



1969

## Mr. Justice Cardozo and the New Deal: An Appraisal

David N. Atkinson

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>



Part of the [Judges Commons](#), and the [Legal Biography Commons](#)

---

### Recommended Citation

David N. Atkinson, *Mr. Justice Cardozo and the New Deal: An Appraisal*, 15 Vill. L. Rev. 68 (1969).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol15/iss1/3>

This Article is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

## MR. JUSTICE CARDOZO AND THE NEW DEAL: AN APPRAISAL

DAVID N. ATKINSON†

### PRELUDE

AS THE DEPRESSION DEEPENED, a majority of the Hughes Court, committed to an economic policy of *laissez-faire*, proceeded to frustrate the legislative policies of President Roosevelt in a series of controversial cases in which Justice Cardozo participated. A direct confrontation between the executive and judicial powers was thereby precipitated when, in 1937, the President submitted a Supreme Court reorganization proposal to the United States Congress.

Ominous indications of impending division within the Court made undisguised appearances during the early months of 1934 when the Minnesota Mortgage Moratorium Law was declared valid in *Home Building & Loan Ass'n v. Blaisdell*.<sup>1</sup> Not long thereafter, in *Nebbia v. New York*,<sup>2</sup> the New York Milk Control Law was also sustained. In both cases, Justices Cardozo, Stone, and Brandeis joined in a majority coalition with Chief Justice Hughes and Justice Roberts. Although neither case constituted a part of the New Deal legislation later invalidated by the Court, both cases did, however, give determined expression to opposing ideals of constitutional interpretation.

Chief Justice Hughes, writing for the Court in *Blaisdell*, held the Minnesota Mortgage Moratorium Law constitutional. Significantly, the Chief Justice was willing to examine the exercise of state police power in the broad perspective necessitated by the depression. Although an emergency does not create power, an emergency may explain and justify the use of power not before invoked. Relying on this explanation of the state's action, the Court found no unauthorized extension of state police power contrary to the contract clause in the Federal Constitution.

---

† Assistant Professor of Political Science, University of Missouri — Kansas City, B.A., M.A., J.D., Ph.D., University of Iowa.

The author is especially grateful to Professor Joseph Tanenhaus of the Department of Political Science of The State University of New York at Stony Brook for his helpful commentary on an earlier draft of this article.

1. 290 U.S. 398 (1934).
2. 291 U.S. 502 (1934).

The sanctity of contract, supposedly rendered inviolate by constitutional provision, was, by the minority view, fundamentally at issue. In a passage akin to a Victorian morality lesson, Justice Sutherland enunciated in its classic form the doctrine of *laissez-faire*.

The present exigency is nothing new. From the beginning of our existence as a nation, periods of depression, of industrial failure, of financial distress, of unpaid and unpayable indebtedness, have alternated with years of plenty. The vital lesson that expenditure beyond income begets poverty, that public or private extravagance, financed by promises to pay, either must end in complete or partial repudiation or the promises be fulfilled by self-denial and painful effort, though constantly taught by bitter experience, seems never to be learned; and the attempt by legislative devices to shift the misfortune of the debtor to the shoulders of the creditor without coming into conflict with the contract impairment clause has been persistent and oft-repeated.<sup>3</sup>

In *Nebbia*, where a storekeeper's conviction under a penal provision of the contested New York price-fixing legislation was affirmed, Justice Roberts' opinion was taken by some observers as an indication of his basic alliance with the Cardozo group. Two sentences in *Nebbia* were singularly in accord with Justice Cardozo's constitutional jurisprudence. "And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal."<sup>4</sup>

In his *Nebbia* dissent, Justice McReynolds, joined by Justices Sutherland, Van Devanter, and Butler, expressed displeasure with Chief Justice Hughes' reasoning in the earlier *Blaisdell* decision. "The theory that legislative action which ordinarily would be ineffective because of conflict with the Constitution may become potent if intended to meet peculiar conditions and properly limited, was lucidly discussed and its weakness disclosed by the dissenting opinion in *Home Building & Loan Ass'n v. Blaisdell*."<sup>5</sup> With a significance not fully appreciated when the dissent was first announced, Justice McReynolds had truly foretold of things to come. That doctrine of judicial restraint, founded on skepticism and sustained by humility in the person of Mr. Justice Holmes and later gracefully restated in the opinions and jurisprudential

---

3. 290 U.S. at 471-72.

4. 291 U.S. at 537.

