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Robert L. Howard
University of Missouri

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THE SUPREME COURT, THE CONSTITUTION, AND
THE A. A. A.

By ROBERT L. HOWARD*

Until somewhat recently, most people other than lawyers, have, no doubt, been accustomed to look upon the Supreme Court of the United States as something rather far removed from their every-day lives, whose decisions likely were to be regarded as of very little immediate importance to them. Such, however, is no longer true.

During the past two or three years the attention of the American people has been centered upon the deliberations of those nine justices in Washington who make up our Supreme Court with a consuming interest without parallel in the history of this or any other country. In no other government the world has yet seen, may one man, holding the balance of power upon a judicial tribunal, control the vicissitudes of government and the social and economic life of a whole people, as does the fifth man making up the majority on the United States Supreme Court, when the justices are closely divided upon some important issue. Not only is that true, but in no other country may a unanimous judicial tribunal exercise such power. And while it is true that at times in our own past history individual cases of great moment have attracted almost universal interest, there has never been a time when, over so long a period, litigation involving such vital interests of all classes of our people, or of such importance politically, socially, and economically, has kept the spotlight in a way at all comparable to the present period.

A discussion of the United States Supreme Court and its decisions (any case or cases) assumes a consideration of the

*Professor of Law, University of Missouri School of Law. A. B. 1917, A. M. 1918, LL. B. 1925, University of Missouri; S. J. D. 1933, Harvard Law School.
problems of constitutional law as developed by the Court in relation to the legislation involved in the case being adjudicated, and may be materially assisted by some attention to the general outlook and background of the justices, as well as by a study of the nature of those provisions of the Constitution which they are called upon to construe and apply. In fact, any intelligent study or understanding of the functioning of the Supreme Court necessitates some knowledge of the personnel of the Court, for in no other type of adjudication, so much as in problems of constitutionality, does the personality of the judge count for so much. The judges’ early training and environment, economically, socially, and intellectually, and—as justices of the United States Supreme Court seldom reach that position younger than about sixty—their whole life’s experiences and associations have very definitely affected their outlook on most social and economic problems, as well as political or governmental questions. This is not to say that the issues have been prejudged, but their methods of approach to such problems and their leanings, consciously or unconsciously, in favor of or against proposed social, economic, or political changes are rather definitely determined.

For want of a more accurate characterization we have come to label these men as liberals and conservatives—dependent largely upon their outlook with respect to social and economic problems. At the present time the Court is less one-sided in its division between these two groups than at most other times in its history.

When legislation, state or federal, involving important social or economic issues, comes before the Court, the chances for approval by at least three members of the Court are likely to be rather good. Justices Brandeis, Stone, and Cardozo are well known for their liberal tendencies and, like the late Mr. Justice Holmes, are willing to allow the legislature a considerable degree of freedom to experiment with social and economic problems, to which there are as yet no for-certain correct solutions.

With an equal degree of certainty, one may predict that at least four members of the Court will register opposition to such
legislation. The conservative outlook of Justices Van Devanter, McReynolds, Sutherland, and Butler needs no particular comment to convince even a casual student of public affairs that social and economic legislation is likely to have an uphill fight to win their approval.

This is not to criticise either group, both of whom may be admitted to be equally honest, equally sincere, and equally devoted to what they conceive to be the fundamental principles of our constitutional system. But, as so admirably pointed out by Dean Pound, there are certain elements or materials on the basis of which or out of which judicial decisions are constructed, which influence and control all judges—liberal and conservative alike—yet allow the reaching of widely divergent conclusions. They include a great mass of legal precepts; a body of traditional ideas as to how the legal precepts should be interpreted and applied, together with a traditional technique of developing and applying them; and finally, and most important for this discussion, a body of ideas and ideals as to the end and purpose of law. It is within this last element that room exists for widely divergent conclusions. These ideas or ideals are intimately tied up with, or perhaps are a part of, the social and political philosophy of each particular judge. His outlook with respect to social and economic problems, based on training, environment, experience, and a thousand other things—the great conglomerate of forces that cause men to think differently and to arrive at different conclusions—dictate his conception of the end and purpose of law, or the proper content to be read into indefinite provisions of the Constitution such as the due process clauses. The situation is well illustrated by Mr. Justice Cardozo in his little book, "The Growth of the Law," where he discusses the early attitude of certain courts toward workmen's compensation and the divisions on the Supreme Court in cases like the first minimum wage decision.

1 This is, of course, a general statement and the specific provisions of any particular piece of legislation may affect this probable attitude of either group one way or the other.
4 Adkins v. Children's Hospital, 261 U. S. 525 (1923).
"What interests me most at the moment is that a problem in the choice of methods lay back of the problem of law and determined its solution. On the one hand the right of property, as it was known to the fathers of the republic, was posited as permanent and absolute. Impairment was not to be suffered except within the narrow limits of history and precedent. No experiment was to be made along new lines of social betterment. The image was a perfect sphere. The least dent or abrasion was a subtraction from its essence. Given such premises, the conclusion is inevitable. The statute becomes an illegitimate assault upon rights assured to the individual against the encroachments of society. . . . The opposing view, if it is to be accepted, must be reached through other avenues of approach. The right which the assailants of the statute posit as absolute or permanent is conceived of by the supporters of the statute as conditioned by varying circumstances of time and space and environment and degree. The limitations appropriate to one stage of development may be inadequate for another. . . . The truth is not always to be reached by looking backward to the beginning and deducing from the source. The end may be frustrated unless we look forward to the goal."

The one group thinks in terms of a constitution directed to the protection of property. The other sees the end and purpose of law, the function of a constitution, as the promotion of social utility, the welfare of the community. All rights guaranteed by flexible and indefinite provisions in a constitution, such as the due process clauses—whether property rights or whatnot—are relative, not absolute. Thus it is not surprising that the Court divides into opposing groups, or that decisions involving the constitutional validity of social and economic legislation are arrived at by sharp divisions.

The above mentioned division on the Court as presently constituted leaves two members, sometimes called the variables, occupying a position of somewhat more middle ground. Mr. Chief Justice Hughes, with notable exceptions including the A. A. A. case, has indicated a greater inclination to align himself with the liberal than with the conservative wing of the Court. This makes not improbable frequent even divisions and leaves Mr. Justice Roberts, who earlier showed some very distinct signs of liberal tendencies, but who more than made up for such tendencies in his later opinions, in a position of holding the balance of power on closely contested issues.

