter to some command

[39] Klein v. Maravelas, 219 N. Y. 383 at 385-386, 114 N. E. 809 (1916). Cf. Cardozo, J., dissenting in Carter v. Carter Coal Co., 298 U. S. 238 at 331, 56 S. Ct. 855 (1936): "Congress was not condemned to inaction in the face of price and wage wars so pregnant with disaster. Commerce had been choked and burdened; its normal flow had been diverted from one state to another; there had been bankruptcy and waste and ruin alike for capital and labor. The liberty protected by the Fifth Amendment does not include the right to persist in this anarchic riot."

Compare also Ashton v. Cameron County Water Improvement District No. One, 298 U. S. 513 at 533-534, 56 S. Ct. 683 (1936); Steward Machine Co. v. Davis, 301 U. S. 548 at 586, 57 S. Ct. 883 (1937); Helvering v. Davis, 301 U. S. 619 at 641-645, 57 S. Ct. 904 (1937).

of the Constitution. No words can sum up this attitude of mind better than his own:[40]

> "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."

The second tendency which runs throughout his constitutional decisions sprang from his innate humility in the presence of the infinite complexity of human problems. No one knew better than he that the subtlety of these problems was greater many times than the subtlety of argument; and no one was less moved by dialectics designed to prove that an honest attempt to remedy an evil had no reasonable relation to the end sought. He had no sympathy with a judicial attitude which, while charged with no duty or power to initiate solutions, condemned on *a priori* reasoning the efforts of puzzled men as lacking any rational foundation and as purely fanciful.[41] His understanding of their difficulties was quick and generous. On one occasion, after stating the predicament of the legislature, he said:[42] "For the situation was one to tax the wisdom of the wisest. At the very least it was a situation where thoughtful and honest men might see their duty differently."

In this field there is no argument about principle. No one disagrees with Mr. Justice Cardozo when he says:

> "It is not the function of a court to determine whether the public policy that finds expression in legislation of this order is well or ill conceived. . . . The judicial function is exhausted with the discovery that the relation between means and end is not wholly vain and fanciful, an illusory pretense. Within the field where men of reason may reasonably differ, the legislature must have its way."[43]

The difficulty comes in the application of the principle. It comes

[40] People v. Crane, 214 N. Y. 154 at 172, 108 N. E. 427 (1915).

[41] If, however, he was convinced that a legislative classification had been made in bad faith to avoid a specific legal inhibition and to confer an improper privilege on one person, he spoke plainly: "A misshapen congeries of accidents has been made to masquerade under the semblance of a class." Matter of Mayor of New York, 246 N. Y. 72 at 79, 158 N. E. 24 (1927).

[42] Mayflower Farms, Inc. v. Ten Eyck, 297 U. S. 266 at 276, 56 S. Ct. 457 (1936).

[43] Williams v. Mayor, 289 U. S. 36 at 42, 53 S. Ct. 431 (1933).

from the resistance of the human mind to the conclusion that what it disapproves can be reasonable, and from its inability to find in considerations which are beyond its experience the basis of honest belief and rational action on the part of others. Only a mind rigidly disciplined by humility and restraint and gifted with imagination can surmount these obstacles. Mr. Justice Cardozo had such a mind.

When it was argued that a tax graduated according to the volume of gross sales can have no reasonable relation to ability to pay, he answered:[44] "Larger and larger sales are sought for . . . with avidity. They are not the products of whim and fancy. They represent a conception of probabilities and tendencies confirmed by long experience. The conception is no more arbitrary in the brain of a government official than it is in the mind of a company director." Or, if the question was whether a classification of chain stores based on the control of units within or without a single county is reasonable, he pointed[45] to the history of the locality concerned, where for a century the county has been the unit of government as the township has been in the section with which he was familiar.

This attitude of generous and understanding welcome to co-workers in the field of law extended to the administrative officer or commission as well as to the legislator. One would expect a judge as aware as Mr. Justice Cardozo of the "complexities of modern life" and the need to "substitute exact knowledge of factual conditions for conjecture and impression"[46] to uphold a broad delegation from the legislator to the administrator of authority to implement and apply general rules in the light of ascertained facts. "In the complex life of today," the Justice said in one such case, "the business of government could not go on without the delegation, in greater or less degree, of the power to adapt the rule to the swiftly moving facts."[47] To him it was enough that

[44] Stewart Dry Goods Co. v. Lewis, 294 U. S. 550 at 572, 55 S. Ct. 525 (1935).

[45] Louis K. Liggett Co. v. Lee, 288 U. S. 517 at 581, 53 S. Ct. 481 (1933). For similar examples, see: Mayflower Farms, Inc. v. Ten Eyck, 297 U. S. 266, 56 S. Ct. 457 (1936); Fox v. Standard Oil Co. of New Jersey, 294 U. S. 87, 55 S. Ct. 333 (1934); Concordia Fire Ins. Co. v. Illinois, 292 U. S. 535, 54 S. Ct. 830 (1934); Aero Mayflower Transit Co. v. Georgia Public Service Commission, 295 U. S. 285, 55 S. Ct. 709 (1935).

[46] CARDOZO, GROWTH OF THE LAW 117 (1924).

[47] Panama Refining Co. v. Ryan, 293 U. S. 388 at 441, 55 S. Ct. 241 (1935); compare Southern Ry. v. Virginia, 290 U. S. 190 at 199, 54 S. Ct. 148 (1933); also Cardozo, C. J., in People v. Teuscher, 248 N. Y. 454 at 463, 162 N. E. 484 (1928), upholding an act providing that when ninety per cent of the herds in a township had been tuberculin tested, an untested herd in the township might be quarantined: "A command thus conditioned is neither a denial of equal laws . . . nor an illegitimate

the legislators set a "standard reasonably clear whereby discretion must be governed" and "canalized within banks that keep it from overflowing."[48] For although he thoroughly appreciated the considerations underlying a separation of powers in government,[49] he rejected the phrase as a dogma. "The Constitution of the United States," he tells us, "is not a code of civil practice."[50] It was only when the social values which the phrase suggests were to his mind sacrificed by a grant of power to do anything, as he described it,[51] "within the limits of the commerce clause for the betterment of business" that he denied the validity of the attempt.