5. *Id.* at 544-45.

writings of Benjamin N. Cardozo, had far to go until it was to find strong acceptance, for even a little while, in the United States Supreme Court.<sup>6</sup>

### *The Rise of National Power*

Statistically, Justices Cardozo and Stone supported the ever-increasing extension of national power during the early nineteen-thirties more frequently than did other members of the Hughes Court, even though they still refused to support the government's position in a substantial number of cases.

The principal cases and the complex economic circumstances which attended them have been examined at length by many commentators.<sup>7</sup> However, little attention has been directed to the cases represented in Table I with primary emphasis placed on Justice Cardozo's role in these decisions. Although condemnors of the Hughes Court have over the years hastened to vilify the Court for its opposition to the legislation held invalid in Table I, an examination of the cases will indicate in specific terms Justice Cardozo's generally favorable reaction to the policies of the New Deal in so far as they involved an extension of national power within the limits of the Constitution.

In a letter written to his cousin, Maud Nathan, Justice Cardozo commented on his dissent in *Panama Refining Co. v. Ryan*.<sup>8</sup> "I think I have had more glory out of my lone dissent than out of all my majority opinions. But lone dissents are not unusual. Holmes made them a habit, unless my memory is playing me tricks. The same day that I filled the solitary role, Stone was the sole dissenter in another case. The only difference was that mine was in the public eye."<sup>9</sup>

Early in 1935, the Supreme Court in *Panama Refining Co.* declared section 9(c) of the National Industrial Recovery Act unconstitutional. Section 9(c) had authorized the President to prohibit interstate oil shipments if the oil had been produced in violation of a state's production quota. Violations of section 9(c) were indictable as a federal misdemeanor. Chief Justice Hughes, who wrote the Court's opinion, was especially troubled by the alleged absence of an express statutory standard circumscribing the delegation of power to the President. The Court was apparently unwilling to acquiesce to a

6. See generally Atkinson, *Mr. Justice Cardozo on the Supreme Court: State and Federal Taxation*, 5 HOUSTON L. REV. 254 (1967); Mendelson, *Mr. Justice Holmes — Humility, Skepticism and Democracy*, 36 MINN. L. REV. 343 (1952).

7. See generally R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* (1941); A. MASON, *THE SUPREME COURT FROM TAFT TO WARREN* (1958); Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645, 883 (1946).

8. 293 U.S. 388 (1935).

9. G. HELLMAN, *BENJAMIN N. CARDOZO* 293 (1940).

Table I

ACTS OF CONGRESS HELD UNCONSTITUTIONAL DURING  
1931-1937 TERMS: CARDOZO, J., PARTICIPATING\*

Justice	1	2	3	4	5	6	7	8	9	10	11	12
STONE	+	+	+	+	-	-	-	-	-	-	-	-
CARDOZO	+	+	+	-	+	-	-	-	-	-	-	-
BRANDEIS	+	+	+	-	-	-	-	-	-	-	-	-
HUGHES	+	+	-	-	-	-	-	-	-	-	-	-
ROBERTS	-	-	-	-	-	-	-	-	-	-	-	-
SUTHERLAND	-	-	-	-	-	-	-	-	-	-	-	-
VAN DEVANTER	-	-	-	-	-	-	-	-	-	-	-	-
BUTLER	-	-	-	-	-	-	-	-	-	-	-	-
McREYNOLDS	-	-	-	-	-	-	-	-	-	-	-	-

Legend: +: vote for constitutionality; -: vote against constitutionality.

\* Comments on cases taken from S. Rep. No. 711, 75th Cong., 1st Sess. 46 (1937).

