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## “AND THIS, TOO, O KING, SHALL CHANGE AND PASS AWAY”

C. T. GRAYDON\*

It might be well, before I get into the subject, to define my conception of the terms with which the country is most concerned today. We hear most often the words “reactionary,” “conservative,” “liberal,” and “radical”. To my mind a *reactionary* is a man who never wishes to change except to go backwards. He is afraid of change and wants to hold the status quo or even to recede. A *conservative* is a person who is willing for change under certain limited conditions but who has to be thoroughly convinced before even attempting a change that the same is in line with his philosophical thought and will not upset the status quo. A *liberal* is a person who is not only willing to change, but is ready and anxious to change, provided, however, that he is convinced, or has reasonable grounds to conclude, that the change might work for better. He is willing to experiment, to try out new ideas and to break with the past where the change apparently betokens good for the future. A *radical* just wants change. It makes no difference to him whether the change is good or bad. He wants to try out new ideas, new thoughts and new theories without any consideration as to the effect upon the country. He is willing to upset any established rule or law just to try something different. He is often not concerned with the effect of the change but wants to tear down the existing order in the hope, if not always in the belief, that things will be better or at least different.

A story is told that in ancient Asia there was a kingdom—the most powerful in the world; it had lasted for centuries, its armies were the greatest in the world, its resources were unlimited and its power was unmeasured. The ruler of that country thought that his kingdom would last forever and he wanted a motto which would always be true and always applicable—as stable as his kingdom. He sent out the ten wisest men in the kingdom to get this eternal truth as a motto for his everlasting empire. For ten years the wise men sought in vain

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for such a motto and finally came and announced that they had at last found something which was true then and would be forever true. And in the gilded palace, amid the show of pomp and power and the armed might of the kingdom, the chief wise man arose and stated, "O King, we have at last found something which is forever true—a motto of eternal truth," and waving his hands about, pointing to the splendor of the kingdom, to the might of the nation, to the glory of the empire, the wise man said, "And this, too, O King, shall change and pass away."

And so it is in life—the only truth which is eternal is that there will forever be change.

Our nation has been subject to change, and fortunately those changes have made us a stronger and more virile nation. It is about those changes in the law as laid down by our United States Supreme Court that this article is written.

When the United States Supreme Court ended its term in the spring of 1937, an era in the judicial thinking of our nation came to a close. For almost one hundred years the highest tribunal of our land, in large measure, stuck doggedly, though not always with consistent reasoning, to the doctrine of stare decisis. The decisions abounded in references to other cases, sometimes not applicable; precedent was the watchword.

But upon what precedent were these decisions of the United States Supreme Court based? Largely on cases which had been decided by a single man: John Marshall. The court, after Marshall's death, regarded as sacrosanct the many opinions which he had written by bold jaunts into fields in which there had been no law before he spoke. On great constitutional questions which were without precedent, Marshall interpreted this document as he saw fit—somewhat, of course, in the light of his knowledge of the constitutional convention.

And when the court began to depart from the so-called established law in the middle of 1937, a howl went up from the bar, the judiciary and vested interests that the Constitution was dead. Many lawyers said that they could no longer safely advise clients, and that no one could know whether or not he was violating the law when the interpretation of the law was to be established without precedent or logic.

Frank J. Hogan, the President of the American Bar Association in 1939, in speaking of the changed court, said:

"\* \* \* Reliance against the exercise of arbitrary power must be placed by the people henceforth in the

legislative, rather than in the judicial department of the national government. Legislative independence and legislative wisdom are now America's almost sole reliance for the continuance of that security of the blessings of liberty for which the Constitution was framed and the Government of the United States created."

But actually it has always been thus, for it was John Marshall who in *Gibbons v. Ogden*, 9 Wheat. 1 (U. S. 1824), had declared:

"The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are in this as in many other instances the sole restraints on which they have relied to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."

We hear, from time to time, lawyers and others refer to the Supreme Court as the great bulwark of our liberties, but I think that this is an exaggeration. Instead of being a bulwark, I think that in many instances the court—as it was formerly constituted—has thwarted the attempt of the people to obtain rights and liberties which were due them under our form of government and retarded democratic progress.

But the court was for many years exactly what John Marshall intended that it should be: the defender of entrenched wealth against the onrush of the democratic mass of the people. Perhaps this concentration of wealth and economic policy of status quo allowed our country to expand to its present greatness; that is not for me to say. But I think that a healthier system is to allow the people to try out various plans and methods through legislation—as was done in the case of the National Labor Relations Act, and let the people correct any mistakes which have been made—as has actually been done in this case through the enactment of certain provisions of the Taft-Hartley Bill.