Just as he recognized that if government were to go on much must be delegated to administrative bodies, so the Justice also recognized that if administrative bodies were to function they must be left free to pursue an undertaking to its conclusion without constant judicial control and review of intermediate or interlocutory decisions. "Public policy forbids," he said,[52] "that the work of the Commission in the fulfillment of the stupendous task of valuation shall be hampered by writs of mandamus except where the departure from the statute is clear beyond debate. . . . In any work so vast and intricate, what is to be looked for is not absolute accuracy, but an accuracy that will mark an advance upon previous uncertainty. If every doubt as to the extent and form of valuation is to be dispelled by mandamus, the achievement of the ends of Congress, already long deferred, will be put off until the Greek Kalends." Here again is the pragmatic test of workability in an imperfect world—a test which in another case he applied to an attempt to set aside an order requiring a uniform system of accounts;[53] and in

delegation of legislative power. . . . It is the adaptation of the rule, according to the judgment of the vicinage, to the occasion and the need. Small use would there be in stimulating the many within a township to a care of the public health, if one or a few wiseacres or obstructionists could make the labor vain. More and more, in its social engineering, the law is looking to co-operative effort by those within an industry as a force for social good. It is harnessing the power that is latent within groups as it is harnessing the power in wind and fall and stream."

[48] Panama Refining Co. v. Ryan, 293 U. S. 388 at 434, 440, 55 S. Ct. 241 (1935).

[49] See Matter of Richardson, 247 N. Y. 401, 160 N. E. 655 (1928).

[50] Panama Refining Co. v. Ryan, 293 U. S. 388 at 447, 55 S. Ct. 241 (1934).

[51] Concurring opinion in A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495 at 553, 55 S. Ct. 837 (1935).

[52] Interstate Commerce Commission v. New York, N. H. & H. R. R., 287 U. S. 178 at 204, 205, 53 S. Ct. 106 (1932).

[53] American Tel. & Tel. Co. v. United States, 299 U. S. 232, 57 S. Ct. 170 (1936).

another, to avoid a subpoena issued to investigate false statements in a proceeding which the initiator sought to terminate.[54]

When the administrative body had issued its order and it came before the Court for review, Mr. Justice Cardozo approached his task with the same practical regard for workability and with deep respect for the integrity and intelligence[55] of the officers whose work he reviewed. If the complainant had administrative remedies of which he failed to avail himself, the Justice would not go further.[56] If these remedies had been exhausted, he then examined the record of the proceedings. If a hearing were required, it must be held. In proceedings looking towards an advisory report the hearing might be conducted differently than in proceedings resulting in an order. For instance, participants in a proceeding of the former type could not unqualifiedly demand inspection of all confidential material gathered by the investigating body.[57] But if the proceeding was preliminary, not to an advisory report, but to an order, he insisted that the evidence upon which the officers acted must be spread upon the record. "A hearing is not judicial," he wrote,[58] "at least in any adequate sense, unless the evidence can be known." If the officers acted upon secret evidence or no

[54] Jones v. Securities & Exchange Commission, 298 U. S. 1 at 29, 56 S. Ct. 654 (1936). Cf. also Cardozo, C. J., in Matter of Edge Ho Holding Corp., 256 N. Y. 374 at 381-382, 176 N. E. 537 (1931): "The powers devolved by the charter upon the Commissioner of Accounts are of great importance for the efficient administration of the huge machinery of government in the city of New York. They will be rendered to a large extent abortive if his subpoenas are to be quashed in advance of any hearing at the instance of unwilling witnesses upon forecasts of the testimony and nicely balanced arguments as to its probable importance. Very often the bearing of information is not susceptible of intelligent estimate until it is placed in its setting, a tile in the mosaic. Investigation will be paralyzed if arguments as to materiality or relevance, however appropriate at the hearing, are to be transferred upon a doubtful showing to the stage of a preliminary contest as to the obligation of the writ. Prophecy in such circumstances will step into the place that description and analysis may occupy more safely. Only where the futility of the process to uncover anything legitimate is inevitable or obvious must there be a halt upon the threshold."

[55] See, e.g., Mississippi Valley Barge Line Co. v. United States, 292 U. S. 282 at 287, 54 S. Ct. 592 (1934).

[56] United States v. Illinois Cent. R. R., 291 U. S. 457, 54 S. Ct. 471 (1934); Utley v. St. Petersburg, 292 U. S. 106, 54 S. Ct. 712 (1934); Hegeman Farms Corp. v. Baldwin, 293 U. S. 163, 55 S. Ct. 7 (1934).

[57] "History, analogy and administrative practice point with sureness to the conclusion that letters of marque have not been issued to every producer . . . to capture knowledge of the business of every rival . . . in all the intimate details uncovered to the investigating officers." Cardozo, J., in Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294 at 303, 53 S. Ct. 350 (1933).

