Robert H. Jackson: The Middle Ground

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I

The precept that political philosophy is interrelated with political activity is perhaps nowhere better illustrated than by political writings during Franklin Roosevelt’s administrations; and considerable of the writing of the period may be regarded as having shaped policies and practices of the New Deal. It is the major concern of this paper to examine the political philosophy of one of the men closely connected with the New Deal and one who has influenced the period both as a political and legal writer and as a practitioner of government: Robert H. Jackson.

Aspects of the New Deal philosophy can be traced in a fairly clear line back through the New Freedom of the first Wilson administration to the period of “trust busting” of Theodore Roosevelt’s Square Deal, and further, to the agrarian democratic philosophies of Jefferson and Jackson. The fact that the party of Jefferson and Jackson has been transmuted from a party of limited national powers to one of strong national powers has tended to obscure this historical connection. In part, this change can be expressed in terms of the “ins” versus the “outs”; but more fundamentally, it is intelligible in terms of the use to which national power is to be placed. The Federalists held to a mercantilist economic theory and were interested in asserting the supremacy of the national government to prevent interference with commerce by the states and, conversely, to encourage the development of the mercantilist system of protective trade barriers, sound currency, and in general, by the support of those governmental measures designed for the protection of the creditor classes. When the national government became a positive instrument in the hands of a public majority, interested in the regulation of industry and the business, the development of the rights

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1. See, for example, Swisher, American Constitutional Development (1943).
2. Brant, Storm Over the Constitution (1936) c. II, Transmigration of Souls.
of labor and the mitigation of the privileges of wealth, then such power was opposed by those who had once supported it. We see in this problem a fundamental disagreement over the proper sphere and purpose of governmental activity although the discussion of this disagreement is more often carried on in terms of economic self-interest than in terms of the role of government in society.

Although the New Deal in practice has reflected conflicting and oftentimes contradictory policies, there is a core of consistent philosophy set forth by its leaders subject to rational exposition. Central to the New Deal philosophy is the denial of the effectiveness of natural automatic regulation of economic life through the economic laws of the market place. Competition in a fundamental sense is dead. It can no longer be relied upon to maintain order in the economic life of the nation. Thus the powers of the national government must be asserted to regain and maintain balance between economic groups and between production and consumption through the use of what the late President Roosevelt once termed "public power." This philosophy maintains, for example, that it is the duty of government to provide employment where private enterprise has failed; that production must be channeled into those lines regarded as desirable by the national government, and the rights of labor to a living wage and an equal bargaining arrangement with their employers must be guaranteed by the national government. As against the modern corporation, the individual has lost personal liberty and his position in society has been rendered insecure. It is the purpose of government to correct these basic inequalities and to provide a certain minimum security to the individual. The tracing in detail of the exposition of this philosophy and its development in government practices is not the purpose of this paper. However, a summation of this philosophy is given in a passage from Professor Edward S. Corwin:

"Under the democratic system there are two possible conceptions of what a government ought to be doing, providing neither is pressed to a logical extreme. One is that government ought to preserve an open field for talent and not dis-

4. Unless otherwise indicated, the majority of this discussion of general New Deal philosophy is from Thomas P. Jenkins, Reactions of Major Groups to Positive Government in the United States (1930-1940) (Unpublished Mss., University of Michigan, 1943).
5. 5 Franklin D. Roosevelt, Public Papers and Addresses (1936) 16, Annual Message to Congress, January 3, 1936.
turb the rewards which free competition brings to individuals. The watchword of such government will, of course, be Liberty. The other theory is that government ought to intervene for the purpose of correcting at least the most pronounced inequalities which are apt to result from the struggle for advantage among private groups and individuals. The watchword of such a government will be Equality."

II

Supreme Court Justice Robert H. Jackson came to the New Deal in 1934 as General Counsel of the Bureau of Internal Revenue. Prior to his entrance into the national administration he had been engaged in the practice of civil and corporation law in Jamestown, New York, and had had experience in public life as corporation counsel for the City of Jamestown. His political rise within the Roosevelt administration was extremely rapid. In 1936 he was appointed Assistant Attorney General in Charge of the Tax Division of the Justice Department. In 1937 he was made Assistant Attorney General in Charge of the Anti-trust Division, and in 1938, he was appointed to the position of Solicitor General. In January 1940, he was made Attorney General of the United States, succeeding Frank Murphy, who had been appointed to the Supreme Court. Jackson served as Attorney General until June, 1941, when he was appointed an Associate Justice of the United States Supreme Court, filling the vacancy created by the registration of Chief Justice Charles Evans Hughes.7

Jackson's career with the Roosevelt administration was such that he was closely associated with the more important New Deal legislative efforts of the pre-war period. These included advocacy of important changes in the tax laws, the period of trust busting under his and Thurman Arnold's direction, testing in the courts of the revised Agricultural Adjustment Act, the Utility Holding Company Act and the Tennessee Valley Authority Act. At one time or another, Jackson was prominently mentioned as a possible Democratic candidate for the Governor of New York, and as a possible heir to the presidency.

There are probably few public personages connected at one time or another with the Roosevelt Administrations who have

6. Corwin, Constitutional Revolution, Ltd. (1941) 3, quoted by Jenkins, op. cit. supra note 4, at 41.
7. Material for this section is from Benson, Associate Justice Robert H. Jackson (1941) 27 A.B.A.J. 478.
set forth more clearly both in writing and in public speeches the nature of what may be called the New Deal political philosophy. For this reason, if for no other, a study of Robert Jackson’s political and legal philosophy is of importance. It is of importance also because Jackson occupies today a position which gives him a major share of the balance of power on the Supreme Court. He can, in many instances, determine Supreme Court decisions and may well be decisive in the next several years in determining the principal trend of American constitutional law as interpreted by the Supreme Court of the United States.