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When we further consider that the issues litigated in contested legislation of the type referred to commonly turn upon provisions of the Constitution which have no certain, definite, and well established meaning, the uncertainty of the result becomes assured, and the social and economic background and predilections of the judges become all important factors. The clauses of the Constitution most commonly involved in the type of litigation to which reference has been made, are the due process clauses of the Fifth and Fourteenth Amendments.

Nobody, not even the Supreme Court, has attempted to define due process. The meaning of that important clause of the Constitution is clarified—or confused as the case may be—bit by bit as cases are decided, the Court authoritatively determining its application in the particular case, but nothing more. The nature of the clause makes this more or less inevitable. It is the expression of a broad general standard akin to that of reasonableness in other fields of the law, and in sharp contrast with the more definite and certain rules of law encountered, for instance, in the domain of real property.

When the constitutional provisions controlling the powers of government and determining the extent to which the individual is protected in his rights against the invasion of governmental power are thus flexible and indefinite, it is hardly surprising that not a few students of constitutional law have been saying for a good many years that the Constitution means what the judges say it means.

During the present period of intense popular interest referred to, the Federal Government and many states have entered upon programs of social and economic legislation, at least allegedly calculated to result in improving the conditions of life for vast millions in our population not the most fortunately situated, which legislation has involved restrictions upon those heretofore able, by virtue of their superior economic position, largely to dominate our industrial and economic set-up, and control the lives, in no small degree, of millions of people less fortunately situated. Such legislation, from its first appearance, has always been fought with every possible resource by those adversely affected by it, and the present forms no exceptions.
A study of the Supreme Court and the A. A. A. involves a legislative similarity to that referred to as well as a constitutional similarity. The legislation enacted was calculated to better the economic conditions of millions of farmers as well as to rehabilitate a basic industry, the administration of which imposed certain burdens upon others more fortunately situated and brought forth a determined effort to prevent the plan from being carried to its intended goal. Passing judgment upon the validity of the legislation involved required the interpretation and application by the Supreme Court of a provision in our Constitution equally as flexible and indefinite as the due process clauses.

For these reasons reference may not inappropriately be made to two now famous and familiar cases decided at the 1933 term of the Supreme Court, involving state rather than federal legislation, but which well illustrate the type of legislation and the type of constitutional construction under consideration, and which also mark the beginning of the present period of intense popular interest in the decisions of the Supreme Court.

The Minnesota Mortgage Moratorium case,7 decided in January, 1934, involved a statute passed by the Minnesota legislature in 1933 for a temporary period of two years, which declared an emergency to exist and provided relief for debtors against mortgage foreclosure by authorizing the courts to extend the period of time in which the debtor might redeem his property from foreclosure sale, for such time as the court might deem just and equitable in each case, not to exceed, of course, the two-year period of the statute.8 Under the terms of the mortgage contract entered into between the parties to the mortgage, the creditor had a right to sell the property under foreclosure and get his money. This right was a property right of which he was deprived by the statute.

Two provisions of the federal Constitution were involved, one which says "no state shall pass any law impairing the obligation of contracts";9 the other, the due process clause of the Fourteenth Amendment, "nor shall any state deprive any person of life, liberty, or property without due process of law". The

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8Minn. Laws 1933, c. 339, p. 514.
9Art. I, Sec. 10.
latter, it has been suggested, is the expression of a general standard, a very flexible clause without certain and definite meaning. It is true, the creditor would be deprived of a property right—but is it without due process of law? Not if there is sufficient justification or necessity in the interest of the public for it, and that is determined, somewhat at least, by weighing the public need to be served by the act against the extent to which the creditor’s rights are invaded. Here, because of the stringent emergency among farmers in an agricultural state, and as the statute made careful provision to protect the interests of the creditor in the meantime by requiring a reasonable rental to be paid and applied to defraying interest charges, insurance, etc., upon the property, the interference with the property rights of the creditor was held not to be without due process of law.

The constitutional provision that “no state shall pass any law impairing the obligation of contracts” sounds like a very definite and certain provision, but, like the due process clause, it has always been construed to be somewhat flexible, and if a state, in the reasonable exercise of its police power for the protection of the health, safety, morals, or general welfare of its inhabitants, enacts legislation that interferes with the enjoyment of contract rights, such legislation will be sustained despite the contracts clause.\footnote{199 U. S. 473, 480 (1905).} Said Mr. Justice Brown, speaking for a unanimous Court in \textit{Manigault v. Springs}:\footnote{290 U. S. 398, 426 (1934).}

\begin{quote}
"It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may be thereby affected. This power . . . to protect the lives, health, morals, comfort, and general welfare of the people . . . is paramount to any rights under contracts between individuals."
\end{quote}

Any literal interpretation of the contracts clause would have outlawed the moratorium statute, but it was held to be a reason-

\footnote{When the provisions of the Constitution, in grant or restriction, are specific, so particularized as not to admit of construction, no question is presented. Thus, emergency would not permit a state to have more than two senators. . . . But, where constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details. That is true of the contract clause.” Mr. Chief Justice Hughes in Home Building & Loan Association v. Blaisdell, 290 U. S. 398, 426 (1934).}
able police measure, justified in the interest of relieving a serious economic emergency. Never before with the possible exception of the emergency rent law cases, had the Court gone so far in allowing legislation to interfere with contracts where health, morals, or safety (the traditional bases for the exercise of the police power) were not involved. It marked the recognition that economic needs may be a justification equally with health, morals, and safety.

This was one of the first in the series of laws passed by the states calculated to better the condition of the economically unfortunate, and the decision sustaining it, taking away as it did some of the power of the economically more fortunate to profit by the plight of his debtor, and expressly extending the police power of the states to the protection of economic needs, constitutes a landmark in the development of our constitutional law.

The opinion in that case asserted that mere historical inquiry into the supposed intention of the framers of the Constitution regarding economic problems of 1934, manifestly beyond their possible contemplation, was not a safe method of constitutional construction. Any safe principle of constitutional construction, the Court emphasized, must take into consideration the social and economic conditions and needs of the time and place—a constitution must adapt itself to present day needs. In no other way can social, economic, and governmental breakdown be avoided. The opinion quoted the now famous assertion of Mr. Chief Justice Marshall that, "A constitution (is) intended to endure for ages to come, and, consequently, . . . (must) be adapted to the various crisis of human affairs." A Constitution that is not flexible and cannot be readily adjusted to meet the needs of changing conditions cannot thus endure.