[58] West Ohio Gas Co. v. Public Utilities Commission of Ohio (No .1), 294 U. S. 63 at 69, 55 S. Ct. 316 (1935).

evidence, he had no hesitation in vacating the order. "This is not the fair hearing essential to due process. It is condemnation without trial."[59] Nor was it, to his mind, a fair hearing if the officer whose duty it was to make the order, and who purported to make it, had not considered the evidence and heard the argument.[60]

To findings made upon evidence of record the Justice accorded the greatest weight. But first he insisted that they must be precise and clear. "We must know what a decision means," he said,[61] "before the duty becomes ours to say whether it is right or wrong." But aside from this requirement he was ready to accept the facts found as virtually conclusive. To him the mandate that the findings be conclusive if supported by testimony was a command to be obeyed. "The Court of Appeals," he writes,[62] "though professing adherence to this mandate, honored it, we think, with lip service only. In form the court determined that the finding of unfair competition had no support whatever. In fact what the court did was to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences. Statute and decision . . . forbid that exercise of power." Since the rule had its foundations in essential considerations of practicality, he saw no more reason to doubt its validity when the facts

[59] Ohio Bell Tel. Co. v. Public Utilities Commission of Ohio, 301 U. S. 292 at 300, 57 S. Ct. 724 (1937). But if the order was one by the chief executive putting legislation into effect upon the happening of a contingency, he would normally presume that an investigation had been made and the contingency found to have occurred. Panama Refining Co. v. Ryan, 293 U. S. 388 at 444-448, 55 S. Ct. 241 (1934). Nor would he entertain an attack on the findings of a commission by a complainant who had not included in his record the evidence taken before the commission. Mississippi Valley Barge Line Co. v. United States, 292 U. S. 282, 54 S. Ct. 692 (1934).

[60] Cardozo, J., in Smith v. State, 214 N. Y. 140 at 144, 108 N. E. 214 (1915): "The board is not in the strict sense a court . . . but its functions are judicial; and the requirement that witnesses shall be seen and heard by the judicial officer who is to weigh their testimony has been proved by experience to be a means so important for the ascertainment of truth as to entitle us to assume that it will not be lightly abandoned." In this case the statute required that the board follow the procedure of the Supreme Court of New York. A commissioner appointed after the testimony had been taken and argument heard participated in the decision. See also Morgan v. United States, 298 U. S. 468, 56 S. Ct. 906 (1936). For Judge Cardozo's view of the necessity for actual notice of the proceeding to the party against whom it was directed, see Matter of the City of New York, 212 N. Y. 538, 106 N. E. 631 (1914).

[61] United States v. Chicago, M., St. P. & P. R. R., 294 U. S. 499 at 511, 55 S. Ct. 462 (1935).

[62] Federal Trade Commission v. Algoma Lumber Co., 291 U. S. 67 at 73, 54 S. Ct. 315 (1934).

bore on a question of constitutionality than when they bore on any other legal question.[63]

Just as he would not substitute the opinion of a court for that of the administrative body on matters of fact, so he would not substitute the discretion of the court in matters of judgment. "This court is not at liberty," he wrote,[64] "to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers. To show that these have been exceeded in the field of action here involved, it is not enough that the prescribed system of accounts shall appear to be unwise or burdensome or inferior to another. Error or unwisdom is not equivalent to abuse. What has been ordered must appear to be 'so entirely at odds with fundamental principles of correct accounting' . . . as to be the expression of a whim rather than an exercise of judgment." And in construing the extent of discretionary administrative power, he would, in the absence of express limitation, extend it to meet practical necessities.[65]

So far we have found running throughout the thinking of Mr. Justice Cardozo, as rugged fibres giving the fabric toughness and strength, the elements of practicality and willingness to compromise with imperfection in advance of the coming of Utopia. But when we come to the safeguards of personal liberties, upon which the whole system of ordered freedom rests, we find a change. "Only in one field," he wrote of his great predecessor,[66] but describing his own attitude as well, "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. There is to be no compromise here, for

[63] See Justices Stone and Cardozo, concurring in St. Joseph Stock Yards Co. v. United States, 298 U. S. 38 at 93, 56 S. Ct. 720 (1936), and compare Justice Brandeis, concurring, 298 U. S. at 82-93.

[64] American Tel. & Tel. Co. v. United States, 299 U. S. 232 at 236, 57 S. Ct. 170 (1936). See also Dayton Power & Light Co. v. Public Utilities Commission of Ohio, 292 U. S. 290 at 294, 302, 311, 54 S. Ct. 647 (1934); Stone, J. (with whom Cardozo, J., concurred), dissenting, West v. Chesapeake & Potomac Tel. Co. of Baltimore, 295 U. S. 662 at 680-681, 55 S. Ct. 894 (1935); Nashville, C. & St. L. Ry. v. Walters, 294 U. S. 405 at 434, 55 S. Ct. 486 (1935).

[65] Cardozo, J., dissenting, Interstate Commerce Commission v. Oregon-Washington R. R. & Navigation Co., 288 U. S. 14 at 43, 53 S. Ct. 266 (1932); Stone, J. (with whom Cardozo, J., concurred), dissenting, Texas & Pacific Ry. v. United States, 289 U. S. 627 at 655, 53 S. Ct. 768 (1933); Atchison, T. & S. F. Ry. v. United States, 295 U. S. 193 at 202, 55 S. Ct. 748 (1935).