There is, of course, some danger in attempting to define a man’s political philosophy. Aside from one book which Jackson has written, his principal ideas have been expressed in public speeches and articles on subjects of current and temporary importance and in his writings as a member of the Court. For the latter, the dicta is often of more importance than the decision. It is also recognized that the work of government officials and judges is not entirely of their own creation. For this there is no criteria for selecting the original from the final version. The best that can be done is to accept it all and trust it represents the author’s principal point of view, if not entirely his personal efforts.

III

“The Supreme Court of the United States has come to be regarded as the unique feature of the American governmental system. It is a feature which distinguishes the American Government from practically all modern political systems.” It can be said with almost equal validity that the power and prestige that the courts and the legal profession enjoy generally in the United States is virtually unrivaled in almost any other part of the world. The Supreme Court especially in this century has enjoyed virtually an unchallenged position in the interpretation of higher constitutional law which frequently becomes the final interpretation of public policy. We have had what Justice Jackson has called “Government by Lawsuits.”

Jackson, however, is distinguished from many of his legal brethren by his critical examination of the public utility of su-

10. Jackson, The Struggle for Judicial Supremacy (1941) c. IX.
premacy of the courts and the omniscience of judges and lawyers. At the same time, he has been keenly aware of the almost unrivaled power enjoyed by the courts, and especially the Supreme Court:

"These constitutional lawsuits are the stuff of power politics in America. Such proceedings may for a generation or more deprive an elected Congress of power, or may restore a lost power, or confirm a questioned one. Such proceedings may enlarge or restrict the authority of an elected president. They settle what power belongs to the Court itself and what it concedes to its 'coordinate' departments. Decrees in litigation write the final work as to distribution of powers as between the Federal Government and the state governments and mark out and apply the limitations and denials of powers constitutionally applicable to each. To recognize or to deny the power of governmental agencies in a changing world is to sit as a continuous allocator of power in our governmental system. The court may be, and usually is, above party politics and personal politics, but politics of power is a most important and delicate function, and adjudication of litigation is its technique."1

It may be that the judicial decision of private disputes which frequently produces an enunciation of public policy as a by-product is "inherently ill-suited, and never can be suited to devising or enacting rules of general social policy. Litigation procedures are clumsy and narrow, at best; technical and tricky, at their worst."2

It would appear that the principal disadvantage of finally testing public policy and governmental action by the courts alone is that the only views that reach the court are those of the lawyer, or at best, views presented through the lawyers, "in spite of the fact that the effect of the decision may be far greater in other fields than in jurisprudence."3 In fact, we may doubt the ability of the legal profession "to furnish single-handed the rounded and comprehensive wisdom to govern all society."4 The legal profession like many others has become over-professionalized, and we tend to "forget that law is the rule for simple and untaught

11. Id. at 287-288.
12. Id. at 288.
13. Id. at 291. This problem may be doubly important when the interests of the legal profession itself are involved, as for example, questions of law and fact in proceedings for disbarment of attorneys.
14. Id. at 291-292.
people to live by. We complicate and over-refine it as a weapon in legal combat until we take it off the ground where people live and into the thin atmosphere of sheer fiction.”

Legal fictions tend to mischief whenever they are believed to have a validity of their own as apart from any purpose they serve. “To regard a giant corporation, with its stockholders, directors and employees, as a single person is a useful and convenient fiction to enable the corporation to sue and be sued as simply as any individual; but to maintain that a worker dealing with his corporation is dealing simply with another individual like himself is to pervert a fiction as only a legal mind could do with solemnity.”

It is, of course, recognized that fictions give a measure of flexibility to the judicial process and often serve “as bridge with the past in order to reach new ground,” but “too often they are employed as a screen to cover up a retreat.” The law looks to the past and preparation for the bar is all too often a study of old precedents.

The above were Jackson’s views based largely on his experience as the administrator in the Justice Department. What are these views as a member of the Court?

Jackson dissenting in United States v. South-Eastern Underwriters Association had this statement to make:

“A judgment as to when the evil of a decisional error exceeds the evil of an innovation must be based on very practical and, in part, upon policy considerations. When, as in this problem, such practical and political judgments can be made by the political branches of the government, it is the part of wisdom and self-restraint and good government for courts to leave the initiative to Congress.”

Taking issue with Justice Black, who held for a majority Court that the insurance business was a part of interstate commerce and subject to the federal anti-trust acts, Jackson agreed that insurance was commerce, that the court had previously erred in placing insurance beyond the regulatory powers of the Congress, but upon that mistake an intricate system of state control

15. Id. at 292.
16. Id. at 294.
17. Id. at 293.
18. Id. at 294.
19. Id. at 295.
had been established which might be endangered by superimposing federal laws; that the intent of Congress was not clear; and consequently, once the mistake of power had been corrected by the Court, the expediency of utilizing such power should be left to Congress. To quote Walton Hamilton, "... error once vested must not be disturbed."21

Apparently this view of precedent is not wholly new in Jackson’s philosophy, for in United States v. Swift & Company,22 he had stated in a concurring opinion:

“If the Court is to dispatch its business as an institution, some accommodation of views is necessary and, where no principle of importance is at stake, there are times when an insistence upon a division is not in the interests of the best administration of justice.”

