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THE BETHLEHEM STEEL CASE—A TEST OF THE NEW CONSTITUTIONALISM I.

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THE concurring opinion of Justice Frankfurter in *Graves v. O'Keefe*,¹ delivered three short years ago, contains prophetic words which herald the arrival of the New Constitutionalism, to be shaped and moulded by a new Supreme Court. Herein the learned Justice pointed out that “. . . an important shift in constitutional doctrine is announced after a reconstruction in the membership of the Court.”² His announcement of an impending change in Constitutional doctrine, directed solely to the issues of the *Graves* case and written before the complete “reconstruction” of the Supreme Court, was an accurate prediction that further and sweeping erasures of antiquated Constitutional law might be expected; the promise has now been translated into performance.³

The *Graves* pronouncement fortunately outlined the judicial formula which Justice Frankfurter indorsed in the accomplishment of these shifts in our organic law. He said:

“Such shifts of opinion should not derive from mere private judgment. They must be duly mindful of the necessary demands of continuity in civilized society. A reversal of a long current of decisions can be justified only if rooted in the Constitution itself as an historic document designed for a developing nation.”⁴

Combining in his prescription for the judicial process the requirements of stability of precedents and the limitation of reversals to those which are imbedded in the roots of the Constitution, Justice Frankfurter set down in *Graves v. O'Keefe*, a clear, but necessarily abbreviated, *caveat*

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This paper will be divided into two Parts. The subsequent Part will consider other phases of the New Constitutionalism—and of the *Bethlehem Steel* case.

1. 306 U. S. 466 (1939).
2. *Id.* at 487.
3. See *infra* notes 6-15.
4. *Graves v. O'Keefe*, *supra* note 1 at 487-488.

against unbridled and unrestrained judicial action derived "from mere private judgment".

With this prediction of Constitutional changes in mind, and with a constant focus upon the stated judicial techniques to be followed in bringing about these changes, it is timely to consider herein some of the judicial and extra-judicial results and accomplishments of the New Constitutionalism to date. Following a general and brief survey of the beginnings of the New Constitutionalism, in judicial decisions and in juristic writings, our main purpose will be to examine *United States v. Bethlehem Steel Corporation*⁵—a test case which seems to provide a juristic proving-ground to evaluate the comparative qualities of the Old and the New Constitutionalism.

I

THE NEW CONSTITUTIONALISM

What is the New Constitutionalism? This term naturally connotes a departure from Old Constitutionalism, the beginning of a new juristic era, the overthrow of old landmarks. It is formed of many legal philosophies and theories, not all consistent one with the others, not all present in the same degree or at the same time.⁶ The legal reformation had its modest start many years ago. It was accelerated by the Depression Decade and its many social and economic problems. The advent of the World War II has rapidly hastened the development of a new jural order. It is not necessary for our purposes to review fully the different stages which mark the jural crescendo of the New Constitutionalism, nor to attempt to evaluate the personal contributions of the progressive and liberal jurists who entered into its making.⁷

5. 62 Sup. Ct. 581, 86 L. Ed. 521 (1942).

6. Albertsforth, *The New Constitutionalism* (1940) 26 A. B. A. J. 865; Powell, *Changing Constitutional Phases* (1939) 19 B. U. L. REV. 509; Hamilton, *Special Competence of the Supreme Court* (1941) 50 YALE L. J. 1319; Rottschaefer, *The Constitution and a "Planned Economy"* (1940) 38 MICH. L. REV. 1133.

7. The names Holmes and Brandeis, JJ., stand forth as pioneers in the New Constitutionalism with Cardozo, J. contributing in his all too brief career on the Supreme Court. It was not until the arrival of Frankfurter, J., and the full complement of seven new Justices that the new approach was assured.

The advent of Justice Frankfurter continues the tradition of the scholar on the Supreme Court and gives a literary touch to the judicial opinions of the new era. Deeply grounded in Constitutional and Administrative law by virtue of his many years of teaching and writing in these fields, he combines, in a substantial degree, the rare talents of his distinguished predecessors and mentors, Justices Holmes, Brandeis and Cardozo. *Infra*, pp. 165-167. Kennedy, Book Review (1940) 9 FORDHAM L. REV. 152.

It suffices to sum up the current trends by pointing briefly to some of the new principles and standards applied by the Court, or supplied by commentators—all loosely gathered together under the broad caption, New Constitutionalism.

The noteworthy elements of the New Constitutionalism are:

(1) A vigorous rejection of the theory that the Supreme Court should act as a Super-legislature in the review of Federal or State legislation.⁸

(2) A similar denial that pronouncements of Governmental "policies", evidenced by Congressional statute or Presidential decree, are subject to review or reversal apart from the clear invasion of Constitutional principles.⁹

(3) A strong defense of "freedom of communication" of ideas even in the face of unambiguous legislative mandate directed to the curtailment of such freedom of expression.¹⁰

8. The stand-by policy of the Supreme Court in the review of Federal or State legislation has been particularly pronounced in the field of taxation law. *Madden v. Kentucky*, 309 U. S. 83, 88 (1940); *Whitney v. State Tax Commission of New York*, 309 U. S. 530, 541 (1940); *Illinois Central Railroad v. Minnesota*, 309 U. S. 157, 161 (1940). Nash, *What Law of Taxation?* (1940) 9 *FORDHAM L. REV.* 165.

For an eloquent defense of flexibility of procedure in modern administrative tribunals, divorced from "conventional judicial modes", see Frankfurter, J., in *Federal Communication Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, 142 (1940).

9. Powell, *Some Aspects of American Constitutional Law* (1940) 53 *HARV. L. REV.* 529; Albertsworth, *Current Constitutional Fashions* (1940) 34 *ILL. L. REV.* 519; Willis, *Constitution Making by the Supreme Court Since March 29, 1937* (1940) 15 *IND. L. J.* 179.

It has been contended that the new Court has not wholly abandoned consideration of "policies" of legislatures or executives. Powell, *id.* at 1547; Hamilton and Braden, *The Special Competence of the Supreme Court* (1941) 50 *YALE L. J.* 1319, 1357.

10. Johnson, *Post-War Protection of Freedom of Opinion* (1940) 1 *WASH. AND LEE L. REV.* 192; *cf.* Wright, *Religious Liberty Under the Constitution of the United States* (1940) 27 *VA. L. REV.* 75.

One of the difficulties with the pronounced formula of "let-alone-ism" of the New Court is that the stated policy is not uniformly applied, notably in the free-speech cases. Legislation aiming to regulate free speech and civil liberties finds the going hard when it strikes the Supreme Court. Lerner has been bothered, and Powell and Hamilton too, by this "fault-line" between the Holmesian theory of judicial self-restraint in the broad field of experimental legislation and the contrary trend in civil liberty decisions. LERNER, *IDEAS AS WEAPONS* (1939) 67-68; Powell, *op. cit. supra*, notes 6, 9; Hamilton, *op. cit. supra*, note 6. The confusion has been intensified with the arrival of *Minersville School District v. Gobitis*, 310 U. S. 586 (1940).

Is freedom of conscience less durable judgmentally than "freedom of communication"? The Court refused to interfere with the compulsory flag salute, and stated: "Judicial review, itself a limitation on popular government, is a fundamental part of our constitutional scheme. But to the legislature no less than to courts is committed the guardianship of

(4) An ardent belief in the power of the people to rectify errors of Executive or Congressional policies by way of the ballot box; and a general indorsement of a "hands-off" policy by the judiciary.¹¹

(5) A tendency to fill in void spots in legislation and to supply the unwritten, but probable, intent of law-making bodies.¹²

(6) A gradual relaxation of the doctrine of *stare decisis*,¹³ an enlarged faith in fact-finding,¹⁴ and a decided skepticism regarding the

deeply-cherished liberties." (*id.* at 600) Justice (now Chief Justice) Stone alone dissented: "But it is a long step, and one which I am unable to take, to the position that government may, as a supposed educational measure and as a means of disciplining the young, compel public affirmations which violate their religious conscience." (*id.* at 602).

Commentators in the law reviews have indorsed his vigorous dissent. (1940) 20 B. U. L. REV. 356; (1940) 14 So. CALIF. L. REV. 56; (1940) 14 U. OF CIN. L. REV. 444; (1940) 18 N. Y. U. L. Q. REV. 124; (1940) 39 MICH. L. REV. 149; (1940) 14 TEMP. L. Q. 545; (1940) 4 DETROIT L. REV. 38; (1940) 15 ST. JOHN'S L. REV. 95; (1940) 29 GEO. L. J. 114; (1941) 6 MO. L. REV. 106. The reviews center their criticism of the *Gobitis* case at the level of the issue of freedom of speech versus freedom of conscience. See also *Constitutionality of the Compulsory Flag Salute*, BRIEF OF COMMITTEE ON THE BILL OF RIGHTS OF THE AMERICAN BAR ASSOCIATION (1940); *The Gobitis Case in Retrospect*, (1941) 1 THE BILL OF RIGHTS REV. 267; Burke, *The Founding Fathers and the Bill of Rights, 1791-1941*, SOME PHASES OF AMERICAN CULTURE (1942) 35-36.

Cf. the recent case of *Chaplinsky v. New Hampshire*, 62 Sup. Ct. 766 (1942) which upholds a New Hampshire statute prohibiting the use of "any offensive, derisive or annoying word", directed to one who is lawfully in any street or public place. The restrictive statute was upheld because such offensive utterances form no necessary part of the exposition of *ideas*. The decision is helpful in delimiting more sharply the above stated policy of the Supreme Court to leave open the channels of communication for the advocacy of political or social changes. But the case in nowise narrows the chasm which divides the *Gobitis* case from the civil liberties decisions.

11. Professor Dowling has emphasized the stated tendency as an important feature of Chief Justice Stone's approach to Constitutional questions. *The Methods of Mr. Justice Stone in Constitutional Cases* (1941) 41 COL. L. REV. 1160. But *cf. supra*, note 10.

12. This principle of judicial "interpretation" of legislation is well expressed by Holmes, J., in *Johnson v. United States*, 163 Fed. 30, 32 (1908). Justice Frankfurter refers to the above case as a "pioneer expression" of inferences to be drawn from legislative policy. *Keifer v. R. F. C.*, 306 U. S. 381, 391n (1939). For a recent use of the same formula, see Frank, J., dissenting in *M. Witmark & Sons v. Fred Fisher Music Co. Inc.*, 125 F. (2d) 949, 969 (1942).

13. *Helvering v. Hallock*, 309 U. S. 106, 122 (1940). *Cf.* Roberts, J., dissenting *id.* at 123; Pound, *Individualization of Justice* (1938) 7 FORDHAM L. REV. 153; Pound, *What of Stare Decisis?* (1941) 10 FORDHAM L. REV. 1; Wilkinson, *Some Aspects of the Constitutional Guarantees of Civil Liberty* (1942) FORDHAM L. REV. 50.