[66] Cardozo, "Mr. Justice Holmes," 44 HARV. L. REV. 682 at 688 (1931).

thought freely communicated . . . is the indispensable condition of intelligent experimentation, the one test of its validity." This deep conviction—the very foundation of his pragmatic thinking—he translated into action in cases where the Supreme Court sustained freedom of speech, freedom of the press, and freedom of assembly against attempted infringement,[67] and when he differed with a decision of the Court that a claim to the constitutional right of free speech had not been raised in time and could not be considered on its merits.[68] In his view, doubtful questions of procedure should be resolved in favor of a defendant asserting so basic a right. Persecution because of race follows close upon the heels of persecution for opinion. When discrimination by government on account of race was charged, Mr. Justice Cardozo looked through the form to the substance of the act and insisted upon equality of treatment in fact as well as in theory.[69]

The right against self-incrimination he stoutly maintained even against strong argument that the public interest required the incriminating testimony. It could not be legally demanded, he said, "if there are loopholes in the tender of immunity through which a prosecutor can cut away to indictment and conviction. The immunity must be as broad as the privilege destroyed."[70] Again, even the convicted criminal, he held, by construction of a statute, had a right to a hearing before probation could be terminated and commitment to prison ordered. "He shall have a chance to say his say before the word of his pursuers is received to his undoing."[71]

In enforcing the immunity against unreasonable search and seizure, he believed that it must be done with a "shrewd appreciation of the necessities of government," and that courts should not "strain an immunity to the point at which human nature rebels against honoring it in conduct" and it is "flouted and derided . . . defeating its own ends."[72]

[67] Herndon v. Lowry, 301 U. S. 242, 57 S. Ct. 732 (1937); Grosjean v. American Press Co., Inc., 297 U. S. 233, 56 S. Ct. 444 (1936); De Jonge v. Oregon, 299 U. S. 353, 57 S. Ct. 255 (1936). See dissenting opinion of Pound, J. (in which Cardozo, J., concurred), in People v. Gitlow, 234 N. Y. 132 at 154, affd. Gitlow v. New York, 268 U. S. 652, 45 S. Ct. 625 (1925).

[68] Herndon v. Georgia, 295 U. S. 441 at 448, 55 S. Ct. 794 (1935).

[69] Nixon v. Condon, 286 U. S. 73, 52 S. Ct. 484 (1932) [but he would not strain the Constitution to reach non-governmental discrimination, Grovey v. Townsend, 295 U. S. 45, 55 S. Ct. 622 (1935)]; Norris v. Alabama, 294 U. S. 587, 55 S. Ct. 579 (1935); Hollins v. Oklahoma, 295 U. S. 394, 55 S. Ct. 784 (1935).

[70] Doyle v. Hofshader, 257 N. Y. 244 at 256-257, 177 N. E. 489 (1931).

[71] Escoe v. Zerbst, 295 U. S. 490 at 493, 55 S. Ct. 818 (1937).

[72] People v. Chiagles, 237 N. Y. 193 at 197, 142 N. E. 583 (1923); see also Grau v. United States, 287 U. S. 124 at 129, 53 S. Ct. 38 (1932); Sgro v. United States, 287 U. S. 206 at 212, 53 S. Ct. 138 (1932).

The rule which barred as evidence articles improperly seized by public officers—but not articles seized by other persons—he thought went too far. "We exalt form above substance," he said,[73] "when we hold that the use is made lawful because the intruder is without a badge of office. We break with precedent altogether when we press the prohibitior farther."

Thus in broad strokes and with colors taken from the palette of his opinions and legal writings, we have tried to sketch one profile of the man—the judicial pragmatist, striving with imagination, restraint, and a mastery of his tools, to deal justly with the never-ending compromises between the individual and society. Yet the work of a Justice of the Supreme Court must be measured, not only by what he says in a few cases, but also by how he votes in many cases. Particularly is this true in that field where the Court has affirmatively employed what it has often called the most delicate exercise of the judicial power, the power to declare governmental action, either state or federal, legislative or executive, forbidden by the fundamental law of the Constitution.

In the six years of Mr. Justice Cardozo's service on the Supreme Court, the Court found some action of government invalid under the Constitution in eighty-nine cases.[74] In these eighty-nine cases Mr. Justice Cardozo concurred in fifty-seven, and dissented in thirty-two.[75]

[73] People v. Defore, 242 N.Y. 13 at 23, 150 N. E. 585 (1926); see also People v. Chiagles, 237 N. Y. 193, 142 N. E. 583 (1924); but compare Taylor v. United States, 286 U. S. 1, 52 S. Ct. 466 (1932); Nathanson v. United States, 290 U. S. 41, 54 S. Ct. 11 (1933).

[74] The classification employed in this computation and the cases included are set out in the Appendix, p. 532 ff. The compilation includes all cases in which action by a state or the federal government has been declared invalid by the majority of the Court in reliance upon the Federal Constitution. Thus there have been included cases in which governmental action was held unconstitutional even though no order issued specifically invalidating action or prohibiting legislation from becoming effective. Cf. Perry v. United States, 294 U. S. 330, 55 S. Ct. 432 (1935), and cases which technically turned on the construction of a particular statute but in which the Court considered that the Federal Constitution required a particular interpretation inhibiting governmental action. Cf., too, Grau v. United States, 287 U. S. 124, 53 S. Ct. 38 (1932); O'Donoghue v. United States, 289 U. S. 516, 53 S. Ct. 740 (1933).

There have, on the other hand, been *excluded*, as not directly concerning action by government in the sense here employed, some ten cases; six involving the full faith and credit clause; two involving proper procedure in the federal courts under the Seventh Amendment; and two in which the pleadings were held to warrant actual trial of the cause. See Appendix, p. 539. If these ten cases were included, the total concurrences would be sixty-four and the total dissents, thirty-five.