1. Railroad Retirement Act; *R.R. Retirement Board v. Alton Co.*, 295 U.S. 330 (1935).
2. Guffey Coal Act; *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Note*: Justices Stone, Cardozo, Brandeis, and Chief Justice Hughes dissented in part.
3. Agricultural Adjustment Act; *United States v. Butler*, 297 U.S. 1 (1936), provision relating to agricultural processing taxes held void.
4. Gold Clause Resolution; *Perry v. United States*, 294 U.S. 330 (1935), held void Section 1 of said act insofar as applicable to gold clause in Government obligations (but recovery was denied because plaintiff did not show damages). *Note*: Eight Justices concurred in holding the statute unconstitutional — Chief Justice Hughes, Justices Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Roberts, and Cardozo; but Chief Justice Hughes and Justices Brandeis, Stone, Roberts, and Cardozo held that the petitioner was not entitled to recover in the suit because he had suffered no damage; while Justices McReynolds, Van Devanter, Sutherland, and Butler dissented on this point. Justice Stone dissented on the ground that, while he concurred with a majority of the Court in holding that the petitioner was not entitled to recover in the suit, because of failure to show any damage, he thought it “unnecessary and undesirable for the Court to undertake to say that the obligation of the gold clause in Government bonds is greater than in bonds of private individuals or that, in some manner and in some measure undefined, it has imposed restrictions upon the future exercise of the power to regulate the currency. . . . There is no occasion now to resolve the doubts which I entertain with respect to these questions.” He stated, therefore, that he did not join in so much of the opinion as held the act unconstitutional.
5. National Industrial Recovery Act, Section 9 (c); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), held void Section 9 (c) of the National Industrial Recovery Act which dealt with “hot oil.”
6. Independent Offices Appropriation Act; *Booth v. United States*, 291 U.S. 339 (1934), held void the provision of the bill reducing pay of federal judges.
7. Economy Act, 1933; *Lynch v. United States*, 292 U.S. 571 (1934), held void the provisions of said act which repealed all laws granting or pertaining to yearly renewable term insurance.
8. National Industrial Recovery Act, Section 3; *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), held void provisions of said act relating to codes.
9. Frazier-Lemke Bankruptcy Act; *Louisville Bank v. Radford*, 295 U.S. 555 (1935).
10. Amended Home Owners’ Loan Corp. Act; *Hopkins Ass’n v. Cleary*, 296 U.S. 315 (1935), held void Section 5 (i) providing for the conversion of state loan associations into federal associations upon vote of 51 per cent of votes cast.
11. Agricultural Adjustment Act Amendments; *Rickert Rice Mills v. Fontenot*, 297 U.S. 110 (1936).
12. Municipal Bankruptcy Act; *Ashton v. Cameron Water Imp. Co.*, 298 U.S. 513 (1936), readjusting of indebtedness by political subdivisions of states.

Congressional delegation of power to the President in the absence of a prescribed standard of presidential conduct.

Although there is no persuasive reason why delegations cannot be validly entered into without express standards,<sup>10</sup> Justice Cardozo assumed in his lone dissent, as did the majority, that a valid congressional delegation of legislative power must be subject to ascertainable limitations. Justice Cardozo, however, discovered a reasonably unambiguous standard governing the President's discretion by looking to the enactment in its entirety. Section 9(c) applied to only petroleum transported in interstate commerce contrary to regulations prescribed by state law. The President was "not left to roam at will among all the possible subjects of interstate transportation, picking and choosing as he pleases."<sup>11</sup> Even though Justice Cardozo was content to abide with the traditional insistence on the presence of standards regulating the activities of the recipient of the power delegated, he was not inclined to view this prerequisite narrowly. He was, instead, prepared to infer the existence of a standard from the legislation, much as a judge deciding a question of contract law might, in the absence of specific language, find an implied promise of consideration in an otherwise complete contract sufficiently definite to sustain its validity. Broadly illustrative of Justice Cardozo's thought in the instant case was his dictum in the New York decision involving the celebrated Lucy, Lady Duff-Gordon.

The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view to-day. A promise may be lacking, and yet the whole writing may be "instinct with an obligation," imperfectly expressed.<sup>12</sup>

So viewed, the delegation of power under section 9(c) was restricted by the context of the legislation which gave rise to the delegation in the first instance. Despite its vagueness, a standard emerged certain enough to sustain the presumption of constitutionality. In memorable language, Justice Cardozo advised the Court:

There is no fear that the nation will drift from its ancient moorings as the result of the narrow delegation of power permitted by this section. What can be done under cover of that permission is closely and clearly circumscribed both as to subject matter and occasion. The statute was framed in the shadow of a national disaster. A host of unforeseen contingencies would have to be

10. See generally K. DAVIS, ADMINISTRATIVE LAW TEXT 31-52 (1959).

11. 293 U.S. at 434.

12. *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 91 (1917).

faced from day to day, and faced with a fullness of understanding unattainable by any one except the man upon the scene. The President was chosen to meet the instant need.<sup>13</sup>

Implicit in Justice Cardozo's dissent was an awareness of the obstacles encountered by the drafters of the invalid legislation. Had the drafters been too precise in stating the terms of the delegation, the statute would not improbably have been unconstitutional as arbitrary and unreasonable. But since the drafters had been imprecise in stating the terms of the delegation, the statute was unconstitutional as an excessive and improper delegation of congressional power.