14. The judicial use of fact finding dates back at least to *Muller v. Oregon*, 208 U. S. 412 (1908) when Mr. Louis D. (later Justice) Brandeis filed one of the first "fact-finding" briefs. Mr. Felix (now Justice) Frankfurter was closely associated with Mr. Brandeis in this commendable development. Frankfurter, *Hours of Labor And Realism in Constitu-*

validity or permanency of pernicious abstractions or sterile concepts, handed down the ages without any reconsideration of their present-day value.¹⁵

One must begin an analysis of the New Constitutionalism with a genuine and deserved tribute for its insistent expression of the limitation of judicial power within the framework of the Federal Constitution. The old evil of the United States Supreme Court acting as a Super-legislature, occasionally translating into judicial decisions the personalized viewpoint of the Justices, turning back meritorious and needed economic and social reforms, and reviewing questions of legislative expediency and wisdom under the guise of constitutional interpretation—all these shortcomings of the old order have been under attack. During the past few years the accelerated tempo of the new Supreme Court has registered judicial victories over extreme formalism and complacent quietism in the realms of public law.¹⁶

But eternal problems of law long antedating the New Constitutionalism are now coming forth to confront the New Court. Is there any limit to the expansive juridical boundaries which are marked by the title—New Constitutionalism? Is there any danger that the new and reconstructed Court may forget the wise words of Chief Justice Stone warning of the need for self restraint?¹⁷ Are there any indications that the human frailties incident to the tenure of the "Nine Old Men" may return and find lodgment beneath judicial gowns of their more youthful successors?

It would indeed be surprising if the rapid and cataclysmic "shift in constitutional doctrine", predicted by Justice Frankfurter in the *Graves* case, failed to produce temporary abnormalities or enthusiastic over-emphasis upon the advantages of change in legal principles versus the disadvantages of stability of precedents. The horse-and-buggy era of

tional Law (1916) 29 HARV. L. REV. 353. For a collection of recent cases using the fact-approach in deciding issues of Constitutional law, see DODD, *CASES ON CONSTITUTIONAL LAW* (1941) 83-85.

15. For example, see *Helvering v. Hallock*, 309 U. S. 106, 118 (1940).

16. *Supra*, notes 6, 8, 9.

17. "The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint." Stone, J., dissenting in *United States v. Butler*, 297 U. S. 1, 78-79 (1936).

Constitutional law is gone forever, replaced by a motorized model, New Constitutionalism, streamlined and knee-actioned, attuned and adjusted to meet the political, social and economic upheavals of our war-torn world. But let us not forget that the instrument boards of our fastest "P-40's" still contain an altimeter and a direction finder; the magic voice of radio spells bedlam unless grooved and channeled to serve the cause of "freedom of communication" among nations and men. If we are "on our way" it is in order occasionally to inquire where we are going lest—matching the epochal air journey of one Corrigan—we belatedly discover that we have been progressing backwards.

Such long established custom of review of judicial decisions, temperately undertaken,¹⁸ supported by pertinent authorities and constructively developed, is of the very essence of the American "way of life"—and law;¹⁹ it distinguishes our Constitutionalism, Old or New, from the sordid and debased power-philosophy of law which marks the dictator nations.

There are gradual and growing indications that a survey of the lawful metes and bounds of the New Constitutionalism is under way. Beginning with the reasoned and increasing dissents of the learned Justices of the Supreme Court,²⁰ supplemented by the pointed criticisms of com-

18. Justice Frankfurter has finely phrased this freedom to review judicial decisions of the Supreme Court: "Judicial exegesis is unavoidable with reference to an organic act like our Constitution, drawn in many particulars with purposed vagueness so as to leave room for the unfolding future. But the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it". *Graves v. O'Keefe*, 306 U. S. 466, 491-492 (1939). See also FRANKFURTER, *LAW AND POLITICS* (1939) 41. The same thought is eloquently expressed by Chief Justice Hughes at the Exercises Celebrating the One Hundred and Fiftieth Anniversary of the Supreme Court, with the added admonition that the Justices do not write their opinions ". . . with the freedom of casual critics or even of studious commentators, but under the pressure and within the limits of a definite official responsibility." 309 U. S. XIII, XIV (1940). Elsewhere the Chief Justice warns against intemperate criticism of the judiciary and the avoidance of an attitude approaching arrogance in the analysis of judicial opinions by eminent legal experts. Hughes, *Foreword* (1941) 50 *YALE L. J.* 737-738; cf. Hamilton, *Trial by Ordeal, New Style* (1941) 50 *YALE L. J.* 778.

19. "It is fortunate and not regrettable that the avenues of criticism are open to all whether they denounce or praise. This is a vital part of the democratic process." Hughes, C. J., Exercises Celebrating the One Hundred and Fiftieth Anniversary of the Supreme Court, 309 U. S. XIII (1940); see Taney, C. J., in *Passenger Cases*, 48 U. S. 283, 470 (1849).

20. A recent popular survey proclaims the beginning of a new minority and the growth of a new conservatism in the Supreme Court. The writer lists Chief Justice Stone and Justice Roberts on the conservative side; and Justices Douglas and Black on the liberal

mentators,²¹ the time is approaching when a tentative appraisal of danger zones may be ventured, which the New Constitutionalism must avoid in order to continue its formidable record of Constitutional revivification.

II

THE BETHLEHEM STEEL CASE

Seasonally there has appeared in the course of Constitutional history pivotal decisions, "great cases"²² which invite an evaluation of a chain of related decisions, an estimate of current Constitutional trends, and perhaps a modest attempt to forecast coming juristic weather.²³

*United States v. Bethlehem Steel Corporation*²⁴ is such a case: a crossroads decision to try out some of the formulas of the New Constitutionalism. Here is a case which offers a tentative proving-ground to test the current theories that the Supreme Court should not act as a Super-legislature; that Governmental "policies" should not be reviewed by judicial bodies; and that ancient precedents must prove their worth in the new era or be discarded.

Herein also will be found indications of the limits of the new legal liberalism; a stalwart defense of the doctrine of *stare decisis* invoked

side. Justice Frankfurter is generally aligned with the conservative Justices, while Justice Murphy is said to favor the liberal viewpoint. Justices Reed, Byrnes and Jackson are placed "in the middle ground". *Shift in Supreme Court: The New Conservatism*, UNITED STATES NEWS, April 17, 1932, at 19-20.

The force of such an ambitious attempt to label the "liberal" or "conservative" tendencies of the Justices is considerably limited. The most significant item is the following statement: "The Chief Justice has dissented 14 times this term. On nine of these dissents, Mr. Stone has been teamed with Justice Roberts. Justice Douglas has 15 dissents for the term, 12 of these with Justice Black. Not a single dissent of the term has found either Stone or Roberts lined up on the dissenting side with either Douglas or Black." *Id.* at 19.

21. See Professor Powell's vigorous criticism of the judicial decisions of the Supreme Court in his recent articles because of the neglect of the Supreme Court to cite "apposite precedents". See *supra*, note 6, at 520; note 9, at 550.

22. This expression is used by Justice Holmes in *United States v. Northern Securities Company*, 193 U. S. 197, 400 (1904).

23. A partial list of "great cases" might contain the following: *Trustees of Dartmouth College v. Woodward*, 17 U. S. 518 (1819); *McCulloch v. Maryland*, 17 U. S. 316 (1819); *Gibbons v. Ogden*, 22 U. S. 23 (1824); *Dred Scott v. Sandford*, 60 U. S. 393 (1857); *Ableman v. Booth*, 62 U. S. 506 (1859); *Slaughter-House Cases*, 83 U. S. 36 (1873); *Lochner v. New York*, 198 U. S. 45 (1905); *Pierce v. Society of Sisters*, 268 U. S. 510 (1925); *Graves v. O'Keefe*, 306 U. S. 466 (1939). These cases are not "great" for the same reason. Some of them continue their greatness down the years; others merely mark a point of departure, actual or threatened.

24. 62 Sup. Ct. 581, 86 L. Ed. 521 (1942).

to stay an understandable urge to overthrow "historic liberties" in response to righteous indignation and public disdain; a commendable example of judicial courage and restraint which resisted an "accident of immediate overwhelming interest", weighed the importance of the continuity of "well settled principles of law" against the "impulse of the moment", and proposed the correction of the morals of the market place not by an unwise extension of the judicial power, but by "the enactment of a statute in accordance with established forms."²⁵

So stating the jural ingredients of the *Bethlehem* litigation, about to be analyzed in detail, it satisfies the "great-case" specifications as defined by Justice Holmes,²⁶ pioneer and exemplar of the New Constitutionalism.

The *Bethlehem* case takes on an added significance and potential importance when it is noted that the litigation dates back to World War I and brings up for final judicial review penetrating legal problems which may be repeated, and indeed exceeded, in our own day and place. By one of those strange coincidences of time, the case was argued in the Supreme Court on December 9, 1941, two days after Pearl Harbor and one day after the declaration of war by the United States on Japan. The basic facts of *United States v. Bethlehem Steel Corporation*²⁷ are in the main easily and simply stated; the doubts and disputes arising out of this litigation in all its manifold stages center about the underlying questions of law. Subject to specific enlargement in the following pages, the basic facts may now be set down.²⁸

25. The interspersed quotations have been taken from two opinions: (1) Holmes, J., dissenting in *Northern Securities Company v. United States*, 193 U. S. 197, 400 (1904) and (2) *Matter of Doyle*, 257 N. Y. 244, 268 (1931).

26. *Supra*, note 25, at 400.

27. There were two cases before the Court. In No. 8, the Government filed a bill in equity against the following parties: Bethlehem Steel Corporation, Bethlehem Shipbuilding Corporation, Ltd., Bethlehem Steel Company, Fore River Shipbuilding Corporation, Union Iron Works Company. The bill alleged fraud and failure of the duty of the Bethlehem Shipbuilding Corporation to perform the contracts for a fair and reasonable profit. The prayer of the bill was for an accounting. The Bethlehem Shipbuilding Corporation filed an answer and a counterclaim for damages based on an alleged breach of contract by the Fleet Corporation.

In No. 9, Bethlehem brought a suit at law against the Fleet Corporation claiming damages for breach of the same contracts. The two actions were jointly referred by the District Court to a Master. It suffices for present purposes to state that the Master, the Federal District Court and the Circuit Court of Appeals found in substance for Bethlehem on all the material issues of law.

28. All page references to *United States v. Bethlehem Steel Corporation* in the text or footnotes are taken from the Supreme Court Reporter. All references to the individual opinions in the *Bethlehem* case mention merely the particular Justice with a citation of the

The Facts

During World War I, the United States Shipping Board Emergency Fleet Corporation (hereinafter called the "Fleet Corporation") entered into thirteen wartime contracts with the Bethlehem Shipbuilding Corporation, Ltd. (hereinafter called "Bethlehem") for the construction of ships. The contracts followed the formula of negotiation relied upon by the Fleet Corporation and other Government agencies at the time.²⁹

The particular provisions of the contracts, determining the method of fixing the prices, were as follows:

"The price to be paid for each vessel to be constructed and furnished in accordance with the terms of this contract . . . shall be the actual cost, plus the definite sum for profit hereinafter in this Article provided for, based upon an estimated base cost to the Contractor. . . . *Should the actual cost be less than the estimated . . . cost . . . the Contractor shall be allowed as profit on each vessel in addition to said fixed sum for profit . . . one-half the amount by which such actual cost of each vessel falls short of the estimated cost. . . .*"³⁰

appropriate page. All references to the Government's Brief or Bethlehem's Brief will be abbreviated as follows: Government's Brief (G. B.), Bethlehem's Brief (B. B.). The Record of the Bethlehem case in the Circuit Court of Appeals (containing the Special Master's Report, Exhibits, Testimony, etc.), will be referred to as: (R.); and the Concession of Documentary Evidence (containing copies of contracts, letters, etc.), will be referred to as: (C. D. E.).