And, on another occasion:

“This Court may follow precedents, irrespective of their merits, as a matter of obedience to the rule of stare decisis. Consistency and stability may be so served. They are ends desirable in themselves, for only thereby can law be predictable to those who must shape their conduct by it and to lower courts which must apply it. But we can break with established law, overrule precedents, and start a new cluster of leading cases to define what we mean, only as a matter of deliberate policy.”23

If I understand this point of view correctly, precedent has assumed considerable importance of its own, quite apart from any guidance it may serve to the formulation of social policy. Precedents and the rule of stare decisis give stability to the law, and make the law predictable to lower courts, the lawyers and the laity, who must shape their conduct by what the courts have already said is law. This is desirable even granting the court has erred, as with the interpretation that insurance is not commerce. We can, of course, break with the rule of stare decisis and begin a new “cluster of leading cases ... as a matter of deliberate policy.”24

It is at this point that Jackson’s views emerge most clearly

24. Ibid.
as to how he believes good government is to be obtained and whom he believes should govern. The courts and judges are to exercise a self-denying ordinance and not take the lead in the formulation of social policy—that is the business of Congress. Thus in his dissent in United States v. South-Eastern Underwriters Association25 there is a recognition that Congress has the power, by appropriate legislation, to bring the business of insurance within the purview of the anti-trust acts. In fact, Congress is the appropriate body to do so, not the Court.

While it seems to me that Jackson has weighted the rule of stare decisis rather heavily in his legal philosophy, it must be admitted that he sees it as useful to deny to the courts the power to determine social policy while leaving Congress or the legislative body free to determine within wide limits the major lines of governmental policy without fear that the weight of outmoded precedent will unduly hamper that power. The courts are limited in their power to govern, as we have seen previously, by the narrow professionalism of the lawyers and the inherent limitations of adjudication, i.e., attempting to extend principles arrived at in private disputes to become rules of general social policy. Thus, it is not the business of the courts “to remedy inequalities necessarily incident to the administration of the statute”26 “or to waste time in settling ‘the verity of the philosophical assumption on which they rest.’”27 This is the business of Congress, not the courts. In final analysis “The measure of success of a democratic system is found in the degree to which its elections really reflect rising discontent before it becomes unmanageable, by which government responds to it with timely redress, and by which losing groups are self-disciplined to accept election results.”28 “But election as a device to defend against violence by registering and responding to this ‘scattered discontent and diffuse enthusiasm’ fails, if the popularly elected regime is to be prevented judicially from putting its policies into force. . . . It leaves the grievances of the frustrated majority to grow, and more extreme remedies to commend themselves to those who

25. 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944).
27. Ibid. See also Jackson’s dissent in City of Indianapolis v. Chase National Bank, 314 U.S. 63, 84, 62 S.Ct. 15, 24, 86 L.Ed. 47, 58 (1941): “If . . . the forefathers are thought to have been unwise in creating a federal jurisdiction based on diversity of citizenship, we would think the remedy of those so minded would be found in Congressional withdrawal of such jurisdiction rather than in the confusing process of judicial constriction.”
would have been satisfied with more moderate (policies), if more timely, ones."  

IV

It is today recognized by many serious students of American constitutional law that Chief Justice Marshall's decision in Marbury v. Madison asserting the power of the Supreme Court to nullify acts of Congress rested on debatable constitutional grounds. However, this power is today almost universally recognized as is the power of the courts to overrule specific acts of administrative bodies by an examination of what are known as jurisdictional facts or points of law. A discussion of the foundation of this power is, therefore, largely academic. Germaine, however, to this discussion is a consideration of how this power shall be exercised by courts in specific situations, especially so in the review of the acts of regulatory bodies, which today far overshadows in volume and frequently in importance the consideration of the constitutionality of acts of Congress.

There is first of all in Jackson's philosophy a primary recognition that the courts are to review only points of law and not facts, although there is considerable confusion in certain of his court decisions as to what constitutes a review of points of law as distinguished from facts. The application of general principles to specific cases is nowhere an easy process. However, in stating the general principle Jackson is clear enough:

"Review of facts is not the conventional function of this Court and resort to it at this stage of this litigation is somewhat less than fair to the courts below as well as to the litigants."

20. Id. at 319.
22. Jackson, op. cit. supra note 10, at c. I, II.
Or again:

“We should not substitute our own wisdom or unwisdom for that of administrative officers who have kept within their administrative powers.”

With this general principle few students of constitutional law would take issue. The critical problem is what constitutes a point of law as distinguished from facts in an administrative ruling, in any particular instance.

In United States v. Carolina Freight Carriers Corporation, Jackson criticized the majority of the Court speaking through Justice Douglas for ruling the Interstate Commerce Commission did not have authority under the “grandfather clause” of the Motor Carrier Act of 1935 to prohibit a motor common carrier from handling certain classes of articles simply because the carrier had not handled these classes of articles before. It is difficult to comprehend that the grandfather clause is anything more than a conceptual principle supplied the regulatory body by Congress to decide specific cases in dispute. In other words, Jackson seems to be criticizing the Court for passing on jurisdictional facts in the case.

On another occasion Jackson, speaking for the majority, remanded a case for rehearing to the National Labor Relations Board to consider whether violence in the course of the original hearing reflects on the credulity of witnesses. If this is not an examination of the facts of the case, it nearly approaches it by reflecting on the method by which facts are obtained without at the same time calling into question the entire procedural technique of the administrative body. It is also Jackson’s belief that the Court is in error in holding that the result reached and not the method employed is controlling and that “the fact that the method employed to reach the result may contain infirmities is not then important.”