Some years later, Justice Cardozo spoke candidly about Justice Brandeis' vote in *Panama Refining Co.* to Robert Marshall, then a promising young government official assigned to the Forestry Division. Justice Cardozo believed that Justice Brandeis had voted against the validity of section 9(c) of the National Industrial Recovery Act "because delegation of power didn't fit in his pattern. Brandeis has thought out a pattern for the whole universe and he has a niche into which every fact fits." After a moment's pause he added, almost as an afterthought, "Holmes didn't see any pattern to the universe."<sup>14</sup>

The next major national legislation to come before the Court was the Joint Congressional Resolution of June 5, 1933, which declared the standard gold clauses, then generally found in credit contracts at the creditor's behest, void as against public policy. The purpose of the legislation was to lessen the drain on the national gold supply; further, Congress intended to devalue all money and obligations outstanding in the country and to thereby protect the debtor class. This change in monetary policy also benefited many persons of wealth with interests in commercial institutions which depended on credit and heavy borrowing.<sup>15</sup>

In opinions delivered by Chief Justice Hughes, the government's position was upheld in three of the four Gold Clause cases. With respect to its own obligations, the Court held that Congress had exceeded its authority to act.<sup>16</sup> Technical rules of damage were then found applicable. A recovery to the petitioner which would have set a catastrophic precedent in terms of the national economy was thereby disallowed. Justice Cardozo reportedly assured Chief Justice Hughes he was "100 per cent right" in his view that the Congress could not constitutionally invalidate the gold clause obligations in bonds issued by the federal government.<sup>17</sup>

13. 293 U.S. at 443-44.

14. G. HELLMAN, *supra* note 9, at 254.

15. See generally R. JACKSON, *supra* note 7, at 96-104.

16. *Perry v. United States*, 294 U.S. 330 (1935).

17. 2 M. PUSKY, CHARLES EVANS HUGHES 737 (1951).

Justice McReynolds' dissent warned of "loss of reputation for honorable dealing" which would bring the country "unending humiliation." "[T]he impending legal and moral chaos," he complained, "is appalling."<sup>18</sup>

On May 6, 1935, Justice Roberts unexpectedly took company with Justices Sutherland, Van Devanter, Butler, and McReynolds and declared the Railroad Retirement Act of 1934 unconstitutional in an opinion markedly sweeping in its castigation of the controversial legislation.<sup>19</sup> Chief Justice Hughes was compelled to register a sharp dissent with which Justices Cardozo, Stone, and Brandeis concurred. The majority was not content with merely objecting to those severable portions of the act which conceivably could have been remedied by further legislation. Instead, the majority denounced the constitutional propriety of any compulsory pension act for railroad employees. It was not in itself extraordinary that Justice Roberts had voted with the four Justices generally opposed to New Deal legislation; it was extraordinary that he had worded the opinion as he did. Although the Railroad Retirement Act was not a New Deal measure specifically, it was New Deal in purpose and in spirit. And yet, even the vehemence with which the Court rejected the Railroad Retirement Act left few informed persons completely prepared for the decisions delivered on the Monday of May 27, 1935.

On that day, at the stroke of twelve, page boys as usual parted the velvet curtains, the Justices filed silently into the courtroom, and the three unanimous decisions repudiating the Roosevelt Administration were announced to a stunned audience.

The news of the Court's decisions was hurried to the White House and President Roosevelt's first demand was "Where was Brandeis?" When informed that Justice Brandeis had voted with the majority, an astonished President next inquired, "Where was Cardozo? Where was Stone?"<sup>20</sup> Justice Cardozo had joined with the rest of the Court to declare the Blue Eagle and the Frazier-Lemke Acts invalid, and in the third case Chief Justice Taft's broad interpretation of the President's removal power had been severely restricted.

Before the decisions were delivered, Chief Justice Hughes had taken counsel with Justice Brandeis and had inquired of him whether it would be wise to rebuke the Administration in three cases on the same day. Justice Brandeis had replied that he was unaware of any reason for altering the scheduled delivery of the opinions. Justice Brandeis did not later change his mind. He always maintained that

18. 294 U.S. 330, 381 (1935).

19. *R.R. Retirement Board v. Alton Co.*, 295 U.S. 330 (1935).

20. *See* 2 M. Pusy, *supra* note 17, at 742.