29. Black, J., at 583.

In the present World War II, the same "marked tendency to enter into contracts by *negotiation* rather than through *competitive bidding*" is present, and a formidable list of reasons for such preference is given by Naval Officers. Investigation of the Naval Defense Program, PRELIMINARY REPORT OF THE COMMITTEE ON NAVAL AFFAIRS, H. R. REP. NO. 1634, PART II, 108-111. (Italics Added).

30. Black, J., at 585-586 (Italics Added); cf. Frankfurter, J. dissenting at 596-598.

This tri-partite method of fixing the price is somewhat like the "target-cost" type of war contract, aptly so called because it aims at an estimated cost—"target" and is said to provide an incentive to cheap production-costs because the resultant "savings" are shared by Government and contractor. This form of contract is now used in Great Britain. "It works in that indeterminate stage during which a more exact knowledge is being built up." Investigation of the National Defense Program, ADDITIONAL REPORT, TRUMAN COMMITTEE, H. R. REP. NO. 480, PART 5 (January 15, 1942) *supra*, note 29, at 112-115. Black, J., at 588, pointed out the similar difficulty of predetermining exact costs due to "rising prices and unpredictable labor supply" in the *Bethlehem* case.

It is said that Powell, Vice President of Bethlehem, had originated the "half-savings" form of contract [Frankfurter, J., dissenting at 595] or was the author of it in this case [Douglas, J., at 605]. But cf. *Uniform Contracts and Cost Accounting Definitions and Methods* (Prepared by the United States Government and published in July, 1917, for use in the making of war contracts) pp. 5-6. Cf. note 33, *infra*.

The italicized clause of the contracts provided the core of the ensuing litigation and is frequently mentioned in the four opinions of the six Justices who participated in the case. Out of this clause came the dominant issues of duress, unconscionable conduct, fiduciary relationship and the divisibility of the contracts. This clause likewise marks the scope of the present analysis of the *Bethlehem* decision.

The creation and exercise of Governmental power to enter into said contracts was derived by the Fleet Corporation mediately from Congress and immediately from the President, who was granted sweeping war powers by the Congress.³¹ Three alternative methods were given by the Congress to the President in its formation of legislative policies regarding the emergency shipbuilding program:

"(1) the power to commandeer shipbuilding plants and facilities,

"(2) the power to purchase ships at what he deemed a reasonable price with a provision for subsequent revision by the courts in the event the seller regarded the price set as unfair, and

"(3) *the power to purchase or contract for the building of ships at prices to be established by negotiation.*"³²

After due deliberation the Fleet Corporation elected to forego the delegated Legislative options (1) to seize the shipbuilding plants; or (2) to fix a reasonable price for the purchase of ships subject to judicial review. Instead, the Fleet Corporation exercised the third method allowed by Congress and chose to negotiate with shipbuilding companies at the level of commercial bargaining.³³

31. Black, J., at 584. Holmes, J., in *Sloan Shipyards Corporation v. United States Fleet Corporation*, 258 U. S. 549, 565-566 (1922) gives the history of the legislation of Congress establishing the Fleet Corporation, subsequently enlarging its powers, and resulting in the creation of a Governmental agency, "with enormous powers". The significance of the nature and extent of the powers vested in the Fleet Corporation will be later developed. *Infra*, pp. 153-157.

32. Black, J., at 584. (Italics added.)

33. Black, J., at 584. In view of the focal issue of "duress" and the confusing question of judicial power to review Governmental policies by the Supreme Court, (both problems to be later developed, *infra*, pp. 148-153 and pp. 157-162) it is important to note the chronology of events leading up to the making of the stated contracts.

The certificate of incorporation of the United States Shipping Board Emergency Fleet Corporation was dated April 16, 1917 under the sub-chapter 4 of the incorporation laws of the District of Columbia (C. D. E. 592). The Fleet Corporation functioned as a skeleton organization until July 11, 1917, when the President, by virtue of powers conferred by Congress on June 15, 1917, transferred to the Fleet Corporation all powers vested in him to purchase or requisition vessels, built or building, and to contract for or requisition new ships. (C. D. E. 632-633). This explains the anticipatory action of Fleet Corporation

This designated formula of free contract, to be used by Fleet Corporation in its dealing with the ship contractors, was carried into the negotiations with Bethlehem. The main issue centered about price. The Government first proposed and then abandoned a lump-sum arrangement due to Bethlehem's reluctance to fix a static price in view of the uncertainty of material and labor costs.³⁴ Following a rejection by the Fleet Corporation of a proposal by Bethlehem that the General Manager of Fleet Corporation should fix the price,³⁵ the tri-partite provision (actual cost, plus fixed fee, plus the "half-savings" clause) was incorporated into the contract.

The *Bethlehem* litigation, comprising two actions, was focused about the amount legally due under the executed contracts.

The Government contended *inter alia* (1) that the so-called "bonus-for-savings" clause was conditioned upon proof of actual "savings" induced by special efforts and increased efficiency of Bethlehem; (2) that the savings clause, if construed to permit Bethlehem to share in the "savings" however caused, was void because of lack of consideration; (3) that the profits obtained by Bethlehem were inordinate and excessive; and (4) that the contracts were exacted through duress or unconscionable acts by Bethlehem.³⁶

Bethlehem contended (1) that the language of the "half-savings" clause regulating final payment is plain and unambiguous; (2) that the "half-savings" provision is supported by ample consideration; (3) that there was no duress; (4) that the contracts were not unconscionable;

in holding a preliminary meeting with shipbuilders on June 15, 1917, almost a month before the transfer of war powers to Fleet Corporation by the President. (Frankfurter, J., dissenting at 595).

Another chronological difficulty remains: When did Powell begin to "insist" on the "half-savings" formula? Frankfurter, J., says "Throughout the entire negotiations which followed [the first meeting between Bethlehem and the Fleet Corporation on June 15, 1917], the Fleet Corporation tried to persuade Bethlehem to enter into 'lump-sum' contracts. Powell refused, insisting upon the so-called 'half-savings' form of contract which he had originated." The first written disclosure of the "half-savings" formula appears in Powell's letter to the Emergency Fleet Corporation, dated December 13, 1917, six months after the initial conference between Bethlehem and the Fleet Corporation, held on June 15, 1917. (C. D. E. 201-202; cf. Frankfurter, J., dissenting at 595). There are indications that Powell, Vice President of Bethlehem, discussed orally the matter of the "half-savings" clause with Piez, General Manager of the Fleet Corporation, before December 13, 1917. (R. 1333-1337; 1352-1353).

34. Black, J., at 588; Frankfurter, J., dissenting at 595; G. B. at 6; B. B. at 60-61.

35. Black, J., at 588; Frankfurter, J., dissenting, at 595.

36. The four points are found in G. B. at 31, 42, 51, 63, 75.

and (5) that the Government is asking the Supreme Court to exercise a function of Congress in respect of the regulation of profits.³⁷

Lack of space plus the novelty and overpowering importance of the charges by the United States of duress and unconscionable conduct exerted by a private corporation necessitate a limitation to these stated points,³⁸ especially so because they provide an adequate "bridgehead" from which to explore the contours of the New Constitutionalism and the metes and bounds of judicial discretion in general.

But it may be helpful to make a few preliminary observations that will serve to narrow and delimit the stated charges of duress against the Government and unconscionable conduct by Bethlehem:

(1) The original charge by the United States that Bethlehem was guilty of fraud in its negotiations with the United States, was withdrawn, following a finding by the Master, approved by the Federal District Court and the Circuit Court of Appeals, that "the estimates submitted by Bethlehem . . . were fairly and honestly made and as accurate as could be expected under the uncertain conditions then prevailing."³⁹

(2) The exhibits offered in evidence by Bethlehem, "the accuracy of which the government has not challenged," indicate that the profits made by Bethlehem in the instant case were not exceptional for wartime industries.⁴⁰

(3) The "generously inclusive formula" for determining "actual cost", which was used in contracts with other shipbuilders by the Fleet Corporation, eliminated all risk of financial loss by Bethlehem.⁴¹

(4) All of the Justices participating in this case were indignant at Bethlehem's claim of 22% profit.

(5) The Justices likewise agreed that the Government had power to rectify the statutory loop-holes which permitted the use of such an objectionable method of fixing prices in war contracts, but differed as to the proper Department of Government constitutionally or

37. The five points are found in B. B. at 22, 52, 58, 70, 77.

38. The principal point omitted is the question whether the "half-savings" clause was divisible so that Bethlehem could not recover its part of the "savings" without proof that the savings resulted from its increased efficiency. Justice Douglas so argued. Douglas, J., at 604-607; *cf.* Black, J., at 586-587.

It is intended to discuss the contract question and other problems of the *Bethlehem* case in a later installment. See *infra*, note 109.

39. Black, J., at 586.

40. Black, J., at 590-591; *cf.* Frankfurter, J., at 602.

41. Black, J., at 584; Frankfurter, J., at 598.

legally authorized or empowered to initiate the corrective processes. The prevailing Justices argued that the relief must be found in Congress, while Justice Frankfurter in his scholarly dissenting opinion contended that the Supreme Court could intervene to review and to restrict the profits derived from the price-formula negotiated under the circumstances disclosed in the *Bethlehem* litigation.⁴²

Frequently in the past the "personal" equation entering into Constitutional decisions by the Supreme Court has been emphasized by commentators.⁴³ A similar survey regarding the relation of the individual Justices to the principal case deserves at least brief mention. Only six Justices participated in the decision. The Chief Justice and Justice Jackson took no part because of their association with the United States as former Attorneys-General. Mr. Justice Roberts also withdrew from the case. Of the remaining six Justices, Justice Black delivered the opinion of the Court, which rejected the Governmental charges of duress and inequitable conduct. Justices Reed and Byrnes concurred. Justice Murphy concurred in a separate opinion. Justice Douglas fully agreed with the views expressed by Justice Black on the points of duress and coercion, but dissented on the issue of divisibility or severability of the "savings" clause of the contracts. Thus it appears that five of the six sitting Justices rejected the contention of the United States that the duress of Bethlehem dominated in the making of these wartime contracts, Justice Frankfurter alone agreeing with the Government that the claims of duress and unconscionable conduct were established. But the voluntary withdrawal of three Justices, the partial dissent of Justice Douglas and the carefully developed and ably argued dissent of Justice Frankfurter presage the possibility of a later review by the full Court of the penetrating and novel problems now to be examined.⁴⁴ These

42. Black, J., at 591-592; cf. Frankfurter, J., *passim*.

43. Many attempts have been made to appraise former or present Justices of the Supreme Court in terms of their economic and extra-legal views or lack of them. Cohen, *Transcendental Nonsense and the Functional Approach* (1935) 35 COL. L. REV. 809, 810-813. Cf. Kennedy, *Functional Nonsense and the Transcendental Approach* (1936) 5 FORDHAM L. REV. 272, 286-289; Cohen, Correspondence (1936) 5 FORDHAM L. REV. 548-551; Kennedy, *More Functional Nonsense—A Reply to Felix S. Cohen* (1937) 6 FORDHAM L. REV. 75, 82-85.

