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THE POLICE POWER AND THE NEW YORK EMERGENCY RENT LAWS.

"This case stands or falls on police power," said Judge Hough, in pronouncing upon the constitutionality of the so-called "Emergency Rent Laws" of New York, enacted in April and September, 1920.¹ "Definition of this phrase," he added, "has never advanced over Chief Justice Taney's declaration that it is no more than the power inherent in a sovereign. License Cases, 5 How., at page 583. Applied to a State, this means its reserved sovereignty, inherent and incapable of being bartered away, because necessary for the State's existence, and lessened only by what the people of the State joined with all the other people of the other States in conveying to and consolidating in the United States."

An objection, perhaps the most serious objection, made to the adoption of the new Federal Constitution in 1787, was that it contained no bill of rights. The men of that day had lived under, and for years fought against, the abuse of governmental powers. Those abuses had led to the Declaration of Independence, the Revolution, and the establishment of a new nation. The government of the Confederation had proved to be too weak. If the Union were to endure, greater powers must be conferred upon the

¹ Marcus Brown Holding Co. v. Feldman, 269 Fed. 306, 316.

federated government. Thus much was conceded. But many men, while willing to erect a stronger national government felt it to be vital that its constitution should contain adequate provisions for the protection of individual rights against the powers of government. They were unwilling to trust anyone—even the chosen representatives of the people—with unrestrained authority over the life, liberty or property of the citizen. “Wherever the real power in a government lies,” wrote Madison, “there is the danger of oppression.” That danger, they insisted, must be guarded against in the adoption of a bill of rights.

The defenders of the proposed constitution answered by pointing out that the new government would have only the powers expressly enumerated in the constitution, and those “necessary and proper” for carrying them into execution, and that in such a government no bill of rights is necessary, because the people have not parted with their powers. “A bill of rights annexed to a constitution,” argued James Wilson, “is an enumeration of powers reserved. If we attempt an enumeration, everything that is not enumerated is presumed to be given.”²

Hamilton advanced a similar contention. Declarations of rights, such as were demanded, he said, “must be intended as limitations of the power of the government itself.” He pointed out that not only were such limitations unnecessary to a government of enumerated powers, but that they would be dangerous, because of possible omissions, and the difficulty of accurately defining the limitations.³

While the Constitution was adopted, as submitted, by the requisite number of States, yet it was only upon the promise of its friends that as soon as the new government was established, a suitable bill of rights should be framed and submitted for adoption as an amendment to the Constitution. Accordingly, at the first session of the Congress, held in 1789, resolutions were adopted reciting that: “The

² Elliott's Debates, 453-459.

³ Federalist, LXXXIV.

Conventions of a number of the States having at the time of their adopting the Constitution expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added; and as extending the ground of public confidence in the government will best insure the beneficent ends of its institution," therefore, there was proposed to the legislatures of the several States twelve amendments,⁴ ten of which were ratified by the requisite number of States, and became a part of the Constitution before 1791.⁵ These amendments were intended as limitations upon, and in express language they did qualify and limit, the powers of the national government in certain specified particulars.

The Fifth Amendment embodied, in the classic language of Magna Charta, a declaration of the rights which the people of that day held most sacred:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, . . . ; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Finally to remove any ground for misapprehension that the new government was to be one of enumerated powers, it was declared in Article X,

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

The provisions of the first nine Amendments early were declared by the Supreme Court to be limitations upon the powers of the Federal Government, not of the States.⁶ They were intended to make certain that the powers of the new government should be exercised subject to the restrictions specifically imposed by the Amendments. Certain

⁴ 1 Stats. at L., 97.

⁵ *Id.* 21.

⁶ *Barron v. Mayor*, 7 Pet. 243.

limitations upon State powers were embodied in the Constitution itself, either inferentially, by the grant of enumerated powers, such as the regulation of commerce among the States, and with foreign nations, or explicitly, as in Section 10 of Article I.