The proponents of the doctrine to emancipate regulatory bodies from judicial control have won a long step in their battle


with the recognition from the courts that only points of law will be examined, as distinguished from the facts. As one writer has put it, "As against the research facilities available to any commission, the fact-finding of the courts is primitive. And remote control, however wise, is no substitute for judgment on the spot." The efforts of the judiciary and the legal profession generally to mold the regulatory agencies into creatures of their own image persists unabated. Thus, for example, the Office of Price Administration employs an arsenal of legal talent to exercise a sort of pseudo-judicial review over the acts of the administrators on the theory that virtually every act of government is the special preserve of the attorneys.

Jackson recoils, as do most of his brethren on the bench, from reading into such phrases as "due process," "freedom of contract" and "constitutional immunities" a nearly absolute prohibition on the powers of the legislature to deal with the complex problems of modern economic society through the enactment of regulatory legislation and the creation of the modern regulatory agency.

As with the review by the courts of acts of Congress, Jackson is likewise concerned that the courts do not frustrate the will of a popular majority by unduly hampering the acts of regulatory agencies acting under legislative grants of power. If there exists inequalities in administration, procedural error and other administrative defects, Congress is the preferred agency for correcting such defects, not the courts.

V

The New Deal, as I have indicated in the introductory portion of this paper, gained political power largely as a result of popular expression of dissatisfaction with the failure of Republican administrations to assert the power of the national government to remedy the crisis in the economic order. The symptoms of failure were the depression and the crash of 1929. Between those who believe the economic order will operate and produce a reasonably high level of prosperity largely through the operation of automatic natural economic laws and those who believe it is necessary for the government and particularly the national

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40. Barnett, American Constitutional Development, A Challenge to Administration (1944) 4 Public Administration Rev. 159.
government to exercise regulation in economic affairs, there is a fundamental cleavage in philosophy. The battle grounds, on the governmental level, have been the courts, the Congress and the regulatory agencies themselves. The stakes of power have been high—the responsibility for the direction and control of the American economic system.

This struggle for power is revealed in the entire argument over judicial review and the question of the jurisdiction of regulatory agencies, vis-a-vis the courts.

Speaking generally, Jackson can be said to be on the side of the "governmental regulators"—although his specific philosophy will be made more clear in the following discussion.

There is first of all the recognition by Jackson that there is no immediate alternative to private capitalism and the so-called profit system.

In an address before the American Political Science Association in 1937, he gave a clear indication of this:

"Whatever system the remote future brings forth, there is no present system alternative to so-called private capitalism motivated by hope of private profit. It has always been my belief that this generation would do better to get the best out of its existing system rather than to urge theoretical systems that have no present foundations in our traditions, our loyalties or our institutions.

"The only agency with the power to condition capitalism and industrialism to survive is the government. To this end I have supported, in general, the program of reform called the 'New Deal' with more doubts about its adequacy than about its moderation."  

In another connection he has said:

"We want no economic or political dictatorship imposed upon us either by the government or by big business. We want no system of detailed regulation of prices by the government nor price fixing by private interests. We do not want bureaucracy or regimentation of any kind, but we will prefer governmental to private bureaucracy and regimentation, if we have to make such a choice. We can not permit private corporations to be private governments. We must keep our economic sys-

tem under the control of the people who live by and under it."\(^{43}\)

As to specific forms of governmental regulation, we are left no precise blue-print. Apparently, however, there is no room for considerable experimentation in the techniques of control. It is clear that taxation is a legitimate method of economic control by the government and also for equalizing maldistribution of wealth.\(^{44}\) Also, the anti-trust laws should be strengthened and rigorously enforced as a desirable alternative to a top-heavy bureaucracy charged with economic regulation.\(^{45}\) He has, on occasion, defended what is today termed "deficit spending" as a desirable method of increasing the total wealth of the country and alleviating the plight which Franklin Roosevelt estimated enveloped one-third of the nation.\(^{46}\)

Probably the greatest single legal barrier to effective federal control of the economy has been the traditionally narrow interpretation given the commerce clause of the Constitution by the courts. In this regard Jackson is for a liberal interpretation of commerce which will leave the federal government and Congress free to apply controls where it deems them desirable,\(^{47}\) and it is his further belief that it is not the function of the courts to adjudicate on the fairness or workability of the plan of regulation.\(^{48}\)

As among the three traditional branches of government, the executive enjoys greater power than do the courts or Congress. This supremacy of the executive is, of course, enormously enhanced by a state of crisis such as war, although it is always

\(^{43}\) Jackson, Should the Anti-trust Laws Be Revised? (1937) 71 U.S.L. Rev. 575, 582.


\(^{45}\) Jackson, Financial Monopoly: The Road to Socialism (1938) 100 Forum 303; and Should the Anti-trust Laws Be Revised? (1937) 71 U.S.L. Rev. 575.

\(^{46}\) Jackson, America Has Only Scratched Her Resources (1936) 96 Forum 108.

\(^{47}\) Jackson, The Supreme Court and Interstate Barriers (1940) 207 Annals 70.

\(^{48}\) See especially Wickard v. Felburn, 317 U.S. 111, 129, 63 S.Ct. 82, 91, 87 L.Ed. 122, 137 (1942): "It is of the essence of regulation that it lays a restraining hand on the self-interest of the regulated and that advantages from the regulation commonly fall to others. The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability, or fairness of the plan of regulation we have nothing to do."
necessary that this power be exercised constitutionally. The crux of the problem of executive control, through the direction of administrative agencies, is not so much that this power will be exercised capriciously or unconstitutionally (the courts are an effective check here) but that the control will be exercised ineffectually and fail to accomplish its desired ends.

