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R. V. Fletcher

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## MR. JUSTICE McREYNOLDS—AN APPRECIATION

R. V. FLETCHER \*

In the course of the memorial exercises in honor of Justice McReynolds, held in the Supreme Court of the United States on March 31, 1948, the Attorney General made the significant statement that McReynolds was neither liberal nor conservative.<sup>1</sup> This observation was made in connection with the statement that the Justice, when he was appointed to the Court, was considered a liberal, and when he left the Court, a conservative. His characterization as a liberal was by reason of his experience as a prosecutor in anti-trust cases; his reputation for conservatism rests upon his attitude toward legislative measures and economic theories that are characteristic of the so-called New Deal. Stated differently, McReynolds is thought of in certain circles as a liberal advocate, but an ultra-conservative judge. Both points of view reflect misconceptions of the man and the basic philosophy by which his life was ordered.

In striving for an appraisal of his career, it should be remembered that he was a Scotchman, a Southerner, an admirer of the American Constitution, a fairly strict constructionist, an active practitioner for twenty-five years, and a man of inflexible purpose and integrity. To him, the law was, indeed, a jealous mistress. Rarely did he seek to embellish his opinions with classical or literary references or illustrations. Indeed, Justice McReynolds disclaimed any purpose to range far afield into the realms of fancy. As he observed in one of his early cases, "The accurate delimitation of the concept 'property' would afford a theme especially apposite for amplificative philosophic disquisition; but the bankrupt law is a prosy thing intended for ready application to the everyday affairs of practical business."<sup>2</sup>

That the transformation of McReynolds from a public prosecutor to a Supreme Court Justice did not, *ipso facto*, change him from a so-called "liberal" into a so-called "conservative" is evidenced by his record in anti-trust cases. For example, he concurred in the majority opinion in the *American Column & Lumber Company* case,<sup>3</sup> in which it was held that the "Open

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\* Special Counsel (formerly President) Association of American Railroads; Justice, Supreme Court of Mississippi, 1908-09.

1. The record of these memorial exercises may be found in 68 Sup. Ct. (Adv. Sheet No. 10) xxvi-xxviii. The statement quoted is on p. xxiv. These exercises consisted of the reading of resolutions adopted by the bar of the Supreme Court on November 12, 1947, and statements by the Attorney General and the Supreme Court. Details of Justice McReynolds' biography are set out in these proceedings, including references to his practice in Tennessee and his position on the faculty of Vanderbilt Law School.

2. *Gleason v. Thaw*, 236 U. S. 558, 560, 35 Sup. Ct. 287, 59 L. Ed. 717 (1915).

3. *American Column & Lbr. Co. v. U. S.*, 257 U. S. 377, 42 Sup. Ct. 114, 66 L. Ed. 284 (1921).

Competition Plan" established by one-third of the lumber manufacturers of the country violated the law as restricting competition. This concurrence was despite the dissenting views of those great liberals, Justices Holmes and Brandeis.

Probably no case can be found that goes further to condemn any form of price-fixing than the *Trenton Potteries* case.<sup>4</sup> Yet here, although Justice McReynolds' usually sympathetic colleagues, Justices Van Devanter, Sutherland and Butler, dissented, McReynolds went along with the majority in holding the pottery people guilty of violating the Sherman Act.

It is true that McReynolds concurred in the dissent of Justice Roberts in the *Socony-Vacuum* case<sup>5</sup> but that dissent deals with alleged errors of the Court in instructing the jury, in certain rulings on the evidence and in permitting improper argument by government counsel. It was the view of the dissenters that a fair jury trial had been denied appellants.

Justice McReynolds was in accord with the unanimous ruling of the Court that a combination of ship owners to control prices and services violated the Sherman Act.<sup>6</sup>

It has sometimes been said of Justice McReynolds that he was distinctively a states rights advocate, concerned with limiting to the utmost the power of the federal government. But this view is likewise a misconception. The record of McReynolds on the bench shows that he was just as zealous in repelling attacks upon federal authority when that authority was sanctioned by the Constitution as he was in the case of invasions of the reserved power of the states. Thus, Justice McReynolds was the organ of the Court in striking down a state statute providing that a foreign corporation, permitted to do business in Wisconsin, should forfeit that right if it sought to remove a case to the federal court.<sup>7</sup> In his opinion in this case McReynolds cited with approval a previous decision where it was said: "[T]he judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority is a power wholly independent of state action, and which therefore the several states may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit, or render inefficacious."<sup>8</sup> In this connection it is interesting to note that McReynolds concurred in Chief Justice Taft's opinion in the *Burke Construction Company* case<sup>9</sup> holding that a state

4. *United States v. Trenton Potteries Co.*, 273 U. S. 392, 47 Sup. Ct. 377, 71 L. Ed. 700 (1927).