Chief Justice Taney, in the License Cases,⁷ emphasized that unless necessarily excluded by the grant of power in the Constitution to the Federal Government, the powers of the States remained unimpaired. It was decided in that case that a State may, in the execution of its police and health laws, make regulations of commerce, "*but which Congress may control.*" It was in this connection that the Chief Justice used the language concerning the police power referred to by Judge Hough in the New York Rent Cases, *viz.*:

"But what are the police powers of the State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, *except insofar as it has been restricted by the Constitution of the United States.*"

This amounts to saying that the States remain possessed of all their powers which are not taken from them by the Constitution of the United States. Nothing in the passage sanctions the doctrine that the powers expressly conferred upon the national government, or the restrictions upon either national or state power in the Constitution, are subject to an undefined reserved power in the States to legislate at will "in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."⁸

⁷ 5 How. 572, at p. 583.

⁸ per Holmes, J., Oklahoma Bank Guaranty Cases, 219 U. S., 104, 111.

By section 10 of Article I of the Constitution, it was among other things, declared that "no State shall * * * pass any * * * law impairing the obligation of contracts * * *"

The law of the State of New Hampshire in effect repealing the charter of Dartmouth College, which the Supreme Court held void as against this prohibition in the Dartmouth College Case,⁹ was not saved as a valid exercise of the police power. Mr. Justice Story thus summed up that decision:

"In my judgment, it is perfectly clear that any act of a legislature which takes away any powers or franchise vested by its charter in a private corporation or its corporate officers, or which restrains or controls the legitimate exercise of them, or transfers them to other persons, without its assent, is a violation of the obligations of that charter. *If the legislature mean to claim such an authority, it must be reserved in the grant.*"¹⁰

The broad proposition asserted by Mr. Justice Barbour in *City of New York v. Miln*,¹¹ "that all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal* police," were not surrendered by the States to the Federal Government, "and that, consequently, in relation to these, the authority of a State is complete, unqualified, and exclusive,"¹² was vigorously combatted by Mr. Justice Story in a dissenting opinion which, he stated, represented also the views of Chief Justice Marshall then but recently deceased. The reasoning of the majority opinion, he wrote, would brush aside all possible limitations upon the exercise by the State of the power to legislate respecting any matter which in the opinion of the legislature "concerned the welfare of the whole people of a State, or any individual within it."

The discussion of the Justices in the Passenger Cases,¹³ resulting in the failure of a majority to agree in the reasons for holding a State law imposing a tax upon all alien passengers arriving at the ports of the State, to be in effect a regula-

⁹ 4 Wheat. 518.

¹⁰ *Id.* p. 712.

¹¹ 11 Pet. 102, 139.

¹² *Id.* at p. 139.

¹³ 7 How. 283.

tion of commerce, and therefore an invasion of the Congressional control over that subject, served to demonstrate the impossibility of giving to the State police power the scope claimed for it in the *Miln Case*, without impairing the supremacy of the national government in the domain expressly conceded to it by the Constitution.

"The police power of the State," wrote Justice McLean, "cannot draw within its jurisdiction objects which lie beyond it. It meets the commercial power of the Union in dealing with subjects under the protection of that power, yet it can only be exerted under peculiar emergencies, and to a limited extent. In guarding the safety, the health, and morals of its citizens, a State is restricted to appropriate and constitutional means."¹⁴

Mr. Justice Wayne qualified and limited the effect of the decision in the *Miln Case*. In his opinion, the police or sovereign of the States had been reserved only so far as necessary to their *internal* government.¹⁵

In the *New Orleans Gas Case*,¹⁶ while conceding

"that there is a power, sometimes called the police power, which has never been surrendered by the States, in virtue of which they may, within certain limits, control everything within their respective territories, and upon the proper exercise of which, under some circumstances, may depend the public health, the public morals, or the public safety,"

the Court declared:

"Definitions of the police power must, however, be taken, subject to the condition that the State cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land."

But a few years later, in *Railroad Co. v. Bristol*,¹⁷ in upholding a State statute compelling a railroad to remove certain grade crossings, the Court, speaking by Chief Justice Fuller, said that it was thoroughly established in the court

"that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process or of the equal protection of

¹⁴ 7 How., at p. 408.

¹⁵ *Id.*, at p. 424.

¹⁶ *N. O. Gas. Co. v. Louisiana Light Co.*, 115 U. S. 650, 661.

¹⁷ 151 U. S. 556, 567.

the laws, by the States, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury."

In a later case,¹⁸ the Court declared that while it had held that the police power is one which remains constantly under the control of the legislative authority, "and that a city council can neither bind itself, nor its successors, to contracts prejudicial to the peace, good order, health or morals of its inhabitants," yet "*it is to cases of this kind that these rulings have been confined.*"¹⁹ The inference is that it was to such cases *only* that these rulings had been confined.