VI

Corollary to the broader question of economic regulation by the national government is the issue of states rights and the problem of local rights and power generally. For the issue of state and local rights is today asserted by precisely the same groups who are most prone to criticize efforts to assert national control over the economic order.

Jackson, as we have seen, is among those who believe the national government the only effective governing body for control of the national economy. This, however, does not preclude the exercise of state and local police powers to control specific aspects of the economy, particularly where the states have traditionally exercised control and have demonstrated ability to deal with a problem effectively.

It is also not intended that the war powers shall be used to ride roughshod over rights of states and local governments.

49. For a development of Jackson's point of view in this regard, see his decision as attorney general on "Acquisition of Naval and Air Bases in Exchange for Over Age Destroyers." 39 Opinions of Attorney General 484.

50. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944). Speaking for a unanimous court in Terminal Railroad Ass'n of St. Louis v. Brotherhood of Railroad Trainmen, 318 U.S. 1, 63 S.Ct. 420, 87 L.Ed. 571 (1942), Jackson held an order of a state railroad commission to provide cabooses for rear brakemen a valid exercise of police power and not a burden on interstate commerce. He has also held that it was a valid exercise of police power for a state to grant a utility authority to build a power transmission line on highway constructed on Indian territory. United States v. Oklahoma Gas and Electric Co., 318 U.S. 207, 63 S.Ct. 534, 87 L.Ed. 1440 (1942). See also Jackson's dissent in Williams v. State of North Carolina, 317 U.S. 299, 63 S.Ct. 207, 87 L.Ed. 716 (1942). In this case Jackson argued for allowing one state the power to refuse to recognize the validity of a divorce granted by another state to citizens of the first state. For his view on the powers of a state to tax citizens of another state, see dissent in General Trading Co. v. State Tax Commission of Iowa, 322 U.S. 335, 64 S.Ct. 1028, 88 L.Ed. 1309 (1942) and International Harvester Co. v. Wisconsin Department of Taxation and Minnesota Mining & Mfg. Co. v. Same, 322 U.S. 435, 64 S.Ct. 1060, 88 L.Ed. 1373 (1942). For his views as to when a state imposes an undue burden on interstate commerce see Jackson's concurring opinion in Northwest Airlines v. State of Minnesota, 322 U.S. 292, 64 S.Ct. 950, 88 L.Ed. 1283 (1943). These cases are not discussed in the main body of the paper as they form questions of legal technicalities and not of general political philosophy. They serve, however, to illuminate Jackson's specific points of view.
"At a time when great measures of concentration of direction are concededly necessary, it may be thought more farsighted to avoid paralyzing or extinguishing local institutions which do not seriously conflict with the central government's place. Congress has given no indication it would draw all such state authority into the vortex of the war power. Nor should we rush the trend to centralization where Congress has not."51

In this connection it can be inferred that Jackson is advocating pragmatic standards, pragmatic in the sense of what works best should be followed in delineating local and national powers. To what end these pragmatic standards are to be used will be made clear in a subsequent portion of this paper.

VII

The tradition of Eighteenth Century liberalism which is prevalent today holds that the only threat to personal liberty or civil rights comes from government; hence, extensions of governmental power are to be opposed for this reason if for no other because "that government is best which governs least." Extensions of governmental power, therefore, are to be opposed per se without reference to the ends to be achieved.52

The one fact this line of reasoning fails to include, however, is that there has developed in the United States and elsewhere, a duality of power—on the one hand governmental or political power and on the other, private or business power—which in its uncontrolled application may result in the extinguishment of civil rights quite as effectively as undue expansion of political power. Many regard state control of many aspects of the economy as necessary to prevent, and as the only alternative to, interference with what are regarded as rights of individuals by business groups.53

It appears to me that this point of view constitutes much of the motivating philosophy behind many of the New Deal reforms. For example, the National Labor Relations Act was on the one hand a restriction on the personal rights of employers to operate their economic holdings in respect to the collective organization of their workers; on the other hand, it asserted a right for the

52. See, for example, Hoover, The Challenge to Liberty (1934) for a contemporary exposition of this argument.
53. Merriam, Public and Private Governments (1944) and Brady, Business as a System of Power (1943).
workers—the right, free from private restrictions, to organize and bargain collectively with their employers.

Liberty is not strictly political in content but social and economic as well. The point often missed in making easy generalities about strong government and personal liberty is that strong governments can be used to assert and protect rights of individuals and otherwise unprotected groups in our society against the encroachments of private powers quite as readily as they can be turned to the extinguishment of these rights. To what ends these powers will be placed depends on the temper of our society and the observance of civil rights guarantees by the governed and the governors.

Civil liberties in wartime have always assumed an especially important place in governmental policy. The experience of the European democracies, overrun and conquered by the Axis powers, had revealed the dangers of allowing hostile “fifth columnists” within the borders of a democratic state free and unrestricted operations under traditional guarantees of civil liberties to attack the foundations of the guarantees on which they relied and to actually assist in the military operations of the Axis powers. At the same time, there is always danger that while restraining those groups whom Justice Holmes’ phrase constitute a “clear and present danger” to the established government there will be restraints and denial of civil liberties against those groups and individuals who in any fashion are critical of the war effort.

With this brief background discussion, we turn now to Justice Jackson’s views on the problem of personal rights and civil liberties.

