The New Deal and the Supreme Court

By Richard Lee Strout

Soon now there must be decisions on the constitutionality of New Deal measures; how will they affect the Roosevelt programme?

As governor of New York, Mr. Roosevelt's relationship with the upper courts was singularly happy. I remember his comment on the subject on his special train in the fall of last year as he made his campaign swing-around-the-circle. He told one or two reporters in his private car of pleasant personal dealings with the members of the New York Court of Appeals, and of a sort of informal concordat by which he occasionally ascertained in advance the possible legality of proposed measures.

It was all very agreeable and Mr. Roosevelt suggested that it would be a good thing if Presidents could have the same relationship with the Supreme Court at Washington. Unfortunately (or fortunately, as the case may be), things aren't run just that way at the capital. Mr. Roosevelt acknowledged it and sighed regretfully; still, something in the way of social intercourse was always possible.

The only official reference to the Court in the campaign was the ill-starred comment in the speech at Baltimore, where Mr. Roosevelt departed from his set speech to interpolate a hint that the Republicans had played politics with Supreme Court appointments. The incident was hardly important, and efforts of Mr. Roosevelt's opponents to make capital from the remark amounted to little.

Then Mr. Roosevelt was elected, and came through Washington triumphantly on his way to Warm Springs for a rest. At the Mayflower Hotel there was, of course, a steady stream of visitors. The egregious Huey Long blundered in and out in a mellow condition. But among the longest interviews of all was one with Justice Brandeis. It was the post-election meeting of two men who perhaps had as much in common as any in public life.

And that was the last that Washington observers thought of the relationship between the Administration and the Supreme Court until a few months ago. While the friendship between the White House and certain members of the Court has been cordial it has been purely personal: it has been featured in

the newspapers even less than was the almost daily meeting of Mr. Hoover with Justice Stone at the "medicine ball" cabinet sessions.

Now suddenly, the Supreme Court comes into the limelight in relationship with the major move of the Roosevelt Administration down to date. The question at issue is simple and vital. Are the NRA and the other reconstruction and recovery moves of Mr. Roosevelt constitutional? The matter is of the very highest importance. There is plenty of criticism of the NRA today in the papers, but much of the criticism is directed at what it fails to do, not at what it does. That the great majority of workers and common labor and voters favor the law, whatever the propertied groups say about it, there can be little doubt. That there is grave constitutional question over the validity of the law, there can be no doubt either. Just where these two facts leave the nation is uncertain: the issue must be decided by the black-robed justices of the Supreme Court.

RECENTLY I made a 3,500-mile trip throughout northeastern America in an automobile, asking questions for my newspaper about the NRA. I was struck by one curious fact in nearly all serious discussions of the subject. At some point in the conversation somebody would mention the relationship of the NRA to the Constitution. There would be a preliminary chuckle at this, and then some bright wag in the group would interject:

"Well, what's the Constitution got to do with it? We dropped the Constitution a long time ago, under the New Deal!"

I never noticed a time when this remark did not bring a guffaw. It seemed to be the joke of the whole nation. The Constitution was scrapped, and it was amusing. What did F. D. care about the Constitution! And he was quite right, too. That was the general attitude of the moment.

I think this attitude has begun to change slightly. My long trip wound up at Grand Rapids, where the annual session of the American Bar Association was in progress. The assembled lawyers did not take the Constitution lightly! Not for a moment! And here, listening to men brought up in the tradition of constitutional interpretation, I came for the first time to sense the fact that the Supreme Court must not, inevitably, bow to the will of the New Deal; that in fact, even with the greatest sympathy in the world for the New Deal, there is the very deepest doubt whether the nine black-robed justices can give the New Deal the stamp of constitutionality even if they want to. The sense of that body of some 1,500 lawyers seemed to be overwhelmingly that they couldn't. They seemed to feel that the NRA was unconstitutional, in whole or part. Nobody can tell, of course, until some "Decision Monday" comes in Washington, when that august body hands down its weighty verdict on a test case. But when the decision comes it may, and very possibly will, shake the nation to its foundations. When has there been a time since the famous Dred Scott decision when the possibility of a clash between the Court's interpretation of the fundamental law and the changing social trends of America itself gave promise of creating such popular clamor?