5. *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 60 Sup. Ct. 811, 84 L. Ed. 1129 (1940).

6. *Thomsen v. Cayser*, 243 U. S. 66, 37 Sup. Ct. 353, 61 L. Ed. 597 (1917).

7. *Donald v. Philadelphia & Reading Coal Co.*, 241 U. S. 329, 36 Sup. Ct. 563, 60 L. Ed. 1027 (1916).

8. *Harrison v. St. Louis & S. F. R. R.*, 232 U. S. 318, 328, 34 Sup. Ct. 333, 58 L. Ed. 318 (1914).

9. *Terral v. Burke Construction Co.*, 257 U. S. 529, 42 Sup. Ct. 50, 66 L. Ed. 352 (1922).

anti-removal statute was invalid regardless of the type of commerce in which the defendant was engaged, and overruling earlier cases announcing contrary views.<sup>10</sup>

McReynolds was orthodox enough in his views as to the lack of power in the states to impose any form of direct tax upon instrumentalities of the federal government. Thus we find no note of dissent from the opinion of Justice Sutherland who denied the right of the State of New York to levy an income tax upon the salary of the general counsel of the Panama Railroad Company, owned and operated by the United States.<sup>11</sup> And although the Justice could hardly agree that sales of gasoline to the United States for use of the Coast Guard were immune from state taxation,<sup>12</sup> yet he had such regard for the principle of *stare decisis* that he raised no voice in protest when the Court, upon the authority of the *Panhandle Oil* case, recognizing that limitations upon the power of the state to tax federal agencies applied precisely to questions dealing with the power of the federal government to tax state agencies, held that a federal excise tax could not be levied upon a motorcycle sold to the city of Westfield, Massachusetts.<sup>13</sup>

The contract clause of the Constitution,<sup>14</sup> prohibiting action by the states which would impair the obligations of contracts, has been badly battered in recent years. To some extent, perhaps, this tendency to weaken the provision was accelerated by business conditions in the distressing period of the great depression, and by New Deal policies and measures, designed, ostensibly at least, to relieve these conditions. It is doubtful if the contract clause has ever been so watered down by judicial legislation as it was in the *Blaisdell* case,<sup>15</sup> presented to the Court in the unhappy year of 1933. That case upheld a state statute which provided for extending the period of redemption under mortgage foreclosures beyond the time stated in the mortgage, the provision as to time of redemption being consistent with the statute in effect when the mortgage was executed. The syllabus in the Supreme Court Reporter condenses the brilliant opinion of the Chief Justice, thus :

"Economic conditions may arise in which a temporary restraint of enforcement of contracts will be consistent with the spirit and purpose of the contract clause, and thus be within the range of the reserved power of the state to protect the vital interests of the community."

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10. *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L. Ed. 148 (1877); *Security Mutual Life Ins. Co. v. Prewitt*, 202 U. S. 246, 26 Sup. Ct. 619, 50 L. Ed. 545 (1906).

11. *New York ex rel. Rogers v. Graves*, 299 U. S. 401, 57 Sup. Ct. 269, 81 L. Ed. 306 (1937); subsequently overruled, *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 59 Sup. Ct. 595, 83 L. Ed. 927 (1939).

12. *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U. S. 218, 48 Sup. Ct. 451, 72 L. Ed. 857 (1928).

13. *Indian Motorcycle Co. v. United States*, 283 U. S. 570, 51 Sup. Ct. 601, 75 L. Ed. 1277 (1931).

14. Art. 1, § 10.

15. *Home Building & Loan Ass'n v. Blaisdell*, 290 U. S. 298, 54 Sup. Ct. 231, 78 L. Ed. 413 (1934).