In an address as Attorney General, before the American Judicature Society on May 7, 1941, Jackson discussed this problem. In this address, Jackson urged that the government be given adequate powers prior to the actual outbreak of war to deal with deportable aliens, sedition, and the “fifth column” generally. Contrasting our rigid system of laws and civil right guarantees with the flexible system of England under the “Defense of the

54. Dodd, The Struggle for Democracy in the United States (1918) 28 International Journal of Ethics 465: “Democracy is equality, economic, political and even social in large measure... [it is] social organization in which all normal men and women have their proportionate voice in the determination of public policy in which all have free opportunity to earn a livelihood, share according to capacity in the common prosperity, and bear their just proportions of the burdens of war and other disasters.”

Realm Act" he stated that the greatest danger lay in not liberalizing these laws and that failure to do so encouraged the growth of vigilantism. On another occasion he stated:

"The law enforcement of the United States and that of the several states and that of the municipalities should be kept under the control of officials who are responsible for their conduct and subject to the discipline and training of legally recognized law enforcement bodies. Expand them if we must to whatever extent necessary, but under no circumstances let us tolerate the taking of law enforcement into private hands."\(^56\)

Although recognizing that the government needs strong powers to deal with sedition and actual threats against the state, Jackson was quick to speak out against what he believes to be unconstitutional and unfair methods to deal with this problem. Writing as Attorney General to Senator Russell of Georgia on the Bridges' deportation bill, he stated:

"As an American I would not, for the sake of my own liberty, deny the protection of uniform and indiscriminatory laws and fair hearings to even the humblest and meanest of men. As an official of the United States I cannot in good conscience do other than recommend strongly against the bill."\(^57\)

As to the specific content of Jackson's civil rights philosophy, several of his Court opinions are of interest. Speaking for the majority in Pollock v. Williams,\(^58\) he held a Florida act, making the non-performance of a contract of labor service a fraud, unconstitutional because it violated the "involuntary servitude" clause of the Thirteenth Amendment.

In Bakery & Pastry Drivers v. Wohl,\(^59\) he stated:

"... one need not be in a 'labor dispute' as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive."

On another occasion he asserted the power of the national


\(^{57}\) Quoted in The Attempt to "Exile" Harry Bridges (1940) 14 Soc. Serv. Rev. 569, 572.

\(^{58}\) 322 U.S. 4, 64 S.Ct. 792, 88 L.Ed. 1095 (1943).

\(^{59}\) 315 U.S. 769, 774, 62 S.Ct. 816, 818, 88 L.Ed. 1178, 1183 (1941).
government acting through the National Labor Relations Board to prevent the extinguishment of labor's right to bargain collectively by a private group through the execution of individual employment contracts.  

On the other hand, Jackson has been cautious about exercising the power of federal judicial review to nullify a state's conviction for crime because the Court may have doubts as to the methods employed to obtain a conviction.

"The burden of protecting society from most crimes against persons and property falls upon the state. Different states have different crime problems and some freedom to vary procedure according to their own ideas. Here, a state was forced by an unwitnessed and baffling murder to vindicate its law and protect its society. To nullify its conviction in this particular case upon a consideration of all the facts would be a delicate exercise of federal judicial power. But to go beyond this as the Court does today, and divide in the due process clause of the Fourteenth Amendment an exclusion of confessions on an irrebuttable presumption that custody and examination are 'inherently coercive' if of some unspecified duration within thirty-six hours, requires us to make more than passing expression of our doubts and disagreements."  

It must not be presumed, however, that federal judicial review will never be used to invalidate state laws dealing with criminal problems. Thus, in *Skinner v. Oklahoma*, he concurred in a separate opinion with the majority which held a state law requiring sterilization of habitual criminals a violation of the "equal protection clause" of the Fourteenth Amendment.

The most famous recent constitutional cases relating to the problems of civil rights has to do with a group of cases involving the religious sect known as Jehovah Witnesses. Jackson's views in these cases are of considerable interest and importance.

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61. Dissent in Ashcroft v. Tennessee, 322 U.S. 143, 174, 64 S.Ct. 921, 928, 88 L.Ed. 1192, 1209 (1943). "The use of the due process clause to disable the states in protection of society from crime is quite as dangerous and delicate a use of federal judicial power as to use it to disable them from social or economic experimentation." In this respect Jackson is consistent with his views on the role of the courts in interfering with the legislative branch of government when economic regulation is involved.
62. 316 U.S. 535, 546, 62 S.Ct. 1110, 1116, 86 L.Ed. 1655, 1663 (1941): "There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority—even those who have been guilty of what the majority define as crimes."
Invalidating several convictions of Jehovah Witnesses for violations of local hand-bill ordinances, Justice Douglas for a majority court had stated:

"... we can restore to their high, constitutional position the liberties of itinerant evangelists who disseminate their religious beliefs and the tenets of their faith through distribution of literature."63a

Taking issue with this point of view, Justice Jackson dissenting in *Douglas v. City of Jeannette*64 stated:

"The real question is where their rights end and the rights of others begin. The real task of determining the extent of their rights on balance with the rights of others is not met by pronouncement of general propositions with which there is no disagreement."65

"In my view, the First Amendment assures the broadest tolerable exercise of free speech, free press, and free assembly, not merely for religious purposes, but for political, economic, scientific, news, or informational ends as well. When limits are reached which such communication must observe, can one go farther under the cloak of religious evangelism? Does what is obscene, or commercial, or abusive, or inciting become less so if employed to promote a religious ideology? I had not supposed that the rights of secular and non-religious communications were more narrow or in any way inferior to those of avowed religious groups."66