It might be argued that the Bar Association membership represents a strongly legalistic atmosphere, and so, in fact it does, but it is the same atmosphere which surrounds the law courts

and which the Supreme Court breathes itself. Judge John J. Parker, of the Fourth Circuit Court, for example, at Grand Rapids, warned the assembled lawyers, judges and law-school professors that the existing threat to the Constitution had reached a point where it should "command the attention of every patriotic lawyer." Another judge, Morris A. Soper, of Baltimore, told how an Iowa magistrate had recently affirmed his principles even when the noose of an anti-foreclosure mob had been dropped around his neck; and then—switching to the national scene—declared with almost religious fervor that the Supreme Court, also, could be trusted to carry out its duties—even under the lash of an infuriated public opinion! The big audience applauded, for they sensed a reference to a possible NRA veto.

The average layman seems to put the matter something like this: Mr. Roosevelt and a great many people support the NRA, and it certainly ought to be given a fair chance; therefore the Supreme Court is bound to find some way to declare it constitutional. But a little analysis shows that the problem is hardly so simple. In the first place, it is not what the nine Supreme Court judges would like to do, but what they can do. It is a question, in short, whether a famous document, written 150 years ago, and stretched in succeeding years to cover forty-eight States instead of only thirteen, has now elasticity enough still left to canopy a world of regimented industry and planned economy! Of course the Constitution was intended to have some elasticity, there is no doubt of that; but the degree to which it has actually been stretched would probably make the eyes of a Founding Father pop, if he could see it today. Many legal observers think the limit has now about been reached.

To come down to cases, if the Constitution as originally drawn attempted to do one thing more than another, it was to divide the powers of State and Federal governments into water-tight compartments. But now comes the NRA and starts smashing holes in these compartments right and left. For example, up to now the Supreme Court, through thick and thin, has upheld the doctrine that it is the States which have control over local industry, and not the Federal Government. But the NRA has practically given Washington the right to fix prices, hours and wages throughout all industry—State and Federal alike! To be sure, this is done through "voluntary" agreements; but can the Court uphold such "voluntary action" that is backed by a possible consumers' boycott?

The difficulty for the Supreme Court is indicated by its own recent precedents. There is the case, for example, of the New State Ice Company *vs.* Liebmann (1932). Oklahoma, some years back, decided that too many people were manufacturing ice in its confines, and in the interest of a "planned economy" set up a licensing system and decreed that nobody should go into the ice business without such license. When the State refused to grant a license in a specific instance the case promptly went into litigation, and in the course of time came to the highest court. The Oklahoma ice law was promptly thrown out—not by any bare majority of five to four, but by the decisive verdict of seven to two. The parallel between Oklahoma's effort to ameliorate old-fashioned rugged individualism, and that of the Roosevelt Administration's today is very striking. How, it is asked,

can the Supreme Court reverse itself on such a matter in two brief years?

Even if the Supreme Court should give the New Deal full endorsement, there would be matters of interpretation which the judges would have to carry out. The public often complains when the Court "interprets" a law out of recognition, but it should be remembered that Congress often does its job so poorly that it is difficult to know just what was really meant. There is a case in point in the NRA. When the price section of the bill was passed there was a point-blank difference of opinion between Senators William E. Borah and Robert F. Wagner as to what it provided. It will be recalled that Mr. Borah led off by denouncing the original price-fixing section on the ground that it permitted monopolistic price control by industry. He introduced an amendment barring "monopolistic practices." This amendment was itself amended. When the revised wording was finally put in the bill, the disgruntled Mr. Borah charged it meant one thing, Mr. Wagner another. Obviously if the very authors of a bill do not know what it means, it places the responsibility of interpretation squarely on the Supreme Court. These are questions of fact rather than of law, and there are plenty of them in the drastic statute.

It would take too long even to touch the complicated legal problems presented by the NRA, but one or two may be mentioned. For example it has been generally assumed that the act profoundly altered the anti-trust laws, even to the point of making it a crime for a firm to refuse to participate in a collective effort, where previously it was a crime to participate. But these early anti-trust laws are still on the statute books. Among practices specifically forbidden and still enjoined are the following: price discrimination; exclusive dealing arrangements, "tying agreements"; bogus independents; local price-cutting; temporary competition to drive rivals out of business; molestation and intimidation; refusal on the part of monopoly to deal; boycotts; inducing breach of contracts; corners; espionage; enticement of employes; defamation of competitors and disparagement of their goods; institution of groundless suits for patent infringement and the like. Just where the distinction lies between the new freedom from anti-trust prosecution and the old laws, and their possible conflict, must also be left to the ultimate decision of the Supreme Court. These matters, however, are of secondary importance to the question of constitutionality of certain phases of the law itself.

