

California Law Review

Volume XXV

MAY, 1937

Number 4

Reorganization of the Supreme Court

THE President's recommendation that Congress, at this time, exercise its constitutional power¹ to enlarge the Supreme Court must be weighed in the light of the character of the decisions of the Supreme Court, as it is now constituted. What are the characteristics of these decisions that have produced wide discontent? Will the President's proposal,² if adopted, tend to bring about decisions of a proper judicial quality but devoid of these objectionable characteristics or tendencies? Also we must consider whether the adoption of the proposal would set a dangerous precedent.

Briefly put, the present discontent is with the Court's illiberal interpretation of the Constitution. A majority of the Court has been illiberal

¹ The Constitution far from establishing the Supreme Court does not even provide the number of judges of which it shall consist. While Article III declares that the judicial power of the national government "shall be vested in one supreme Court, and such inferior Courts as the Congress may from time to time ordain and establish," that the tenure of "the Judges, both of the supreme and inferior Courts" shall be during good behavior, and that the "supreme Court shall have original jurisdiction" in a few specified classes of cases, and appellate jurisdiction in other classes "with such Exceptions, and under such Regulations as the Congress shall make," it was left to Congress by statute to determine the composition of the Supreme Court and bring it into existence as a working institution. The first Congress realized this by enacting a statute entitled, "An Act to establish the judicial Courts of the United States" (1 STAT. (1789) 73) which provided "That the supreme court of the United States shall consist of a chief justice and five associate justices, any four of whom shall be a quorum, and shall hold annually at the seat of government two sessions . . ."

Since that time Congress has several times legislated to increase or to decrease the number of members of the court. The number has varied from six to ten.

In Article II of the Constitution there is also a mention of "the supreme Court" in the provision that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court." The Constitution also assumes that there would be a "Chief Justice," by providing that when the Senate is trying an impeachment of the President, "the Chief Justice shall preside." It is obvious that these mentions of "Judges of the supreme Court" and of "the Chief Justice" do not affect the conclusion above, that without the action of Congress in "establishing" the Supreme Court none could have come into existence.

² The proposal of the President submitted to Congress in his message of February 5, 1937 was rendered definite by the draft of a proposed bill which he submitted with his message. The bill deals with judges both of the Supreme Court and the inferior federal courts. Quoting so much as applies to the Supreme Court, the proposed bill is as follows:

in two senses of liberalism. One sense of liberalism is not to be cock-sure and opinionated but rather to be able and willing to put aside personal prejudices and prepossessions or to temper personal opinions in the light of the doubts and opinions of others. Such liberalism is essential to the judge who pays more than lip service to the principle so often reiterated by the Court, that a statute should not be held unconstitutional unless its conflict with the Constitution is clear, or to the oft-repeated statement that reasonable deference should be paid to the judgment of the legislature.

A second sense of liberalism is a sympathy with governmental attempts to improve the social and economic status of the underprivileged. It does not require much liberalism in a judge to support freedom of religious worship, freedom of speech and press, or rights of privacy against unreasonable searches and seizures. