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The Constitutionality of New Deal Measures

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THE CONSTITUTIONALITY OF NEW DEAL MEASURES.*

IT is not enough to consider merely the letter of our Constitution in seeking to determine the constitutionality of recovery measures. The Constitution has spirit as well as letter, substance concealed in its form and purpose that is all too frequently obscured by over-emphasis upon the methods by which the purpose of government is to be effectuated.

Lawyers, of all people, should not be guilty of confusing principles with methods. And yet much of the legal criticism that has been leveled at the so called New Deal fairly bristles with misunderstanding of the purpose of American government as distinguished from the forms and processes of governmental operation. Lawyers have drifted into the habit of becoming more concerned over "how" the government works than they are concerned with "why" the government is called upon to work at all.

During the past year it has been customary to begin any criticism of recovery measures with references to "the Constitution." The Constitution, as we all know, was written in 1787 and ratified in 1789. It is a matter of common knowledge, however, that we declared our independence of Great Britain in 1776 and concluded the treaty of peace which

*An address delivered at various bar association meetings.

established us as a separate nation in 1781. It is patent therefore that government in America did not begin with the Constitution of 1787. The American States were functioning under American forms of government for more than a dozen years prior to the adoption of the Constitution.

What was the objective of government in these pre-Constitutional days? What was the lodestar of American governmental operation in the Revolutionary years and in the years immediately succeeding the Revolution? References to the "Fathers of the Constitution" invariably include the names of Washington, Franklin, Madison, Hamilton, and Jefferson. Such an august member of the critical nobility as James M. Beck says that "While Jefferson was not a member of the Constitutional Convention, his ideal of liberty was one of its inspirations." All of the "Fathers" that I have just named were Fathers of the American Revolution as well as Fathers of the American Constitution. Much of our difficulty in present-day Constitutional construction would be eliminated if we could better integrate the purposes of the Revolution with the purposes of the Constitution which was drawn up a dozen years after our independence was declared.

Through the Declaration of Independence we decided to discharge the British government and hire a governmental agent of our own. Further on in the same Declaration, the "Fathers" plainly stated just *what* the American governmental agent was expected to do. *How* it was expected to do it was not described in detail save only that its powers should be derived from the people themselves.

The Declaration of Independence marked out the direction in which American government was to move. The method of transportation was not described. This was a simple and supremely sensible omission. When the "Fathers" went from one place to another they used a stage-coach, but the method of transportation did not alter the fixed point of their destination. We travel to those same places today in

automobiles, railroad trains, and airplanes. Methods have changed, but the destinations are in exactly the same places they were in 1776. Here is what the "Fathers" said about the destination of American government in the first official American state paper, the Declaration of Independence:

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness. That, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

Thus it is seen that the object—the destination—of American government is the protection of the life and liberty of the citizen.

The American governmental agent was hired by the "Fathers" to achieve this purpose. In the years immediately succeeding the Declaration, the power of the agent was increased from time to time; first by the adoption of the Articles of Confederation, secondly by the adoption of our present Federal Constitution, and lastly by judicial construction. But never in any place was it suggested that the *purpose* for which the agent was employed was to be modified or changed in the slightest particular.

The Supreme Court of the United States has frequently taken cognizance of this fundamental postulate. For instance, in the case of the *Railway Company v. Ellis* [1] Mr. Justice Brewer says:

"The first official action of this nation declared the foundation of government in these words: [Quoting the Declaration of Independence]. While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter [the Constitution] is but the body and the letter of which the former [the Declaration of Independence] is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence."

[1] 165 U. S. 150, 159, 160 (1896).

The orthodox in Constitutional construction therefore makes the Declaration of Independence the substance of that for which the Constitution is the form. It is in this spirit that we should approach a consideration of present governmental measures. The governmental agent today is confronted with the task of protecting the citizen under circumstances vastly different from those which confronted either the government or the citizen in 1776 or 1789. It was one thing to protect the inalienable rights of man in the forest and field conditions of the eighteenth century; it is quite another thing to protect those rights in the complicated congestion of this day and age.

Regulation of persons and things is never justified nor justifiable as an end in itself. Regulation for the sake of regulation is paternalism; but regulation as the only means for individual protection is a bulwark of our traditional American liberty. Regulation finds its only justification in the proof of the fact that it is a necessary means for adequate protection of the citizen's rights. The practice of fraud, for instance, in 1789 was simple and elemental as compared with the advanced efficiency of fraudulent practice today. That conservatism is archaic, if not criminal, which would insist that government police the radio with those methods found adequate for the Pony Express.