May 27th was "the most important day in the history of the Court and the most beneficent."<sup>21</sup>

The first decision announced on May 27th, *A.L.A. Schechter Poultry Corp. v. United States*,<sup>22</sup> involved section 3 of the National Industrial Recovery Act, which authorized a code of fair competition thereafter promulgated by the President. The Live Poultry Code, drafted under the authority of section 3, purported to regulate the poultry industry in an extensive manner, including *inter alia* the determination of hours, wages, and trade practices. In the Court's opinion, Chief Justice Hughes found this delegation of power to the President invalid and further indicated, in sweeping language, the inadvisability of using the commerce clause as a basis for emergency legislation if the intrastate transaction only "indirectly" affected interstate commerce.

Even though he concurred in the Court's result, Justice Cardozo elected to make explicit his own reasoning. He objected specifically to the Live Poultry Code as an illustration of "delegation running riot."<sup>23</sup> The Live Poultry Code, he concluded, "outruns the bounds of the authority conferred."<sup>24</sup> Section 3 of the National Industrial Recovery Act gave the President general authority to promulgate codes of unfair competition; and yet, the Live Poultry Code was not concerned with the issue of fair competition within the poultry industry. An elaborate set of rules had been established to improve the welfare of the industry, but they were largely unrelated to oppressive or unethical business conduct. For example, Justice Cardozo was disturbed by the Code's provision which prohibited the selective buying of poultry, an established practice which was neither unethical nor oppressive. In a word, Congress had authorized the President to deal with unfair trade practices, but the Live Poultry Code established regulatory guidelines which very nearly brought within its penumbra the total activities of the poultry industry.

Neither did Justice Cardozo accede to the regulation of wages and hours in such part of the petitioner's business as was involved in interstate transactions. The recognition of a basis for wage and hour regulations under the interstate commerce clause would obfuscate any meaningful distinction between activities purely local and those of national significance, so completely were the petitioner's activities centralized in New York state.

The Court of Appeals for the Second Circuit, in an opinion by Judge Learned Hand, had previously affirmed the government's posi-

---

21. A. MASON, BRANDeis 620 (1946).

22. 295 U.S. 495 (1935).

23. *Id.* at 553.

24. *Id.*

tion in *Schechter*. In an unforgettable paragraph in his *Schechter* opinion, Justice Cardozo stayed to take issue with the court below. As is so often true in the law, although the issue before the Court seemed small and insignificant, questions of imposing significance were present, only partially concealed in the opinion. Here the smaller matter considered by Judge Hand and Justice Cardozo was whether the President had been given sufficient authority by section 3 of the National Industrial Recovery Act to regulate the poultry industry by means of the Live Poultry Code. Congressional authority to act under the commerce clause is restricted to interstate commerce among the several states, and Congress has no delegated power to act with respect to intrastate commerce, local in kind, which does not affect interstate transactions. What, then, constitutes local commerce and what is required before commerce becomes subject to the regulation of the national government? This question, as Judge Hand and Justice Cardozo perceived it, goes to the very essence of federalism. Justice Cardozo took notice of the presence of a view which "would obliterate the distinction between what is national and what is local in the activities of commerce."<sup>25</sup> Concerned with the importance of this distinction, and wishing to elaborate its implications, Justice Cardozo enlarged upon Judge Hand's metaphorical use of vibration to illustrate his thought: "Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours 'is an elastic medium which transmits all tremors throughout its territory; the only question is of their size.'"<sup>26</sup> Although Justice Cardozo agreed with Judge Hand that the law's concern is very often with considerations of degree and not of kind (as was thought by the Chief Justice when he relied on a supposed distinction between "direct" and "indirect" affects on interstate commerce), he interpreted the legal seismograph differently than did Judge Hand in the instant case. With only the mildest suggestion of correction, Justice Cardozo observed, "activities local in their immediacy do not become interstate and national because of distant repercussions." He then concluded: "If centripetal forces are to be isolated to the exclusion of the forces that oppose and counteract them, there will be an end to our federal system."<sup>27</sup>

The scale, therefore, must not be misread to the advantage of the national government of delegated powers, and powers exercised beyond the limits of an expressed delegation are powers exercised ultra

---

25. *Id.* at 554.

26. *Id.*

27. *Id.*

vires. Unless the scale is kept on balance, federalism cannot over time be maintained. The question of the desirability of federalism is, of course, a question distinct and apart from the question of its preservation. In the instant case, Justice Cardozo was unwilling to acquiesce in an extension of national power which he found unauthorized by the Constitution. In controversies over the respective provinces of state and national power, as in other questions of degree, he was inclined to pursue the middle way.

