

*Law School of Harvard University,
Cambridge, Mass.*

February 14, 1936

Dear Stone,

1. It wouldn't be accurate to say that I have been passing sleepless nights because of some of the recent performances of your Court, for I am a hardy fellow and an extrovert and all that. But it is the simple truth that I have been more intellectually disturbed than I have been for a very long time, and some of these decisions will not get out of my head. I have already written you about them, but they keep bobbing up in my mind and perhaps you will let me make you the victim of my thinking out loud, even of my repetition of the obvious.

2. But really, really the more I think about the Great Northern case, the more outrageous it seems. You, of course, devastatingly established the complete departure from settled doctrine. And that means that the very foundation of the adjudicating process is turned into quicksands. It's easy for you to think yourself back as a law professor. Just how would you deal, in all the good conscience, of the primary obligation of disinterested thinking which a teacher owes to his students, with the Great Northern case, not only in the light of the whole current of decisions reviewing state tax assessments, but in light of the Court's treatment of the significance of reduced price levels in this case compared with the Court's attitude in the Baltimore Telephone case. Making angels dance on a pin's head is child play compared with the attempt to reconcile the Baltimore case and the Great Northern decision. I'm talking about us poor law professors who cannot do what the Court did, namely, dispose of the inconsistency by disregarding it. It's all right for Butler not to cite the West case, but what are you to tell a law student who knows all about the West case and uses it as a critique in analyzing the Great Northern case? We are told that the perpetuity of our nation requires an adherence to law – and

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in the large meaning of this observation I surely cannot be wrong in thinking that you and I subscribe to that belief.- and yet we have the majority again and again decide a case in defiance of the settled doctrine of the Court itself and in complete disregard of economic views invoked less than a year ago. Is it any wonder that there are those who find “a higher consistency” in these inconsistent decisions, the higher consistency being the invalidation of public claims and the judicial sanctification of the statu quo.

3. And what bothers me most is the Chief Justice’s role in all this business. I understand those whom Learned Hand calls the mastiffs” or “the Battalion of death”. Nor is Roberts unintelligible, especially in view of the analysis Joe Cotton made of him when he was appointed. But the Chief beats my conception, certainly of his capacity to understand, in the light of his experience and his decisions in other cases, what was involved in the Great Northern case. I just cannot believe that Charles Evans Hughes, the man, and not the Chief Justice, would not completely agree with your views in the Great Northern case. Something deep in me just balks at that assumption of obtuseness in Hughes. And so I am driven to the alternative which makes the matter worse.

4. And I am equally puzzled by the line-up in the Mayflower case. Can it really be that the Chief was not persuaded by Cardozo’s dissent? I wish that at least he would have written in his own words his views in the Great Northern and the Mayflower cases, instead of sheltering behind a silent concurrence.

5. Am I wrong in thinking that you and Brandeis, especially, must have gulped in swallowing some of Roberts’ language in the Borden case, particularly his talk about interfering with “the natural laws of trade or industry”? I wonder if Roberts knows what those natural laws

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are. If so, he ought to formulate them, at least for the guidance of economists, who to put it mildly are at sixes and sevens about them. How dogmatic all such talk seems – and how irrelevant to the judicial task – is again made clear in a very suggestive review in the latest number of *The Economist* to reach me, of what is evidently an important book, Professor Allen G. B. Fisher's, *The Clash of Progress and Security*. I am enclosing it, and I'll trouble you to return it at your convenience.

Well, I could go on, for I am really troubled, troubled as I am sure every teacher of public law must be, who has the responsibility of trying to analyse these and other cases decided by the Court with reference to the relevant traditional doctrines, the authority of prior decisions, the bearing of the concrete circumstances to the generality, the significance of individual factors, personal factors in the intellectual result, and above all in the light of the professed and accepted role of the judiciary in the scheme of American society. If you take your responsibility towards your students and towards truth as you see it seriously, I tell you ours, these days, is not an easy job. Come and try it if you don't believe me.

Ever yours,

F. F.

Hon. Harlan F. Stone