Thus, for more than a hundred years the court followed almost blindly the principles which John Marshall had laid down. While I do not subscribe to his beliefs, nor do I consider Marshall a great jurist in the common accepted sense of that term (he was not an erudite lawyer having had little legal education), I must admire him as an original thinker. Not until the last decade have we had a court which was willing,

as he did, to go into uncharted seas. Of course there have been other original thinkers on the court since Marshall—Holmes, Cardozo, Brandeis—to mention three within our times. But they were always in a dissenting minority.

And so virtually for the first time within the history of the court since Marshall's day, it becomes vastly important not merely to examine the opinions of our court, but also the personalities of the men who sit on the bench. The court today will often stick to precedents, and at times invoke the principle of *stare decisis*—but they will not hesitate to break with the past and write decisions which, instead of being attuned to past opinions or doctrines, are in harmony with the times in which we live.

It will not be possible for me to examine in detail each of the men who is on the present court. I can only give a general picture of the court with a few facts about each man. I don't know how each attorney feels about the matter of handling a case before different judges, but I attribute what success I have had in the courts in large measure to an ability to present each case as I think the judge would like to hear it. Before some judges, lengthy arguments are desirable; others merely want a short answer to questions which they ask.

First I will give you a general picture of the court as it is composed at this time. There are now on this bench seven Roosevelt appointees, the first of whom—Hugo Black—became a member of the court in 1937; the two Truman appointees are Burton of Ohio and the chief justice, Fred M. Vinson. No man on the court has therefore served for more than a decade, an unusual circumstance since the court has usually had some veterans of many years' service on the bench. The late chief justice, Harlan Stone, served for 21 years; Oliver Wendell Holmes for 30 years; John M. Harlan for 34 years; Stephen J. Field for 33 years; Roger Taney for 28 years; Joseph Story for 34 years and John Marshall for 34 years. In that list one of these justices was on every court between 1801 and 1946—which helps explain the regard for precedent and the conservative continuity of the body.

But now we have a court which is relatively new in its time on the bench—and therefore more willing to break with the past. The average age of the present members is 57.5 years. Three of the present members are from the east, three from the south (two being nominally from the State of Kentucky) and three from the midwest. They do not think along sectional

lines, however. To attempt to divide them into conservatives and liberals is difficult in a nation where so-called conservatives often vote, and sometimes actually become liberal, and where the young liberal often changes into the old reactionary. At best those terms are difficult, for I defy you to find me the man who classifies himself as a reactionary. And there are few in our nation who style themselves conservatives. Most of us think that we are the liberals.

The oldest member of the court in point of time, as we have said, is Hugo Black. He is a strange mixture. When Roosevelt appointed him to the court in 1937 the country was amazed. He is a southerner of the New South. Before he became a United States Senator from Alabama in 1927, Black had a large and successful practice of law and he was known throughout his state and the south as a finished lawyer.

When he went to the Senate he soon became an expert legislator. There are many who serve within the Congress for decades who never seem to learn anything about the business of legislating. But Hugo Black had the mind and the ambition to do whatever he set out to accomplish efficiently and effectively. Many corporate lawyers said that he was not fit to sit on the court, and the newspapers raised the bugaboo of a one-time membership within the Ku Klux Klan.

A decade on the bench has established his ability and fitness for the highest tribunal. In 1946-47 he wrote more opinions than any other member of the court—29 decisions, 9 dissents and one concurring opinion. Here, again, he has proven his originality and adaptability in any job assigned him. Many of his opinions at first were lone dissents—but they abounded in a respect for the worth of the little man and showed a genuine attempt on his part to bring the court “up to date”.

Black joined Cardozo (whose health was waning), Brandeis, Hughes and Stone to change the complexion of the court completely. But this was, of course, only the beginning of the revolution which was shortly to be accomplished.

Halfway through the winter of 1937-38 Sutherland, one of the most bitter reactionaries of the old wing of the court, retired. Only 25 years before his retirement, when he was still a Teddy Roosevelt progressive from the Rocky Mountain area, the then Senator from Utah had this to say to the American Bar Association of the Constitution:

“It is not and never has been a wall, but a wide, free flowing stream within whose ample banks every needed and wholesome reform may be launched and carried.”