The opinion in *Louisville Joint Stock Land Bank v. Radford*,<sup>28</sup> which declared the Frazier-Lemke Act unconstitutional, was delivered by Justice Brandeis. The Frazier-Lemke Act, a particularly improvident piece of legislation, was drafted for the benefit of farm debtors. It was, however, patently class legislation which transferred property from creditor to debtor in the absence of any larger public interest. Most incredibly, the Frazier-Lemke Act failed to provide any remedial procedures whereby the creditor could redeem his interests with the coming of improved economic conditions. If, in fact, a larger public interest was involved, as alleged by the Administration, the exercise of the right of eminent domain was the proper procedure whereby the property should have been confiscated. For, in that case, the burden of the relief would have been borne equally by all through taxation; the procedures adopted by the Frazier-Lemke Act would arbitrarily have discriminated against the creditor class, who might with least equity be made to bear their full financial loss.

The third opinion of the day, *Humphrey's Executor v. United States*,<sup>29</sup> written by Justice Sutherland, sharply cut back into the broad implications of *Myers v. United States*,<sup>30</sup> where Chief Justice Taft had implied that the President's power of removal was an inherent corollary of his power of appointment, and especially so when the appointee had failed to wisely execute the duties entrusted to his discretion. To hold otherwise, Chief Justice Taft had insisted, would prevent the President from insuring the faithful execution of the laws charged to his responsibility under the Constitution. In *Humphrey's Executor*, one William E. Humphrey, a Hoover appointee to the Federal Trade Commission, was in President Roosevelt's estimation strikingly incompetent in his official capacity;<sup>31</sup> however, the President assigned political disagreement as his motive for requesting the appointee's removal.<sup>32</sup> The President's request was sound in the light of Chief

28. 295 U.S. 555 (1935). For an excellent discussion, see A. MASON, *supra* note 21, at 619.

29. 295 U.S. 602 (1935).

30. 272 U.S. 52 (1926).

31. See R. JACKSON, *supra* note 7, at 107.

32. *Id.* at 107-09.

Justice Taft's dictum in *Myers*. Nonetheless, the Court refused to acknowledge a shift away from *Myers* and, instead, strongly implied the appointee had been unconsciously wronged in a manner prohibited by the Constitution. Taken solely as a methodological illustration of appellate decision-making, the *Humphrey's* case was difficult to defend. Taken as substantive doctrine, the opinion was more defensible. The Federal Trade Commission, when established, was purposefully non-partisan. Whether or not President Roosevelt agreed or disagreed with Mr. Humphrey's judgment in matters affecting the Federal Trade Commission was irrelevant. Justice Cardozo found no reason to depart from the Court's judgment, even though the opinion lacked ordinary judicial diplomacy. The dictum in *Myers* on which the President relied should have been expressly disapproved or else strictly limited to the facts there involved.

Although he refused to view the province of national power with overexact restrictiveness, Justice Cardozo was, in the instance of the amended Home Owners' Loan Corporation Act, persuaded that Congress had overreached into an area pre-empted by the reserved powers of the states. Justice Cardozo's opinion in *Hopkins Federal Savings & Loan Ass'n v. Cleary*,<sup>33</sup> written for an unanimous Court, disallowed the conversion of building and loan associations incorporated under state law into federal institutions when conversion was expressly prohibited by state law. Noticeable in *Cleary* was the caution with which Justice Cardozo drafted the opinion. The dictum was circumspect and the holding no broader than was necessary for the disposition of the case.

Confining ourselves now to the precise and narrow question presented upon the records here before us, we hold that the conversion of petitioners from state into federal associations is of no effect when voted against the protest of Wisconsin. Beyond that we do not go. No question is here as to the scope of the war power or of the power of eminent domain or of the power to regulate transactions affecting interstate or foreign commerce. The effect of these, if they have any, upon the powers reserved by the Constitution to the states or to the people will be considered when the need arises.<sup>34</sup>

There was here no evidence of hostility towards the legitimate exercise of national power; there was, however, clear insistence on the need for justifying extraordinary national legislation affecting the states on a basis provided in the Constitution. The amended Home Owners' Loan Act was an attempt by Congress to exercise broad general powers

---

33. 296 U.S. 315 (1935).

34. *Id.* at 343.

affecting quasi-public corporations permitted by the state to conduct business in furtherance of its public policy. The legislation was held unconstitutional because it had not been justified within any of the powers specifically delegated to Congress by the Constitution. In *Cleary*, the national government attempted to disregard Wisconsin law which was expressly contrary to the provisions of the amended Home Owners' Loan Act. Legislation which would have infringed on the quasi-sovereignty of the states was beyond the range of congressional power: Congress had failed to invoke a constitutional grant of power sufficient to its task.