MR. HOMER S. CUMMINGS, the Attorney General, at the Grand Rapids convention, flatly declared "there has not been the slightest fundamental departure from the form or nature of our government or the established order"; and that "the life, letter, and integrity of the Constitution have not been impaired." His assistants have not been so confident. They have rather stressed the need of constitutional consideration in the light of "the present emergency, and under existing circumstances" as one of them put it in a recent case. Indeed, several preliminary skirmishes have been won on this ground. One judge declared, for instance, that "the court finds a national emergency exists and that the welfare of the people and the very existence of the Government itself are in peril."

The Roosevelt Administration is

eager to postpone the final test of its venturesome economic measures until they have been given a chance to prove their value. However, it is acknowledged that such a test must come, sooner or later. When it comes it is certain that great weight will be attached to this "emergency" argument. Here indeed, a chief legal hope of the Administration seems to lie. The "doctrine of emergency" has never been fully defined, but in general it is agreed that things are permitted in times of crisis which would not be sanctioned at other times. To name only one case, the Adamson Eight-hour Law for railway workers was validated by a five to four vote in the Supreme Court in the World War, largely as an emergency measure (Wilson *vs.* New—1917). But for the War it certainly could not have passed.

Professor Milton Handler of Columbia University has recently written a careful and by no means unsympathetic analysis of the NRA from the constitutional standpoint for the *Journal of the American Bar Association.* On this question of "emergency," he says:

> We are accustomed to abnormal expansion of governmental authority in times of war, but even in the cases involving wartime regulation of industry, the Supreme Court emphatically asserted that the existence of a state of war did not remove or change the limitations upon Congressional authority imposed by the Constitution. . . . The presence of an emergency is an important factor in constitutional interpretation; it may result in the restriction of the normal rights of the individual; it does not however afford a blanket exemption from constitutional limitations, nor convert a federal into a strongly centralized system of government.

As to the constitutionality of the NRA as a whole, Professor Handler reaches the following significant conclusion:

> The enumeration of the constitutional difficulties that will be encountered in the administration of this legislation implies no unfriendliness toward its basic purposes. For the statute in its main aspects to be invalidated would be little short of a major tragedy.
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> But candor demands the admission that for the statute and the codes to be sustained in their entirety requires a change of attitude on the part of the Supreme Court no less revolutionary than the legislation itself.

There it is in a nutshell—"a change of attitude on the part of the Supreme Court no less revolutionary than the legislation itself"! Whether that necessary change of attitude will occur remains the great enigma of the moment.

Enough has been said, at any rate, to show that there is grave doubt as to the constitutionality of the New Deal and its related phases. One of these relates to the right of a citizen to hoard gold. A case has been started to decide this matter, and it may be the first New Deal issue to come before the high court. Frederick B. Campbell, respectable New York attorney, has started a civil suit to force the Chase National Bank to restore to him twenty-seven bars of gold, each bar said to be worth $5,000, despite the President's anti-gold-hoarding order, which he terms unconstitutional. A Federal grand jury has simultaneously indicted Mr. Campbell for failing to register the gold in accordance with the Presidential order of August. The case has been started on its tortuous trip to the Supreme Court. Will the nine judges in their black robes at Washington finally decide that Mr. Campbell can not have his own gold? He faces a fine of $10,000, and ten years' imprisonment. On the other hand, the New Deal faces its first big legal test. Who can predict the outcome?

One can not but sympathize some-

what with Mr. Campbell; but on the other hand it would be folly to ignore the point of view of the millions of workers all over the country who have been benefited by the New Deal and who can not conceive that the Constitution will run athwart this great new force. If the Constitution and the New Deal should come into collision, it is no very difficult matter of prediction to say that the heart of the Forgotten Man would beat on the side of the latter! There is a recent tendency in conservative journals to scoff at the Blue Eagle, but if any one wants to question the real popular support for Mr. Roosevelt and his programme from the man in the street, he should seat himself in a motion picture audience when the President's face is flashed on the screen. There is not a city in the country where it does not bring prompt applause, usually of an enthusiastic nature.