The man who was to succeed him and interpret the Constitution in the very broad way which Sutherland had suggested long before he went on the court was Stanley Reed, Roosevelt's Solicitor General. Reed had led the government argument in cases involving the A.A.A., N.R.A. and the National Labor Relations Act Board so that it is not surprising that we find him saying in a concurring opinion in *Erie v. Tompkins*, 304 U. S. 64 (1937), a few months after he went on the bench:

“In this court, *stare decisis*, in statutory construction, is a useful rule, not an inexorable command \* \* \*”

Reed is a good, sound lawyer, with much practical courtroom experience, his many activities in governmental circles before coming onto the bench equip him well to handle the numerous administrative and complex governmental questions with which the court is often faced today.

The next appointment after Reed was Felix Frankfurter, a Hebrew, to take the place of the great Cardozo, also of the Jewish faith. Here was a man who had served for 22 years as a professor and theorist in the law. He was also an expert in the field of public service, and many business men feared him as the most dangerous member of the court when he was first appointed. Their fears were short-lived, for this man who had paid lip service for so many years to liberality became, as so often happens, a champion of the status quo when he ascended to a position of power. The theories with which he had played in college were not to be put into effect by him; his opinions in the beginning were written in the high-flown language of the college professor, but they contained little that was original except their verbosity and obscurity, although there has been marked improvement and he is now the erudite and vigorous champion of States Rights almost forgotten. He is now the court's leading dissenter, having written 18 dissents in 1946-47.

When the great Brandeis retired in 1939, the chairman of the Securities Exchange Commission, William O. Douglas, then only 41, was appointed to the court. Douglas had little trial experience when he went on the bench, most of his short career having been devoted to the teaching of law and to the

investigation of the Stock Exchange. His ability in this investigation and as chairman of the Securities Exchange Commission convinced Roosevelt that this was a man well qualified for the court. I think that his subsequent service on the bench has proven the correctness of this estimate. He is next to Black in work, actually having written more pages than the Alabamian in the session of 1946-47.

The court's complexion was now changing fast. Butler died, McReynolds and Hughes retired and Stone was elevated to the chief justiceship. The places were filled by Frank Murphy, Robert H. Jackson and Jimmy Byrnes, the latter of whom is, of course, no longer a member of the court.

Frank Murphy is unmarried and a staunch Catholic. He served at one time in the office of the United States District Attorney in Michigan, sat for a short time as Judge in a police court and became Mayor of Detroit. He later became Governor General of the Philippines, Governor of Michigan and, finally, Attorney General of the United States. Thus his career has been largely political, rather than judicial.

Robert H. Jackson, before he became general counsel for the Bureau of Internal Revenue, was an attorney with a large practice in Jamestown, New York. By 1936 he had risen to a position as Assistant Attorney General, later became Solicitor General, and like Murphy, was appointed to the court from the office of Attorney General. His name, of course, came into the news recently when he went to Germany to prosecute the Nazi war criminals, and there is in the minds of some a question as to his temperamental fitness since the episode of his ill-timed blast against Black.

Late in 1942 Byrnes resigned; he had not been in the Court long enough to test his qualification as a member of the body, but the few opinions which he did render showed that he, too, was not to be hidebound by precedent, and was willing to move with modern and enlightened thought. His place was taken by Wiley Rutledge, who had served as a law professor at various western institutions for 25 years before his elevation to the United States Court of Appeals for the District of Columbia in 1939.

The first Truman appointee to the Court was Harold Hitz Burton, a conservative, who had long been prominent in republican circles in Ohio. He had served as Mayor of Cleveland, but most of his practice was in the corporate field. He was elected a Senator from Ohio in 1941.



The most recent appointee to the Court was Fred M. Vinson, a liberal Kentuckian who had served for some time on the Court of Appeals of the District of Columbia and in various other governmental offices, including Secretary of the Treasury under Truman. The appointment was a most happy one, because it came at the time of the open fight between Jackson and Black, which had been smoldering for several years. It was Vinson's job to reconcile the differences between a court which was seething with personal feuds; this was the natural result of the Roosevelt policy of placing men of highly individualized views on the bench.

It is noteworthy that Vinson, serving his first term, was the only member to register no dissents in the 1946-47 session. It is also a tribute to Vinson that during his first year feuds and dissension among the justices did not flare into the open, although the court was just as divided opinionwise as ever.