As remarked above, the first nine amendments to the Constitution embodied limitations upon the powers of the national government. The Thirteenth, Fourteenth and Fifteenth Amendments, adopted after the close of the Civil War, were direct limitations upon the States, established primarily for the protection of the former African slaves and their descendants, but also in certain broader aspects for the protection of all persons within the law. The Fourteenth Amendment forbade a State to "deprive any person of life, liberty or property, without due process of law," or "deny to any person within its jurisdiction the equal protection of the laws."

The volume of controversies over the application of these provisions to State legislation has resulted in increasing scope being given by the courts to the definition of the police power which the States are deemed not to have surrendered in the Constitution, and not to have been restricted or impaired by the Fourteenth Amendment. Their decisions have tended back to the extreme view taken in *City of New York v. Miln*, *supra*. Shortly after the adoption of these amendments, it was held in the *Slaughter House Cases*²⁰ that the provision that "no State shall make or en-

¹⁸ *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 15.

¹⁹ To the same effect see *Atlantic Coast Line v. Golsboro*, 232 U. S. 548.

²⁰ 16 Wall. 36.

force any law which shall abridge the privilege or immunities of citizens of the United States," did not extend the protection of the Federal power to his rights as a citizen of the State. It was further held that a statute regulating the slaughter of cattle for use in New Orleans, under consideration in that case, did not deny to any person the equal protection of the laws, and it was upheld as a legitimate exercise of the police power of the State—that power which, Mr. Justice Miller said, (at page 62),

"is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property."

In a later case,²¹ the Court, speaking by Mr. Justice Harlan, said:

"The validity of a police regulation, whether established directly by the State or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose."

"It may be said in a general way," observed Mr. Justice Holmes in the *Oklahoma Bank Guaranty Cases*²² "that the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality, or strong and preponderant opinion, to be greatly and immediately necessary to the public welfare."

"Even liberty itself, the greatest of all rights," said the Supreme Court in another case, "is not an unrestricted license to act according to one's own will."²³

It has been held that the right to make contracts is embraced in the conception of liberty as guaranteed by the Constitution, yet, it is declared that freedom of contract is a qualified, not an absolute right.

"There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists in the making of contracts, or deny to government the

²¹ *Railroad Co. v. Drainage Commrs.*, 200 U. S. 561, 592.

²² *Noble State Bank v. Haskell*, 219 U. S. 104, 111.

²³ *Crowley v. Christensen*, 137 U. S. 86, 89. Cited in *Reduction Co. v. Sanitary Works*, 199 U. S. 306, 324.

power to provide restrictive safeguards. Liberty implies the absence of *arbitrary* restraint, not immunity from reasonable regulations and prohibitions imposed in the interest of the community."²⁴

This distinction in a measure was the basis of the decisions, in the cases of *Adair v. United States*,²⁵ and *Coppage v. Kansas*,²⁶ where State statutes restraining the right of employers to discharge employees because of their membership in a labor union, or to require them to agree not to join such unions, as a condition to continued employment, were held invalid because repugnant to the due process clause of the Fourteenth Amendment.

The line was drawn in the majority opinion in *Coppage v. Kansas*, between regulations in the public interest, where private rights of liberty and property are *incidentally* involved, which were said to be permissible exercises of the reserved police power, and interferences with "the normal exercise of personal liberty and property rights," which were held to be the *primary objects* of the statute under consideration, and not *merely incidents* to the advancement of the general welfare, and therefore in contravention of the Constitution.²⁷

"With regard to the police power," said Mr. Justice Holmes in the *Oklahoma Bank Guaranty Cases*, (*supra*, at p. 112) "as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on opposing sides." Chief Justice Shaw remarked in an early case,²⁸ "It is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe the limits to its exercise."

True it is that the courts from time to time asseverate that the State's police power is subject to the limitations imposed by the Federal Constitution, which "*undoubtedly*" forbid "any *arbitrary* deprivation of life, liberty, or property,

²⁴ *Railroad Co. v. McGuire*, 219 U. S. 549, 567. See also *Arizona Employers Liability Cases*, 250 U. S. 400.

²⁵ 208 U. S. 161.

²⁶ 236 U. S. 1.

