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DEFENSE OF THE "OLD" COURT AND A PLEA FOR SOME CERTAINTY IN THE LAW*

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The article by Mr. Graydon is well written and interesting but in the main it is wrong factually and is illogical in its conclusions.

The two underlying purposes of his article are to minimize the necessity of the principle of stare decisis in our system of jurisprudence and to extol the excellence of the present Supreme Court of the United States and its superiority to the Court existing prior to 1937.

Of course no thoughtful student of law and government will subscribe to a blind adherence to the stare decisis doctrine, for, after all, in the main, the law is a growing and changing system that must be adapted to the times—to fit the needs of living persons. If the principle of stare decisis were an absolute one, both the legislative and judicial branches of our triune system of Government would become hopelessly petrified and archaic. Hence, applied to laws in general, particularly statutory enactments, the principle is unimportant. Let us not forget, however, that under our constitutional plan of Government, where the Executive, Legislative and Judicial branches and their powers are clearly separated, and where the genius of the plan demands that one shall not exercise or infringe upon the rights of the other, lest the structure, so wisely planned, be overbalanced and destroyed, the Courts must preserve the fundamentals of the Constitution jealously, through the application of the doctrine of stare decisis. Let us also not forget that it is not the prerogative of the Judicial branch to make laws, but to interpret laws, and to determine whether the enactments of the Legislative department or the orders of the Executive branch conform to the requirements of the Constitution.

Constitutional interpretations once made become fundamental, and should be adhered to and preserved, since they

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furnish the beacon lights to the course of the Ship of State. These fundamentals should be made strong and clear and should not be tampered with, blotted out, or changed unless clearly outmoded or wrong. And, assuredly, there is no power in the Courts, or in the Executive, or Legislative branches to amend or abrogate constitutional provisions, which are inviolate until changed by the will of the people by amendment in the manner provided therein.

These things being true, how can it be argued that the principle of stare decisis as applied to Constitutional interpretations by the most powerful Court in the world is something of minor importance, and should be disregarded at the whim of a set of philosophers and ideologists who might happen to control the Supreme Court of the United States? However, I shall refer a little later to the present situation, in answer to my friend's glorification of the Court as composed since 1937, and his disparagement by implication of the so-termed "old" Court, prior to that date.

In conclusion as to the matter of stare decisis, it is interesting to note that after the theme song of the principal paper that *all things too will change,* the speaker extols the definition of John Marshall of "interstate commerce" in *Gibbons v. Ogden,*[1] and points out that the present Court adheres thereto logically to support its extensions of the scope of inter-state commerce. A more impressive tribute to the stare decisis principle cannot be found.

I have no patience with detractions and criticisms of the formerly *great* Supreme Court of the United States by those who are pleased to term it "the old Court", the "reactionary Court", the "Nine Old Men", etc.; and to charge that the record of the Court has been deterrent to the interests of the people. Let us not forget that through the course of the country's history, that Court has preserved the rights of minorities, and during the dark, disgraceful period of reconstruction, it was the one and only branch of the government

1. 9 Wheat. 1 (U. S. 1824).

2. United States v. Murray Stanley; United States v. Michael Ryan; United States v. Samuel Nichols; United States v. Samuel D. Singleton; Richard A. Robinson and Sallie J. Robinson, his wife v. Memphis and Charleston Railroad Company, 109 U. S. 3 (1883).

that protected our liberties. Note the *Civil Rights Cases*[2] and others.

The contention that the Court was responsible for enslavement of American labor is mythical and fantastic. So, also, is the general assumption that interests of capital and labor are necessarily diametrically opposed. Such privileges that the capitalistic system enjoyed from the end of the Confederate War to the early 1900's were opportunities that arose in the development of the natural resources of the country, fostered and afforded by the Executive and Legislative branches of National and State governments. The advantages enjoyed were political and so long as they remained within Constitutional limits, the Court was bound to uphold them. Any lawyer knows that an executive or a legislative body may within its powers promulgate or enact orders or statutes that are utterly wrong or absurd from a commonsense view that a Court is powerless to correct.