To this holding, which reflects the view, widely held in certain quarters, that the Constitution must be revised by the Court from time to time to meet altered and extraordinary conditions not capable of being anticipated by the framers of the Constitution, the famous four horsemen of the Court, Justices Sutherland, Van Devanter, McReynolds and Butler, vigorously dissented. Justice Sutherland was the organ of the minority and his considered dissenting opinion sounded a solemn warning against a holding which represented "serious and dangerous inroads upon the limitations of the Constitution which are almost certain to ensue as a consequence naturally following any step beyond the boundaries fixed by that instrument."<sup>16</sup> The judgment in the *Blaisdell* case rests largely upon the holding in earlier cases dealing with statutes in New York and the District of Columbia designed to ease the lot of tenants,<sup>17</sup> who wished to hold possession after the expiration of leases. Justice McReynolds cannot be charged with any degree of inconsistency since he joined three of his colleagues in dissenting from the holdings in these cases, which upheld the right of legislative bodies, despite the contract and due process clauses of the Constitution, to permit tenants to overstay their terms.

In truth, McReynolds was a firm believer in the sacredness of contracts. He held to the view that men should carry out their promises whatever might be the consequences of compliance. He was therefore just as much opposed to federal impairment of contracts as to state impairment. His inclination was to construe the Fifth Amendment in such fashion as to protect contractual obligations. Perhaps the attitude of Justice McReynolds upon the subject of contract impairments can best be appreciated by considering his dissenting opinion in the *Gold Clause Cases*.<sup>18</sup> The oral utterance of the Justice when the opinion in the first case was announced by the Chief Justice has become famous, and familiar to every newspaper reader.<sup>19</sup> The studied later expression of dissent in all four cases<sup>20</sup> is not so well known, at least to the laity. In that carefully reasoned dissent, written with due regard to the statutory situation and the decisions of the English, International and American Courts, McReynolds expands his views as to the sacredness of

16. 290 U. S. at 448.

17. *Block v. Hirsh*, 256 U. S. 135, 41 Sup. Ct. 458, 65 L. Ed. 865 (1921); *Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170, 41 Sup. Ct. 465, 65 L. Ed. 877 (1921).

18. *Norman v. Baltimore & Ohio R. R.*, 294 U. S. 240, 55 Sup. Ct. 407, 79 L. Ed. 885 (1935); *Nortz v. United States*, 294 U. S. 317, 55 Sup. Ct. 432, 79 L. Ed. 912 (1935).

19. "It seems impossible to over estimate the result of what has been done here this day. . . . God knows, I do not want to talk about such matters but it is my duty. . . . The Constitution is gone . . . this is Nero in his worst form. We are confronted with a dollar which has been reduced to 60c which may be 30c tomorrow, 10c the next day and 1c the day following.

"We have tried to prevent its entrance into our legal system but have tried in vain. . . ." *Time*, Feb. 25, 1935, p. 11, col. 3; *N. Y. Times*, Feb. 19, 1935, p. 15.

20. 294 U. S. 361-81.

contractual obligations in a fashion that exemplifies his devotion to the principle of what he conceives to be honorable conduct both as to private and government undertakings. To quote some significant expressions in his dissenting opinion :

"Just men regard repudiation and spoliation of citizens by their sovereign with abhorrence; but we are asked to affirm that the Constitution has granted power to accomplish both. No definite delegation of such a power exists; and we cannot believe the farseeing framers, who labored with hope of establishing justice and securing the blessings of liberty, intended that the expected government should have authority to annihilate its own obligations and destroy the very rights which they were endeavoring to protect."<sup>21</sup>

In discussing the result if the Gold Reserve and similar Acts were given effect regarding corporate bonds, Justice McReynolds says with feeling and emphasis :

"We think that in the circumstances Congress had no power to destroy the obligations of the gold clauses in private obligations. The attempt to do this was plain usurpation, arbitrary and oppressive."<sup>22</sup>

In discussing the effect of the Joint Resolution of June 5, 1933, the dissenting opinion asserts :

"Again, if effective, the direct, primary and intended result of the Resolution will be the destruction of valid rights lawfully acquired. There is no question here of the indirect effect of lawful exercise of power. And citations of opinions which upheld such indirect effects are beside the mark. The statute does not 'work harm and loss to individuals indirectly,' it destroys directly. Such interference violates the Fifth Amendment; there is no provision for compensation. If the destruction is said to be for the public benefit proper compensation is essential; if for private benefit, the due process clause bars the way."<sup>23</sup>