For additional examples of present-day attempts to catalogue the Justices of the Supreme Court see the writer's paper *Portrait of a Realist, New Style* (1941) 10 FORDHAM L. REV. 196, 202-203n, 204n. See also, Rodell, *Felix Frankfurter, Conservative* (1941) 183, HARPERS MAGAZINE 449; Powell, *Some Aspects of American Constitutional Law* (1940) 53 HARV. L. REV. 529, 535-536; *supra*, note 20.

44. The *Bethlehem* case is one of first impression, (Black, J., at 587), decided in the

divisional factors in the *Bethlehem* decision cast a shadow upon the permanency of the instant case as a binding authority.⁴⁵

A Novel Contention

The first matter of importance in the consideration of the charge of duress advanced by the United States against Bethlehem is the fact that the stated defense was "the first instance", so far as the majority of the Court were aware, "in which government has claimed to be a victim of duress in dealings with an individual".⁴⁶ Nor did the Government's able Brief reveal a case which squarely presents an established claim of duress against Government in its contractual relations with an individual or private corporation.⁴⁷

At the very outset, it therefore appears that the problem of *stare decisis* enters the *Bethlehem* case and calls for brief consideration of a doctrine long recognized in the history of Anglo-American law.⁴⁸

absence of three Justices, and disclosing four opinions written by the six Justices who participated. Cf. Frankfurter, J., in *Helvering v. Hallock*, 309 U. S. 106, 119-122 (1940). Cf. *Stettler v. O'Hara*, 243 U. S. 629 (1917) and *Adkins v. Children's Hospital*, 261 U. S. 525 (1923). For additional comment and cases bearing upon the question of the force of particular decisions as precedents, see BRANDT, *HOW TO FIND THE LAW* (3d ed. 1940) 287-297.

45. Justice Shientag recently offered a scholarly article on Lord Mansfield, which discloses the long-continued effect of a dissenting viewpoint. Two centuries after his minority opinions were delivered, American law, especially contract law, is translating his dissents into current legislation. Shientag, *Lord Mansfield Revisited—A Modern Assessment* (1941) 10 FORDHAM L. REV. 345, 361-368.

46. Black, J., at 587.

47. The closest line of cases mentioned by the Government seems to be the "salvage" cases. G. B. at 63-75. These cases are considered later. *Infra* pp. 148-151.

48. The *Bethlehem* case is unusual in that it centers in the main about questions of common law, rather than problems of Federal law, Constitutional or statutory. (Black, J., at 587, 590; Murphy, J., at 592; Douglas, J., at 604-606; Frankfurter, J., *passim*). The fact that this is largely a common law decision and not one moving principally in the area of Constitutional law is likewise evidenced by the kind of legal problems herein litigated (e.g. divisibility of contract, duress, fiduciary relations, etc.). The importance of the rather complete absence of Constitutional law in the *Bethlehem* case is due to the fact that there is a greater degree of flexibility in the doctrines of Constitutional law than in the more rigid common-law rules and principles. It is true, as Professor Frankfurter points out, that "the Supreme Court has . . . ceased to be a common law court. The stuff of its business is what on the continent is formally known as public law and not the ordinary legal questions involved in the multitudinous lawsuits of *Doe v. Roe* of other courts." FRANKFURTER, *LAW AND POLITICS* (1939) 29. But this generalization is qualified occasionally by the nature of the legal problems arising in the area of "public law". That the *Bethlehem Steel* decision moves away from the field of Constitutional law into the area of

How far should a Court go in the exercise of the judicial discretion which has been variously defined as "judge-made law" or "judicial legislation"? The ever present issue between legal stability and change, between adherence to precedents and the urge to improve rules and principles, defies definite solution in terms of a precise legal formula. One of the simplest statements of the problem, outlining in a general way the basic test to be applied, was first expressed by Dean Pound and repeated by Judge Cardozo: "Law must be stable and yet it cannot stand still."⁴⁹ The generalization is simple of statement but exceedingly difficult to apply in individual cases.

But there are helpful aids which deserve constant repetition, jural sign-posts which warn against the dual dangers inherent in the judicial process: the sudden and unconsidered departure from the settled stream of precedents on the one hand,⁵⁰ and the equally disastrous consequences of a frozen formalism and static complacency which marks the ultra-conservative position. A complete vacuum of legal precedents in the vast warehouse of common law authorities accumulated after centuries of controversial litigation, is a pertinent fact of no mean proportion. At the very least, a plea for a reevaluation of a settled principle enjoying an age-old monopoly in the realms of judicial decisions, calls for careful reflection and studied analysis before the ancient rule is materially changed. The burden of proof properly rests upon the advocate or judge who proposes substantial change in legal doctrine; classic legal landmarks are at least entitled to the presumption of validity and a "day in court".

With this review of common-law solidarity in mind, a deserved tribute is due to the Supreme Court for its adherence to the doctrine of *stare decisis* in a "hard case" which impelled the Justices without emotional

the common law must be considered a factor in appraising the extent of judicial discretion allowable in the overthrow of old precedents. See Powell, *supra* note 9, at 534.

49. Dean Pound opens one of his well-known books with the stated sentence. POUND, *INTERPRETATIONS OF LEGAL HISTORY* (1923) 1. Judge Cardozo begins and ends his *THE GROWTH OF THE LAW* (1924) 2, 143, with the same maxim.

50. No man has done more than Justice Frankfurter to warn against precipitate acceptance of social and economic data without critical examination. FRANKFURTER, *LAW AND POLITICS* (1939) 287-298.

The writer's article, *A Review of Legal Realism* (1940) 9 *FORDHAM L. REV.* 362, deals with this tendency to accept personalized and pseudo-scientific conclusions as sufficient bases for the ouster of well-settled rules and principles of law. *Obiter Dicta, Pragmatism in Practice* (1939) 8 *FORDHAM L. REV.* 136; *Matter of del Drago*, 287 N. Y. 61, 38 N. E. (2d) 131 (1941).

enthusiasm to follow the path of the authorities in the belief that the common good would be thereby enhanced and to reject pressing and plausible reasons arguing for a departure from precedents. The following pages will be devoted largely to a consideration of the enduring wisdom and long-range soundness of the common-law principles courageously upheld by the Supreme Court.

III

WAS THE GOVERNMENT UNDER DURESS?

In view of the admitted novelty and importance of the proposal to include Government for the first time as a party protected in its dealings with citizen or private corporation under the doctrine of common-law duress, it is necessary to consider carefully the able and exhaustive analysis of analogous authorities which mark the Brief of the Solicitor General and the dissenting opinion of Justice Frankfurter in the *Bethlehem* case. Massing a formidable and varied collection of legal authorities on the law of duress, the Government and Justice Frankfurter cited a number of collateral categories in the law and analogies to support the argument that the stated contracts were made under duress exerted by Bethlehem against the United States.⁵¹ But one alleged parallel instance of duress, emphasized by the Government, deserves special mention.

"Traffic of Profit" versus "Public Duty"

A particular analogy invoked by the Government⁵² and stated by Justice Frankfurter to be "strikingly analogous to the case at bar"⁵³ came forth from the decisions of Courts of Admiralty which hold that an agreement for salvage service to be rendered to a ship in distress is subject to the close scrutiny of the Courts in order to relieve against possible duress. A typical case mentioned by the United States and the dissenting Justice is *Post v. Jones*, wherein the court said:

"They [the Admiralty Courts] will not tolerate the doctrine that a salvor can take the advantage of his situation, and avail himself of the calamities of

51. G. B. at 63-75; Frankfurter, J., at 600-601. It is noteworthy, as further proof that the *Bethlehem* case is one of first impression (*supra*, note 44), that neither the Government nor the scholarly dissenting Justice was able to cite a case wherein the charge of duress against a sovereign was sustained. The list of authorities regarding duress did not disclose a single case where the strong arm of Government was atrophied by the forceful act or domination of individual or corporation.

52. G. B. at 68-70.

53. Frankfurter, J., at 601; *cf.* Black, J., at 589.

others to drive a bargain; nor will they permit the performance of a *public duty* to be turned into a *traffic of profit*.”⁵⁴

In the *Post* case the Court set aside a forced sale of the cargo of a vessel stranded thousands of miles from port to the owners of nearby vessels of the same fishing fleet. Another quotation from the *Post* case, which was used in the Government's Brief,⁵⁵ may be helpful in appraising the emphasized analogy between the mariner in distress and the United States in time of war:

“The contrivance of an auction sale, under such circumstances, where the master of the *Richmond* was hopeless, helpless, and passive—where there was no market, no money, no competition—where one party had absolute power, and the other no choice but submission—where the vendor must take what is offered or get nothing—is a transaction which has no characteristic of a valid contract.”⁵⁶

To liken the Fleet Corporation of the United States to the master of a stranded vessel, whom the Court found to be “hopeless, helpless and passive—where there was no market, no money, no competition” seems to be highly debatable as a formidable analogy. To link Bethlehem with the unconscionable salvor who “had absolute power”, and to assimilate the position of the Fleet Corporation with that of the unfortunate shipmaster who “had no choice but submission” strains the Government's analogic reasoning to a considerable degree. The demonstrable differences between the Government and the “hopeless” shipmaster, and between the Bethlehem Steel Corporation and the salvors, cast grave doubts upon the Government's concluding contention that the law of duress based upon economic pressure “. . . should be enforced with redoubled solicitude in the case of contracts entered into by the Government under the compulsion of an overriding national emergency.”⁵⁷

54. *Post v. Jones*, 19 How. 150, 160 (U. S. 1857). This quotation was used by Justice Frankfurter in his dissenting opinion at 601 (italics added) and the case was cited in G. B. at 68.

55. G. B. at 69.

56. *Supra*, note 54, at 159.

57. G. B. at 70.

It is pertinent to note the apparent shift in the position of the Government in the *Bethlehem* case on the matter of “economic pressure” from its position on “economic coercion” in *United States v. Butler*, 297 U. S. 1 (1936). In the stated *AAA* case, the position of the Government was that there was no duress asserted against the farmers because they were free to accept or reject the permissive Governmental aid: “We distinguish, of course, between the use of Federal money to coerce some action by an individual, and the inducement to the individual.” (Argument of the Solicitor General, at p. 12). See also

Courts of Admiralty very properly consider the contractual relations arising out of the hazardous callings of those who go down to sea in ships. Salvage contracts are subject to close scrutiny by the Admiralty Courts and are closely scanned in accordance with rigid rules not applicable to suits at law or in equity.⁵⁸ Nor is this salutary principle limited to salvage service. Seamen have long been treated as "wards of Admiralty" by the protective arm of Government operating through the Admiralty Courts.⁵⁹

But there is a wide expanse of juristic waters between a ship stranded at sea thousands of miles from its home port and the Ship of State sailing the tempestuous seas of a "national emergency". As Chief Justice Hughes stated in *Home Building & Loan Association v. Blaisdell*:

the dissenting opinion of Stone, J.: "Threat of loss, not hope of gain, is the essence of economic coercion." (p. 81).