That of course was the great period of the industrial development of this country and of the discovery and utilization of our natural resources. The capitalistic system necessarily was riding high, and, of course, there were instances of injustice and ruthlessness where the rights of the little man were trodden down. However, it cannot be truthfully contended that such was the rule and not the exception; and out of it all came a growing and ever increasing sense of social responsibility both in corporate and governmental spheres. Particularly since the turn of the century have the great masters of industry and wealth begun to employ vast resources for establishment of foundations for the uplift and betterment of employees and of all mankind. Space forbids elaboration on this—so, hurriedly, locally, in a small field, I call attention to increasingly improved conditions for the past twenty-five years or more in the mill villages of this State; in the large national field, note the Rockefeller and Carnegie foundations. These latter, of course, are conspicuous examples, but hundreds of others, large and small, might be cited.

One more consideration that should be noted is that during the period from the end of the War Between the States to 1937, this country grew and developed from a third-rate power to the greatest nation the world has ever known. We may assume our system of government, of which the Supreme Court is the stabilizing factor, and conditions of life that the

system fostered are responsible for our greatness. Apply the test of "the proof of the pudding"—and thank God—that the plan we adopted has not only preserved to us happiness and the blessings of liberty, but also has made us the conservators of liberty for the rest of the earth.

Let us balance against the so-called Capitalistic era, which so generally and thoughtlessly is denominated bad, the labor era brought about by the half-baked, crack-pot philosophies of the Roosevelt regime. Consider the sit-down strike, the enslavement of the individual laborer by his union, the enforced membership or "closed-shop" principle, the jurisdictional strike, the czaristic powers built up by a few selfish leaders —Lewis, Petrillo, and others—which leaders in time of national peril defied the Government to the point of treason! Many other shocking excesses of this orgy of labor will occur to all of you. Of course it would be absurd to blame this situation on the present "New Deal" or "Roosevelt" Supreme Court for it was brought about by legislative cringing to a demagogic executive. However, it is not creditable to the Court that a majority of its members, at least, have sought through an unseemly obeisance to the Executive and Legislative will to uphold statutes such as the Wagner Act, and to condone incidents such as culminated in the notorious *Teamster* decision[3]. My distinguished friend holds up the *Carter Coal* case[4] as an iniquitous example of the old Court's reactionary leanings. All I ask of you is to compare it with the *Teamster's* decision, and I could mention others, and you will have to conclude that the *Carter* case falls within strict constitutional limits, whereas the *Teamster* case violates constitutional guarantees and fundamental natural and moral laws assuring human and property rights.

The field of interstate commerce—to which my friend refers—has been necessarily enlarging since Chief Justice Marshall's time with the growth and development of the country. The commerce clause of the Constitution wisely places the control and regulation of this commerce, so essential to

3. Local 807 of International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, et al, v. United States of America, 315 U. S. 521 (1942).

4. James Walter Carter v. Carter Coal Company, et al, 298 U. S. 238 (1935).

the public welfare, for uniform control under the power of the Congress. During the New Deal regime this power was invoked and exercised beyond all limits hitherto conceived, in order to attempt to justify the extension of the central or Federal power to objects hitherto subject only to State regulation—which the New Deal ideologists deemed essential to their political success. Realizing the "Old Court" would not demean itself to decide for political ends what practically every recognized constitutional lawyer in the country, save the subsidized "brain-trusters", knew was unconstitutional, the President attempted to pack the Court. The country was shocked, and for the first time the controlled Legislative branch rejected the Master's mandate. Time, however, due to the unprecedented period of occupancy of the Presidential office by Mr. Roosevelt, afforded him his opportunity to pack the Court. He did. He meant to lower the Court's prestige. He did—by appointing men, in the main, of mediocre legal ability to what, up to that time, had been the greatest court in the world.