It was argued in these cases that the effect of striking down these relief measures would be to work intolerable hardships upon debtors, and lead to widespread bankruptcies. But McReynolds does not flinch in the face of these well grounded predictions of disaster. Instead he observes :

"Counsel for the Government and railway companies asserted with emphasis that incalculable financial disaster would follow refusal to uphold, as authorized by the Constitution, impairment and repudiation of private obligations and public debts. Their forecast is discredited by manifest exaggeration. But whatever may be the situation now confronting us, it is the outcome of attempts to destroy lawful undertakings by legislative action; and this we think the Court should disapprove in no uncertain terms."<sup>24</sup>

The dissenting opinion concludes with this solemn warning :

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21. *Id.* at 362.

22. *Id.* at 375.

23. *Id.* at 376.

24. *Id.* at 381.

"Loss of reputation for honorable dealing will bring us unending humiliation; the impending legal and moral chaos is appalling."<sup>25</sup>

Here we see McReynolds at his best or worst, according to our views as to the rights of the individual under our form of government as opposed to the welfare of the majority, as that welfare is determined by the action of Congress, legislating in a period of unprecedented difficulty. Not wholly unaware of existing crises, Justice McReynolds could not bring himself to seek a remedy by ingenious and novel departures from established standards of constitutional interpretation; his suggestion was that if the Constitution was outworn and inadequate to meet present conditions, it should be amended and not disregarded. To quote his language in another vigorous dissent:

"Until now I had supposed that a man's liberty and property—with their essential incidents—were under the protection of our charter, and not subordinate to whims or caprices or fanciful ideas of those who happen for the day to constitute the legislative majority. The contrary doctrine is revolutionary and leads straight toward destruction of our well-tried and successful system of government. Perhaps another system may be better,—I do not happen to think so,—but it is the duty of the courts to uphold the old one unless and until superseded through orderly methods."<sup>26</sup>

That McReynolds had a wholesome respect for the doctrine of *stare decisis* no one can deny. Indeed, an examination of his opinions, concurrences and dissents in more than 500 cases in which he expressed his views during the 26 years of his service on the Court, discloses very few instances where he advocated the disregard of previous decisions. And yet when no rights of property were involved and when Constitutional questions were present, he did not hesitate to express his disapproval of earlier cases. As an example, early in his career on the bench, in a case involving a suit against state officers,<sup>27</sup> he boldly advocated overruling such familiar cases as *Ex parte Young*,<sup>28</sup> saying that cases supporting the doctrine that Federal Courts may enjoin the enforcement of state enacted criminal statutes should be overruled as plainly in violation of the Eleventh Amendment. McReynolds was no slave to precedent when, in his judgment, a previous holding of the Court contravened the plain language of the Constitution.

Any review of the judicial career of Justice McReynolds should deal with his struggle to retain the conventional theory as to construction of statutes, and his utter rejection of any justification for judicial legislation, which was one of his pet abhorrences. He concurred in the vigorous dissent of Mr. Justice Sutherland in a case in which the Justice emphatically asserted

25. *Ibid.*

26. *Arizona Employers' Liability Cases*, 250 U. S. 400, 450-51, 39 Sup. Ct. 553, 63 L. Ed. 1058 (1919).

27. *Truax v. Raich*, 239 U. S. 33, 36 Sup. Ct. 7, 60 L. Ed. 131 (1915).

28. 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714 (1908).

"The judicial function, as many times we have been told, does not include the power to amend a statute."<sup>29</sup>

That case, decided in 1938, while by no means of great public importance, illustrates very well the conflict of view between strict constructionists on the Court, and the rapidly increasing majority who indicated by the course of decision, if not by positive declaration, that the statutes may very well be construed to reflect what was the probable legislative will even though not expressly stated in the language employed. As an extreme instance of such a viewpoint, reference may be made to a decision rendered two days after Justice McReynolds had retired, in which the majority, all New Deal appointees, announced the view that since Congress had prohibited proceedings by injunction in labor cases on the ground that equity proceedings would ordinarily deny a jury trial, there could be no criminal proceeding under the Sherman Act, although trial by jury in such action would be preserved.<sup>30</sup> Justice Stone, a pre-Roosevelt judge, concurred in the result on the view that the indictment was defective. It would be difficult to find a decision that departs more radically from the conventional rules that govern statutory construction. Think of this:

"To be sure, Congress expressed this national policy and determined the bounds of a labor dispute in an act explicitly dealing with the further withdrawal of injunctions in labor controversies. But to argue, as it was urged before us, that the Duplex Printing Press Co. case still governs for purposes of a criminal prosecution is to say that that which on the equity side of the court is allowable conduct may in a criminal proceeding become the road to prison. It would be strange indeed that although neither the Government nor Anheuser-Busch could have sought an injunction against the acts here challenged, the elaborate efforts to permit such conduct failed to prevent criminal liability punishable with imprisonment and heavy fines. That is not the way to read the will of Congress . . ." <sup>31</sup>

In other words, the holding is that since Congress has seen proper to insure a jury trial for violations of the Sherman Act, in labor cases, there can be no jury trial nor any other form of trial in such cases. From this remarkable conclusion even the quasi-liberal constructionists Chief Justice Hughes and Justice Roberts dissented. In that dissenting opinion (by Justice Roberts) it is said:

"By a process of construction never, as I think, heretofore indulged by this court, it is now found that, because Congress forbade the issuing of injunctions to restrain certain conduct, it intended to repeal the provisions of the Sherman Act authorizing actions at law and criminal prosecutions for the commission of torts and crimes defined by the anti-trust laws. The doctrine now announced seems to be that an indication of a change of policy in an Act as respects one specific item in

29. *United States v. Raynor*, 302 U. S. 540, 552, 58 Sup. Ct. 353, 82 L. Ed. 413 (1938).

30. *United States v. Hutcheson*, 312 U. S. 219, 61 Sup. Ct. 463, 85 L. Ed. 788 (1941).

31. 312 U. S. at 234-35.



a general field of the law, covered by an earlier Act, justifies this court in spelling out an implied repeal of the whole of the earlier statute as applied to conduct of the sort here involved. I venture to say that no court has ever undertaken so radically to legislate where Congress has refused to do so."<sup>32</sup>

It is almost a certainty that had not Justice McReynolds laid aside his armor two days before this case was decided he would have waved the banner of revolt even more vigorously than his cooler colleague from Pennsylvania.

One curious feature of this decision deserves passing notice. Justice Frankfurter cites as an authority in support of his precedent-shattering opinion an earlier case in which the conclusion was only a grain less surprising.<sup>33</sup> In this *Keifer* case, Justice Frankfurter, the organ of a unanimous Court, held that although Congress in authorizing the organization of regional agricultural credit corporations had not provided that these government agencies could be sued, yet they could be sued because Congress in creating numerous other government owned and operated corporations *had* provided that these others could be sued. And further, that the regional organizations being creatures of the Reconstruction Finance Corporation could be sued because Congress had provided that the parent corporation could be sued. This is a feature of heredity which has not heretofore been recognized in the law. Strange to say Justice McReynolds is not found in dissent in the *Keifer* case. This may be an example of Jupiter nodding or it may be that even the iron will of McReynolds had been weakened by fatigue and a sense of futility in the face of repeated defeats. Those interested in the swing of the Court from orthodoxy to modern judicial thinking will be interested in re-reading what Justice Frankfurter says in his concurring opinion in a case which held that the State of New York can levy an income tax upon the salary of an employee of the Home Owners' Loan Corporation, a federal agency created by Congress to provide emergency relief to home owners.<sup>34</sup> That case overrules, expressly a number of earlier cases granting immunity from income taxes levied by either state or federal government upon the compensation of the employees of the other. Speaking of the earlier practice of the judges to render individual opinions, now largely abandoned, Justice Frankfurter says:

"But the old tradition still has relevance when an important shift in constitutional doctrine is announced *after a reconstruction in the membership of the Court*. 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."<sup>35</sup>

32. *Id.* at 245.

33. *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U. S. 381, 59 Sup. Ct. 516, 83 L. Ed. 784 (1939).

34. *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 59 Sup. Ct. 595, 83 L. Ed. 927 (1939).

35. 306 U. S. at 487-88. (Italics added).

It is abundantly evident that McReynolds did not sympathize with this shift in constitutional doctrine brought about by the reconstructed Court. For in this very case, he joined with Justice Butler in a brief but vigorous dissent.