Cf. the Government's Brief in the *Bethlehem* case: "These examples [of duress operating against masters of vessels in distress] are but specific instances of a more pervasive rule of general contract law that duress exists whenever the consequences of resisting economic pressure to accept an unequal agreement would be catastrophic to the individual and injurious to social interests deserving of protection." (G. B. 70) *Cf.* Frankfurter, J., at 599, in the *Bethlehem* case: "The fact that the representatives of the Government entered into the contracts 'with their eyes wide open' does not mean that they were not acting under compulsion."

It is respectfully submitted that the test of duress developed by Justice [now Chief Justice] Stone, and apparently accepted by the Government in the *AAA* case, was not invoked by the Government in the *Bethlehem* case. The "hope of gain" actuated the Fleet Corporation, primarily at least, in electing to waive its authority to capture the ship-building plants or to fix prices unilaterally subject to judicial review. (See Black, J. at 588).

This "hope of gain", wholly separated from "threat of loss", is still present in the formulation of Governmental policies today. See Investigation of the Naval Defense Program, PRELIMINARY REPORT, H. R. REP. No. 1634, Part I, p. 109, wherein the advantages of negotiated war contracts are enumerated by Government experts.

58. *The Tornado*, 109 U. S. 110 (1883); *The Elfrida*, 172 U. S. 186 (1898).

59. *Bonici v. Standard Oil Co.*, 103 F. (2d) 437 (1939); *Sitchon v. American Export Lines*, 113 F. (2d) 830 (1940); *Hume v. Moore-McCormack Lines*, 121 F. (2d) 336 (1941). The *Hume* case defends the status of a seaman as a "ward of admiralty" and the right of the Court to reject a release signed by the seaman without counsel or independent adviser. Judge Frank, writing for an unanimous court, stresses the *power* of Government rather than its *feebleness*. He says: "The hand that guided national defense must be visible and forceful; the nation's very existence being at stake, there was no room, when it came to sea-power, for the minimalist dogma that the best government is invariably that which governs the least". (Frank, J., at 345). Judge Clark in the *Bonici* case, *supra*, traces back the rule of "wards of admiralty" to the ". . . tender consideration of admiralty for these 'favorites' of the court who are 'a class of persons remarkable for their rashness, thoughtlessness, and improvidence' . . ." (Clark, J., at 438.)

"While emergency does not create power emergency may furnish the occasion for the exercise of power".⁶⁰ This now famous case, decided in the early days of our economic depression, upheld the right and power of the individual states to protect their citizenry against "economic pressure" in time of peace. Certainly this residual power of a State to save itself in peace time is not lacking to the National Government in time of war. Indeed, the Chief Justice cited the breadth of war powers to sustain his argument that Government can meet and overcome emergencies in time of peace:

"Thus, the war power of the Federal Government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme coöperative effort to preserve the nation."⁶¹

Concluding the alleged analogy offered by the Government between the distressed ship at sea and the Ship of State in wartime, it is respectfully submitted that distress of Government in wartime spells power, constitutionally exercised and permitting "the harnessing of the entire energies of the people"; its favored position is far removed from that of the storm-tossed mariner at an auction sale. Certain it is that the attempt to reduce the United States to the status of a "ward of Admiralty" was properly and decisively rejected by the Supreme Court.⁶²

Government—Feeble or Strong?

The nub of the *Bethlehem Steel* case is focused about the curt reference by Justice Black to the "febleness" of the United States in contrast with the "overpowering strength on the side of a single private corporation".⁶³ Here is the heart of the legal problem: Is it true that the complete scenario of the *Bethlehem* case depicts an enfeebled sovereign overcome by a mighty corporation? Justice Frankfurter meets the issue squarely in the following words:

60. 290 U. S. 398, 426 (1934).

61. *Ibid.*

62. Black, J., at 589-590.

"Thou too, sail on, O Ship of State!
Sail on, O Union, strong and great!
Humanity, with all its fears,
With all its hopes of future years,
Is hanging breathless on thy fate!"

—LONGFELLOW.

63. Black, J., at 587.

"To deny the existence of duress in a Government contract by ironic reference to the feebleness of the United States as against the overpowering strength of a single private corporation is an indulgence of rhetoric in disregard of fact. The United States with all its might and majesty never makes a contract. To speak of a contract by the United States is to employ an abstraction. We must not allow it to become a blinding abstraction. Contracts are made not by 130 million Americans but by some official on their behalf."⁶⁴

The juristic argument that the United States never makes a contract is true in so far as it proclaims that the artificial entity we call the United States of America acts, and must act, through its officials and agencies, duly authorized to represent the sovereign. But it is respectfully suggested that the argument of the scholarly Justice proves too much. Without more than formal changes, the quoted passage might be lifted out of the text and used to describe the actions of the Bethlehem Steel Corporation, a mighty entity and another abstraction, which has never yet raised a pen to sign a contract.⁶⁵ The same realistic approach leads to the conclusion that the hiatus which separates the United States from its officers and citizens similarly divides Bethlehem from its officials, stockholders and employees.

Avoiding the many conflicting theories of the nature of a state, its relation to people and the source of its power,⁶⁶ it is respectfully submitted that the realistic severance of the United States from its authorized agencies is questionable; a contract *with* the United States is no mere abstraction. Even in the realms of practicality and realism, the sovereign power of the United States is at least latent throughout the preliminary negotiations, concededly opposed by the might and strength of the Bethlehem Corporation, both acting through legally authorized agencies. The panoply of power, corporate or Governmental, does not fall so easily from the individual agencies or representatives of the two

64. Frankfurter, J., at 601.

65. Elsewhere in his opinion, Justice Frankfurter states the fact that "Bethlehem was the largest shipbuilding company in the world." (Frankfurter, J., at 593-594.)

66. See Justice Holmes' opinion in *Kawananakoa v. Polyblank*, 205 U. S. 349 (1907); cf. Frankfurter, J., in *Keifer v. R. F. C.*, 306 U. S. 381, 388n (1939). Judge Frank has recently reviewed the origin of the maxim "The King Can Do No Wrong" and contends that the insulation of the Government from actions by its citizens does not derive out of the classic phase. *Hammond-Knowlton v. United States*, 121 F. (2d) 192, 204-206 (1941). Incidentally, the opinion of Judge Frank in the *Hammond* case seems to follow the position of the prevailing Justices in the *Bethlehem* case on the issues of *stare decisis*, suability of the Fleet Corporation, judicial protection of the interests of the citizen in relation to the Government, etc. *Hammond* case, *passim*.

contracting parties; they carry into their give-and-take bargaining the strength and greatness of their respective organizations.

Status of the Fleet Corporation

In view of Government's attempt to insulate the United States from liability in the *Bethlehem* case on the ground that "the Government agents were without authority to enter the contracts"⁶⁷ and the contentions of the learned dissenting Justice that the United States is an abstraction which never makes a contract and enjoys the immunity of a sovereign in situations wherein a private party might be bound,⁶⁸ it is important to consider the nature, origin, powers, and liabilities of the Fleet Corporation. It is believed that such a study will disclose additional weaknesses in the Government's case and additional reasons why judicial precedents and sound policy argue against the Government's defense of non-liability for profits claimed by Bethlehem.

The full title of the Fleet Corporation, it is important to recall, is the United States Shipping Board Emergency Fleet Corporation. This corporate entity was not created directly by Congress, nor was it chartered by the Federal Government. The USSBEFC was created under the general corporation laws of the District of Columbia in accordance with authority emanating from Congress to the President and by him transferred to the new corporate entity.⁶⁹ The exact legal status of USSBEFC was clearly developed by Justice Holmes in the leading case of *Sloan Shipyards Corporation v. United States Shipping Board Emergency Fleet Corporation*:

"The Shipping Act contemplated a corporation in which private persons might be stockholders and which was to be formed *like any business corporation* under the laws of the District [of Columbia], with capacity to sue and be sued. The United States took all the stock but that did not affect the legal position of the company."⁷⁰

Dismissing the argument that the tremendous powers given to the Fleet Corporation by way of Congressional enactment placed it in the position of the sovereign and allowed it to share the immunity of the sovereign from suit, Justice Holmes concluded that the Fleet Corporation could

67. G. B. at 85-86.

68. Frankfurter, J., at 601n.

69. *Supra*, note 31.

70. 258 U. S. 549, 565 (1922). Italics added. This method of incorporating a Federal agency under ordinary corporation statutes is not exceptional. *Olson v. United States Spruce Production Corporation*, 267 U. S. 462 (1925).

be sued even in State courts and that the immunity of the sovereign to suit could not be invoked by its separate corporate agency.⁷¹

This basic principle, which denied to the Fleet Corporation the procedural protection which is extended to the United States, has since been frequently affirmed.⁷² In *Keifer v. Reconstruction Finance Corporation*,⁷³ Justice Frankfurter traced the advantages to Government which followed the creation of such separate corporate entities.⁷⁴ Replying to the same contention raised by the Government in the *Sloan Shipbuilding* case, that these corporate arms of the sovereign were immune from suit because of their performance of Governmental work, the following striking language was used in the *Keifer* case: ". . . the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work."⁷⁵

Translating the principles of the *Sloan Shipbuilding* and *Keifer* cases regarding the nature and status of the Fleet Corporation into the *Bethlehem* case, it is submitted that the entire development of separate corporate agencies⁷⁶ and "Authorities"⁷⁷ of Government, Federal or State, legally and equitably renders strong support to the position of Justice Black and the concurring Justices in the principal case. It is pertinent to recall that the thirteen contracts involved in the *Bethlehem* litigation were signed by the "United States Shipping Board Emergency Fleet Corporation" and the "Bethlehem Shipbuilding Corporation, Ltd." It is true that the abstraction, "United States of America", did not physically affix its signature to these contracts nor was it written down by any of its corporate subsidiaries or their officials.⁷⁸ But this fact, it now ap-

71. *Sloan Shipyards v. United States Fleet Corporation*, 258 U. S. 549, 568 (1922).

72. *Keifer v. R. F. C.* 306 U. S. 381 (1939); *United States v. Shaw*, 309 U. S. 495 (1940); *Federal Housing Administration v. Burr*, 309 U. S. 242 (1940).

73. 306 U. S. 381 (1939).

74. *Id.* at 390, 391.

75. *Id.* at 388.

76. Thurston, *Government Proprietary Corporations* (1935) 21 VA. L. REV. 351, 465; Field, *Government Corporations: A Proposal* (1935) 48 HARV. L. REV. 775; *Keifer v. R. F. C. supra*, note 73 at 390n.

77. See informative articles by E. H. Foley, Jr., General Counsel of the United States Treasury, stressing the advantages to the Government in the creation and use of "Authorities" in the States and Municipalities. Foley, *Some Recent Developments in the Law Relating to Municipal Financing of Public Works* (1935) 4 FORDHAM L. REV. 13; *The Case of Tierney v. Cohen* (1936) 5 FORDHAM L. REV. 73; *Legal Aspects of Low-Rent Housing in New York* (1937) 6 FORDHAM L. REV. 1.