²⁷ *Com. v. Alger*, 7 Cush., 53, 85.

and secures equal protection to all under like circumstances in the enjoyment of their rights;" but on the other hand, it is declared, that the Fourteenth Amendment "was not designed to interfere with the power of the State to protect the lives, liberties and property of its citizens, and to promote their health, peace, morals, education and good order."²⁸ In every case, therefore, the courts must inquire "whether the legislature has adopted the statute in exercise of a *reasonable* discretion, or whether its action be a mere excuse for an *unjust discrimination*, or the oppression, or spoilation of a particular class."²⁹

Thus, the action of the court in each case largely becomes a matter of personal equation, for what may appear to one mind to be quite reasonable, to another will seem oppressive and discriminatory.

From the decision in 1876 in the Grain Elevator Cases³⁰ to the Blue Sky Law Cases³¹ increasing scope has been given by the Supreme Court to the exercise by the States under the police power, of control over the activities, the property and the business of individuals. Much of this legislation has been sustained on the theory that the legislature, in the exercise of its constitutional authority, has clothed with a public interest the particular property or business affected, and hence brought it within the area of its reserved sovereign powers. The application of this theory has so widened in recent years, that, as Judge Hough said in the New York Emergency Rent Cases,³²

"it may be and has been asserted that any business is affected with a public interest as soon as the electorate becomes sufficiently interested in it to pass a regulatory statute."

The so-called "Emergency" Rent or Landlord and Tenant Laws, recently enacted, have served to emphasize to an unusual degree the theory of a virtually unrestricted

²⁸ *In re Kemmler*, 136 U. S. 436, 448, 449.

²⁹ *Holden v. Hardy*, 169 U. S. 366, 398.

³⁰ *Munn v. Illinois*, 94 U. S. 113. See also *Budd v. New York*, 143 U. S. 517; *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389; *Rast v. Van Deman*, 240 U. S. 342.

³¹ 242 U. S. 539.

³² *Marcus Brown Holding Co. v. Feldman*, 269 Fed. 306, 317.

police power in the States. One of the consequences of the late war has been a great shortage of housing facilities in most of our large cities, due to the diversion of mechanical industry to war service. The law of supply and demand, operating in respect of this shortage, naturally caused a great increase in rents of dwellings of all kinds; just as the same law (aided by the War Labor Board) operated to greatly increase wages of mechanics and artisans. Congress sought to restrict this increase, in the case of rents of residential properties in the District of Columbia, by declaring²¹ such property to be "affected with a public interest, and that all rents * * shall be fair and reasonable"; creating a commission clothed with jurisdiction to fix such fair and reasonable rent and authorizing tenants who were willing to pay the same, to hold over after the expiration of their terms. This statute was held unconstitutional by the District Court of Appeals, and a certiorari to review the decision was denied by the United States Supreme Court.²² Plaintiff in that case was held to have a vested estate and reversion in fee in the property in question, to come into possession upon the expiration of the lease on January 1, 1920. This right of reversion was held to be a property right of which plaintiff could not be divested, except by due process of law. The arbitrary fixing of rentals under the statute was held not to be due process. The renting of property was declared to be a private business which could not be made public, or impressed with a public interest by legislative fiat. The statute was viewed as in effect taking private property for private use.

On the other hand, statutes enacted for the same purposes by the legislature of the State of New York, have been upheld in highest court of the State and in the Federal (District) Courts. These decisions will shortly come before the United States Supreme Court for review. The very large number of cases of threatened evictions of occupants

²¹ Ball Rent Law, 41 Stats. 298, 300.

²² Hirsch v. Block, 267 Fed. 614, 254 U. S.—; 41 Sup. Ct. 13.

of tenements and apartments in the City of New York and the consequent public agitation, led the Governor of the State to appoint a commission to investigate and report upon the situation and as to remedies. Certain laws were enacted in April and May, 1920, as a result of the condition shown to the legislature in the Commission's report, and as these laws did not bring about the desired relief, a special session of the legislature was summoned in September of the same year at which further statutes were passed. The purpose of these laws was expressed in one of them³⁵ which recited that

"unjust, unreasonable and oppressive agreements for the payment of rent having been and being now exacted by landlords from tenants under stress of prevailing conditions whereby the freedom of contract has been impaired and congested housing conditions resulting therefrom have seriously affected and endangered the public welfare, health and morals in certain cities of the State, and a public emergency existing in the judgment of the legislature by reason thereof,"

therefore it was³⁶ made a defence to any action for rent accruing under an agreement for premises occupied for dwelling purposes (with certain exceptions), that the rent is unjust or unreasonable, and that the agreement under which it is sought to be recovered oppressive. Such an agreement was³⁷ made *presumptively* unjust and unreasonable, if it appeared that the rent had been increased more than twenty five per cent over that which existed one year prior to the time of the proceeding to recover the rent or possession of the demised premises.