It has been sometimes asserted that Justices McReynolds and Brandeis, in the pre-New Deal era, represented opposing points of view as to the value to be attached to precedent and, indeed, upon the broader question of constitutional interpretation. And it has also been said that this conflict of opinion affected the personal relations of these eminent jurists. As to the latter assertion, the writer has no knowledge. Certain it is that the apprehensions entertained by many sincere members of the bar at the time of his appointment as to Justice Brandeis's fitness for judicial duties disappeared in the face of his brilliant career on the bench, characterized by fairness, graciousness, prodigious industry, sound learning and almost unprecedented ability as a writer of opinions. The distinction between the approach of McReynolds and Brandeis to problems of a public character is very well illustrated by their respective opinions in a familiar case dealing with the valuation of property dedicated to public service.<sup>36</sup>

An examination of the opinion of the Court written by McReynolds discloses not only the disposition of the Justice to adhere to settled principles, but also throws light upon his method of stating and disposing of cases. Almost invariably, McReynolds states the case in the body of the opinion, rather than separately. The facts are stated with commendable brevity and in such fashion as to present only the salient points. There are extended quotations from the decision under review, it being, obviously, the McReynolds conception that the theory of the lower tribunal can best be understood by using its exact language. Then follow references to standard authorities with brief and pertinent quotations therefrom.

The Court's conclusion that reproduction cost at current prices must be given effect is stated briefly, one might be tempted to say, dogmatically. But no one can be doubtful as to what was actually decided. If we turn then to the Brandeis dissent upholding the doctrine of prudent investment with its wealth of references to economic studies and its exquisite process of plausible exposition, we get a very good idea of the mental processes of these powerful exponents of opposing ideologies.

The majority view, as expressed by Justice McReynolds, was upheld for many years, as a glance at the record will show. Thus in 1926, in a water case from Indiana,<sup>37</sup> the Court, through Justice Butler, reaffirmed the holding that in determining value consideration must be given to current prices and wages. Justice Holmes concurred in the result, probably upon the view that the right

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36. *Southwestern Telephone Co. v. Public Service Commission*, 262 U. S. 276, 43 Sup. Ct. 544, 67 L. Ed. 981 (1923).

37. *McCardle v. Indianapolis Water Co.*, 272 U. S. 400, 47 Sup. Ct. 144, 71 L. Ed. 316 (1926).

decision had been rendered even if the theory of the Court was erroneous. Since the decision in the *Southwestern Telephone* case,<sup>38</sup> Justice McKenna had ceased to be a member of the Court, and Justice Stone was on the bench. He joined Brandeis in dissenting.

In a railroad-recapture case, decided in 1928,<sup>39</sup> Justice McReynolds again spoke for the Court in upholding the reproduction theory of valuing property devoted to public use. Characteristic of Judge McReynolds' philosophy and style is the following:

"In the exercise of its proper function this Court has declared the law of the land concerning valuations for rate-making purposes. The Commission disregarded the approved rule and has thereby failed to discharge the definite duty imposed by Congress. Unfortunately, proper heed was denied the timely admonition of the minority: 'The function of this commission is not to act as an arbiter in economics, but as an agency of Congress, to apply the law of the land to facts developed of record in matters committed by Congress to our jurisdiction.'"<sup>40</sup>

The quoted observation from the dissenting opinion of Commissioner Hall, may well be adopted as Justice McReynolds' conception of the duty of the courts. The elaborate and very persuasive dissenting opinion of Justice Brandeis was this time concurred in by both Holmes and Stone.

For many years, the stout position of McReynolds in these cases was recognized as the law. But, of course, with the shift from the old to the new Court, with its corresponding change in point of view, the theory of constitutional protection of values and earnings has gone with the wind.<sup>41</sup> Admirers of Justice McReynolds take comfort in the fact that when these devastating decisions were rendered, the venerable Justice was spared the agony of being present at the slaughter of his cherished lifetime beliefs.

No estimate of Justice McReynolds' work on the Court can afford to ignore his diligent labor over a quarter of a century in the disposition of ordinary cases to which the public pays little or no attention. Probably ninety per cent of all the cases that reach the Supreme Court have little or no political complexion. And yet they present multitudes of difficult questions of law, of the greatest importance to litigants and their counsel. They concern property rights of every variety—priorities in bankruptcy, nice questions of admiralty law, validity of patents and copyrights, issues in Federal Employers

38. *Supra*, note 36.