78. The contracts were made between Bethlehem Shipbuilding Corporation, Ltd. (a subsidiary of Bethlehem Steel Corporation) and the "United States Shipping Board Emer-

pears, does not help the cause of the Fleet Corporation by permitting it to hide behind the broad mantle of sovereign power. The Fleet Corporation—a sort of “emancipated child”⁷⁹ of the parent Government—is “on its own” and is properly suable on its contracts, subject generally to the operation of orthodox contract law.⁸⁰ Having descended to the market place⁸¹ and elected to enter into a face-to-face, (or corporation-to-corporation) bargain with another private corporation, the juristic barrier voluntarily erected by the parent Government should not now be removed in aid of the Fleet Corporation.

Here is a legalistic argument which at first blush may seem to rest upon a tenuous and fine-spun distinction between the United States and its authorized agencies. But it is well to recall that there may be

gency Fleet Corporation, a corporation organized under the laws of the District of Columbia (herein called the Owner), representing the United States of America, party of the second part.” The contracts were signed by “Bethlehem Shipbuilding Corporation, Ltd.,” and the “United States Shipping Board Emergency Fleet Corporation” (R. 109 *et seq.*).

Even if the contracts were signed: “United States of America, by United States Fleet Corporation,” it seems that the contracts would still be construed to be the contracts of the Fleet Corporation, not of the “United States of America”. Sloan Shipyards Corporation, *supra*, note 70 at 568; Dietrich v. U. S. S. B. Emergency Fleet Corporation, 9 F. (2d) 733 (1925), *cert. denied*, 278 U. S. 647 (1928); U. S. S. B. Emergency Fleet Corporation v. Tabas, 22 F. (2d) 398 (1927).

79. It is not intended to drive the textual analogy of “emancipated child” too far, but it is worth noting that the legal consequences attaching to the status of an emancipated child are not unlike the enlarged rights and responsibilities of the separate corporate offsprings of the Federal Government. For a carefully developed treatment of the status of the “emancipated child”, see Justice Shientag’s opinion in *Cohen v. Delaware, L. & W. R. Co.*, 150 Misc. 450, 269 N. Y. Supp. 667 (1934).

80. There are unquestionably sizable remnants of the idea of the sovereign still present in the legal status of these corporate entities. Thurston, *supra*, note 76, at 485, 502; Field, *supra*, note 76, *passim*. But the over-all picture seems to be one of a gradual diminution of sovereign power. Indeed, Thurston concludes his scholarly survey of the problem with a wise paradox: “In the law of government proprietary corporations, the *public interest* is best served by regarding them as *private*”. *Supra*, note 76 at 503. (Italics added.)

The use of the term “proprietary” in connection with the discussion of the Fleet Corporation has been avoided because we believe that it is a border-line classification, when applied to an emergency corporation functioning in wartime. Doubtless Thurston, and probably Field, would classify the Fleet Corporation as a proprietary one because of the nature of its activities, its charter, etc. Thurston, *supra*, note 76, *passim*; Field, *supra*, note 76, *passim*.

81. “If it [Government] comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there.” *Cooke v. United States*, 91 U. S. 389, 398 (1875), cited with approval in *United States v. Rockland Bank*, 35 F. Supp. 912, 914 (1940).

good dogma as well as "bad dogma".⁸² Here is a chance to test out one of the most elusive abstractions in the law—the magic words which give corporate life by means of a formalistic ritual—and inquire whether the separate Governmental entities, upon solid grounds of practicality and realism, should be allowed to hide behind the mighty sovereign which gave them life. If space permitted, it would be interesting to relate this juristic insulation, which severs the United States from its multiple corporate agencies, to the entire area now occupied by administrative bodies. Suffice it to say that the Governmental policy of creating corporations and "Authorities" was not inaugurated in order to strait-jacket the Government, but was voluntarily undertaken to aid materially in furthering its proper and expanding functions.⁸³ The so-called "Fourth Department" of Government was instituted because the use of the corporate "abstraction" brought with it many advantages, paralleled—let it be remembered—by many responsibilities not ordinarily assumed by the State.

In this setting it is well to recall the closing words of Justice Murphy in his concurring opinion:

"It cannot be left out of consideration that the Government entered into the agreements with full understanding of their terms. Surely there is much

82. "Give a bad dogma a good name, and its bite may become as bad as its bark." Frank, J., in *Kulukundis Shipping Company v. Amtorg Trading Corporation*, United States Circuit Court of Appeals, Second Circuit, decided March 2, 1942, Unofficial Report, 879, 889. Another gem from the same case: "[Lord] Campbell, here as elsewhere, was distinctly not Coke-eyed." *Id.* at 887.

The advent of Judge Jerome Frank to the Circuit Court of Appeals, Second Circuit, one year ago, has been followed by a new style in judicial writings. His opinions are adorned with a sparkling verve in which to package his sweeping surveys of authoritarian law and with a versatile display of extra-legal citations unique in current juridical output. Critics of legal philosophy who have oft repeated the aphorism—"Jurisprudence bakes no bread"—are now warned that this dogma, like many another dogma, must be revised in the light of Judge Frank's interesting contributions to juristic literature. (*Supra*, notes 59, 66.) An erstwhile critic may venture his tentative opinion that there is appearing in Judge Frank's legal philosophy a somewhat broader and more judicial attitude, a less authoritarian point of view than he evidenced, for example, in *LAW AND THE MODERN MIND* (1931) Ch. VII, VIII, XII, XVIII.

Concededly in these days of war and economic distress, the lowly pun serves a laudable purpose and makes lighter the load of the depressed lawyers. To add a permissible gloss to Judge Frank's humorous turn-about-phrase taken from the maxim anent canine behavior: A good dogma, let it be remembered, like a good dog, is "man's best friend" and is not harmed (or helped) by unconsidered and unscientific name-calling. See *Chaplinsky v. New Hampshire*, 62 Sup. Ct. 766 (1942); see note 94, *infra*.

83. *Supra*, note 76.

to be said in favor of the Government's standing behind obligations, even though quite onerous, which it incurred with knowledge of the circumstances. The possibility that the Government may be relieved of bargains twenty-four years after agreeing to them is not conducive to mutual trust and confidence between citizens and their government."⁸⁴

These apt words take on additional force when we consider the nature, origin and purposes of the Fleet Corporation, the designated Governmental agency authorized to enter into the shipbuilding contracts with Bethlehem.

It is respectfully submitted that *both* precedent and sound policy argue against the position of the Government in its present attempt to recapture the discarded mantle of sovereign power. *Principle* and *practicality* unite in support of the Court's valiant adherence to the integrity of Governmental obligations, absent fraud, duress, collusion or other legal principle invalidating its engagements with citizen or corporation.

Judicial Review of Governmental "Policies"

One of the enigmas of the *Bethlehem Steel* case is the strange mixture of confusion and agreement which threads through the prevailing opinion of Justice Black and the dissenting opinion of Justice Frankfurter regarding the judicial power of the Supreme Court to review legislative or executive discretion in the matter of the wartime "policies" entering into the shipbuilding contracts in the principal case. The confusion arises because *all* of the six Justices are seemingly in substantial agreement that the *Supreme Court should not interfere by substituting its own judgment on the issues of legislative wisdom or administrative expediency; nor should the Court act as a Super-legislature in the appraisal of Governmental discretion.*

The striking parallel between the prevailing Justices and the dissenting Justice may be evidenced by the placement of their considered statements in opposite columns:

Justice Black says:

"The futility of subjecting this choice of policy to judicial review is demonstrated by this case, coming to this Court as it does more than twenty years after the ships were completed. In any event, we believe the question of whether or not this

Justice Frankfurter says:

"If the history of this Court permits one generalization above all others, it is the unwisdom of entering the domain of policy outside the very narrow legal limits presented by the record of a particular litigation. Such intrusion into the executive and legis-

84. Murphy, J., at 593.

policy was wise is outside our province to decide. Under our form of government we do not have the power to nullify it, as we believe we should necessarily be doing, were we to declare these contracts unenforceable on the ground that profits granted under Congressional authority were too high."⁸⁵

lative domains is not conducive to the just disposition of the immediate controversy. We are much less likely to go wrong if we do not depart from the well-grooved path of judicial competence."⁸⁶

Thus it seems that the Court and the minority Justice are expressing very similar views on a judicial "hands-off" policy in the matter of review of Congressional and Executive action; both Justice Black and Justice Frankfurter invoke the same *caveat* of the "unwisdom of entering the domain of policy" in support of their antagonistic positions in the *Bethlehem Steel* case.

One may well pause before attempting to solve the semantic riddle regarding "policy" and confess that the true solution of this strange blending of judicial accord and discord must await the skilled probing of our cranial legalists who specialize in the psychological art of explaining how and why judges decide cases.⁸⁷ But the conventional commentator (while awaiting the *ipse dixit* of the legal psychologists) may be permitted to venture his opinion with due humility regarding the substantive merits of the double use of judicial "let-alone-ism" in the instant case. How do the dual admissions of the futility or unwisdom of subjecting legislative and executive policy to the appraisal of the Justices of the Supreme Court fit into the contrasted positions of the prevailing and minority opinions in the *Bethlehem* litigation?

It seems that the logic of Justice Black's opinion justifies his contention that the policies of the Government have been fixed and predetermined by Congress, the President and the Fleet Corporation, and that the United States is now asking its judicial arm to revise the contracts framed in accord with the sweeping war powers, transferred by the Congress to the Fleet Corporation *via* the President.⁸⁸ Acting within

85. Black, J., at 591.

86. Frankfurter, J., at 604; *id.* at 593.

87. This process of judicial probing is considered in the writer's papers: *Psychologism in the Law* (1940) 29 GEO. L. J. 139; *Portrait of a Realist, New Style* (1941) 10 FORDHAM L. REV. 196.

88. It is necessary to separate, as far as possible, the parallel and somewhat overlapping problems of "duress" and "policy" in the *Bethlehem* case. The stated question of "policy" is a narrow one: Who is "entering the domain of policy" in his judicial opinion—Justice

the broad limits of the granted Congressional powers, the Fleet Corpor-

Black, Justice Murphy, Justice Douglas or Justice Frankfurter? Otherwise stated, who is asking for a judicial review of the "policies" which culminated in the specific contracts in question? These are the questions which come out of the dispute as to "policy" set forth in the text-quotations from the *Bethlehem* case.

Concededly, if *duress* against Fleet Corporation is proved according to law, then matters of Governmental *policy* become of secondary importance. It may also be conceded that Congress did not intend to sanction "unconscionable contracts" which are contrary to law. (Frankfurter, J., at p. 603.) But the difficulty with the maintenance of the claim of "duress" is that it cannot be raised, much less established, without a review and evaluation of the Governmental "policies" of Congress, the President and the Fleet Corporation. Moreover, such policies of the Fleet Corporation call for a comparison with contrasted "policies" in other Departments of Government in time of war. At the moment, let it be carefully noted, it is not necessary to consider the soundness or sufficiency of these comparisons of "policy". *It suffices to point out that these evaluations of policy formed, and must form, the core of the Government's case against Bethlehem and of the learned Justice's dissent.*

In the course of his scholarly opinion, Justice Frankfurter says: "We know that the *policy* of the Navy Department with respect to so-called straight cost-plus shipbuilding contracts was to allow profits of 10% of actual cost." (Frankfurter, J., at 602. Italics added.) Again the Justice says: "We know that, similarly, the *policy* of the War Department with respect to cost-plus contracts for the construction of cantonments was to allow profits not exceeding 10% of cost." (*Id.* at 602. Italics added.)