[75] In sixteen of these thirty-two cases Mr. Justice Cardozo wrote a full dissenting opinion. During eighteen years on the Court of Appeals of New York Judge Cardozo wrote fourteen dissenting opinions. Of the writer of such opinions, he said: "Comparatively speaking at least, the dissenter is irresponsible. . . . He has laid aside the

These total figures prove little more than that the Justice concurred in more than half the exercises of this great power. But examination of the cases in more detail indicates that the judge in action followed the judge in articulated opinion. Perhaps any attempt to fit constitutional cases into categories is folly, but from study of these cases a few groups of more or less definite contour emerge in which the Justice's votes are revealing.[76]

The first group consists of fourteen cases enforcing constitutional safeguards of personal liberties—fairness in penal rule and procedure, free speech, free press, freedom to assemble, the right to vote. Here the Justice joined the majority in all but two cases.[77]

In the second group fall the cases dealing with the division of powers between state and federal governments. Here the Justice concurred twice as often as he dissented. But that statement alone is not enough. Of the twenty-three decisions that state action was invalid because of the superiority of national interests, the Justice concurred in all but five—and in those he dissented not because he disagreed with the rule announced, but because he felt that it had been pushed too far. All five cases involved state taxes which the majority thought burdened national commerce or a federal governmental function, but which Mr. Justice Cardozo believed had not crossed a line which he was entirely willing to draw, as his concurrences in this group show.[78] But in the eight cases where federal action was invalidated because it interfered with functions of the states he dissented in all but two. Here he differed chiefly with the doctrine that an exercise of a power expressly granted to the federal government was void because the effect of its exercise was to invade the reserved powers of the states.[79] This doctrine seemed to him a species of judicial psychoanalysis which he regarded with suspicion.[80]

role of the hierophant, which he will be only too glad to resume when the chances of war make him again the spokesman of the majority. For the moment, he is the gladiator making a last stand against the lions. The poor man must be forgiven a freedom of expression, tinged at rare moments with a touch of bitterness, which magnanimity as well as caution would reject for one triumphant." CARDOZO, LAW AND LITERATURE 34 (1931).

[76] For those who desire to pursue the inquiry in more detail or to determine for themselves the validity of the conclusions, the classification used and the placing of all the cases within it are set out in the Appendix, p. 532 ff.

[77] See Appendix, p. 532, and footnote 72, supra.

[78] See Appendix, pp. 534-536.

[79] See Appendix, pp. 535-536. If A.L.A. Schechter Poultry Corp. v. United States, 295 U. S. 495, 55 S. Ct. 837 (1935), is classified in this group, there are three instead of two concurrences.

[80] See United States v. Constantine, 296 U. S. 287 at 299, 56 S. Ct. 223 (1935).

The last group comprises the cases invalidating taxes and economic regulation under the contract, due process, and equal protection clauses of the Constitution. Here he dissented as often as he concurred, but again further analysis is revealing. Nine of the cases upheld contract rights against asserted impairment of legislation. Here he dissented only once, and then because in his opinion the right lost was not a contract right.[81] Thirteen of the decisions declared that a law or its application was unreasonable or arbitrary. Here he agreed only twice.[82] But in the nine cases holding administrative procedure unfair or administrative orders confiscatory he concurred five times.[83]

In short, the votes, like the considered opinions, consistently maintain historic personal liberties. They show a shrewd appreciation of the necessities of the federal system in the present day, and, while restricting economic regulation to respect the pledged word and fair procedure, leave free a choice of ends and means so long as the effort is made in good faith.

But the votes, opinions, and legal writings of Mr. Justice Cardozo give but samples of the richness and depth of his mind. As one tries to chart it from these scattered soundings, one thinks of the words of Mr. Justice Holmes:[84]

> "I look into my book in which I keep a docket of the decisions of the full court which fall to me to write, and find about a thousand cases. A thousand cases, many of them upon trifling or transitory matters, to represent nearly half a lifetime! A thousand cases, when one would have liked to study to the bottom and to say his say on every question which the law ever has presented, and then to go on and invent new problems which should be the test of doctrine, and then to generalize it all and write it in continuous, logical philosophic exposition, setting forth the whole corpus with its roots in history and its justifications of expedience real or supposed!
>
> "Alas, gentlemen, that is life. . . . We cannot live our dreams. We are lucky enough if we can give a sample of our best, and if in our dreams we can feel that it has been nobly done."

Justice Cardozo joins the roll, all too short, of the great judges. Of him it can be truly said that his work was nobly done.

[81] See Appendix, p. 536.
[82] See Appendix, pp. 537, 538.
[83] See Appendix, pp. 537, 538.
[84] HOLMES, COLLECTED LEGAL PAPERS 245-246 (1920).

APPENDIX

ACTION OF MR. JUSTICE CARDOZO IN CASES IN WHICH THE SUPREME COURT INVALIDATED GOVERNMENTAL ACTION BECAUSE OF THE FEDERAL CONSTITUTION

	Concurred	Dissented
I. PERSONAL LIBERTIES	12	2
(a) Criminal laws or trials invalid because of arbitrary presumption, ex post facto, counsel denied, torture employed, or class excluded from jury.	6	
(b) Free speech, press or assembly denied.	3	
(c) Right to vote denied.	1	
(d) Search and seizure, use of seized evidence.	2	2
II. DIVISION OF POWER BETWEEN GOVERNMENTS AND WITHIN GOVERNMENT	23	12
State Action Invalid Because:	18	5
(a) It burdens interstate commerce.	7	2
(b) It attempts to exert extra-territorial jurisdiction.	2	1
(c) No jurisdiction by court over foreign corporation.	1	
(d) It encroaches on federal function.	7	2
(e) It discriminates against suitors under federal law.	1	
Federal Action Invalid Because:	5	7
(f) Use of the commerce, taxing, or bankruptcy powers invades reserved power of states.*		4
(g) It interferes with or taxes a state instrumentality or officer.	2	2
(h) A delegation of legislative power.	1	1
(i) Improper exercise of executive removal power.	1	
(j) Judge exercised legislative power.	1	
III. ECONOMIC INTERESTS—ART. I, SEC. 10, FIFTH AND FOURTEENTH AMENDMENTS	19	17
(a) Impairment of contract obligations.	8	1
(b) Administrative procedure denied due process.	2	2
(c) Vagueness of statute denied due process.	1	
(d) Retroactive tax denied due process.	2	
(e) Interest from date of taking required by due process.	1	
(f) Martial law under circumstances denied due process.	1	
(g) Administrative rates and orders confiscatory.	3	2
(h) Statute or order held arbitrary.	1	4
(i) Basis of, or classification for, taxation arbitrary.		8
IV. MISCELLANEOUS	3	1
(a) Conviction under Prohibition Act after repeal is invalid.	1	
(b) Judges' salaries may not be reduced.	1	1
(c) Release of prisoner held for interstate rendition.	1	
TOTAL	57	32

* See also II (h).