The principle of inalienable liberty sounded in the Declaration of Independence may be readily translated into terms of modern conditions by reference to the ancient legal maxim: "Sic utere tuo ut alienam non laedas." That is, "So use your own as not to injure others." This is a fundamental restriction applied in every age, and casting upon government the duty to see that changing and complicated circumstances do not form a mask for the invasion of our neighbor's rights.

The turn of the century witnessed the growth of corporate combination in industry. Remember that a corporation is a creature of the state, whereas the individual is the creator

of the state. To permit the hireling of the servant to throttle the life out of the servant's master would be as illogical as it would be unjust. In considering the constitutionality of the government's regulation of corporations therefore, we must admit at the outset that in dealing with corporations the government is managing its own creatures. As long as such management and regulation is calculated and reasonably adapted to the protection of the citizen, there can be little question concerning the propriety of the government's procedure.

Simply because a corporation, or an individual for that matter, has established a perfectly valid property right to a thick club is no reason for assuming that he has a right to swing it in any direction, with disastrous effect upon the heads and shoulders of his near neighbors. Property, when grouped and located in certain particular ways, may affect the rights of citizens just as directly and just as disastrously as a club swung promiscuously in a crowded room. To say that government is powerless to prevent either the one or the other is to deny the very fundamentals of the Declaration of Independence.

Industrial practice changes much more rapidly than judicial precedent customarily develops. Productive processes are as volatile as judicial determinations are slow and conservative. It is as impossible, and perhaps as undesirable, to slow down the one as it is to speed up the other. But it is well to remember that if a car of the motorist may easily outdistance the motorcycle of the traffic policeman, regulatory speed laws, designed in the interests of individual protection, will be practically and effectively repealed.

The governmental recovery measures have suddenly moved the protective processes to which the citizen is entitled, suddenly and squarely up abreast of the industrial procession. Judicial determination, which has unfortunately been concerned more directly with methods than with principles, has consequently been left many miles in the rear.

Unless lawyers and judges take the proper perspective therefore, we are apt to hear the sorrowful confession that American government is no longer able to protect the American citizen.

The Supreme Court of the United States, in the much-publicized *Minnesota Mortgage Case,* indicates that that august tribunal is prepared to take high ground in its observation of what government has found it necessary to do for the protection of life, liberty, and property—in that order — as a result of the depression. In that case, *Home Building and Loan Association v. Blaisdell,*[2] Chief Justice Hughes, writing the majority opinion, says:

> "The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society [government] in order to protect the very bases of *individual opportunity.*" (Italics mine.)

Note that the Chief Justice states that the object of government has been to protect "individual opportunity." Our drift has not been towards the socialization of the state. The purpose of measures such as the Minnesota Moratorium Law has not been to subordinate the individual to the necessities of the group. On the contrary, the purpose of this measure, as seen by the Supreme Court, has been to prevent the individual from being submerged, to prevent the enslavement of the individual by combinations of impersonal capital. It is to prevent Socialism, and not to establish it, that recovery measures have been adopted by national and state governments.

Our American system from 1776 to date has been predicated upon the theory that the individual has some inalienable rights that everybody else, including his government, is bound to respect. If our civilization is to be allowed to drift casually by the forces of economic gravitation into a capital-

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2 78 L. Ed. 271, 54 S. Ct. 231, 241 (1934).

istic feudalism where the barons of money and monopoly move their rightless human chattels about like pawns upon a chessboard, then indeed has the noble aspiration of the Declaration of Independence disappeared in the blue smoke that pours from the factories and furnaces of industry. If the powers of government are not adequate for the protection of the citizen, if the trunk of principle and purpose is to be obscured by the ivy of method that has gathered around the bark; then the only alternative is direct action and revolution with all of the chaos, confusion, disaster, and bloodshed that have always attended direct action throughout history. To think of the Constitution as method rather than principle, to honor its form and ignore its substance, is to destroy the document while we give lip service to its inviolability. The "Fathers" who wrote and subscribed to the Declaration of Independence, as well as to the Constitution, would have never embraced such a disastrous alternative.

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