The Court as now constituted is composed generally of individuals of good mentality, but among them is a paucity of real lawyers. There is no common foundation of legal knowledge among them, consequently the unprecedented number of dissenting opinions. Philosophers and ideologists are individualists, generally exhibitionists, and there is no common ground of theory or understanding. As much as such may be worth to introduce thought provoking theories among thinkers—or super intellectuals—their value is negligible, to say the least, on the most all powerful Court in existence, whose pronouncements are ultimate law in the intensely practical plan of a great government, whose existence is based on liberty under law. This existence is not theoretical but is founded on the positive guarantee of equal justice under the Constitution to all. The "all" being made up of persons, individual, employee and employer, laborer and capitalist.

With an obvious lack of observance of the purpose of the Constitution, so essential to the balanced structure of our Government, the present Court follows an uncharted course, failing to recognize the constitutional beacon lights that warn against an uncertain or wrong course. These beacon lights have been broad and ample in their beneficient indications of constitutional rights; beyond their limits lies danger to our

plan of Government. For example, since the opinion in *Cooley v. The Wardens*[5] and perhaps earlier, it has been recognized that the commerce clause of the Constitution did not deprive the state of the right to subject interstate commerce to reasonable police provisions within their borders, provided such provisions were not discriminatory nor burdensome as to commerce, and the Congress had not entered such regulatory field. This exception is as classical as the guiding principles laid down in *Gibbons v. Ogden.* Leaving this momentarily, I revert to Mr. Graydon's reference to the new Court's *Southeastern Underwriters* case[6] holding insurance to be commerce and when conducted across state lines—interstate commerce. For seventy-five years prior to the *Southeastern Underwriters* case, insurance had been adjudicated non-commerce, and many states including South Carolina, had passed purposely discriminatory tax laws against foreign insurance corporations. In the confusion created by this decision of the Court, affecting the largest business interest of the nation, the Congress passed Public Law 15, known as The McCarran Act, which, in substance authorized the continued effect and existence of the various and varied state regulatory statutes. The admittedly discriminatory and burdensome South Carolina laws were appropriately attacked as violative of the Commerce Clause, among others, of the United States Constitution, and the final decision upholding such laws was delivered by this new Court.[7]

The writer challenges any lawyer who reads this to interpret the confused reasoning of this opinion. One must conclude that the Court means that the admittedly discriminatory and burdensome imposition on interstate commerce is neither, because the Congress by Public Act 15 *allowed* the power to regulate this phase of interstate commerce to the various wills of the different states. Mark you! I waive the point of the Court finding the act not discriminatory; even though the act, itself, proclaims its discriminatory purpose;

5. Cooley v. The Board of Wardens of the Port of Philadelphia, etc., 12 How. 299 (U. S. 1851).

6. United States of America v. South-Eastern Underwriters Association, et al, 322 U. S. 533 (1944).

7. *cf* Prudential Insurance Company v. L. George Benjamin, 328 U. S. 408 (1946).

I do not protest the Court finding the imposition not burdensome, though the revenue exacted amounted to approximately $25,000 a year; but I do protest in desperation—that a finding that the Congress can delegate to the states the power, exclusively granted to it, to tax and regulate interstate commerce is not only violative of the commerce clause, but is subversive of the Constitution itself—giving the creature of the Constitution power to alter and destroy the Constitution itself.

On the same day this constitutional monstrosity was produced, and the admitted discrimination and burden were held nonexistent, this selfsame Court in *Morgan v. Virginia*[8] held unconstitutional an obviously proper police regulation of the Commonwealth of Virginia requiring—with equal accommodations—the segregation of whites and Negroes on buses, on the ground that it constituted a *burden* on interstate commerce.

These instances are noted because in the principal paper the subject of the Commerce Clause and its enlargement was referred to. Many others of equal inconsistency under the Commerce Clause, under the 14th Amendment and other constitutional provisions could be cited if space permitted, to substantiate the writer's contention that the principal writer's position that the present Supreme Court is a more enlightened Court and is superior to the Court that existed prior to 1937, is entirely untenable.