The days of December 9th and 10th, 1935, were reserved for argument in the case of *United States v. Butler*,<sup>35</sup> with the constitutionality of the Agricultural Adjustment Act at issue. The government's position was stated by Solicitor General Stanley Reed in an unemotional and straightforward presentation which emphasized the emergency conditions which had prompted the legislation. Mr. Reed was followed by the very distinguished George Wharton Pepper of the Philadelphia Bar, whose flamboyant oratory had, in an earlier time, marked his career in the United States Senate. The stentorian effectiveness of his style had, if anything, improved with the passing of years. Not since Joseph H. Choate's oration in *Pollock v. Farmers' Loan & Trust Co.*,<sup>36</sup> had the Court been party to a plea of similar strength.

I do not want your Honors to think that my feelings are not involved, and that my emotions are not deeply stirred. Indeed, may it please your Honors, I believe I am standing here today to plead the cause of the America I have loved; and I pray Almighty God that not in my time may "the land of the regimented" be accepted as a worthy substitute for "the land of the free."<sup>37</sup>

Although the majority held the Agricultural Adjustment Act invalid, Justices Cardozo and Brandeis joined in Justice Stone's dissent. With a reminder to the majority that "[c]ourts are not the only agency of government that must be assumed to have capacity to govern,"<sup>38</sup> Justice Stone's dissent emphasized the distinction between judging the wisdom of an act of Congress (which the Court cannot do) and determining whether Congress has in a given case exceeded its power to act.<sup>39</sup>

35. 297 U.S. 1 (1936).

36. 157 U.S. 429 (1895).

37. 297 U.S. 1, 44 (1936).

38. *Id.* at 87.

39. In a memorandum dated February 4, 1936, Justice Stone revealed that in conference Justice Cardozo had contented himself with a remark to the effect that he

The Government was equally unsuccessful in *Jones v. Securities Exchange Comm'n*,<sup>40</sup> where Justice Sutherland went beyond the statutory construction question presented by the facts. Jones had filed a registration statement before the SEC; the Commission had questioned the accuracy of his statement, and had then subpoenaed him to produce his private files. Thereupon, Jones withdrew his registration statement and argued that the Commission's right of investigation had, with his withdrawal, been terminated. The Court agreed with the petitioner, and thereupon took the occasion to castigate the SEC with some harshness. Joined by Justices Brandeis and Stone, Justice Cardozo filed a significant dissent. Justice Sutherland's charge of arbitrary and irresponsible inquiry by the Commission was at once rejected. "Nothing in the case gives color to the argument that the witness was to be subjected to a roving examination without the restraints of pleadings or bounds analogous thereto."<sup>41</sup>

Justice Cardozo's dissent in *Jones* is alive with suspicion of the petitioner's wrong-doing in the telling of untruths or half truths. Few jurists have been as conscious of the importance of ethics in the affairs of business. Perhaps his father's unethical conduct on the New York Supreme Court, which eventually led to his resignation, influenced him more than he may ever have realized.<sup>42</sup> Whatever the importance of his family's past, it can be recorded with certainty that Justice Cardozo would tolerate no compromise with complete and honest disclosure in business dealings. Wrongs committed or attempted, he insisted in *Jones*, "must be dragged to light and pilloried," else the Securities and Exchange Commission Act be made "the sport of clever knaves . . . intent upon obscuring or suppressing the knowledge of their knavery."<sup>43</sup>

Two opinions which further restricted the exercise of national power, and from which Justice Cardozo dissented, were delivered in the spring of 1936. The Court's majority, in an opinion by Justice Sutherland, held the Bituminous Coal Conservation Act, more popularly known as the Guffey Coal Bill, unconstitutional in *Carter v. Carter Coal Co.*,<sup>44</sup> and the Municipal Bankruptcy Act was found unconstitutional

---

agreed with what Justice Stone had said. Justice Cardozo apparently had nothing more to say regarding the case after Justice Stone had stated his views. Immediately before Justice Stone had stated his position, Justice Brandeis had passed without comment. See A. MASON, HARLAN FISKE STONE 414-15 (1956).

40. 298 U.S. 1 (1936).

41. *Id.* at 29.

42. For details, see G. HELLMAN, *supra* note 9, at 10-11.

43. 298 U.S. at 32-33.

