**Louisiana Law Review**

Volume 7 | Number 1
*November 1946*

# Forum Juridicum: Patterns of the Law, Old and New

John C. Knox

# Forum Juridicum

## PATTERNS OF THE LAW, OLD AND NEW*

JOHN C. KNOX†

In this day and age, with all their complexities of life and human relationships, both of which are in a state of constant flux, no man can take satisfaction in being a mere "case lawyer." He must, if he is to be competent, and able to contribute to the public welfare, have a knowledge of the reason and philosophy that prompted the decision of the case on which he relies; and any decision—as he will learn—may undergo a change that is both sudden and startling.

Recent years, as well as the present period, have been times of emergency. For example, in the early Thirties, when factories and mills ceased to operate; when railroad and steamship lines lost their traffic; when banks failed and investment houses closed their doors; when millions of men ceased to work; and when farmers, due to conditions beyond their control, could not market their products; and when, also, the homes of thousands of householders were under foreclosure, things were much out of place, and something had to be done; and this was attempted.

National distress—when it is so deep and widespread that the future offers no hope of the success of individualistic enterprise—is properly productive of legislation that is designed to provide against despair and desperation. Unless needed remedies in such situations be promptly supplied, and unless they operate effectively, red riot and the breaking up of laws inevitably will follow. No government worthy of the name can pursue the example of Nero, and calmly witness the destruction of Rome. It may be unfortunate, but it is the fact, that critical conditions require drastic remedies. And if one will look at present day statute books, he will readily conclude that, in the mind of Congress, the word *drastic* begins with a capital D.

If, in so believing, Congress was in error, and if, in giving

---

* The substance of this article was presented as an address before the Louisiana State University Law School students on April 24, 1946.

† United States District Judge, Southern District of New York; Lecturer in Law, New York University School of Law.

support to Congress, the courts were wrong, criticism against them should be tempered by reason. In this country, basic law cannot be written over night, and stare decisis must never be permitted to stand in the way of relief that is essential to the public welfare. We should always understand that if a constitution be so rigid that it cannot bend, and if legal doctrine be so stiff that it will never yield to legitimate demand, the icy storms of national discouragement will bring about their destruction.

No wonder, therefore, that our statute law has been multiplied, and that the courts, in passing upon the constitutionality of this legislation, evolve theories that give grave concern to many of our people.

But, this is no new development in American history. From the beginning, judicial doctrine has been in a state of oscillation. As much may be said of every branch of statecraft. What is more, as much may be said of our own points of view. As each of us is aware, individually and nationally, self interest motivates both our thought and action. It is but natural, therefore, that judicial decisions should be greatly influenced by practical considerations of what, at a particular time, seems needful and desirable. So far as private law is concerned, such considerations are not so influential. If, in that branch of jurisprudence, the judiciary adheres to a rule that is unworkable or unduly burdensome, legislative action is usually capable of furnishing a remedy. But, with respect to constitutional rulings, legislatures are without the power of correction. The courts themselves must come to the rescue.

Ninety-seven years ago, in *The Passenger* cases,[1] Justice Taney announced that "the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and . . . judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported."[2]

It was not long until this principle was given practical application. In the early days of the Republic Mr. Justice Story, writing for the Supreme Court, in the case of *The Thomas Jefferson,*[3] held that the admiralty and maritime jurisdiction of a federal district court was distinctly and definitely limited. The case involved the wage contract of a seaman who had rendered

1. Smith v. Turner, Health Commissioner of the Port of N.Y., 48 U.S. 283, 12 L.Ed. 702 (1849).
2. 48 U.S. 283, 470, 12 L.Ed. 702, 781.
3. 23 U.S. 428, 6 L.Ed. 358 (1825).

services on a steamboat that plied the Missouri River. The libel was dismissed upon the ground that, except when a seaman did work upon the sea, or upon the waters within the ebb and flow of the tide, the admiralty was without jurisdiction.