Comprehensively stated, the legislation³⁸ enables a tenant of a dwelling who fails to pay the agreed rental, or who holds over and refuses to deliver up possession of the demised premises when, under the lease, the landlord is entitled to possession, to defeat the efforts of the landlord to oust him, so long as he is willing to pay a rent fixed by

³⁵ Laws N. Y. 1920, Chap. 136.

³⁶ by Chap. 136.

³⁷ by Chap. 136.

³⁸ Laws 1920, Chaps. 132, 133, 134, 137, 139, 210. Laws 1920 (September Session) Chaps. 942, 944, 947.

the court as being just and reasonable. These laws were to remain in force during a period of two years from their enactment.

"A knowledge of preexisting law and the words of the statute," says Judge Hough, in the *Marcus Brown Holding Co. Case* cited *supra*, "are enough to prove that the legislative desire is to maintain for about two years the September status of the kind of dwellings in which (by common knowledge) lives the major portion of the population of the metropolitan district. This status is to be maintained against the landlord's will if necessary, but at the option of the tenants . . . yet every such tenant is and will be as free to depart and choose another landlord as he was before September, 1920."

* * * * *

"Speaking now specifically of the facts in the present case," the court continued, "the tenant defendants herein, by law older than the State of New York, became at the landlord's option trespassers on October 1, 1920. Plaintiff had then found and made a contract with a tenant it liked better, and had done so before these statutes were enacted. By them plaintiff is, after defendants elected to remain in possession, forbidden to carry out his bargain with the tenant he chose, the obligation of the covenant for peaceable surrender by defendants is impaired, and for the next two years *Feldman, et al.*, may, if they like, remain in plaintiff's apartment, provided they make good month by month the allegation of their answer, *i. e.*, pay what 'a court of competent jurisdiction' regards as fair and reasonable compensation for such enforced use and occupancy * * *."

This is upheld as a valid exercise of the police power by the three Federal Judges sitting as a statutory District Court pursuant to Section 266 of the Judicial Code. Thus the Court squarely affirms the proposition that despite the language of the 10th section of Article I of the Constitution a state legislature may impair the obligation of an existing contract, or abrogate it, by virtue of its (supposedly) reserved police power.

While the Court said at page 317 that it was not necessary to go so far as to assert that "any business is affected with a public interest as soon as the electorate became sufficiently interested in it to pass a regulatory statute," yet it did hold "that the business of renting out living space is quite as suitable for statutory regulation and as such

affected with a public interest, as fire insurance,³⁹ and trading stamps."⁴⁰ That is to say, the business of renting houses and space in houses for dwelling purposes may be declared by the legislature to be affected with a public interest, and regulated—the price or rental fixed by law, and the right of the tenant to remain in possession be determined by the legislature, in entire disregard of the landlord, so long as the tenant shall pay the rent fixed by the court. The constitutionality of these acts also has been upheld by the New York Court of Appeals,⁴¹ not only under the State Constitution, which contains the usual due process clauses (Art. I, Secs. 1, 6), but also under the provisions of the Fourteenth Amendment to the Federal Constitution. The grounds of the decision were somewhat different from those of the Federal judges. The State court rejected the theory of clothing the business with a public interest, referring with apparent approval to the decision of the Court of Appeals of the District of Columbia in *Hirsch v. Block*, *supra*, and stating:

"The proposition is fundamental that private business may not be regulated, and may not be converted into public business by legislative fiat (*Producers Trans. Co. v. R. R. Comm.*, 251 U. S. 228)."

But the Court of Appeals also asserts that the proposition is equally fundamental, that the State may establish regulations reasonably necessary to secure the general welfare of the community by the exercise of the police power, although the rights of private property are thereby curtailed and freedom of contract abridged.