Mr. Chief Justice Hughes wrote the majority opinion in this case, speaking for himself and Mr. Justice Roberts, as well as the three liberals—Justices Brandeis, Stone, and Cardozo. Any such doctrine as he asserted, keeping the Constitution attuned to changing social and economic conditions and needs, hardly accords with the conception of the four most conservative members of the Court. They dissented in an opinion by Mr. Justice

24 McCulloch v. Maryland, 4 Wheat. 316, 415 (1819).
Sutherland, warning, substantially, that the end of constitutional government was "just around the corner".

The second case, illustrative of desirable methods of construction and interpretation to be applied to flexible and indefinite provisions of the Constitution, and again representing a part in such a state program as referred to above, was the so-called New York Milk case.\(^1^4\)

There was involved New York's attempt, again for a temporary emergency period, to control the price of milk for the purpose of salvaging the dairy-farming industry,\(^1^5\) "a paramount industry of the state" which constituted so fundamental a link in her chain of economic stability. No other legislation has been more jealously restricted than price regulation. Never before had a regulation of prices for an ordinary commodity, not subject to monopolistic control, been sustained by the Court.\(^1^6\) In a well reasoned opinion, Mr. Justice Roberts, speaking for the same five justices who had sustained the Minnesota Moratorium statute, upheld the power of New York, because of the importance of the dairy industry to the economic life of the state, and partially and indirectly, to safeguard the public health by insuring a safe milk supply. This case constituted, perhaps, the most far-reaching and liberal construction of the due process clause yet announced by the Supreme Court. It appeared to overrule, \textit{sub silentio}, among others, the \textit{New State Ice Company case}\(^1^7\) by adopting the method of approach and the point of view of Mr. Justice Brandeis' able dissent in that case, and to expand the field for price control to ordinary commodities whenever, in the opinion of the legislature and of the Court, a sufficient need therefor was found to exist.

"The phrase 'affected with a public interest'," said Mr. Justice Roberts, "can, in the nature of things, mean no more than that the industry, for adequate reason is subject to control for the public good . . . There can be no doubt that upon proper occasion and by appropriate measures the state may regulate the business in any of its aspects, including the prices to be charged for the products or commodities it sells. So far as the requirement of due process is concerned, . . . a state is free to adopt whatever economic policy

\(^{14}\text{Nebbia v. People of State of New York, 291 U. S. 502 (1934).}\)
\(^{15}\text{N. Y. Laws 1933, c. 158.}\)
\(^{16}\text{\textit{Of. American Coal Mining Co. v. Special Coal and Food Commission of Indiana, 265 Fed. 563 (D. C. Ind. 1920).}\}
\(^{17}\text{\textit{New State Ice Co. v. Liebman, 285 U. S. 262 (1932).}}\)
may reasonably be deemed to promote the public welfare, and to enforce that policy by legislation adapted to its purpose.\textsuperscript{19}

The same four justices who dissented so vigorously in the Moratorium case found themselves equally unable to follow the majority, and joined in an opinion by Mr. Justice McReynolds which made the startling assertion that, "plainly . . . this Court must have regard to the wisdom of the enactment."\textsuperscript{19} The assertion was startling, not because the Court had never been known to consider the wisdom of an enactment in passing upon its constitutional validity, but because never before had a justice of the Supreme Court, or perhaps of any other court, admitted as much.

These two cases were epoch-making in the development of our constitutional system, and appeared to stamp Mr. Chief Justice Hughes and Mr. Justice Roberts as much more liberal than the most ardent liberals had dared to hope they might be.

While there are many cases between these two and that invalidating the A. A. A. which might further illustrate the type of problem here involved, and which would trace the developments revealing Mr. Justice Roberts' later abode with the conservative wing of the Court, such as the Railroad Retirement case,\textsuperscript{20} these two suffice to show the possibilities for diverse judicial attitude when social or economic legislation is under consideration, and when uncertainty is made more uncertain by the necessity of construing and applying flexible and indefinite provisions of the Constitution.

A discussion of the Supreme Court and the A. A. A.\textsuperscript{21} does not necessitate any detailed setting out of the Act of Congress, familiar in its general aspects to most students of public affairs. The purpose of the act was to assist in general economic recovery by the rehabilitation of agriculture throughout the country, to be accomplished by establishing a balance between the production and consumption of agricultural commodities that was intended to bring the price of farm products back to the 1909-1914 level. To bring this about the Secretary of Agriculture

\textsuperscript{18}Nebbia v. People, 291 U. S. 502, 536, 537 (1934).
\textsuperscript{19}Id. at 556.
\textsuperscript{21}United States v. Butler, 297 U. S. 1, 56 S. Ct. 312 (1936).
was authorized to enter into agreements with farmers to reduce production of certain specified "basic" agricultural commodities in return for "rental or benefit payments" to them, in such amounts as the Secretary might deem fair and reasonable. Money to make these "rental or benefit payments" was to be obtained by taxes levied upon the first processors of the commodities in question.

In what may be recorded by future historians as one of the most far-reaching pronouncements by the United States Supreme Court in the first century and a half of its existence, Mr. Justice Roberts, speaking for six members of the Court,23 read an opinion which destroyed substantially the whole of the Agricultural Adjustment program, forecasting a like doom for numerous other important legislative acts.

That five members of the Court would hold the original Agricultural Adjustment Act involved in the Hoosac Mills case unconstitutional was not entirely unexpected. That Mr. Chief Justice Hughes would join them in such holding was a subject of legitimate speculation. But that the opinion should completely ignore the issue of delegation of legislative power, which was the principal basis for the holding of invalidity below,24 and make its decision so broad and sweeping as to shatter beyond any immediate prospect of redemption all existing legislative attempts to put agriculture on a basis of partial equality with the favored and powerful manufacturer and industrialist, was entirely unexpected. To millions of farmers in this country, together with many other millions sharing a similar viewpoint, the decision appeared to mark the complete destruction of the most important part of what many of them considered the first constructive legislative program ever directed to the substantial betterment of their economic condition, while the manufacturer and the industrialist continued to profit, by a high protective tariff. What the consequences of that feeling in terms of agrarian unrest might have been had prompt efforts not been directed to the substitution of some constructive remedy,25 no one can say.

23 Justices Roberts, Van Devanter, McReynolds, Sutherland, and Butler, and Mr. Chief Justice Hughes.


25 Soil Conservation and Domestic Allotment Act, 16 U. S. C. A. 590 G (1936), approved February 29, 1936. The decision invalidating the A. A. A. was handed down January 6, 1936. This act omits the
Whether the Agricultural Adjustment Act represented wise economic or social policy, or the opposite, whether desirable or highly undesirable, is no concern of the present article. Any study of problems of constitutionality, whether by judges or other students of constitutional law, should look only to the existence or lack of constitutional power. From such a point of view a profound interest for every careful student of constitutional law arises as to what the decision in the A. A. A. case means for constitutional development in this country.