CASES CLASSIFIED BY SUBJECT MATTER

I.

PERSONAL LIBERTIES

(a) Criminal laws or trials invalid because of arbitrary presumption, ex post facto, counsel denied, torture employed, or class excluded from jury

Cardozo Concurred	Cardozo Dissented
Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55 (1932). Accused denied counsel.	
Morrison v. California, 291 U. S. 82, 54 S. Ct. 281 (1934). Arbitrary presumption in criminal trial.	
Norris v. Alabama, 294 U. S. 587, 55 S. Ct. 579 (1935). Exclusion of negroes from jury.	
Hollins v. Oklahoma, 295 U. S. 394, 55 S. Ct. 784 (1935). Same.	
Brown v. Mississippi, 297 U. S. 278, 56 S. Ct. 461 (1936). Use of third degree.	
Lindsey v. Washington, 301 U. S. 397, 57 S. Ct. 797 (1937). Ex post facto law.	

(b) Free speech, press or assembly denied

Grosjean v. American Press Co., 297 U. S. 233, 56 S. Ct. 444 (1936). Louisiana tax on newspapers; free speech.

De Jonge v. Oregon, 299 U. S. 353, 57 S. Ct. 255 (1937). Participation in communist party meeting; law violates freedom of assembly.

Herndon v. Lowry, 301 U. S. 242, 57 S. Ct. 732 (1937). Georgia insurrection statute; free speech.

(c) Right to vote denied

Nixon v. Condon, 286 U. S. 73, 52 S. Ct. 484 (1932). Negroes' right to vote in primary.

(d) Search and seizure, use of seized evidence

Taylor v. United States, 286 U. S. 1, 52 S. Ct. 466 (1932). Breaking into building to secure evidence without warrant; mere suspicion.

Nathanson v. United States, 290 U. S. 41, 54 S. Ct. 11 (1933). Search warrant on affiant's suspicion held insufficient.

Grau v. United States, 287 U. S. 124, 53 S. Ct. 38 (1932). Search warrant held invalid because affidavit alleged mere manufacture and not sale.

Sgro v. United States, 287 U. S. 206, 53 S. Ct. 138 (1932). Search warrant redated without additional affidavits after expiration.

II.

DIVISION OF POWER BETWEEN GOVERNMENTS AND WITHIN GOVERNMENT

State Action Invalid Because:—

(a) It burdens interstate commerce

Cardozo Concurred	Cardozo Dissented
Cooney v. Mountain States Tel. & Tel. Co., 294 U. S. 384, 55 S. Ct. 477 (1935). Tax based on telephone instruments in use in state burdens interstate commerce.	Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U. S. 218, 53 S. Ct. 373 (1933). State franchise tax measured by capital employed in state burdens interstate commerce.
Baldwin v. Seelig, 294 U. S. 511, 55 S. Ct. 497 (1935). New York Milk Law burdens importation of milk.	Great Northern Ry. v. Washington, 300 U. S. 154, 57 S. Ct. 397 (1937). Washington tax on railway invalidated because no showing it was limited to cost of inspection. Cardozo believed burden on railway to show opposite.
Pennsylvania R. R. v. Illinois Brick Co., 297 U. S. 447, 56 S. Ct. 556 (1936). State order directing reparation burdens commerce.	
Bingaman v. Golden Eagle Western Lines, 297 U. S. 626, 56 S. Ct. 624 (1936). State gasoline use tax invalid as applied to interstate buses.	
Fisher's Blend Station v. Commission, 297 U. S. 650, 56 S. Ct. 608 (1936). Tax on radio broadcasting measured by gross receipts burdens interstate commerce.	
Ingels v. Morf, 300 U. S. 290, 57 S. Ct. 439 (1937). State tax on motor vehicles exceeding cost of inspection burdens interstate commerce.	
Puget Sound Stevedoring Co. v. Commission, 302 U. S. 90, 58 S. Ct. 72 (1937). Tax on gross receipts of stevedoring business burdens interstate commerce.	

(b) It attempts to exert extra-territorial jurisdiction

Johnson Oil Refining Co. v. Oklahoma, 290 U. S. 158, 54 S. Ct. 152 (1933). Taxation on tank cars not based on average within state.	Senior v. Braden, 295 U. S. 422, 55 S. Ct. 800 (1935). Tax on trust certificates representing land within and without the state held invalid.
Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U. S. 143, 54 S. Ct. 634 (1934). Attempt to apply local statute to contract executed outside the state.	

(c) No jurisdiction by court over foreign corporation

Consolidated Textile Corp. v. Gregory, 289 U. S. 85, 53 S. Ct. 529 (1933). Proceedings based on service on foreign corporation not doing business denied due process.

(*d*) *It encroaches on federal function*

Cardozo Concurred

Standard Oil Co. v. California, 291 U. S. 242, 54 S. Ct. 381 (1934). State tax on gas not operative on sales made on United States military reservation.

Murray v. Joe Gerrick & Co., 291 U. S. 315, 54 S. Ct. 432 (1934). State statute not operative on land ceded to United States.