A good deal of speculation has occurred in Washington over Mr. Roosevelt's course if the Supreme Court should really throw out the NRA, bag and baggage. The answer to this would doubtless depend somewhat on the wording of the Court decision, and the size of the majority against him. The present membership of the Court is divided roughly into so-called "Conservatives" and so-called "Liberals," with two men in between who are hard to place. On the Conservative side are Van Devanter, McReynolds, Sutherland and Butler. The Liberals are Brandeis, Stone and Cardozo. Chief Justice Hughes and Owen J. Roberts are the imponderables, though they are generally found on the "Liberal" side. In the Oklahoma Ice Company case, however, it is interesting to note that only Brandeis and Stone voted in favor of the effort at controlled economy (Justice Cardozo was not then a member of the Court).

In the extreme instance, Mr. Roosevelt might find his adventure in what might be termed romantic economics thrown out by a hair-breadth majority of five to four, and in that case it has frequently been suggested in the press that he might call a special session of Congress and with its consent, raise the number of Supreme Court justices from nine to eleven; the assumption being that the two new appointees would turn the balance in his favor.There is precedent in the past for changing the membership. When the Court began its historic career it had only six judges, and since then it has fluctuated from time to time, till it arrived at the present membership. Furthermore, on at least one occasion, the membership has been juggled to achieve political ends.

When General Grant took office as President, Congress voted to increase the membership of the high court by two, the membership then being seven. President Grant did not fill the vacancies thereby created, but bided his time. The great question of the day was the constitutionality of the "legal-tender act" involving the validity of the Civil War greenbacks. On February 7, 1870, the Supreme Court handed down its edict—the act was unconstitutional. Its vote was four to three. Only a few hours before its decision, however, President Grant had sent up to Congress the names of two additional judges for the Court. History indicates pretty clearly that the Chief Executive had known in advance what the verdict would be, and had taken action accordingly. At any rate, the two new judges were promptly confirmed, the whole case was re-

opened; the Court made an abrupt about-face, and by a decision of five to four declared the legal tender acts valid, damaging as this quick reversal was to its prestige as a court of law.

In the present instance it is at least conceivable that Mr. Roosevelt might be tempted to take some such step if his favorite proposals were thrown out by a close majority. However, there are strong arguments against the move which he would certainly have to consider. To increase the size of the Court would make it cumbersome. He could not be sure that the two additional judges would uphold the constitutionality of the law after they were named. Such a step would damage the prestige of the Court, and, finally, it would undoubtedly alienate a large section of conservative thought.

On the other hand, if the Supreme Court should give a veto to the new programme of regimented industry and planned economy, a very grave question would immediately confront the American people. There would undoubtedly be some personal outcry against the Justices, particularly if the court divided as between "Conservatives" and "Liberals." This hysterical outburst, which Judge Soper at the Bar Association described as "the fierce lash of public opinion," would however be only a part of the picture, and far less important than other considerations.

THE whole problem of the revision of the Constitution might well become involved, together with the question of the future direction of the Ship of State. Should the Constitution be "modernized"? After all, with all the legal subtleties of those members of the high court who might be in full accord with Mr. Roosevelt's progressive motives, could they square the New Deal with the concepts of the Founding Fathers? The Constitution may stretch, but it is not made of rubber! There was no "planned economy" in the intensely individualistic day in which the Constitution was drawn up. Can judges be blamed for failure to find something in the Constitution which is not there?

The question opens up a wide field for speculation. A flat Supreme Court reversal might give the country a longer interval in which to consider the postulates and ramifications of the New Deal, and to contrast the respective merits of the old-fashioned *laissez faire* doctrines with the new-fangled notions of regulated competition. One can imagine the two great parties splitting on the issue and fighting it out in a national election.

As a possible hint of the Administration's attitude there is the speech of Mr. George H. Dern, Secretary of War, before the Governors' Conference in Sacramento, California, July 24, which received slight attention at the time. In the light of recent events, however, his remarks may prove to have been prophetic. Why, he inquired in effect, ask the Supreme Court to struggle to harmonize the Constitution with economic concepts which did not exist when the great document was written?