The Constitution, Article I, Section 8, provides that "Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States ..."—the so-called general welfare clause. The controlling issue, said the Court, was whether this provision had the effect of authorizing the expenditure, in the way provided by Congress, of the funds raised by the processing taxes.

It is to be noted that the general welfare clause, thus made the determining factor in the case, is without certain and definite meaning, and is subject to diverse constructions and interpretations—in short, is flexible and indefinite in much the same fashion as the due process clause, and should be construed and interpreted with the same caution lest its application be unduly restricted. It can, at best, like the due process clause, involve only a matter of judgment and opinion, and is almost always certain to be tied up with matters of policy, and a court should be careful in its application of the clause not to assume the policy determining function which has been vested by the Constitution in other hands.

Three conceivable interpretations have been advanced in the past. In the first place it was early suggested that this clause was meant to confer upon Congress a substantive power to legis-
late generally for the general welfare. Such a construction would have given to Congress a general power equivalent to the police power of the states and would have rendered entirely useless the subsequent enumeration of special powers conferred upon Congress. Under this interpretation little if anything would have been left of the doctrine that Congress is a body of limited powers. Little serious support for this construction ever existed.

Chiefly under the leadership of Madison, it was contended that the clause should be restricted by that which follows, and that the power of Congress to tax and spend should be limited to the purposes specifically set forth in the enumeration of powers conferred upon Congress. Such a construction would have the effect, of course, of rendering entirely nugatory the mention of general welfare; and, since power to lay and collect taxes and appropriate the money so collected is implied in the special powers expressly granted (certainly with, and probably without the "necessary and proper" clause of the same section), it would restrict the power of Congress to tax and spend to what it would have been had the entire clause of Article I, Section 8, been omitted.

Alexander Hamilton, whose views were later supported by Story, took a position somewhat between these two extremes and advocated a construction which, unlike the first view, according a complete and unrestricted power to legislate for the general welfare, would nevertheless give to Congress a substantive power to tax and spend for the general welfare, thus in contrast with Madison's view making that power a mere incident of the later enumerated powers.

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26 See 1 Story, Commentaries on the Constitution (3d ed. 1858), Ch. XIV, p. 629, and authorities there collected.
27 Id. at 631 et seq.; The Federalist, No. XLII, 326 et seq. For a rather detailed discussion of the circumstances that led up to the inclusion of this clause in the Constitution, see the letter of Madison to Andrew Stevenson of November 17, 1830, and other writings published in 3 Farrand, The Records of the Federal Convention (1911), 483–494.
28 1 Story, Commentaries on the Constitution (3d ed. 1858), Ch. XIV, 639, et seq.
The Court did lip service to this doctrine of Hamilton and Story that the general welfare clause is not without meaning, and that it does confer a power separate and distinct from the later enumerated powers, on the basis of which Congress has a substantive power to tax and to appropriate, limited only by the requirement that such powers shall be exercised to provide for the general welfare of the United States, as distinguished from local welfare.

This, at first glance, looked like a determination of far-reaching importance. Throughout the period of our history there have never ceased to be exponents of the doctrine of Madison that the general welfare clause, in effect, had no purpose except to occupy space, and that the power to tax is directly limited to what is incident to the execution of the other enumerated powers of Congress, a power which the majority admits Congress clearly would have had without the general welfare clause. Laudable as may be this assertion of the Court that the Constitution means what it says, those who look for constitutional interpretation, not in what the Court says by way of generalities in its introductory remarks, but in the concrete application of constitutional provisions to the facts of a particular case being adjudicated, must find small comfort in that which follows.

After giving meaning to the general welfare clause as just indicated and reasserting the time honored principles—now perhaps as frequently honored in their breach as in their observance—that a strong presumption of constitutionality is to be indulged and an act of Congress is to be declared invalid only if the Court is inevitably impelled to that conclusion by the clear and controlling provisions of the Constitution, and that a court is never to concern itself with the wisdom or policy of a legislative act, the majority came near doing exactly what it condemned in an opinion holding the legislative act unconstitutional.

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31 "When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the government has only one duty—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. . . . The court neither approves nor condemns any legislative policy." Mr. Justice Roberts in United States v. Butler, 56 S. Ct. 312, 318 (1936). Cf. Mr. Justice McReynolds' assertion in his dissent in Nebbia v. People, 291 U. S. 502, 556 (1934), cited note 19, supra.
in such sweeping terms as to make of doubtful validity any attempt to bring about a solution of the indisputably national problem created by the condition of maladjustment under which our agricultural system previously had been struggling with rapidly increasing difficulty for some years past.

After admitting that Congress, under Article I, Section 8, of the Constitution, has a substantive power to lay and collect taxes to provide for the general welfare, the Court prefaced the principal part of its opinion with the assertion that the processing taxes, being mere expropriations of money from one group for the benefit of another, are not in reality taxes at all and are thus invalid, though similar expropriations from one group for the benefit of another would be valid in the case of a protective tariff (without using the words “protective tariff”). But since that is not the basis upon which the decision is made to turn, perhaps it may be laid on one side as of comparatively small importance.

When Mr. Justice Roberts started out by an interpretation of the general welfare clause, giving it the content and meaning he did, he was certainly on safe constitutional ground and his reasoning must command the respect of all. And he did more. He pointed out the wide range that must be allowed to the legislature under a clause of such broad and general meaning. “How great,” he asserted, “is the extent of that range, when the subject is the promotion of the general welfare of the United States, we need hardly remark.” When a question of constitutionality comes here, he asserted, “we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress.”

His next logical inquiry would seem to have been, whether or not such a program for the rehabilitation of agriculture, under existing conditions, so far affected the public welfare as to bring it within the general welfare clause, thus interpreted, as a purpose for which the power of taxation might be exercised. Once

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32 “We may concede that the latter sort of imposition (expropriation of money from one group for the benefit of another) is constitutional when imposed to effectuate regulation of a matter in which both groups are interested and in respect of which there is a power of legislative regulation.” 56 S. Ct. 312, 317 (1936).

For a discussion of the A. A. A. decision with special reference to the protective tariff, see Hart, Processing Taxes and Protective Tariffs (1936), 49 Harv. L. Rev. 610.

31 56 S. Ct. 312, 320 (1936).
having posed that inquiry he might have had considerable difficulty in avoiding a conclusion contrary to that which the majority opinion announced.