"The legislative or police power," said Judge Pound, speaking for all but two Judges of the Court, "is a dynamic agency, vague and undefined in its scope, which takes private property or limits its use when great public needs require, uncontrolled by the constitutional requirements of due process. Either the rights of property and contract must when necessary yield to the public convenience, advantage and welfare, or it must be found that the

³⁹ *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389.

⁴⁰ *Rast v. Van Deman*, 240 U. S. 342.

⁴¹ *People ex rel. Durham Realty Co. v. La-Fetra*, N. Y. Law Journ., Mar. 15, 1921, page 2021.

State has surrendered one of the attributes of sovereignty for which governments are founded and made itself powerless to secure to its citizens the blessings of freedom and to promote the general welfare."

This argument is powerful, *ad captandum*, but the thought naturally arises that bills of rights were insisted upon and embodied in constitutions for the very purpose of restricting the exercise of some of "the attributes of sovereignty" and to protect individual rights and private property against governmental encroachment for any purpose, even "the general welfare." And what becomes of the principle, recognized as viable by the Court, that "emergency cannot become the source of power," and that "the Constitution cannot be suspended in any complication of peace or war," if the owner of real property may be deprived of its use, stripped of his contract rights concerning it, compelled to accept as compensation for its use and occupation a sum fixed by the judge of a petty court as "just and reasonable," where many others are clamoring to secure it and are willing to pay a much higher rent than the existing tenant is willing (or able) to pay. If this decision be approved in the Supreme Court we must frankly recognize that the age of individualism is past and the era of collectivism arrived; that all rights are held subject to the legislative will, restrained only by the remnants of judicial power to be asserted where the encroachment appears to the Court to be obviously unjust, even to the accomplishment of what is "greatly and insistently demanded" in the name of the public welfare.

But while recognizing the powerful arguments in favor of the enlarging of the scope of action of this power adjudged to have been reserved to the States in spite of the language of the Constitution, and realizing the almost unrestricted area now conceded to its action one cannot but recall the language of Chief Justice Marshall:

"To what purpose are powers limited, and to what purpose are these limitations committed to writing; if these limits may, at any time, be passed by those intended to be restrained?"^a

^a *Marbury v. Madison*, 1 Cranch, at p. 69.

The police power has been fitly called "the law of necessity." It is the product of judicial alchemy which in it has found a solution for the great embarrassment which would have resulted by conceding to constitutional restrictions on governmental power the full force of the language of those who sought to express actual limitations, and to preserve individual rights in fact as well as in theory. But in so doing, the rights of liberty and property have been reduced to slender and unsubstantial proportions. Eternal vigilance is now, more than ever, the price of liberty. That protection which, in the earlier period of our national history, was furnished by the courts, henceforth must be looked for in the legislature. Never before in our history has it been more vital to the individual citizen that legislative bodies, State and National, should be representative of the best intellect and character of our people. With a sense of a responsibility of which the legislature no longer is relieved by the courts, legislation should be more cautiously framed, more wisely conceived and more justly enacted than ever before. But the citizen must henceforth be the guardian of his own liberty, for the ancient protection embodied in the formulae of individual rights, interpreted and enforced by judicial tribunals, no longer can be depended upon as barriers against collective wishes or group desires.⁴³

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⁴³On April 18, while this article was in the hands of the printer, the Supreme Court of the United States handed down its decision in the New York Emergency Rent Laws case, *Marcus Brown Holding Co. v. Feldman* (note 1, *supra*), and also in the Ball Rent Law case, *Block v. Hirsh* (note 34, *supra*). Both laws were held constitutional by vote of 5 to 4, the Chief Justice and Justices McKenna, Van Devanter and McReynolds dissenting. Mr. Justice Holmes, delivering the opinion of the Court in the main decision, *Block v. Hirsh*, laid special stress upon the emergency feature of the laws, citing as authority the Adamson Law case, *Wilson v. New*, 243 U. S. 332. The dissenting opinion delivered by Mr. Justice McKenna is likewise a very able and convincing opinion.

The reader will find it most interesting to compare the views of Mr. Wickersham in this article and those of Mr. Rhoads (in his article commencing on the next page) as to the proper scope of the Police Power, with the views of Mr. Justice Holmes and Mr. Justice McKenna as expressed in their opinions.—
EDITOR.