True, Justice Black was obliged to answer this tender of comparative "policies" practiced by the Navy and War Departments during World War I. His answer is that these excursions into the familiar "straight cost-plus shipbuilding contracts" are not only irrelevant but in fact add weight to the reasonableness of the stated price-formula used by the Fleet Corporation in making the Bethlehem contracts. Justice Black invades the area of "policy" not for the purpose of altering it, but to justify the "hands-off" attitude of the prevailing Justices throughout the *Bethlehem* decision. A few brief quotations from the learned opinion of Justice Black seem to fortify this contention. Justice Black says:

"To establish a standard of customary profits, the petitioner points to the experience of the Navy and War Departments and other branches of the government in connection with straight cost plus contracts . . . The relevance of experience with cost plus contracts to the contracts here is not clear. The Shipping Board deliberately chose to avoid cost plus contracts where possible, having found them unsatisfactory in practice . . . experience in many fields has demonstrated that the percentage of profit actually realized under cost plus contracts is likely to be far more than the percentage specified." (Black, J., at 590.)

Thus it appears that Justice Black enters the "domain of policy" solely for the purpose of answering the learned dissenting Justice who has seemingly raised the issue of comparable "policies" of other Government Departments during World War I. The opinions of the Court make clear that they are not acting as a "Super-legislature", nor do they contend that the "policies" of Government herein developed meet with their unqualified approval on the questions of legislative wisdom or administrative expediency. They are content to justify the stated actions of Government on the ground that they were reasonable under the circumstances; that they did not offend any Constitutional or legal principle; and that their decisions in favor of Bethlehem should not be construed as an indorsement of

ation, *alter ego* of the Chief Executive, decided after due deliberation to forego its right and power to commandeer shipbuilding plants, or to purchase ships at a reasonable price subject to judicial revision in the event that the seller regarded the price as unfair.⁸⁹

Turning back to the tempestuous times of the World War I and limiting, in so far as possible, our present judgment to the available data and the powers of prevision given to the officials of the Fleet Corporation in 1917-1918, a justiciable question is hardly present in the review of the "policies" of these mortal men in their decision to build ships after free negotiation, rather than under force of Government operation of plants, or unilateral price-fixing subject to judicial review. Sad to state it, we are today able to observe similar questions of "policy" and the diverse and conflicting views regarding the relations of Government, industry and labor in time of war.⁹⁰ Twenty-five years have elapsed since the

the Governmental policies or business morals which permitted the profits in the principal case. (Black, J., at 591; Murphy, J., at 592.)

89. The issues of "policy" and "duress" do not "date" merely from the time the officers of Bethlehem and Fleet Corporation began their negotiations. Long before they started, Congress, The President and the Fleet Corporation had many knotty questions of policy to decide, not the least of which was the comparative advantages of Government capture and operation versus arms-length bargaining. It could hardly be argued that Bethlehem compelled or even participated in these preliminary decisions. Cf. *supra*, note 31, 33.

90. Another unusual feature of the *Bethlehem* case is the recurrence today of the same problem of Governmental policies in wartime which faced the Congress, President Wilson and the Fleet Corporation in 1917-1918.

It suffices to state that one need not look beyond the pages of the daily press to realize the multiple, complex and varied solutions, pending or proposed, regarding war profits, wages or prices.

Herein may be mentioned the emphasis upon production, maximum speed and maximum volume by the War Production Board; the curtailment of competitive bidding in military supply contracts; the substitution of the negotiated contract system for competitive bidding to permit the entry of small manufacturers into war production even though the result is higher costs; the construction of experimental war vessels, like the "Sea Otter", without concern about immediate costs.

These items taken from the daily press (March 4, 1942-April 1, 1942) indicate clearly that such delicate decisions of "policy" properly reside in the Congressional and Executive Departments of Government rather than in the Supreme Court.

Turning briefly to the question of war profits we find the following diverse opinions: Senator Walsh of Massachusetts proposes that the United States recapture all profits above 6%. The New York Times objects on the ground that a contractor might turn his investment over twenty times in a year and thus run his annual profit up well above 100%. Under-Secretary of War Robert P. Patterson makes the same general argument before the House Naval Affairs Committee. The United Automobile Workers Union proposes that legislation be enacted limiting war production profits to 3%. Others argue for a sliding

policy-making decision of the officers of the Fleet Corporation, yet today (April 1, 1942) Congress is still debating the many competitive plans for fixing war profits and erecting a ceiling over wages. The President and his many Executive agencies are facing similar vexatious questions of maximum "all-out" production versus minimum profits and maximum efficiency of labor. This inevitable uncertainty and necessary flexibility of Government policy, understandable in time of war and under our democratic freedom of discussion, is of value when we turn back the pages of history a quarter of a century and consider the wisdom of the exercise by the Supreme Court of a veto power over administrative acts performed in the haste and complexities of preparation for waging an effective and speedy war in defense of our institutions.⁹¹

Whether we consider the stated issue of "policy", which divides the Justices in the *Bethlehem* case, from the viewpoint of World War I, or World War II; or even under the judicial "let-alone" formula originated by Justice Holmes,⁹² the jural architect who first outlined the specifica-

schedule of profits or the vigorous use of the excess profits tax. The same complexity reigns with reference to the regulation of the hours and wages of labor. (Daily press, *passim*.)

One of the most significant of present-day "policies" is that a form of contract somewhat similar to the "half-savings" clause, which is the focal point of attack by the Government in the *Bethlehem* case, is still defended by Government officials, and in fact emphasized, as a desirable form of war contract in certain cases. See the discussion of the "target-cost" contracts in Investigation of the Naval Defense Program, PRELIMINARY REPORT OF THE COMMITTEE ON NAVAL AFFAIRS, H. R. REP. No. 1634, PART II, 112-115.

91. The reasonableness of the preliminary decision of Fleet Corporation to elect free bargaining rather than compulsory seizure of the shipbuilding plants finds additional support out of the parallel experience of the Government in the operation of the railroads during World War I. SPLAWN, GOVERNMENT OWNERSHIP AND OPERATION OF RAILROADS (1928) ch. XVII-XVIII; LOREE, RAILROAD FREIGHT TRANSPORTATION (1929) Foreword; DIXON, RAILROAD AND GOVERNMENT (1922) Ch. X; JOHNSON, GOVERNMENT REGULATION OF TRANSPORTATION (1938) Ch. II; PROBLEMS IN AMERICAN DEMOCRACY (1940) 123-126.

For an able defense of the experiment of Government operation of railroads in wartime, see HINES, WAR HISTORY OF AMERICAN RAILROADS (1928) *passim*. It is of course true, as Hines states, that the experiment of Government operation of railroads in wartime is not a fair test to determine the broader question of the advantages or disadvantages of Government ownership in normal times. Perhaps it is worth noting that there is no insistent demand today for a repetition of the World War I experiment in Government management of the railroads, any more than there is for the operation of shipbuilding plants by the Federal Government. The intangible factors leading to these decisions are more numerous than the alleged recalcitrance or unwillingness of the shipbuilders to cooperate in compulsory operation. Frankfurter, J., at 594; *cf.* Black, J., at 589.

92. *Lochner v. New York*, 198 U. S. 45 (1905) Holmes, dissenting at 74; *Adkins v. Children's Hospital*, 261 U. S. 525 (1923) Holmes, dissenting at 567; *Hammer v. Dagenhart*, 247 U. S. 251 (1918) Holmes dissenting at 277.

tions of the current "hands-off" policy of the new Court—by any or all these tests, it seems that the prevailing opinions of the Supreme Court in the *Steel* case exhibit a wise and restricted exercise of judicial revaluation of Governmental "policies" in wartime.

A Bit of Realism

Our realist reformers repeatedly warn us against the evils of juristic complacency and exalt the joys of purposeful experiment and ameliorating changes in the rules and principles of classical law. Here indeed is one of the great accomplishments of the New Constitutionalism: a willingness to revalue old concepts and past dogmas in Constitutional law in the light of the socio-economic problems of present-day society. Justice Holmes, in an oft-quoted passage, states the functional position in his scintillating style:

"It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."⁹³

Accepting with footnoted reservations⁹⁴ the validity of the Holmesian critique directed against the standpattism of traditional law, there are signs aplenty that legal reformers are not always observant of the restrictive language carefully incorporated into his wise comment. Frequently no adequate examination is made into the preliminary question of whether there are "better" reasons for a rule of law than its mere longevity. Their favorite pragmatic formula "try anything once" may necessitate an occasional gloss. In practice it sometimes assumes an altered form: "Try anything once—and at once—and repent at leisure"! Instances may be cited where realist scholars propose a vital change in bread-and-butter principles of law without adequate consideration of

93. HOLMES, COLLECTED LEGAL PAPERS (1920) 187.

94. The text quotation from Holmes has frequently been used as a "spring-board" for a broadside attack against sterile dogma, elusive abstractions, illusory precedents, etc., etc. One gains the impression from some of his present-day disciples, that the adjectival prefixes are merely added to characterize the inherent nature of legal concepts, principles and standards, if not in fact to question their validity or utility.

A natural query arises: Are *all* legal abstractions and concepts inherently bad? Cf. RODELL, *Woe Unto You, Lawyers!* (1939); CHASE, *Round and Round with the Judges, The Tyranny of Words* (1938) Ch. XVIII; McDougal, *Fuller v. The American Legal Realists: An Intervention* (1941) 50 *YALE L. J.* 827, 836n. For a current estimate of the status of "dogma", see Ayres, Book Review (1942) 51 *YALE L. J.* 881-882.

their favorite test of "results and consequences". Frequently adherents to the common-law doctrine have been able to demonstrate, out of the actual analysis of realists' writings, that the ancient principle of law under attack is not only conceptually defensible but is preferable, on the plane of practicality, to the proposed change.⁹⁵

The *Bethlehem* case furnishes an excellent example of the importance of considering carefully the remote as well as the immediate consequences of a clear departure from uniform and ancient precedents of the common law. An examination of past experiences may aid us in determining whether there is a "better reason" for the conclusions reached by the Supreme Court than the mere age and drab uniformity of the legal authorities invoked by Justice Black and the concurring Justices.