It is just possible that he might have found, either that the rehabilitation of agriculture is a purely local matter and so far unrelated to the general (national) welfare as to place it beyond the scope of the general welfare clause, or he might have said that while this was a legitimate purpose within the scope of the general welfare clause, the particular program set up by the legislation under consideration was a purely arbitrary and unreasonable imposition which could not by any "reasonable possibility" effect the announced purpose. To have done either, in the face of existing realities, would have required considerable courage. A third possibility may suggest itself. He might have found this to have been a provision for the general welfare but asserted that it so far invaded the power of the states that it ought not be permitted to stand, in which case he must of necessity have shown some sound constitutional basis for distinguishing this from other familiar exercises of enumerated powers that effect a regulation, which, standing alone, is reserved to the states. This, likewise, would have been beset with no little difficulty.

He elected to embrace none of these possibilities. Whether because the current of his reasoning was sweeping him to a destination at which he did not wish to arrive, or for other reasons not announced, he changed his course in mid-stream, so to speak. He asserted that the purpose of the Act (and apparently its ultimate end as well) was to control agricultural production within the states—a purely local matter—and whether the taxes were in reality taxes or not, and whether truly for the general welfare or not, they were nevertheless invalid because the tax was but a step in a general plan, which as a whole invaded the rights of the states by attempting to control agricultural production. The Court bluntly made the gratuitous assertion that "powers not granted are prohibited. None to regulate agricultural production is given, and therefore legislation by Congress for that purpose is forbidden." 34

34 Ibid.
But power to tax and spend\textsuperscript{35} to provide for the general welfare is granted to Congress. With respect to every other enumerated power the Supreme Court has always held that the enumerated power includes, by implication, such other powers as are necessary and proper to make the granted power effective, i.e., the power to so formulate its legislative enactment as to achieve effectively the intended purpose. Here the ultimate end was indisputably the promotion of the general welfare by the use of public funds to rehabilitate agriculture on a national scale. Certain restrictions upon agricultural production were set up by way of conditions to the receipt of the rental or benefit payments. These were conceived, however, as incidents to the broader plan to provide for the general welfare, and not as a regulation of agriculture as such. The Court in effect said that while as to all other enumerated powers, incidental powers to make the granted powers effective are properly to be implied, not so under the grant of power to provide for the general welfare by the use of the public money. There it reasoned as if the Tenth Amendment\textsuperscript{36} contained the word "expressly", in which case it could well have said that "powers not (expressly) granted are prohibited. None to regulate agricultural production is (expressly) given, and therefore legislation by Congress for that purpose is forbidden."\textsuperscript{37} But the Articles of Confederation did contain the term "expressly delegated" in defining the powers which alone Congress had.\textsuperscript{38} The Constitutional Convention omitted any such clause and inserted the "necessary and proper" clause\textsuperscript{39} instead. The Congress which proposed the Tenth

\textsuperscript{35} Everyone, including the Court, admits that while the terms "spend" or "appropriate" are not used, they are implied in the constitutional grant of the taxing power. \textit{Id.} at 319; \textit{United States v. Realty Co.}, 163 U. S. 427 (1896).

\textsuperscript{36} "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

\textsuperscript{37} \textit{Cf.} Mr. Justice Roberts' statement, 56 S. Ct. 312, 320, quoted in text at note 34, supra.

\textsuperscript{38} Articles of Confederation, Art. II. "Each state retains its sovereignty, freedom and independence, and every power, jurisdiction and right which is not by this confederation \textit{expressly delegated} to the United States, in Congress assembled."

\textsuperscript{39} "The Congress shall have power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."—Art. I, Sec. 8, par. 18.
Amendment to the states for ratification—a Congress filled incidentally with members of the Constitutional Convention—rejected a proposal to include the phrase “expressly delegated” in that amendment. In view of these historical facts, the uniform construction recognizing implied powers would seem to be amply justified. That any reason exists for making an exception in the case of the granted power to tax and spend for the general welfare is by no means demonstrated by the Court. The reasoning of Mr. Justice Roberts at this point is not greatly unlike that of Mr. Chief Justice Taney in the unfortunate Dred Scott case by which he arrived at the conclusion that the grant in the Constitution to Congress of the broad and plenary power to govern territories did not include the power to prohibit slavery therein.

In this general connection it should be observed in passing that the Tenth Amendment reserves to the states “powers not delegated to the United States” and not broad general subjects or fields of governmental action. It is freely admitted that no general power to regulate agricultural production in the nature of a police power is granted to Congress, yet it does not necessarily follow that the subject of agricultural production may not be reached by some other power of Congress—here the power to tax and spend for the general welfare, including the contractual conditions incident to the grant of the public funds. A general regulatory power of a police nature would imply the possibility of penal sanctions for disobedience, and would be based on a specific grant like that of power to regulate interstate and foreign commerce. But the contractual purchase of compliance with a general program such as involved in the instant case, may be a proper incident to the granted power to tax and spend for the general welfare. The admission that Congress is not granted and has no general regulatory power over agricultural production within the states does not in the least militate against the soundness of this conclusion. This is not the exercise of the same power but is the incidental effect of the exercise of a

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40 Annals of First Congress, August 18, 1789.
41 Mr. Chief Justice Marshall definitely established for all time the doctrine of implied powers in such cases as McCulloch v. Maryland, 4 Wheat. 316 (1819), and Gibbons v. Ogden, 9 Wheat. 1 (1824).
42 Dred Scott v. Sanford, 19 How. 393, 451, 452 (1856).
43 Tenth Amendment, quoted note 36, supra.
distinct and granted power upon a *subject* over which no direct national regulatory power exists. Probably little more than a mere statement of the facts in the two situations is needed to convince most unprejudiced students of this problem that the making of benefit payments to induce curtailment of production, only partially effective under the A. A. A. as demonstrated by Mr. Justice Stone's dissent, is hardly the same thing as an act prohibiting production beyond a stipulated maximum with a fine or jail sentence as the penalty for disobedience. With equal ease it would seem to follow that the two powers, if exercised, must spring from different sources and the restrictions upon the one would not necessarily mark the limits of the other.44

After the Court discloses its discovery that the Constitution contains no grant to Congress of a power to regulate agricultural production within the states, the reader of the opinion is given the rather astonishing information, at least by very definite implication, that this case is on a par with and controlled by the Child Labor Tax Case.45 In that case the so-called tax was held to be not a tax, but in reality a penalty for deviation from a prescribed course of conduct. The basis of similarity between the cases, the Court was content to leave to the reader's own imagination. That what the Court found to be a penalty in that case, imposed upon the manufacturer for failure to conform to a course of conduct prescribed by the statute, was the same in nature and effect as the processing tax here imposed, not upon the farmer whose conduct it was hoped to influence but upon one whose only conduct to be controlled was the payment of the tax, could hardly, it would seem, be seriously contended.