"The First Amendment grew out of an experience which taught that society can not trust the conscience of a majority to keep its religious zeal within the limits that a free society can tolerate. I do not think it any more intended to leave the conscience of a minority to fix its limits. Civil government can not let any group ride rough-shod over others simply because their 'consciences' tell them to do so."67

64. 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1942).
65. 319 U.S. 157, 178, 63 S.Ct. 877, 888, 87 L.Ed. 1324, 1337.
66. 319 U.S. 157, 179, 63 S.Ct. 877, 888, 87 L.Ed. 1324, 1337.
67. Ibid. See also dissent in *Prince v. Massachusetts*, 321 U.S. 158, 177, 64 S.Ct. 438, 445, 88 L.Ed. 645, 658 (1943): "My own view may be shortly put: I think the limits [on religious freedom] begin to operate whenever activities begin to affect or collide with liberties of others or of the public. Religious activities which concern only members of the faith are and ought to be free—
While the state can thus limit the secular activities of religious groups it cannot at the same time compel positive allegiance to the state on the part of these same groups.

Speaking for the majority in *West Virginia State Board of Education v. Barnette,*68 Jackson, in overruling *Minersville School District v. Gobitis,*69 held that we cannot compel a minority to declare a belief through the observance of a rite—namely the flag salute in public schools.

"We can have intellectual individualism and rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."70

as nearly absolutely free as anything can be. But beyond these, many religious denominations or sects engage in collateral activities intended to obtain means from unbelievers to sustain the worshippers and their leaders. They raise money, not merely by passing the plate to those who voluntarily attend services or by contributions by their own people, but by solicitations and drives addressed to the public by holding public dinners and entertainments, by various kinds of sales and Bingo games and lotteries. All such money-raising activities on a public scale, are, I think, Caesar's affairs and may be regulated by the state so long as it does not discriminate against one because he is doing them for a religious purpose, and the regulation is not arbitrary and capricious, in violation of the other provisions of the Constitution." This view is somewhat contradicted in Jackson's dissent in United States v. Ballard, 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148 (1943), where he favored dismissal of mail fraud charges against the "I Am" group on the ground it involved examination of religious faith.

68. 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1942).
69. 310 U.S. 586, 60 S.Ct. 1010, 84 L.Ed. 1375 (1942).
70. Board of Education v. Barnette, 319 U.S. 624, 641, 63 S.Ct. 1173, 1187, 87 L.Ed. 1628, 1639 (1942). Jackson has also come out strongly for the civil rights of another minority group—the Japanese-American. Dissenting in *Toyosaburo Korematsu v. United States,* 323 U.S. 214, 243, 65 S.Ct. 193, 206, 89 L.Ed. 202, 217 (1944), he stated: "Now, if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. Even if all of one's antecedents had been convicted of treason, the Constitution forbids its penalties to be visited upon him, for it provides that 'no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.' Article 3, section 3, cl. 2. But here is an attempt to make
No one who has given even the most cursory examination to the history of public law generally and the history of judicial review specifically in the United States can fail to be struck with its political nature, yet it is precisely this aspect of the subject which has been most assiduously ignored in discussions of the subject. It is, of course, in the chambers of the Supreme Court where this political process has received its highest expression.

"The ultimate function of the Supreme Court is nothing less than the arbitration between fundamental and ever-present rival forces or trends in our organized society. The technical tactics of constitutional lawsuits are part of a greater strategy of statecraft in our system. Every really important movement has been preceded by 'leading cases' and has left others in its wake, even as will the New Deal. Conflicts which have divided the justices always mirror a conflict which pervades society. In fact, it may be said that the Supreme Court conference chamber is the forum where each fundamental cause has had its most determined and understanding championship. The student of our times will nowhere find the deeper conflicts of American political philosophy and economic policy more authentically and intelligently portrayed than in the opinions and dissents of members of the Supreme Court."  

It is too early to entirely estimate Jackson's importance to the Court or the effect of his general philosophy upon his line of decisions. It seems clear, however, he does not command the position of leadership enjoyed by Justices Black or Frankfurter, or even of Douglas. It would also be the part of rashness to identify his position with any particular division of the Court, although it would appear that he is less bold than, say, Black, in pioneering new lines of public policy, and somewhat less conceptual than Frankfurter, in asserting the philosophy of Holmes or Brandeis, to be the ultimate frontier in American liberalism. As pointed out previously, Jackson occupies more or less what may be termed the "middle of the road" and is frequently able

an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice and belongs to a race from which there is no way to resign. If Congress in peace-time legislation should enact such a criminal law, I should suppose this Court should refuse to enforce it."  

to determine by his vote the ultimate character of the majority opinions of the Court. Thus, his influence may be of greater importance than may be imagined from simply reading the opinions of the Court.\footnote{Pritchett, op. cit. supra note 9, at 45-46: "At each end of the court there is a pair of justices (Black—Douglas and Frankfurter—Roberts) who were in dissent fifteen times together. Further, it appears that the Black—Douglas nucleus is usually joined by Murphy and, somewhat less often, by Rutledge, these four justices forming a definite bloc on the left of the Court. In the same way, Frankfurter and Roberts are jointed in their dissents sufficiently often by Reed and Stone to compose a right-wing bloc. On the balance, Jackson seems also to belong to this group, although there is the curious fact that he dissented only once with Chief Justice Stone as compared with five occasions on which he joined Justice Douglas in dissent. His position would seem to indicate a position less consistent or more complex than that of his colleagues."}

Jackson's thought is perhaps less conceptual than any member of the Supreme Court, and with Justice Holmes, he is apparently convinced that "the life of the law has not been logic: it has been experience."\footnote{Holmes, The Common Law (1881) 1.} He is, however, impressed with the weight of precedence and is desirous the Court perform its symbolic function of maintaining the fiction of continuity in its decisions. It is perhaps important the courts do this, but between precedence and the need for change, the former should not stand in the way of the latter.