Some court observers tend to give Vinson considerable credit for the comparative calm which prevails on the high bench. But just what Vinson did or did not do is not quite clear. The contentious judges may have decided to resolve their own difficulties, but certainly the appointment of Vinson calmed the rough water and made for surface peace.

As any lawyer who practices before the court today will tell you, they are not the austere and formidable group which sat on the bench for so many years. Each member is fully aware of the spirit of the times. Several of them ask questions in the midst of argument; some of them often seem slightly rude and perhaps even dictatorial in their outlook. But it must be remembered that they have a tremendous load to carry, particularly in this age where there are so many instrumentalities of the United States Government in the courts.

Although many have said that the Constitution is gone, the Court still lives within the broad framework set out by the authors of the supreme law of the land. And it is my belief that the Court today is interpreting the Constitution in the spirit which the members of the Convention of 1787 intended. I think that one instance which has been constantly in the news and in the courts for the past ten years will support this view: I refer, as you might have anticipated, to the commerce clause.

Too often, I think, we lawyers make a habit of going to the decision on questions of Constitutional law without ever think-

ing of referring to the original instrument itself. Most certainly the decisions should be consulted to guide us, but often an examination of the original words will give us a clear and fresh insight. That was what John Marshall had to do, and that, in substance, is what has been done in some of the recent decisions handed down by our court.

So let us for a moment go back to the words upon which the federal government has based so much of its legislation: in Article I, Section 8, Subdivision 3, we find these words:

“The Congress shall have Power \* \* \* to regulate Commerce with foreign Nations, and among the several states, and with the Indian tribes \* \* \*”

*To regulate commerce among the several states*—only seven words—yet on these words are hinged such far-reaching measures as the Labor-Management Relations Act, the Farm Control Program, the Fair Labor Standards Act, the act creating the interstate commerce commission, the Pure Food and Drug Act, the Federal Kidnapping Act and numerous other acts promulgated under the New Deal.

It would not be possible for me in a few words to trace the history of the commerce clause; volumes have been written on this single sentence in our Constitution within the past ten years alone. But I think a few illustrations will suffice to show you how the thinking of the court has swung back and forth on this clause.

In the case from which we have already quoted, *Gibbons v. Ogden*, Marshall, in discussing the Commerce Clause, said that commerce as contemplated by the Constitution:

“concerns more states than one \* \* \* The genius and character of the whole government seems to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which *affect* the states generally; but not to those which are completely within a particular state, which do not *affect* other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.”

This sweeping interpretation of the clause as reaching all commercial matters affecting the states generally was, of course, to be seized on by New Deal lawyers more than 100 years later as the Constitutional basis for legislation designed to whittle down the economic power and wealth of the same

type which Marshall was trying to build up. The passage was repeated in numerous cases after *Gibbons v. Ogden*, but it was not applied in the broad sweep which the language of Marshall indicated.

The attitude of Marshall towards the Constitution is best summed up in a sentence from the earlier case of *McCulloch v. Maryland*, 4 Wheat. 316 (U. S. 1819), which has also become a classic expression of constitutional law. The great Chief Justice in that decision declared:

“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.”

Many of you probably recognize that phrase, and it sounds perhaps more like the utterance of a Holmes or a Cardozo than Marshall. That is because we necessarily associate Marshall with building up the power of the Supreme Court as a bulwark for economic wealth, while the latter judges are generally associated with broadening the powers of the federal government to allow the people economic liberties denied them by corporate interests. It is a remarkable tribute to the men who wrote the Constitution that it has, despite assertions to the contrary and despite the attempts of many distinguished justices in many decades—including our own—to twist it to fit the times, remained the basic, fundamental law of the land. Within its ample banks, a McReynolds and a Brandeis would sit on the same court and believe in their hearts in the same Constitution.

This, I think, is due for the most part of the elastic and adaptable nature of the Anglo-Saxon mind and temperament in devising means and methods of achieving freedom of the individual and the promotion of the general welfare within the framework of our democratic system. Many declare the virtues of our written Constitution, and I do not deny that it is necessary under our federal form of government, but I think that we would have achieved essentially the same measure of liberty and democratic progress even had we adopted no Constitution. I think that the fundamental liberties which are expressed in the Constitution were engraved on the hearts and minds of our people before they were set down in written form and would have remained with us. That a central govern-

ment was necessary would have been realized in time.

If the interpretation of the written instrument can be changed to meet the varying times, then it is not the exacting and technical law which some judges have declared it to be. It is only a general and broad pointer for our government to follow, not indicating a narrow path or trail, but merely the direction in which the authors believed our people would wish to proceed.