44. 298 U.S. 238 (1936).

in *Ashton v. Cameron County Water Improvement Dist.*,<sup>45</sup> in an opinion delivered by Justice McReynolds.

In *Carter*, Justice Cardozo was satisfied that the Act was "within the power of the central government in so far as it provides for minimum and maximum prices upon sales of bituminous coal in the transactions of interstate commerce and in those of intrastate commerce where interstate commerce is directly or intimately affected."<sup>46</sup> The Act, however, contained provisions affecting labor relations within the coal industry which the Court considered invalid; consequently, the entire Act was condemned as unconstitutional, including the price-fixing provisions. The invalid provisions were not considered severable from the rest of the Act even though the Act contained a clause which stated Congress' intention that invalid provisions be condemned apart from the rest of the Act. Justice Cardozo considered the price-fixing provisions valid; the other sections had not been implemented and, hence, their constitutionality was not properly before the Court. "To adopt a homely form of words," said Justice Cardozo, "the complainants have been crying before they are really hurt."<sup>47</sup>

When the Supreme Court held the Municipal Bankruptcy Act unconstitutional, Chief Justice Hughes, as well as Justices Stone and Brandeis, joined in Justice Cardozo's dissent. The Act had been drafted to permit debt-ridden municipal corporations an opportunity to compromise their obligations, with the permission of the major creditors. Only those municipalities duly authorized by state law could avail themselves of the relief permitted in the federal courts under the Municipal Bankruptcy Act. Hence, the Act was inapplicable to any municipality if two prerequisites were not satisfied: 1) state law had to authorize municipal participation and 2) major creditors had to consent to an equitable compromise. It was, therefore, not completely accurate for the Court to conclude the Act constituted an invasion of the fiscal prerogatives of the states. Further, the same objection was made with respect to the rights of the municipalities. A question of sovereignty under the Constitution was at issue. A position at odds with the majority was carefully expressed in dissent. "In the public law of the United States a state is a sovereign or at least a quasi-sovereign. Not so, a local governmental unit, though a state may have invested it with governmental power."<sup>48</sup> The municipalities were without sovereignty and their position as a governmental unit was not compromised; in truth, the legislation was designed to

---

45. 298 U.S. 513 (1936).

46. 298 U.S. at 325.

47. *Id.* at 341.

48. 298 U.S. 513, at 542 (1936).

assist municipal corporations at their option. The Municipal Bankruptcy Act, by the better view, was less an extension of national power than an attempted implementation of national responsibility.

### *Conclusion*

The foregoing discussion has illustrated three aspects of Justice Cardozo's reaction to the broadened exercise of national power under the Roosevelt Administration. First, Justice Cardozo had no sympathy for doctrinaire *laissez-faire* economic theory. Unlike Justices Sutherland, Van Devanter, Butler, and McReynolds, but like Justice Holmes before him, Justice Cardozo entertained the view that "a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez-faire*."<sup>49</sup> Second, Justice Cardozo was aware of the federal government's responsibility to the nation; in an economic crisis of unparalleled dimensions, direction and leadership in the arduous process of national recovery could not for light or transient cause be frustrated by judicial fiat. Even before his appointment to the Supreme Court, Justice Cardozo had observed that cases are not decided in a vacuum devoid of economic and political realities: "Courts know today that statutes are to be viewed, not in isolation or *in vacuo*, as pronouncements of abstract principles for the guidance of an ideal community, but in the setting and the framework of present-day conditions, as revealed by the labors of economists and students of the social sciences in our own country and abroad."<sup>50</sup> Third, Justice Cardozo, like Justices Stone and Brandeis, did not enthusiastically support the Government's position in most of the cases in which national legislation was declared invalid. However, as his opinions clearly indicate, it was not the spirit or intent behind the legislation with which Justice Cardozo was prone to disagree. It was, rather, hastily drafted or improvidently considered legislation which was apt to find his disfavor. "A *constitution*," he once wrote, "states or ought to state not rules for the passing hour, but principles for an expanding future."<sup>51</sup> He was, as one might expect, unwilling to compromise the structure of constitutional government in the United States because of considerations of expediency demanded by the passing hour. Broad national power could be exercised under the authority of the Constitution, but the power so exercised had, as always, to find ultimate justification in the delegating provisions of the Constitution.

---

49. *Lochner v. New York*, 198 U.S. 45, 75 (1905). See also B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 79 (1921).

50. B. CARDOZO, *supra* note 49, at 81.

51. *Id.* at 83.