SUPREME COURT: LAWS AND MEN

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THE Supreme Court presents an interesting case history in the growth of a political institution. The Court of 1937 had succeeded in establishing itself as a bulwark of reaction against the social and economic reforms which an entire country required. By 1944 it had developed into a genuine force for American liberalism and democracy.*

The explanation of this significant political growth certainly does not lie exclusively in the change of personnel of the Supreme Court. The new members of the Court have been, rather, the media of that growth. The Court has come to assume a new role in American government and that role does not find its definition in its personnel any more than in any formal, legal document. For a real understanding of the Court today, therefore, it is necessary to trace the power of the Court to its source rather than to dwell upon its personnel.

The Constitution provides only the broadest outlines and not the specific sources of power for the Court. Few absolute or specific compulsions are exerted upon the Court by the Constitution. In fact, the Court has so shifted and expanded its "constitutional" functions that it is impossible to believe that the Court has not been moved in its delineation of its functions by some forces not articulated by the exact language of the Constitution. The Constitution provides no conclusive clue as to why the Court will act vigorously in some fields and not in others.

The popular will does, of course, supply the outermost limits of the Court's power. After 1937 the Court could not, in the face of an aroused public opinion, persist in its obstruction of urgent liberal legislation. But, within the framework and limits of the Constitution and the popular will, there still remains a tremendous area within which the Court's discretion is exercised. This article suggests that, apart from the influence exerted by the social welfare views of the members of the Court, the exercise of that discretion has had one very discernible drive: *The Court today appears to be motivated by its own evaluation of its own special competency.*

The Supreme Court is acutely aware that, as compared to the executive or legislature, it operates under the limitations incidental to the judicial process. The most important limitation, of course, is the fact that a court does not look out over the troubled world and pick out the evils that require treatment. Courts do not move on their own initiative. They must wait until a case is brought to them. They must accept the case in the context in which it is brought, and they must decide only the particular case presented. In addition, a fair trial requires that the proof be confined to the exigencies of the individual case. As a result, the presentation of social and economic facts to a court is heavily restricted. Finally, in those instances where a court is reviewing legislation, the court that strikes down legislation is faced with the anomaly which results from judicial inability to fill the gap created.

The limitations described have convinced the Court that legislators and administrators are more competent than the Court to handle complex, modern economic problems, and it also appreciates that the President clearly enjoys a more favorable political position to handle foreign affairs. Formerly the due process clause of the Constitution was interpreted by the Court to permit it to pass on the wisdom or expediency of economic legislation. But today, influenced by its notion of its own competence, economic legislation is favored with a "presumption of constitutionality" and the Court recognizes that it has little or no justification in the due process clause or otherwise for preferring its ideas of sound legislative policies or techniques to those of Congress or the state legislatures. As a result, the Court devotes less of its energy to testing whether economic legislation conforms to the due process clause of the Constitution, and its main preoccupation is to implement the statute by interpreting it in a manner consonant with the legislative intent.

The interpretation and application of legislation in litigation is no mean task and provides ample room for full expression of economic and political ideologies. Similarly, the tendency has been to find the exercise of the executive power constitutional without scrutinizing the actual merits or content of the executive action, particularly in matters pertaining to the prosecution of the war. Here too, the main inquiry is that of determining what the executive wants to achieve and assisting him. In foreign affairs, the Court has, at least since the *Curtiss-Wright* case of 1936, completely abandoned any pretense of ability to control the executive.

The Court's new interpretation of the due process clause has allowed administrative agencies to acquire considerable freedom from judicial review in regard to both findings of "fact" and of "law." Thus, Mr. Justice Rutledge, in the *National Labor Relations Board v. Hearst Newsboys* case of 1944, held that the Court would not review the National Labor Relations Board's determination that an individual is an "employe" within the scope of the National Labor Relations Act. In *Dobson v. Commissioner of Internal Revenue*, decided in 1944, the Board of Tax Appeal's determination of a matter of "law" was also held to be final and non-reviewable.

YET this general disinclination to review economic legislation under the due process clause has not been indiscriminate. The Court has continued to require that the *mode of procedure* employed by executive and administrative agencies conform to certain minimum procedural standards which the Court derives from the due process clause. This explains the close scrutiny which the Court applied in *Yakus v. United States*, 1944, to the question of the constitutionality of certain criminal prosecutions by the Office of Price Administration. The establishment of these procedural standards entails judicial "legislation" just as surely as the testing of the wisdom of economic legislation under the due process clause by the pre-New Deal Court entailed judicial "legislation." The difference between the two types of judicial "legislation" lies in the relative expertise of the Court in

* See the article by Leonard Boudin in NEW MASSES of Aug. 29, 1944 for a full discussion of the recent decisions of the Supreme Court.

matters of procedure. This expertise comes from a long judicial history of concern for the rights of litigants to be heard fully and fairly. *It is because the Court is aware of its competency in testing matters of procedure that it proceeds to act vigorously in this field.*