In the so-called era of big business in this nation, from 1890 until 1930, the court took the Commerce Clause and decided that Congress did not have the power to extend the clause to activities only indirectly engaged in interstate commerce. The theory was that the clause applied only to commerce itself and not to production and mining and other activities which naturally closely affected interstate commerce.

The Sugar Trust cases of 1895\* limited the extension of the Sherman Anti-trust Act, and the *Hammer v. Daggenghart* case, 247 U. S. 251 (1917), held that Congress did not have the constitutional power to regulate the interstate shipment of goods made with child labor. The theory was that this was a regulation of conditions in productive industry rather than an attempt to control commerce. There were two cases in 1908 which had actually decided that some railroad activities were not closely enough related to interstate commerce to be subject to the commerce power.

Such statutes as the Lottery Act, the Pure Food and Drugs Act, the White Slave Act, the Motor Vehicle Theft Act and the Animal Industries Act were upheld on the grounds that they were concerned with the interstate commerce of prohibited commodities or persons. The court has uniformly favored such efforts at federal-state cooperation, notably, too, in the case of laws regulating the shipment of whiskey.

By the time the New Deal came to power some of the cases restricting the application of the Commerce Clause had been in effect or expressly overruled, so that the principal obstacle to the broad social and economic legislation needed so sorely by the country in 1933 was the *Daggenghart* case, *supra*, and many dicta in cases dealing with reservations of powers to the states. The balance in the scale was in favor of the doctrine which had been enunciated first in *Gibbons v. Ogden*.

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\**cf* United States v. E. C. Knight Co., et al., 156 U. S. 1; United States v. Kissel, 218 U. S. 601.—Ed.

The court, however, was not disposed to accept the changes proposed by Mr. Roosevelt and his associates. The first decisive case was the *Schechter* decision,<sup>1</sup> holding the N.R.A., which by that time had already spent most of its usefulness, unconstitutional. The court said that the fact that an industry was merely related to interstate commerce was not enough to place the particular concern under the federal power.

The next New Deal Act to come before the court was the Guffey Coal Act. *The Carter coal case*<sup>2</sup> had been bitterly fought, and the high point of trial came when the counsel for the coal company, William D. Whitney, cross-examined Philip Murray and defied the labor leader to give at least one example by name and date of a family which had been cheated by coal weighing. After some hesitation, Mr. Murray told of a 16-year-old boy who in 1903 had been deprived of 40 per cent of the weight of his coal, of how he protested and was discharged and how his father and entire family were immediately thrown out of their company-owned house into the street.

“The name of the family evicted from their home without notice was Murray. The head of that family’s name was William. His son was Philip. I am the individual that was involved.”

Despite the tremendous economic crisis which was still rocking the country and crying necessity for some kind of concerted governmental action, the court declared the Act unconstitutional by a 5-to-4 decision. The court used the so-called direct-indirect test. The reasoning was that since a strike halts production, and the cessation of production interferes with commerce, the strike only “indirectly” affects commerce—even though it might block it completely.

The decision in the *Carter* case, *supra*, had been foreshadowed in the decision of *United States v. Butler*, 277 U. S. 1 (1935), which held the Agricultural Adjustment Act unconstitutional. This case was pitched, however, on the taxation provisions of the Constitution and the power “to promote the general welfare”. These were, of course, the decisions which caused Roosevelt to determine to try to increase the size of

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1. *Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935).  
 2. 298 U. S. 238 (1935).

the court to 15 in order to effect the legislation so necessary for the nation's recovery.

The President, of course, won, as we now know, without having to resort to so radical a plan as appointing six additional judges. The court shifted its viewpoint before a single appointment was made by Roosevelt; this change resulted, probably, from the nation-wide approval of the measures which had been taken under the New Deal. At any rate, Justice Roberts abandoned the position of the four judges with whom he had agreed only a few months before.

The cases which were expressly overruled in *West Coast Hotel Case v. Parrish*, 300 U. S. 379 (1936), were the *Adkins*<sup>3</sup> and *Morehead*<sup>4</sup> decisions, both declaring minimum wage legislation invalid—*Adkins* case having been handed down in 1923 with the *Daggenhart* case as authority and the *Morehead* case in 1936.