Jennings v. United States Fidelity & Guaranty Co., 294 U. S. 216, 55 S. Ct. 394 (1935). Application of Indiana Bank Collection Code to national banks.

Old Company's Lehigh v. Meeker, 294 U. S. 227, 55 S. Ct. 392 (1935). Same as to New York Bank Collection Code.

Oklahoma v. Barnsdall Refineries, 296 U. S. 521, 56 S. Ct. 340 (1936). State tax on oil produced by lessees of Indian lands invalid.

Rogers v. Graves, 299 U. S. 401, 57 S. Ct. 269 (1937). New York cannot tax employees of Panama Railroad Company.

Knox Nat. Farm Loan Assn. v. Phillips, 300 U. S. 194, 57 S. Ct. 418 (1937). State court cannot dissolve national farm loan association.

Cardozo Dissented

Schuylkill Trust Co. v. Pennsylvania, 296 U. S. 113, 56 S. Ct. 31 (1935). Exemption in state tax on shares of trust company held to discriminate against federal securities.

Graves v. Texas Co., 298 U. S. 393, 56 S. Ct. 819 (1936). State gas tax cannot be applied to sales to United States. Cardozo argues that tax is not upon sales but upon withdrawal from storage at time of sale.

(*e*) *It discriminates against suitors under federal law*

McKnett v. St. Louis & San Francisco Ry., 292 U. S. 230, 54 S. Ct. 690 (1934). State may not close its courts to transitory actions against foreign corporations arising in other states under federal law while permitting such litigation on causes arising in other states under state law.

(*f*) *Use of the commerce, taxing, or bankruptcy powers invades reserved power of states*

Railroad Retirement Board v. Alton R. R., 295 U. S. 330, 55 S. Ct. 758 (1935). Railroad Retirement Act unreasonable and regulates intrastate affairs.

United States v. Constantine, 296 U. S. 287, 56 S. Ct. 223 (1936). Federal tax specifically upon liquor sold in violation of state law held violation of reserved power.

Cardozo Concurred	Cardozo Dissented
	United States v. Butler, 297 U. S. 1, 56 S. Ct. 312 (1936). Agricultural Adjustment Act.
	Carter v. Carter Coal Co., 298 U. S. 238, 56 S. Ct. 855 (1936). Bituminous Coal Conservation Act.

(g) It interferes with or taxes a state instrumentality or officer

Hopkins Federal Savings & Loan Assn. v. Cleary, 296 U. S. 315, 56 S. Ct. 235 (1936). Home Owners' Loan Act, as it permitted conversion of state associations into federal ones in contravention of laws of state, invalid.	Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, 52 S. Ct. 443 (1932). Federal income tax upon income of lessees of lands leased by state for support of schools to private company invalid.
Brush v. Commr., 300 U. S. 352, 57 S. Ct. 495 (1937). Salary of Chief Engineer of municipal water supply bureau not subject to tax.	Ashton v. Cameron County District, 298 U. S. 513, 56 S. Ct. 892 (1936). Municipal bankruptcy act.

(h) A delegation of legislative power

Schechter Poultry Corp. v. United States, 295 U. S. 495, 55 S. Ct. 837 (1935). National Industrial Recovery Act.	Panama Refining Co. v. Ryan, 293 U. S. 388, 55 S. Ct. 241 (1935). Regulation of oil transportation under N. I. R. A.

(i) Improper exercise of executive removal power

Humphrey's Exr. v. United States, 295 U. S. 602, 55 S. Ct. 869 (1935). Removal of Federal Trade Commissioner.	

(j) Judge exercised legislative power

Central Kentucky Natural Gas Co. v. R. R. Commission, 290 U. S. 264, 54 S. Ct. 154 (1933). District court holding rate confiscatory conditioned relief on company's adopting higher rate found reasonable.	

III.

ECONOMIC INTERESTS—ART. I, SEC. 10, FIFTH AND FOURTEENTH AMENDMENTS

(a) Impairment of contract obligations

W. B. Worthen Co. v. Thomas, 292 U. S. 426, 54 S. Ct. 816 (1934). Exemption of life insurance policies from prior liens.	Coombes v. Getz, 285 U. S. 434, 52 S. Ct. 435 (1932). Repeal of constitutional provision for liability of corporate directors.
Lynch v. United States, 292 U. S. 571, 54 S. Ct. 840 (1934). War risk contracts under Fifth Amendment.	
Perry v. United States, 294 U. S. 330, 55 S. Ct. 432 (1935). Abrogation of gold clause in government bonds.	

Cardozo Concurred	Cardozo Dissented
W. B. Worthen Co. v. Kavanaugh, 295 U. S. 56, 55 S. Ct. 555 (1935). Legislative changes in security provisions of municipal bonds.	
Stewart v. Keyes, 295 U. S. 403, 55 S. Ct. 807 (1935). Federal statute changing Indians' rights in land held invalid.	
Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 55 S. Ct. 854 (1935). Frazier-Lemke Act.	
Treigle v. Acme Homestead Assn., 297 U. S. 189, 56 S. Ct. 408 (1936). Modification of state law requiring reserves to meet certain contingencies.	
International Steel & Iron Co. v. National Surety Co., 297 U. S. 657, 56 S. Ct. 619 (1936). Retrospective application of state regulation of public construction contracts.	

(b) Administrative procedure denied due process

Morgan v. United States, 298 U. S. 468, 56 S. Ct. 906 (1936). Under the act a full hearing is required and the Secretary must himself consider the case.	Southern Railway Co. v. Virginia, 290 U. S. 190, 54 S. Ct. 148 (1933). No notice or hearing required by statute for order eliminating grade crossings.
Ohio Bell Tel. Co. v. Commission, 301 U. S. 292, 57 S. Ct. 724 (1937). Order of state commission held void because based on data not of record.	Jones v. Securities & Exchange Comm., 298 U. S. 1, 56 S. Ct. 654 (1936). Refusal of right to withdraw registration statement held invalid.