There are, of course, some incongruities and paradoxes in Jackson's thought and particularly in his opinions from the bench. This is not to be wondered at for few men have presented consistent philosophies unless they have reduced their thoughts to a single systematic work where the inconsistencies have become apparent and are, therefore, resolved. Too often consistency is a sign of mental stagnation. Constructive politics is a tough-minded process and contemporary political problems are tremendously complex and varied in their implications. It is my own thought that we are perhaps more secure with those judges who have no set solution to every problem but are willing to examine anew the facts of a case and the tenets of their philosophical beliefs. By this test Justice Jackson is not found wanting—no matter how we may disagree with his specific decisions.

Despite these minor points of paradox and apparent inconsistency, there is a consistent thread explicit in his writings as to how he believes good government is to be achieved and whom he believes capable of governing. Further, there is implied in the means he advocates to achieve good government his values as what government is for. Both problems are central to his
entire political philosophy and I now turn to their consideration.

If there is one consistent line of reasoning in Jackson's thought both on and off the bench, it is his constant reiteration that the courts have only limited ability to govern. They are professionalized bodies run by highly specialized men—lawyers—and are out of touch with many of the human realities which which government is concerned. Further, the very nature of adjudication has inherent limitations—its inadequacy in attempting to generalize governing principles for a whole society by considering facts in a particular suit.

Although upholding the symbolic value of consistency in legal decisions, the rule of stare decisis is not generally emphasized for its own ends, but rather as a check on the courts in embarking on new lines of policy where Congress has not done so. Congress is the legislative body, not the courts.

Jackson's line of reasoning shows a deep-seated conviction in the democratic process and a willingness to allow the powers of government to be exercised by our most representative governing body—the Congress.

Stare decisis is to be followed where it will prevent the courts from legislating—it is not used, as it was from 1933 to 1937, to frustrate the desires of a popularly constituted majority. In case after case, Jackson continually asks the question: Has Congress intended this shall be the intent of this law? And we find him in exhaustive examinations of legislative history and politics attempting to discover the answer to his question. In fact, his method is closely akin to the famous Brandeis brief in which history, social and economic considerations, a study of political debate and an examination of non-legal opinion assumes an importance nearly equal to legal precedence. 74

In fact Jackson's tendency toward non-legal research may account in part for his apparent uncertainty in decision. Knowledge cannot be said to lead to dogmatism in the social sciences.

The same viewpoint is also evidenced in his consideration of acts of administrative agencies—which are the creatures of the legislative bodies. It is not the business of the courts, but of

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Congress to "remedy inequalities necessarily incident to the administration of the statute." 7

This then is the means of achieving good government but for what ends? Here, I believe, we have to assume the ends from the means, as Jackson is not explicit. In emphasizing that the legislature, not the court, is the law making body, I think we can logically infer that he is interested in self-government and political equality where achievements are tested in the pragmatic school of results achieved. For if the courts are criticized, it is for representing an elite group who operate in a symbol world far removed from Henry Wallace's "common man." The legislature, on the other hand, receives its powers and support, and represents, no matter how imperfectly, the will of the majority and its results are tested by experience, not in abstract logic.

If insurance is to be subject to anti-trust suits, let the people through Congress say that it is—for Congress is the representative body, not the courts.

By the same token, Jackson has been hostile to concentrations of wealth in our society and to its unregulated use. For private wealth, especially in its modern corporate form, is hostile to the principle of political equality and the democratic process. 6

Interpreted in terms of traditional American political thought, Jackson's philosophy would seem to stem from what may be called the Jeffersonian tradition. This tradition is hostile to private wealth, emphasizes political equality, and has championed congressional power against both the executive and the courts. 7 In short, it has stood for democratic government as against government by any elite group whether based on property, education or heredity.

IX

Big business and big industry begat big government and have enormously complicated the problems with which government must deal. The problems with which government must concern itself have, in fact, become so enormously complex that Congress and the courts are able to do no more than pass on the broad outlines of social policy—leaving the details of solutions of problems to administrative bodies staffed by experts.

76. See articles cited in note 44, supra.
This, however, has raised a counter-problem—namely, the problem of democratic control of administrative agencies. For if the courts represent an elite group, so does the modern administrative agency—with its experts, its rituals and its symbolism. If the masses of mankind are baffled by the technicalities of the courts, they are equally confused by O.P.A. directives and procedures.

Partially the problem of democratic control of the administrative branch of the government can be met by developing and improving legislative controls. Without discussing techniques it can be said Congress will probably develop more responsibility when the courts refrain from reviewing and revising in detail acts of administrative agencies.

The second solution lies in improved selection of personnel, especially at the policy level, for administrative agencies. Many top administrative posts in the government today are filled from two groups—business men and attorneys, and both groups are largely hostile to principles of governmental control over the economy. There simply does not exist a sufficiently large body of trained career civil servants from which to staff administrative agencies. If, therefore, a considerable portion of the administrative machinery of the government has been slanted toward championing the interests of corporate wealth in the United States—they have won their decision by default, not design.

78. Hamilton, supra note 39.