Excerpts from the address give an admirable summary of the whole Administration point of view on the vital issue:

> The old problem of States' rights, in the strict sense, is being supplanted by a new problem arising from the fact that the original interrelationship between States and the nation was cast in the Constitution at a time when the type of nation-wide economic and social problems of today was not foreseeable. A new conception of the relationship between the States and the nation may be necessary.

The events of the past year have thrown into bold relief the difficulty of working forty-eight sovereignties within a sovereignty under present economic and social conditions. . . .

Every one who understands the historical background of the Constitution will admit that our type of government grew up, not because it was the best that could be constituted for good and all, but because there were already thirteen sovereignties in existence, and federalization had to be accomplished with this as an established fact. It was the best frame of government that could be made under the circumstances.

Since then it has been transmuted into being the best that could possibly have been made under any circumstances, and even naïvely hailed here and there as divinely inspired. The fact is that, with some amending, but particularly through liberal judicial construction, it has worked so well that the United States has grown into a rich and powerful nation, with economic advantages on the whole perhaps better distributed than in almost any other country.

That is the grandiose way of putting it. Perhaps a more correct, if less hifalutin, way to express it is that we muddle along haltingly until the condition becomes so intolerable through depression or otherwise, that something simply must be done about it. Then Congress, under stress, passes a law which it hopes that the Supreme Court will hold constitutional, in spite of the fact that the Supreme Court, if it pursued its duty, even in a properly liberal spirit, would have to declare it unconstitutional, because our frame of government was cast at a time when the public problems were of different character and scope.

Perhaps, instead of expecting the Supreme Court, as Mr. Dooley said, "to follow the iliction returns," we ought to respect it for doing its duty, and turn our attention to the fact that economic and social problems are more—shall I say appallingly—national, rather than 1776-local in scope—*and to the possibility that we may need a new definition in the Constitution of State and Federal powers and the relationship of State to Nation.*"

This proposal for "a new definition in the Constitution of State and Federal powers and the relationship of State to Nation" was made by a Cabinet member, and presumably submitted to the Chief Executive before delivery. It is quite obvious that Mr. Dern and his superior realize the constitutional hazards that confront the New Deal. This address in California may therefore be a straw showing the direction of the wind.

The Great Mountains

By John Steinbeck

A Story

In the humming heat of a midsummer afternoon the little boy Jody listlessly looked about the ranch for something to do. He had been to the barn, had thrown rocks at the swallows' nests under the eaves until every one of the little mud houses broke open and dropped its lining of straw and dirty feathers. Then at the ranch house he baited a rat trap with stale cheese and set it where Doubletree Mutt, that good big dog, would get his nose snapped. Jody was not moved by an impulse of cruelty: he was bored with the long hot afternoon. Doubletree Mutt put his stupid nose in the trap and got it smacked, and shrieked with agony and limped away with blood on his nostrils. No matter where he was hurt, Mutt limped. It was just a way he had. Once when he was young, Mutt got caught in a coyote trap, and always after that he limped, even when he was scolded.

When Mutt yelped, Jody's mother called from inside the house, "Jody! Stop torturing that dog and find something to do."

Jody felt mean then, so he threw a rock at Mutt. Then he took his slingshot from the porch and walked up toward the brush line to try to kill a bird. It was a good slingshot, with store-bought rubbers, but while Jody had often shot at birds, he had never hit one. He walked up through the vegetable patch, kicking his bare toes into the dust. And on the way he found the perfect slingshot stone, round and slightly flattened and heavy enough to carry through the air. He fitted it into the leather pouch of his weapon and proceeded to the brush line. His eyes narrowed, his mouth worked strenuously; for the first time that afternoon he was intent. In the shade of the sage-brush the little birds were working, scratching in the leaves, flying restlessly a few feet and scratching again. Jody pulled back the rubbers of the sling and advanced cautiously. One little thrush paused and looked at him and crouched, ready to fly. Jody sidled nearer, moving one foot slowly after the other. When he was twenty feet away, he carefully raised the sling and aimed. The stone whizzed away: the thrush started up and flew right into it. And down the little bird went with a broken head. Jody ran to it and picked it up.

"Well, I got you," he said.

The bird looked much smaller dead than it had alive. Jody felt a little mean pain in his stomach, so he took out his pocket-knife and cut off the bird's head. Then he disemboweled it, and took off its wings; and finally he threw all the