Twenty-six years thereafter, the case of *The Genesee Chief*[4] came along. A vessel bearing that name had collided with another upon the waters of Lake Ontario. When the suit came before the Supreme Court, Taney was Chief Justice. He and his associates decided diametrically opposite to the holding in the case of the *Thomas Jefferson*. One of the justifications for doing so was that

> "These lakes [the Great Lakes] are in truth inland seas. Different states border upon them on one side, and a foreign nation on the other. A great and growing commerce is carried on upon them between different states and a foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered upon them, and prizes been made; and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas, applies with equal force to the lakes. There is an equal necessity for the instance and for the prize power of the admiralty court to administer international law, and if the one cannot be established neither can the other."[5]

The real fact, of course, was that the Supreme Court recognized that the growth and commercial development of the country had come to need the application of a judicial doctrine which would support and encourage that growth and development.

In this connection, a reference to the *Dartmouth College* case[6] may not be inappropriate. As each of us knows, it was there that the court, in an opinion by Chief Justice Marshall, declared that under no circumstances could a state legislature destroy the sanctity of a contractual obligation. Had that decision remained unmodified, the economic development of America, as we have come to know it, might have been impossible. But, here again, Roger B. Taney had a breadth of view quite as wide as was that of Marshall in *Gibbons v. Ogden*.[7] The circumstance that Taney's

4. The Genesee Chief v. Fitzhugh, 53 U.S. 443, 13 L.Ed. 1058 (1851).
5. 53 U.S. 443, 453, 454, 13 L.Ed. 1058, 1063 (1851).
6. Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 4 L.Ed. 629 (1819).
7. 22 U.S. 1, 6 L.Ed. 23 (1824).

opinion in the *Charles River Bridge* case[8] materially qualified, if it did not, in effect, reverse Marshall's holding concerning the sanctity of the charter of Dartmouth College, does nothing to lower my estimate of Marshall's ability. Both he and Taney were judges par excellence. But, each of them was much more than that. Any lawyer, fortunate enough to be struck by the lightning of presidential favor, can sit upon the bench of a federal court. If, however, that lawyer is truly to serve the purposes which warrant the existence of judges, he must have knowledge of what goes on about him. He must, in addition, recognize its significance and respect the just demands of that significance.

That is what Taney did in the *Bridge* case. Appreciating that industry was on the march, and that the day of the machine was about to dawn, the man who dared brook the enmity of Lincoln, and who, figuratively speaking, threw the *Merryman* decision[9] in the face of the great emancipator, saw the industrial needs of the land, and acted accordingly.

What was then said of Taney did not differ materially from the calumny that is, today, heaped upon some of those who now sit upon the Supreme Court of the United States. The fears of those who opposed Taney's confirmation became absolute. He has shown himself as being opposed to monopoly. Then, as now, in the minds of many eminent citizens, any such demonstration upon the part of a judge was quite enough to warrant his damnation. But when all is said and done, Taney envisioned the future and not the past. He decided merely that judicial doctrine, like machinery, can and does become obsolete and that such obsolescence should not be allowed to retard the proper functioning of national necessities. Taney, nevertheless, as I have indicated, was subjected to violent criticism. Furthermore, it came from those in high position. Story, for example, wrote to Judge McLean in a most doleful tone, and this, in part, is what he said:

> " 'There will not, I fear, ever in our day, be any case in which a law of a State or of Congress will be declared unconstitutional; for the old constitutional doctrines are fast fading away, and a change has come over the public mind from which I augur little good' "[10]

One can thus see that the language used by some of our

8. Charles River Bridge v. Warren River Bridge, 36 U.S. 420 (1837).
9. Ex Parte Merryman, Taney 246, Fed. Cas. No. 9487 (1861).
10. 2 Warren, The Supreme Court in United States History (1926) 28.

prominent citizens in their denunciation of recent Supreme Court decision has an ancient precedent behind it.