The real indication that a new day had been reached came in the *Jones & Laughlin case*,<sup>5</sup> which upheld the validity of the National Labor Relations Act. The opinion spoke in terms which even the laymen could understand, when Mr. Justice Hughes, speaking for the court, declared, in referring to the operations of this vast steel company:

“\* \* \* The fact remains that the stoppage of these operations by industrial strife would have a most serious effect upon interstate commerce. In view of respondent's far-flung activities, it is idle to say that the effect would be immediate and might be catastrophic. \* \* \* We have often said that interstate commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience.”

Thus, for the first time virtually since John Marshall's day, the Court was to return to the criterion of actual experience rather than judicial precedent. In the case of *United States v. Darby*, 312 U. S. 100 (1940), the Court was to bury once and for all the doctrines of the *Daggenhart* case; by this time, of course, the Court had almost completely changed in personnel.

3. *Adkins v. Children's Hospital*, 261 U. S. 525 (1922).

4. *Morehead v. People of State of N. Y.*, 298 U. S. 587 (1935).

5. *National Labor Relations Board v. Jones-Laughlin Steel Corp.*, 301 U. S. 1 (1936).

There followed, then, a host of decisions, with many of which you are familiar, upholding various phases of the New Deal program: *Mulford v. Smith*, 307 U. S. 38 (1938), saying that Congress had the power to regulate the amount of tobacco grown on a farm; *Oklahoma v. Atkinson*, 313 U. S. 508 (1940), upholding the government's right to enter into such projects as the TVA under their power to improve navigation and provide for flood control; *Wickard v. Filburn*, 317 U. S. 111 (1942), upholding the Wheat Control Act; the *Polish Alliance*<sup>6</sup> and *Southeastern Underwriters*<sup>7</sup> cases in 1944, extending the power of the federal government to the control of insurance; *North American Company v. Securities & Exch. Commission*, 327 U. S. 686 (1945), upholding the validity of the Public Utility Holding Company Act of 1935.

Thus, by the end of the decade under the new court, every decision which invalidated an exercise of the Congressional power under the commerce clause has either been overruled or distinguished to death. Thus the erosion of time, as Mr. Frankfurter puts it, has worn away a view which held sway for many years.

The Commerce Clause was not recognized as a grant of authority permitting the Congress to allow interstate commerce to take place on whatever terms it might consider for the well-being of the nation. This view, of course, recognizes the inescapable fact that in our present-day economy interstate and intrastate aspects of American business are inseparable. Production cannot be separated from commerce. Truly ours is an interstate economy, with each part of the nation's industry dependent upon other sections and industries. Of necessity the Congress must be empowered to regulate in some manner this complex economic structure.

And it is ironic, to my mind, that the trend of the court today, in its interpretation of the Constitution, follows the classic lines set down by John Marshall. It is difficult to say how a man would behave in an entirely different age, but I venture to guess that, had Marshall been living in 1930-36, he would have allied himself with the members of the status quo—for

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6. *Polish Nat. Alliance v. National Labor Relations Board*, 322 U. S. 643 (1943).

7. *United States v. South-Eastern Underwriters Association, et al.*, 322 U. S. 533 (1943).

it cannot be denied that their stand was widely believed to have protected entrenched wealth and power.

Just as Marshall had to use imagination and ingenuity to wrest the control of the government from the people as represented by the state governments by placing authority in a central government at a time when communications were scant and the power business and industrial interests had not yet arisen, just so in the past decade the court has had to use imagination and daring to free the people from the economic control of Big Business and industrial combines.

The revolution in the court is now complete; there is already a swing of the pendulum in the other direction, both in the legislative and the judicial branches of the government. But I do not believe that we will ever return to the hide-bound view of *stare decisis* which a little more than a decade ago infected certain members of the court to a point where they placed this doctrine, as I see it, above the welfare of the nation and, if you please, above a fair reading of the Constitution itself.

To say that these men were dishonest would, of course, be to accuse them falsely. And I do not say that the members of the present court are beyond compare; far from it; they are lacking in trial and judicial experience in some degree. But at least they are making an honest effort to make the court a living and vital force for progress and advancement, rather than a millstone about the neck of the greatest nation on the face of the earth.

Precedent is not gone. *Stare decisis* is not forgotten. They, like all other rules or procedures in law, are merely guideposts which should and must be abandoned when justice or the national welfare demands other judicial methods for the solution of our governmental problems.

Let us not be upset about these or any other changes—let us remember the words of the wise man of the East:

**“AND THIS, TOO, O KING, SHALL CHANGE AND PASS AWAY.”**