Being unwilling to press its claim that the processing tax was not really a tax, or that it was on a par with the penalty in

44 "It is obvious that the government of the Union, in the exercise of its express powers . . . may use means that may also be employed by a state in the exercise of its acknowledged powers. . . . So if a state, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other which remains with the state, and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical". Mr. Chief Justice Marshall in Gibbons v. Ogden, 9 Wheat. 1, 204 (1824).

the Child Labor Tax Case, as the remainder of the opinion demonstrates, the Court next asserted that the plan of regulation involved was not voluntary but coercive and compulsory and thus beyond the power of Congress. Regulation that does not require compliance would hardly seem to be regulation, so the element of compulsion would seem to be important to the result toward which the Court was obviously directing its efforts.

The plan, thus declared to be compulsory in its nature, authorized the Secretary of Agriculture to enter into agreements with the farmers whereby the latter agreed to reduce production in return for the so-called rental or benefit payments to be made out of money raised by the processing taxes.

The Court made the rather damaging admission that the farmer was at liberty to comply or refuse to comply as he might see fit (previously believed to indicate the opposite of coercion), but, said the Court, since by refusal to comply the farmer would lose the benefits he would otherwise obtain, and since the amount offered was intended to be sufficient to cause him to agree, it amounted to coercion. Anticipating the very obvious answer to this assertion, the Court hastened to assure us that, "the coercive purpose and intent of the statute is not obscured by the fact that it has not been entirely successful."40

The facts are that as to cotton, which was involved in this case, although the act became effective in June, 1933, more than six and one-fourth millions of acres of productive cotton land did not participate in the plan in 1934, and nearly three millions of acres did not participate in 1935. Put differently, of the one and one-half millions of farmers in the United States growing cotton, thirty-three per cent. did not participate in 1934 and thirteen per cent. did not in 1935.47

Even more significant is the fact that because the A. A. A. plan did lack coercive features and was not sufficiently effective, the Bankhead Cotton Control Act48 was passed in 1934 imposing a tax of fifty per cent. on all cotton produced in excess of certain prescribed limits, the purpose being, as clearly set out in the debates on the Bankhead Bill in Congress,49 to prevent the non-

40 56 S. Ct. 312, 321 (1936).
47 See Mr. Justice Stone's dissent, id. at 326.
49 See Hearing before Committee on Agriculture, U. S. Senate, S. 1974, 73rd Cong., 2nd Sess.; Hearing before Committee on Agri-
cooperating growers from increasing their plantings in order to capitalize upon the price advances that had resulted from the reduction in acreage made by contract signers.\textsuperscript{50}

It is, to say the least, a bit disconcerting, to observe the same Court, by substantially the same majority, asserting, in effect, that an unemployed, penniless widow, with dependent children, stands on a plane of free bargaining equality with the employment manager of a fifty million dollar corporation, and that their complete freedom of contract with respect to wages cannot be regulated by an exercise of the police power of the state,\textsuperscript{51} and at the same time finding unconstitutional coercion in the mere offering of a possibly alluring contract which, by the Court's own admission, the farmer was free to accept or reject as might appear to his advantage.

Equally striking by way of contrast is the Court's earlier decision that a state legislature could not be permitted to interfere with the free and equal bargaining of the two parties to a labor contract, when the employer, by his superior economic position, was able to induce the employee to sign an agreement not to join a labor union as the price of obtaining employment.\textsuperscript{52}

As if sensing the weakness of its holding with respect to coercion, the Court moved on to its last stand, namely, that whether compulsory or voluntary, it was nevertheless beyond the power of Congress because by offering inducements in the form of rental or benefit payments, the farmer was induced to enter into an agreement to comply with the plan of acreage reduction.

Congress has no power directly to compel reduction in acreage. Under the A. A. A., by means of a contract arrangement and the use of federal funds, the National Government induced...
compliance with a plan of crop control which it had no power directly to command. This, said the Court, constituted an invasion of state rights and was unconstitutional, and the processing taxes, being but parts of the plan, were illegal.

What the ultimate consequences of this decision may be, it is difficult to say. Does it mean as suggested by the dissent, that all of the acts of Congress, such as the creation of the Departments of Agriculture and Labor for which there is no grant in the Constitution, through all that long line of measures appropriating federal funds for the relief of human suffering and misfortune, as in the case of earthquake or flood, the suppression of plant and animal disease or the eradication of pests in aid of agriculture, the fostering of education, agricultural, rural, or otherwise, and scores of other things, because coupled with some requirement to insure the wise application of the funds, rest upon an insecure constitutional foundation? The dissent in this connection seems entirely sound when it asserts that,

"if the expenditure is for a national public purpose, that purpose will not be thwarted because payment is on condition which will advance that purpose. The action which Congress induces by payments of money to promote the general welfare, but which it does not command or coerce, is but an incident to a specifically granted power, but a permissible means to a legitimate end."

The Court purported to find a distinction, perhaps of doubtful validity, between the situation under the A. A. A. and other acts conferring bounties, as in connection with agricultural education, fighting boll weevil, etc., in that as to the latter there is an appropriation upon condition, while in the former the recipient assumes a contractual obligation to comply.

Lastly, as in the Child Labor Tax Case relied upon, the Court asserted that if this Act of Congress could stand, the way was opened for Congress to assume control of any and all local matters, to the ultimate destruction of the forty-eight states.

Interesting light is shed upon Mr. Justice Roberts' conception of what are local as distinguished from national problems by his assertion that "it does not help to declare that local conditions throughout the nation have created a situation of national concern; for this is but to say that whenever there is a widespread similarity of local conditions, Congress may ignore con-

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56 S. Ct. 312, 328 (1936).
To assert that the universal economic strangulation of the most basic and fundamental industry throughout the whole country is nothing more than the similarity of local conditions, explains a great deal about the attitude of the Court which previously may have been difficult to understand. A certain editorial writer has possibly not exaggerated in asserting that under such reasoning, "Noah's flood was solely of local concern, since at each spot on the earth only one spot was under water," though perhaps it would be admitted that the similarity of the local conditions was rather striking and widespread.