After all, the purpose of this article is to discuss the relative merits of the present Supreme Court of the United States and that logically brings up the comparison with what my friend terms the "old" or "conservative" Court. Conservatism in a tribunal such as the Supreme Court of the United States is a necessary characteristic in my opinion, since it is admittedly the stop-gap or stabilizing influence in our governmental scheme of things. *However,* it is beyond my comprehension how the term "conservative" can be used to *stigmatize* a court, five of whose members were Holmes, Hughes, Brandeis, Stone, Cardozo. Consider the remaining four—Roberts, a magnificent lawyer, without a compeer on the Court as such, save, doubtfully, Hughes and Sutherland; Van Daventer, rich in long judicial experience; Sutherland, a profound and skilful

8. Irene Morgan v. Commonwealth of Virginia, 328 U. S. 373 (1946).

lawyer, with much political experience; and McReynolds, a rock-ribbed conservative, less able than his associates, but at least clear and unmistakable in his judicial utterances—a lost virtue at this stage of judicial pronouncements.

All I ask is for any fair minded, thoughtful lawyer to stack this "old" Court against what we have now, and he will find only two of the incumbents that will qualify with the average of that Court: Felix Frankfurter, a scholar, though a New Deal exhibitionist, who mellowed and sobered with his great responsibility, with his real devotion to the law will go down in history as a great Justice. Also Robert H. Jackson, the only highly experienced practitioner of law on the Court; he is forceful and determined and allows no philosophies to lure him away from constitutional fundamentals. The leader of the majority branch of the Court is Black. He was Roosevelt's first appointee; and was selected as a reward for political adherence, without possessing in advance any true qualifications for the great office; but on the bench he has worked tirelessly. He strives for the unique, and, apparently, for the reputation of champion of the individual. Somewhat incongruously, and—though a Southern Democrat whatever that is now—his opinions are not friendly to the doctrine of States' Rights. In general mental vigor he is the equal of Jackson, is smart, ingenious, dangerous in his inclinations to play fast and loose with the fundamentals, and with which he, apparently, is unacquainted.

The late unfortunate blast of Jackson against Black was discreditable; and it must be admitted at the present Jackson apppears at fault because he "blasted." I predict, however, —and it may be wishful thinking—that when the real facts are disclosed Jackson will not only be vindicated but justified.

The great number of dissents is unfortunate, but even more deplorable is the bitterness that many of the opinions evidence.

The real grievance against the present Court is that with differences among themselves, with disregard of precedent, with failure to appreciate constitutional limitations, the mass of opinions might be likened to a "crazy quilt." How my friend, able lawyer that he is, can compare this Court advantageously with the "old Court" is surprising! This Court has abandoned accepted principles of constitutional interpreta-

tion, sets up new interpretations and sometimes within a few months changes or overrules itself as to the matters of grave import—with the result that I do not believe there is a lawyer in this broad land today who can with even slight certainty advise a client as to his constitutional rights. In other words, the law of the land is beclouded in uncertainty and obscurity. Not infrequently the difference between right and wrong decisions as affecting the general welfare is not vital. One of the greatest vices in any system of the law can be uncertainty. Often an individual may not agree with the law laid down by the Court, but right or wrong, let's have a law and know what it is! Otherwise there is chaos.

The present situation created by the "new" Supreme Court of the United States brings to mind the instance that through centuries has been an example of tyranny and misgovernment; that of the Roman Emperor who published his laws on tablets of brass—placed so high upon the temple walls in the Forum that none could read or know them.

In conclusion—realizing that there is nothing perfect—that everything is subject to change—I, nevertheless, maintain that to preserve our system of Government, with its Executive, Legislative, and Judicial branches operating independently and without the impingement of one upon the other, it is essential that we should go back to constitutional fundamentals—have them declared as in the past clearly and certainly—unobscured by ideologies—in order that our way of life and our great government may survive to insure the existence of freedom and the blessings of liberty.