39. *St. Louis & O'Fallon R. R. v. United States*, 279 U. S. 461, 49 Sup. Ct. 384, 73 L. Ed. 798 (1929).

40. 279 U. S. at 487.

41. *Federal Power Commission v. Natural Gas Pipelines Co.*, 315 U. S. 575, 62 Sup. Ct. 736, 86 L. Ed. 1037 (1942); *Federal Power Commission v. Hope Natural Gas Company*, 320 U. S. 591, 64 Sup. Ct. 281, 88 L. Ed. 333 (1944); *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U. S. 581, 65 Sup. Ct. 829, 89 L. Ed. 1206 (1945); *Colorado-Wyoming Gas Co. v. Federal Power Commission*, 324 U. S. 626, 65 Sup. Ct. 850, 89 L. Ed. 1235 (1945); *Panhandle Eastern Pipe Lines Co. v. Federal Power Commission*, 324 U. S. 635, 65 Sup. Ct. 821, 89 L. Ed. 1241 (1945).

Liability cases, matters of federal jurisdiction and the venue of cases, application of the principles governing conflict of laws, questions that deal with pleadings, alleged errors in the admission or exclusion of testimony—all the interminable and often tedious questions that arise in the trial of cases from the filing of a complaint in the court of first instance until judgment is rendered in the court of last resort.

In this class of cases, Justice McReynolds bore his full share of labor and responsibility. And it is significant that his judgments were very rarely the subject of dissents by his brethren—a mark of confidence in his diligence, his devotion to duty and his sound conception of the law. In a very real sense, he was a lawyer's judge; the bar came to have the highest respect for his intellectual integrity, his insistence upon orderly procedure, and his studied avoidance of *obiter*, even when there may have been an alluring temptation to catch the public eye by some spectacular utterance.

McReynolds was a rigid, inflexible precisian. He detested and penalized slovenliness, whether it was manifest in the record or evident in the manner or even the attire of the advocate at the bar. It is reported of him that he once privately chided a friend for appearing before the Court without a waistcoat, and at another time he gently criticized in conversation a very eminent lawyer because in the course of an argument he thrust his hand into the pocket of his trousers. He was keen in his scrutiny of petitions for certiorari, and woe betide the attorney who at the bar sought to depart from the points urged in the petition. He had little patience with a lawyer who undertook to argue his case with defective knowledge of the record. His distaste for prolixity either in argument or in opinions was often manifest. His frequent questions from the bench went straight to the heart of the issues in controversy. He had a practice, sometimes very disturbing to counsel, of asking the one who opened the argument to state his opponent's contention in addition to his own. He did not cultivate the faculty, prominent in Chief Justice Taft and in Justice Brandeis, of putting the lawyer at his ease. Indeed, upon occasion, particularly when the ground was a trifle treacherous, his attitude made advocacy difficult.

The writer of this paper is not competent from personal experience to discuss the personal side of Justice McReynolds. Others, however, who knew him well have recently testified to his charitable proclivities, his tender interest in little children, and the spotless purity of his private life. Altogether he was an impressive figure who can never be ignored in any objective study of his times—an example of unflinching devotion to what he believed to be the best interests of his country—one who never “bent the pregnant hinges of the knees that thrift may follow fawning.”

In Mr. James A. Farley's latest book dealing with the Roosevelt years, he mentions an interview with President Roosevelt in which the Chief Executive speaks of the retirement from the Supreme Court of Mr. Justice Van

Devanter. The President read to Mr. Farley a note addressed by Mr. Roosevelt to the retiring Justice, cordial in tone, in which Justice Van Devanter was urged to pay the President a visit. But the President added, so Mr. Farley reports, that there was one Justice on the Court that would receive no such invitation when he finally retired. When Farley suggested that perhaps the reference was to Justice McReynolds, President Roosevelt smilingly acquiesced.<sup>42</sup> Doubtless this remark made to an intimate friend was on the jocose order. But if there was a trace of seriousness in the remark, it but pays tribute to the strength and influence of a powerful personality, utterly out of sympathy with the economic and political theories then being eloquently advocated and widely accepted.

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42. FARLEY, JIM FARLEY'S STORY: THE ROOSEVELT YEARS, 83 (1948).