The majority opinion ends with a long list of possible abuses of the taxing and spending power, if the present act were upheld, such as might result in the complete destruction of local self-government. It asserted that in the name of the general welfare of the United States—aptly described as "an indestructible union of indestructible states"—there might be brought about an obliteration of the constituent members of that union.

In one of the most brilliant dissenting opinions to be found in the literature of the Supreme Court, Mr. Justice Stone, speaking for himself and Justices Brandeis and Cardozo, found ample constitutional basis for the power which Congress sought to exercise.

He started his dissent with a masterly admonition to the Court to stay within its proper judicial province.

"The power of the courts to declare a statute unconstitutional," he admonished, "is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own (the Court's) exercise of power is our own sense of self restraint."

The fundamental character and abiding importance of these admonitions to the Court, it is impossible to overemphasize.

He pointed out that the constitutional power of Congress to levy an excise tax upon the processing of agricultural products was not questioned by the majority, and he might have added,
was beyond question. Further, he conceived that the levy in question was held invalid, not for any want of power in Congress to lay such a tax to defray public expenditures including those for the general welfare, but because the use to which the proceeds were put was disapproved by the Court.

In what was probably intended as an answer to Mr. Justice Roberts' intimation that the needs of agriculture were matters of purely local concern, he asserted that, as the existing depressed state of agriculture was nation-wide in its extent and effects, there certainly could be no basis for saying that the expenditure of public money in aid of farmers was not within the specifically granted power of Congress to levy taxes to "provide for the . . . general welfare".

The pivot on which the decision of the majority was made to turn, the dissent pointed out, was that a levy unquestionably within the taxing power of Congress might be treated as invalid because it was considered a step in a plan to regulate agricultural production and for that reason a forbidden infringement of state power. But the levy of the processing taxes, said Mr. Justice Stone, was none the less an exercise of the taxing power because intended to defray an expenditure for the general welfare rather than in the execution of some other enumerated power of the federal government. And the levy and collection of the tax in itself did not constitute regulation.

The tax was thought to be completely unlike the penalties held invalid in the Child Labor Tax Case, relied on by the majority, because there the so-called tax was itself treated as the instrument of regulation by virtue of its coercive effect over conduct with respect to matters reserved to the control of the states. In that case failure to follow the prescribed course of conduct in a local enterprise subjected one to the payment of a destructively burdensome tax. Here the farmer changed his course of conduct, if at all, by the expectation of improvement of economic conditions in the agricultural industry, and the promise of some ready money in the meantime. "Threat of loss, not hope of gain," said Mr. Justice Stone, "is the essence of economic coercion." 57

What is perhaps the most significant aspect of the case as

57 Id. at 326.
decided by the majority is set out in bold relief by Mr. Justice Stone when he asserts that,

"while the Constitution gives Congress, in specific and unambiguous terms, the power to tax and spend," according to the majority ruling "that power is subject to limitations which do not find their origin in any express provision of the Constitution and to which other expressly delegated powers are not subject."58

The ultimate and most fundamental clash between the majority and minority opinions is best illustrated in this connection by Mr. Justice Stone’s comparison of the power of Congress to regulate interstate commerce or to impose customs duties, with the power to lay and collect taxes to provide for the general welfare. All three were admitted by the majority to be substantive powers expressly conferred upon Congress by the Constitution.

As to the last power—to lay and collect taxes to provide for the general welfare—just as in the case of the other two, the majority admitted that the constitutional provision confers a substantive power, not limited to being exercised as incidental to the later enumerated powers, as was contended for by attorneys for the processors.

For the last 118 years, since the opinion of Mr. Chief Justice Marshall in the famous case of *McCulloch v. Maryland,*59 it had been uniformly recognized that enumerated powers carry with them such incidental powers as may be necessary and proper to make the granted powers effective, and in a most far-reaching opinion that doctrine was recently reasserted in its full vigor by the Court in the Gold Cases.60

Applying that hitherto universally recognized doctrine to the three powers under discussion, Mr. Justice Stone pointed out that under the power to levy customs duties on imports, Congress has built up or destroyed local industries by the raising or the lowering of the tariffs. Under its power to regulate interstate commerce, Congress, acting through the Interstate Commerce Commission, has set aside intrastate rates or regulated

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58 Id. at 327.
59 4 Wheat. 316 (1819).
intrastate traffic.61 None of these are powers granted to Congress and all are powers belonging to the states, but because reasonably incident to the granted power, and reasonably necessary to make the granted power effective, they may be exercised, though standing alone they are clearly beyond the power of Congress. With equal accuracy as compared with his assertion of an absence of Congressional power to regulate agricultural production, Mr. Justice Roberts might assert that "powers not granted are prohibited. None to regulate intrastate rates or build up a local industry is given, therefore legislation by Congress for those purposes is forbidden."62

At this point it should be noted that any such action, when taken by Congress, supersedes any action by the states with respect to the same subject,63 by virtue of that provision in the Constitution which says that "this Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."64

In the case of the taxing and spending power—likewise enumerated and, so far as appears from its wording or position in the Constitution, on a par with the customs and commerce powers just referred to—no similar incidental power to make the granted power effective exists, according to the majority. As Mr. Justice Stone asserted, "it is a contradiction in terms to say that there is," distinct from and independent of the other enumerated powers, the "power to" tax and "spend for the national welfare, while rejecting any power to impose conditions

62 Cf. Similar statement as to control of agricultural production, 56 S. Ct. 312, 320 (1936).
63 Shreveport Rate Cases, 234 U. S. 342 (1914); Board of Trustees of University of Illinois v. United States, 289 U. S. 48 (1933).
64 Art. VI, Sec. 2.
reasonably adapted to the attainment of the end which alone would justify the expenditure.'

The majority, by denying that this power carries with it the reasonable incidents necessary to make the granted power effective, either completely repudiated its own opening pronouncement that Hamilton and Story were right in asserting that the general welfare clause does constitute a substantive grant of power not limited by the enumerated powers which follow, or it must have found that there is something in the nature of the power, of which it does not inform its readers, which required a construction fundamentally inconsistent with giving any real meaning to the Hamilton-Story doctrine. Nothing in the Constitution, and nothing in prior decisions, lends the slightest support to any such distinction, but on the contrary both very clearly indicate the opposite.

Whence comes this strange and novel doctrine then, if not from the Constitution and not from prior decisions? And what becomes of the enunciation at the outset that the Court will hold an act unconstitutional only when inevitably impelled to do so by the clear and controlling provisions of the Constitution? Manifestly the doctrine has just one source—it comes out of the mind of the Justice writing the opinion, and illustrates the statement, of the truth of which all careful students of constitutional law have long been convinced, that the Constitution means what the judges say it means—and the judges change from time to time.