(c) Vagueness of statute denied due process

Champlin Refining Co. v. Commission, 286 U. S. 210, 52 S. Ct. 559 (1932). Vagueness of statutory standard.	

(d) Retroactive tax denied due process

Helvering v. Helmholz, 296 U. S. 93, 56 S. Ct. 68 (1935).	
White v. Poor, 296 U. S. 98, 56 S. Ct. 66 (1935). Retroactive federal estate taxes.	

(e) Interest from date of taking required by due process

Jacobs v. United States, 290 U. S. 13, 54 S. Ct. 26 (1933). Interest a part of just compensation.	

(f) Martial law under circumstances denied due proces

Sterling v. Constantin, 287 U. S. 378, 53 S. Ct. 190 (1932). Martial law in Texas oil fields.	

(*g*) *Administrative rates and orders confiscatory*

Cardozo Concurred

Columbus Gas & Fuel Co. v. Public Utilities Comm., 292 U. S. 398, 54 S. Ct. 763 (1934). Rate order confiscatory because no amount included for replenishing waste assets.

West Ohio Gas Co. v. Commission, 294 U. S. 63, 79, 55 S. Ct. 316, 324 (1935). Rate order confiscatory.

Panhandle Eastern Pipe Line Co. v. State Highway Comm., 294 U. S. 613, 55 S. Ct. 563 (1935). Order requiring relocation of pipeline at company's expense.

Cardozo Dissented

Interstate Commerce Commission v. Oregon-Washington R. R., 288 U. S. 14, 53 S. Ct. 266 (1933). Order to build extension held invalid.

West v. Chesapeake & Potomac Tel. Co., 295 U. S. 662, 55 S. Ct. 894 (1935). State rates held confiscatory.

(*h*) *Statute or order held arbitrary*

Thompson v. Consolidated Gas Utilities Corp., 300 U. S. 55, 57 S. Ct. 364 (1937). Arbitrary limitation of amount of gas to be produced.

Nashville, Chattanooga & St. L. Ry. v. Walters, 294 U. S. 405, 55 S. Ct. 486 (1935). Railway required to pay half cost of overpass.

Mayflower Farms, Inc. v. Ten Eyck, 297 U. S. 266, 56 S. Ct. 457 (1936). New York Milk Law differential.

Morehead v. Tipaldo, 298 U. S. 587, 56 S. Ct. 918 (1936). Minimum wage law.

Hartford Steam Boiler Inspection & Ins. Co. v. Harrison, 301 U. S. 459, 57 S. Ct. 838 (1937). Statute regulating payment of insurance company agents held arbitrary.

(*i*) *Basis of, or classification for, taxation arbitrary*

In the following cases arising under reasonable classification for tax purposes:

Liggett Co. v. Lee, 288 U. S. 517, 53 S. Ct. 481 (1933).

Concordia Fire Ins. Co. v. Illinois, 292 U. S. 535, 54 S. Ct. 830 (1934).

Stewart Dry Goods Co. v. Lewis, 294 U. S. 550, 55 S. Ct. 525 (1935).

Colgate v. Harvey, 296 U. S. 404, 56 S. Ct. 252 (1936).

Valentine v. Great Atlantic & Pacific Co., 299 U. S. 32, 57 S. Ct. 56 (1936).

Binney v. Long, 299 U. S. 280, 57 S. Ct. 206 (1937).

And in the following cases where the basis of the tax or assessment was held arbitrary:

Georgia Ry. & Elec. Co. v. Decatur, 295 U. S. 165, 55 S. Ct. 701 (1935).

Great Northern Ry. v. Weeks, 297 U. S. 135, 56 S. Ct. 426 (1936).

IV.

MISCELLANEOUS

(a) Conviction under Prohibition Act after repeal is invalid

Cardozo Concurred	Cardozo Dissented
United States v. Chambers, 291 U. S. 217, 54 S. Ct. 434 (1934). Reversing a conviction under the Prohibition Act after repeal of Eighteenth Amendment.	

(b) Judges' salaries may not be reduced

Booth v. United States, 291 U. S. 339, 54 S. Ct. 379 (1934). Retired federal judge.	O'Donoghue v. United States, 289 U. S. 516, 53 S. Ct. 740 (1933). District of Columbia judge.

(c) Release of prisoner held for interstate rendition

South Carolina v. Bailey, 289 U. S. 412, 53 S. Ct. 667 (1933).

CASES EXCLUDED

(a) Full faith and credit clause

Clark v. Willard, 292 U. S. 112, 54 S. Ct. 615 (1934).

Loughran v. Loughran, 292 U. S. 216, 54 S. Ct. 684 (1934).

John Hancock Mutual Life Ins. Co. v. Yates, 299 U. S. 178, 57 S. Ct. 129 (1936).

Yarborough v. Yarborough, 290 U. S. 202, 54 S. Ct. 181 (1933).

Broderick v. Rosner, 294 U. S. 629, 55 S. Ct. 589 (1935).

(b) Jury trial under the Seventh Amendment

Schoenthal v. Irving Trust Co., 287 U. S. 92, 53 S. Ct. 50 (1932).

Dimick v. Schiedt, 293 U. S. 474, 55 S. Ct. 296 (1935).

(c) Constitutional cases in which pleadings held to require trial

Mosher v. Phoenix, 287 U. S. 29, 53 S. Ct. 67 (1932).

Borden's Farm Products Co. v. Baldwin, 293 U. S. 194, 55 S. Ct. 187 (1934).