Story, however, did not stand alone. His satisfaction must have been great when Kent wrote him as follows:

> " 'I have re-perused the *Charles River Bridge* case, and with great disgust. It abandons, or overthrows, a great principle of constitutional morality, and I think goes to destroy the security and value of legislative franchises. It injures the moral sense of the community, and destroys the sanctity of contracts. If the Legislature can quibble away, or whittle away its contracts with impunity, the people will be sure to follow . . . . I have lost my confidence and hope in the constitutional guardianship and protection of the Supreme Court.' "[11]

In spite of all this, and within a few years, the wisdom of Taney's decision was recognized and acclaimed. It was realized that monopolistic rights and privileges could not continue to be implied in the issuance of every legislative charter having to do with transportation. Were this to be done, the result, as Taney said, would be that

> "The millions of property which had been invested in railroads and canals, upon lines of travel which had been before occupied by turnpike corporations, will be put in jeopardy. We shall be thrown back to the improvements of the last century, and obliged to stand still until the claims of the old turnpike corporations shall be satisfied; and they shall consent to permit the states to avail themselves of the lights of modern science, and to partake of the benefit of those improvements which are now adding to the wealth and prosperity, and the convenience and comfort, of every other part of the civilized world."[12]

Doctrine such as this is strong precedent for some of the contemporary utterances of Justices Douglas, Black, Murphy and Frankfurter. And while many of the pronouncements of these men give us feelings of both apprehension and concern, who among us, with respect to their wisdom and propriety, can forecast the verdict which posterity will some time place upon them? The passage of time, changes in thought, and the extent to which

---

11. Id. at 29.
12. Charles River Bridge v. Warren Bridge, 36 U.S. 420, 552, 553 (1837).

recent decisions contribute to national happiness and welfare will give the ultimate answer. Possibly it will come to pass that the New Deal justices, contrary to the expectation of many persons, will be regarded as much more than intellectual puppets who came to power in order to rationalize the political predilections of the President who appointed them. In saying this, it is to be remarked that the Supreme Court has frequently reversed itself upon important questions. Take, for example, *Adair v. United States*[13] and *Coppage v. Kansas*[14]—one decided in 1908 and the other in 1915. In each of these cases, the court said that yellow dog labor contracts could not be outlawed by legislative action.

In 1930, however, in the case of *Texas and New Orleans Railway Company v. Brotherhood of Railway & Steamship Clerks*,[15] an enactment of this character was approved. Consider also that for a period of half a century, it was the law that only in the matter of public utility rates could prices be regulated. But twelve years ago, in *Nebbia v. New York*,[16] it was held that the cost at which milk could be sold was within the ambit of legislative authority. In the closing years of the last century, the hours that miners could labor were said to be a proper subject matter of legislative power.[17] Seven years thereafter, we were told that the working hours of bakers fell within a different category.[18] Within the next three years, when legislatures had undertaken to prescribe the length of continuous time to which women could devote their energies, the legislation was upheld.[19] Almost a decade passed, and in 1917 it was decided that the hours of service of all factory workers were subject to regulation.[20] From this recital, anyone can see that as the evil of the sweatshop was appreciated, and when humanity came to know that humanity itself is our most priceless possession, the rigidity of the Constitution relaxed and the document became sufficiently flexible to safeguard the health of the country's citizenship. Who would return to the days when it was decreed that in America industrial slavery had the support of constitutional authority?

13. 208 U.S. 161, 28 S.Ct. 277, 52 L.Ed. 436, 13 Ann. Cas. 764 (1908).
14. 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441, L.R.A. 1915C 960 (1915).
15. 281 U.S. 548, 50 S.Ct. 427, 74 L.Ed. 1034 (1930).
16. 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469 (1934).
17. Holden v. Hardy, 169 U.S. 366, 18 S.Ct. 383, 42 L.Ed. 780 (1898).
18. Lochner v. New York, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905).
19. Muller v. Oregon, 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551, 13 Ann. Cas. 957 (1908).
20. Bunting v. Oregon, 243 U.S. 426, 37 S.Ct. 435, 61 L.Ed 820, Ann. Cas. 1918A 1043 (1917).