The closing paragraphs of Mr. Justice Stone's dissent are worthy of special consideration. Referring to the latter part of the majority opinion, which catalogued a lengthy list of possible abuses of the taxing and spending power by Congress should the legislation under consideration be sustained, which he says hardly rises to the dignity of argument, he counters with the assertion, "so may judicial power be abused", and chides the majority with the statement that a "tortured construction of the Constitution is not to be justified by recourse to extreme examples of reckless congressional spending which conceivably might

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66 56 S. Ct. 312, 327, 328 (1936).
67 "We are under a constitution, but the Constitution is what the judges say it is . . ." From a speech by Charles Evans Hughes (now Mr. Chief Justice Hughes) before Elmira Chamber of Commerce, Elmira, N. Y., May 3, 1907. Hughes, Addresses and Papers (1908) 139.
occur’ at the hands of a ‘legislature lost to all sense of public responsibility.’ Then he quotes Mr. Justice Holmes’ famous assertion that ‘it must be remembered that legislators are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.’ He might have added, they are equally bound by an oath to support the Constitution.

The final paragraph of this masterly dissent is so packed with wisdom and warning for all students of government and of constitutional law as to warrant quotation at some length.

“Courts are not the only agency of government that must be assumed to have the capacity to govern,” he asserts. “Congress and the courts both unhappily may be mistaken in the performance of their constitutional duty. But interpretation of our great charter of government which proceeds on any assumption that the responsibility for the preservation of our institutions is the exclusive concern of any one of the three branches of government, or that it alone can save them from destruction is far more likely in the long run,” here paraphrasing the closing theme of the majority, “to obliterate the constituent members of ‘an indestructible union of indestructible states’ than a frank recognition that language, even in a Constitution, may mean what it says; that the power to tax and spend includes the power to relieve a nation-wide economic maladjustment by conditional gifts of money.”

Thus he closes as he begins, with a ringing admonition to the Court to restrict itself to its proper judicial function. He asserts the existence of a danger to our constitutionally established system of government in the proneness of the Supreme Court to govern by judicial fiat, and to set itself up as a super-legislature substituting its judgment for that of the constitutionally created legislative body as to matters of wisdom and policy involved in legislative acts—constituting itself the ultimate legislative as well as judicial authority whose acts are subject to no review and from whose determinations there can be no appeal.

Perhaps the most significant feature of the case is Mr. Justice Stone’s caustic warnings to the Court against government by “Judicial fiat” and the employment of “a tortured construction of the Constitution”, foreign alike to both the letter and the spirit of that great document, to arrive at a conclusion

67 56 S. Ct. 312, 328, 329 (1936).
68 Missouri, Kansas & Texas R. Co. v. May, 194 U. S. 267, 270 (1904).
69 56 S. Ct. 312, 329 (1936).
70 Id. at 328.
71 Ibid.
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in harmony with ideas of desirability\textsuperscript{72} entertained by a majority in sympathy with the notion that it is "the business of courts to sit in judgment on the wisdom of legislative action."\textsuperscript{73}

The position of the majority throughout is in striking contrast with the clear-cut utterances of Mr. Chief Justice Hughes and the earlier Mr. Justice Roberts in the two cases discussed\textsuperscript{74} at the outset of this article. In those cases the Court went back to the principles so forcibly enunciated by Mr. Chief Justice Marshall in such epoch-making cases as McCulloch v. Maryland\textsuperscript{75} and Gibbons v. Ogden,\textsuperscript{76} and gave full recognition to the fact that our national Constitution is an agency of progress, a flexible and living instrument, capable of being "adapted to the various crises of human affairs" and "intended to endure for ages to come."\textsuperscript{77} Those cases recognized as a reality the presumption of constitutionality of an act of Congress until the contrary is clearly demonstrated, while the assertion of Mr. Justice Stone that it is here overturned on the basis of "nothing more substantial than groundless speculation"\textsuperscript{78} seems not an unwarranted observation. That the Court recognized the existence of a national problem requiring for its solution measures whose application must be coextensive with the evils involved is

\textsuperscript{72}The present levy is held invalid, not for want of power in Congress to lay such a tax to defray public expenditures, including those for the general welfare, but because the use to which its proceeds are put is disapproved". (Italics supplied.) Mr. Justice Stone's dissent. \textit{Id.} at 325. Compare the language of his dissent in the recent New York Minimum Wage case. "It is difficult to imagine any grounds, other than our own personal economic predilections, for saying that the contract of employment is any the less an appropriate subject of legislation than are scores of others, in dealing with which this Court has held that legislatures may curtail individual freedom in the public interest." (Italics supplied.) Morehead v. People ex rel. Tipaldo, 298 U. S. 587, 56 S. Ct. 918, 933 (1936).

\textsuperscript{73}56 S. Ct. 312, 328 (1936). But see the dissent of Mr. Justice McReynolds in Nebbia v. People, 291 U. S. 502, 556 (1934). "But plainly, I think, this Court must have regard to the wisdom of the enactment."


\textsuperscript{74}4 Wheat. 316 (1819).

\textsuperscript{75}9 Wheat. 1 (1824).

\textsuperscript{76}McCulloch v. Maryland, 4 Wheat. 316, 415 (1819). This statement is preceded by another which might, with equal propriety, be recalled at this point that, "We must never forget that it is a \textit{constitution} we are expounding". \textit{Id.} at 407.

\textsuperscript{77}56 S. Ct. 312, 326 (1936).
nowhere indicated, but rather the opposite. Such a recognition, together with a charitable approach toward the purposes of legislation honestly designed for the relief of nationwide agricultural needs or other similar ills no longer capable of effective control by action of the individual states, grounded upon a conception of the Constitution as a flexible and living instrument of government, would seem to require an ultimate departure from the basic doctrines set forth by the majority opinion in this case. How far removed we now may be from such a reversal of form by the Court, no one can safely predict. With a growing prospect, however, for the early enactment of further legislation of a similar nature to supplement or replace the present less effective soil conservation program, it seems highly probable that the constitutional problems involved in this case must be faced again at no far distant date by both the Congress and the Court and in the meantime merit the continued and profound consideration of all serious students of constitutional government.

79 "It does not help to declare that local conditions throughout the nation have created a situation of national concern; for this is but to say that whenever there is a widespread similarity of local conditions, Congress may ignore constitutional limitations upon its own powers and usurp those reserved to the states." Id. at 323.