History Revisited

We are naturally prone to believe, especially in these trying days, that our political, economic and social problems are something entirely new, arising principally during the Depression Decade of 1930-1940, and therefore demand new attempts at "planned economy" which are the discoveries of our own genius. History warns that there are rich mines of experience to be reopened and reexamined before we conclude that all of the trials and tribulations of our day are entirely new and must call for new remedies. It may be well to recall that "ceilings" on prices, wages and profits are as old as the common law. We should be reminded that the Ordinance of Labourers, enacted in 1349, was in effect a "ceiling" on wages and provided that the old wages, and no more should be paid.⁹⁶ The history of legislation in our own country, beginning with the colonial era, indicates that similar attempts have been made to erect ceilings on wages in Massachusetts as early as 1632,⁹⁷ and later in New York and in our times, in Kansas.⁹⁸

95. Cf. my articles dealing with specific realists (Felix S. Cohen) *supra*, note 43; (Arnold) *Realism, What Next?* I (1938) 7 *FORDHAM L. REV.* 203; (Eno) *Realism, What Next?* II (1939) 8 *FORDHAM L. REV.* 45; (Hamilton) *Portrait of a Realist, New Style* (1941) 10 *FORDHAM L. REV.* 196; (Rodell, *et alii*) *Psychologism in the Law* (1940) 29 *GEO. L. J.* 139, 154-156.

96. 23 Edward III (1349). See Kennedy, *Discretion in Industrial Law* (1926) 1 *THOUGHT* 399, 405, for a discussion of early labor laws in England and colonial America. Holdsworth gives many examples of the enactment of legislative "ceilings" on prices in the early common law. 2 *HOLDSWORTH, HISTORY OF ENGLISH LAW* (1927) 390; 4 *HOLDSWORTH, id.* at 375-377; 6 *HOLDSWORTH, id.* at 306, 346.

97. 1 *WILEY-RINES, THE UNITED STATES* (1912) 249.

98. Kennedy, *Law and the Railroad Labor Problem* (1923) 32 *YALE L. J.* 553, 556-557.

This excursion into Anglo-American attempts to regulate labor is of material value in our present endeavor to localize the policy-making powers of Government. Recalcitrant and unwilling "traders" and "labourers" did not first come forth as a result of present-day economic conditions or wartime emergencies. But most important of all, for purposes of determining the realistic aspects of Governmental "policies" in the *Bethlehem* case, this series of legislative experiments and restrictive acts of Government indicates that the wisdom or expediency of attempts to fix profits, prices and wages should reside in the Congress and/or in the President; it calls for the exercise of wise, flexible and changing discretion rather than for the belated operation of judicial review by the Supreme Court twenty-five years after the event.⁹⁹

Here is one problem of Government which is not "dated": Human nature in England in the days of King Edward III, in the Massachusetts Bay Colony, in New York, in Kansas and in America in 1918 argues for the soundness and wisdom of the prevailing opinions of the Supreme Court in *United States v. Bethlehem Steel Corporation* in 1942.

Once more we may invoke the aid of American history to point a warning against the remote consequences of precipitate expansion of settled common law doctrine under pressure of extenuating circumstances present in a particular piece of litigation. A glance into the past lends support to the contention of the Court that a Government contract should spell out a promise and not a mere "prediction".¹⁰⁰ History sometimes has a way of repeating itself; at least history deserves to be repeated to warn against the ready acceptance of the novel principle that a mighty Government or its authorized agencies may be subject to duress in the making of war contracts. Consider the deplorable episode of the French Spoliation Claims ". . . which for many decades occupied the attention of appropriation committees of Congress and wore out their patience, with results that have put in the hearts of claimants a deep sense of the injustice of Governments".¹⁰¹

99. It is in order to recall that there is no dispute between the six Justices about the residual powers of Congress under the Constitution to fix the policies governing war contracts. *Supra*, notes 42, 48.

100. ". . . I am one of those who believe that a promise is something more than what it is fashionable nowadays to consider it; that it is something more than a mere prediction." Pound, *Address to the Judicial Section of the New York State Bar Association*, 64 REPORT OF NEW YORK STATE BAR ASSOCIATION (1941) 525.

101. Taft, J., dissenting in *Sloan Shipyards v. United States Fleet Corporation*, 258 U. S. 549, 573 (1922).

The French Spoliations incident deserves retelling to prove that a Government may not

A study of the French Spoliation Claims, destructive of the obligatory relations of Government to citizen, lends force to the concluding statement of Justice Murphy that the Bethlehem contracts should be enforced "unless there are valid and appropriate reasons known to the law for relieving it [Government] from its obligations."¹⁰²

IV

CONCLUSION

The solemn warnings by eminent judges¹⁰³ that well-settled rules of law should not be lightly tossed aside certainly cannot with any accuracy be directed to the exhaustive coverage of legal analogies and fac-

only be powerful, but delinquent, in performing its monetary obligations with resultant hardship to its citizens.

On October 25, 1803, Congress passed an act which provided for the payment of \$3,750,000 to citizens of the United States holding claims against France, arising out of French depredations committed before 1801. This sum was assumed by the United States as part of the price paid for Louisiana. The action of the United States Government prevented United States claimants from exercising their rights to prosecute their claims against France, and substituted their own country as the debtor nation. From 1803 to 1885, these claims were presented year after year and reported favorably over forty times by the Congressional committee, but Congress never appropriated the necessary funds, save in 1846 and 1855 when the approved bills were vetoed by Presidents Polk and Pierce respectively.

Finally in 1885, over eighty years after the original Congressional Act, the French Spoliation Claims were transferred to the United States Court of Claims. The Court threw out many of the claims because of insufficient, stale or defective evidence, but reported favorably upon those claims that could be proved. But the necessary appropriations were still withheld. On June 6, 1896, President Cleveland vetoed a bill appropriating \$1,027,314.09 as a partial payment upon these claims, but there the matter ended, and some of the old claims were still pending in 1910, over a century after the legislative act, implementing the treaty with France, was first passed. 4 WILEY-RINES, *THE UNITED STATES* (1912) 442-443, and bibliography at 443n.

102. Murphy, J., at 592.

103. A persuasive passage, which points to the limits imposed upon judicial discretion, is found in the dissenting opinion of Justice Oliver Wendell Holmes in *Northern Securities Company v. United States*. Herein the learned Justice said: "Great cases, like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend." Holmes, J., dissenting in *Northern Securities Company v. United States*, 193 U. S. 197, 400 (1904).

Justice Cardozo paid Justice Holmes, his predecessor on the Supreme Court, the delicate compliment of borrowing the thought in the stated passage and using it in an opinion written by him while he was Chief Judge of the New York Court of Appeals. Cardozo, C.J., in *Matter of Doyle*, 257 N. Y. 244, 268, 177 N. E. 489, 498 (1931).

tual data provided in Justice Frankfurter's learned dissent. The scholarly jurist is a worthy successor of his mentor, Justice Holmes, in his able presentment of a cause which is much broader than the confines of a single case. Justice Frankfurter advances to a long-range and reasoned presentment of a judicial principle to be applied in the contractual relations of Government and citizen in wartime. His juristic vision sweeps the horizon and he offers in his concluding paragraphs a general formula which should be applied in evaluating the relations existing between contractors and Government in time of war.

Justice Frankfurter says:

"During wartime the bargaining position of Government contracting officers is inherently weak, no matter how conscientious they may be. If they are to deal on equal terms with private contractors, particularly where the subject matter of contracts is so intricate and so specialized as the building of ships, *they must have available to them not only detailed information but also the time within which to study the data and the freedom to exercise a real choice*".¹⁰⁴

Thus it appears that the learned Justice is proposing a judicial standard of conduct which should govern the relations of the United States and private contractors in time of war. So stated, it is apparent that the full force of his dissent is not reached with his earlier references to the law of duress. The expansive nature of Justice Frankfurter's judicial formula is deducible clearly from the concluding sentences of his summation of the standards to be applied between the sovereign and subject:

"Because the Government is in such a dependent position, and because those who deal with it on a cost-plus arrangement or some similar basis are assured of a profit, it is wholly consistent with practicalities and makes no unduly idealistic demand for the law to judge the arrangements of such wartime contractors by standards not unlike those by which a fiduciary's conduct is judged. Those upon whom the nation is dependent for its supplies in the defense of its life would hardly wish to be judged by lower standards."¹⁰⁵

In this passage of his scholarly dissent, Justice Frankfurter is at his best, a worthy successor of Justices Holmes, Brandeis and Cardozo—his three life-long guides along the paths of the law. Beginning with the pertinent Holmesian epigram—"Men must turn square corners when they deal with the Government"—one sees the application of Brandeis' ruthless pursuit of the facts in the dissenting jurist's apt relation of

104. Frankfurter, J., at 604. (Italics added.)

105. *Id.*

Holmes' epigram to the World War II, a grim War in which this great nation is involved in defense of sacred ideals and of its very existence; and his conclusion in the stirring style of a Cardozo: "Those upon whom the nation is dependent for its supplies in the defense of its life would hardly wish to be judged by lower standards."

Here is a judicial *dictum*¹⁰⁶ which breaks loose from the narrow confines of common-law duress, transcends the bounds of contract law, brushes aside the materialistic morals of the market place and pleads for a new concept of citizenship in wartime. These words, which were received without extended comment by the Associate Justices of the Supreme Court,¹⁰⁷ may prove to be an important and durable passage of the *Bethlehem* case. Unheeded for the moment in the Supreme Court,¹⁰⁸ his inspirational appeal may yet be heard in the Halls of the Congress. Certain it is that the above quotations deserve most careful consideration before any superficial appraisal or judgment is attempted. Spatial limitations of page and time, as well as a proper sense of humility, unite in the reservation of judgment upon the juristic peroration of the distinguished jurist. Suffice it to say that there is dimly discernible in his concluding utterance a number of new and important questions which must be settled before the boundaries of the New Constitutionalism are definitely fixed.¹⁰⁹

Returning once more to the vital issues of "duress" operative against

106. Justice Frankfurter's principle of fiduciary relationship was offered at the end of his lengthy opinion. It is noteworthy that he expresses his fiduciary principle in negative form: the relations between Government and contractor in wartime are ". . . not unlike those by which a fiduciary's conduct is judged." There is no indication that he is insisting upon *exact* conformity of the obligations of war contractors with all the duties of a fiduciary.

107. The closest approach to a discussion of the fiduciary-relation principle seems to be found in Justice Black's brief rejection of the Government's claim of "unconscionability" of Bethlehem's conduct in the matter of excessive profits. Black, J., at 590.

108. *Supra*, notes 44, 45.

109. The development of the fiduciary-relation status reinforces Justice Frankfurter's earlier contention that Government enjoys what might be called jural "exemptions" in situations where citizens or corporations might be bound. (Frankfurter, J., at 591 and 591n.)

But many more penetrating issues are visible in the background: (1) the return of the problem of "liberty of contract" which vexed the Supreme Court for many years; (2) the revival of Maine's classic question, contract to status? which has been a lively subject of late in jurisprudence and in judicial decisions. [See, for example, SEAGLE, *THE QUEST FOR LAW* (1941) ch. XVII; *Hume v. Moore-McCormack Lines*, 121 F. (2d) 336, 342-345 (1941).]; (3) the query whether the proposal of Justice Frankfurter falls within the province of the judicial power, or belongs in the legislative area of the Federal Government.

Government and of judicial review of Governmental "policies", which permeate the *Bethlehem* case and form the major part of the present paper, and limiting our tentative conclusions to the stated points, it is respectfully submitted that principle and practicality, precedent and public policy, history and human nature, Constitutional and common law—all lend substantial support to the decision of the Supreme Court on these controversial items in *United States v. Bethlehem Steel Corporation*.

(To be concluded)