Nor has the due process clause become completely obsolete as a basis for the judicial review of the *substance* and *merits* of legislation. Chief Justice Stone, in a footnote in the 1938 *US v. Carolene Products Co.* case, indicated that while the Court had restricted powers of review of economic legislation, it retained full power under the due process clause to determine the constitutionality and *unconstitutionality* of legislation affecting civil liberties. He maintained that the Court should exercise this power most vigorously for the protection of political and religious rights. This distinction in the Court's attitude turned on an important democratic theory of government: unwise or oppressive economic legislation can be alleviated by the electorate through its control over the legislature, so that there was no need for the Court to substitute its notion of good legislation for that of the legislature; but restraints imposed upon civil liberties cannot be so alleviated, *for the restraint itself restricts the channels of political activity through which alleviation must be sought.* This distinction has been deemed adequate by most members of the Court to allow it to reverse the ordinary presumption of constitutionality of legislation. Any restraint upon freedom of speech, press, or religion is presumed to be *unconstitutional.* Regardless of the political theory involved, the more important consideration is that, at least in matters of civil liberties, the present Supreme Court has usually shown itself to be a more disinterested and competent appraiser of human rights and values than either Congress or the state legislatures. No case better illustrates the courageous liberalism of the Court than *Smith v. Allwright,* 1944, where the Court declared void any efforts to exclude a Negro from voting in the Texas primary.

While the Supreme Court realizes that it does not, as a Court, have the facilities to consider the wisdom or propriety of legislation treating complex economic problems, it has a different notion as to its ability to adjust conflicting claims of power of the states and the federal government. Here the Court feels that its political vantage point in our governmental structure makes it most competent to adjust the stresses and strains of a going federal system. The Court acts as a sort of "umpire of the federal system" in marking out the boundaries between state and federal power.

The Court acts as "umpire" by dint of the "commerce clause" of the Constitution. This clause permits the federal government to legislate on matters of "interstate commerce." With the recent expansion of the federal government the Court has had to stretch the term "interstate commerce" and the federal government can now regulate anything that might be said to "affect" interstate commerce. Thus, in the *Southeastern Underwriters' Association* case, 1944, it was held that insurance is interstate commerce subject to the federal antitrust laws.

But while the commerce clause indicates what the federal government *can* do it does not indicate what the state government *cannot* do. It is just at this point that the Court steps in to adjust the boundaries between state and federal power. Of course, when Congress acts under the "commerce clause" no one disputes the inability of the state to pass *conflicting* legislation on the same matter. But even where Congress has acted, the Court frequently permits state legislation in the same field on the theory that the state legislation was not in conflict with and could be "accommodated" to the federal statute. This was the approach of Chief Justice Stone in *Parker v. Brown,* 1942. The problem becomes acute, however, where Congress has not acted and has not given the states the green light to go ahead in the field. In regard to this problem, Mr. Chief Justice Stone expresses the view of the majority of the Court when he argues that, at least in the field of taxation, to grant constitutional permission to one state to tax an item of interstate commerce would permit *all* states through which that commerce passes to do the same. Theoretically this would result in a threat of the imposition of a "multiple burden" upon the commerce which would put it at a competitive disadvantage with intrastate commerce, and, therefore, such a tax is often declared unconstitutional.

The Court has been more modest in acting as "umpire of the federal system" in a "conflict of laws" situation. A "conflict of laws" arises when a court is dealing with a fact situation which has contacts with more than one state. The Court must then choose and apply the law of one of these states, and disregard the law of the other states. When the choice has been made by a state court, the Supreme Court has displayed a considerable reluctance in reversing that choice. But even this modesty is not unrelated to the Court's notions of competency. The choice of law made by the state court is said to concern a matter of "local policy," better left to the states.

A similar regard for "local policy" has resulted in a substantial diminution of the Court's importance in "diversity of citizenship" cases. Such cases arise under the constitutional provision that suits between citizens of different states may be brought into the federal courts. This makes it possible for local questions, unrelated to federal statutes or the federal Constitution, to be heard by the federal courts where the litigants are of different states. The local law problems presented gave rise to a body of "national" law on these local subjects. But in 1937 *Erie v. Tompkins* established the rule that state law controls these cases even though a case is in a federal court.

IT APPEARS then, that the Court is earnestly engaged in working and shaping its proper province in our government, on the basis of two main considerations: the limited techniques available to a court as a court; and the Court's political vantage point which puts it in an admirable position to adjust the stresses and strains of a going system of federalism. Yet no criticism should be levelled against the Court for its assumptions and definitions of its own powers. It is only natural that an institution, through its experience and development, will shape its functions as its functions shape it. Such flexibility is essential to a vital system of government.

Of course, most laymen, and many lawyers, will be surprised to learn that the Court is primarily a "human" institution, growing out of modern political and governmental developments, rather than a "legal" institution whose outlines are definitively marked by a single written instrument. Yet this surprising discovery should bring with it real satisfaction to progressive forces. The Court which is defining its role in American life is a liberal Court. In fact, both on the levels of economic and political thought, the Court is comprised of the most liberal personnel of any branch of the state or national government. From all appearances the Court will continue to operate in its self-chosen spheres of activity with liberal vigor and courage to the end that it will become a real force for progress in this country.