And, as men now voice criticism of the lately appointed justices, they should remember, as some do not, that most of these controversial decisions became the law of the land long before we heard of the New Deal. This is also true of several other decisions. For example, the first of the *Tennessee Valley* cases,[21] two of the Labor Board cases,[22] the Washington State minimum wage case,[23] and the social security cases[24] were decided before any one of Mr. Roosevelt's appointees[25] went upon the court. It also is worthy of note that in several other decisions of liberal tendencies and far reaching results, the votes of the new judges did not affect the outcome. In other words, the old court, recognizing that it could not indefinitely resist the expressed will of Congress and remain insensible to the ground swell of public opinion, spread its sheets, and on its own initiative, set sail upon Norris Dam. It were better, perhaps, both for the country and the prestige of the Supreme Court, had that tribunal made earlier and more willing response than was given to what the public regarded as just demands.

As a result of the Court's failure to take note of changing conditions and to understand their implications, the safe ports of constitutionalism are not so plentiful as once they were. Many of them have been closed by the mine fields of public clamor and uproar. The bombs laid by these agencies will not be swept away until considered opinion and reasoned judgment again find lodgement in the national consciousness. We can only speculate as to when that time will come.

But this I do believe—The indispositions from which we have suffered, and many of which continue to afflict us, and which have moved Congress to enact legislation that has proved embarrassing to the courts, are due merely to our own neglect and carelessness in solving the problems that are incident to a highly complicated way of living. Engrossed in our own affairs, we momentarily forgot that fair dealing, honest government, capable

21. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688 (1936).

22. National Labor Relations Board v. Jones and Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937); Associated Press v. National Labor Relations Board, 301 U.S. 103, 57 S.Ct. 650, 81 L.Ed. 953 (1937).

23. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937).

24. Steward Machine Co. v. Davis, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279 (1937); Helvering v. Davis, 301 U.S. 634, 57 S.Ct. 906, 81 L.Ed. 311 (1937).

25. Mr. Justice Hugo L. Black, who took his seat on October 4, 1937, was the first Roosevelt appointee on the court.

administration, and an appreciation of realities, together with high patriotism, are the essentials of a democracy.

Furthermore, we also forgot that, in the last analysis, the citizens of a free government should be the masters of their own destinies. Paternalism in government should never be substituted for a people's self reliance. Upon self reliance we have endured, and upon self reliance we should continue to live. Save in times of great disaster and unusual emergency, government should do no more than see that the fields whereon we wage the contests of life shall be open, free and clear; that the rules shall be fair and just—that in the games no fouls be permitted; that the umpires shall have no favorites; and that those who win the prizes shall have and enjoy the fruits of victory.

In days gone by, representative democracy has achieved these ends. It can do so again. It must do no less. It is required, however, that straightforwardness and honest dealing shall become a way of life. Along that way, public officials, and each of us must walk. Unless democracy lives in the hearts of men, unless public officials be animated by a spirit of democracy, and unless the populace, in honest endeavor, seeks the administration of democracy, and will submit to nothing else, our Constitution, the labors of the Congress, the action of an executive, and the declarations of the judiciary, will be as phantasies of the night, which disappear at the dawn.

What has so far happened, with respect to modern day holdings of the Supreme Court, will not prove fatal to our system of jurisprudence. About that tribunal there has ever been a tradition of justice and an atmosphere of high statesmanship. It may be that we would be better off had the court exercised more restraint than has recently been apparent. Nevertheless, if we exercise restraint upon ourselves, and are willing to adhere to the fundamentals of justice, and are willing that fair and even handed justice be administered, the courts, sooner or later, will follow our lead. They will also adopt our philosophy.

So long as men who interpret the Constitution are endowed with a sense of their responsibility; and so long as all of us are fired with the conviction that America is worthy of preservation, we need have no fear of decisions of the Supreme Court which do not always accord with our concepts of constitutional interpretation.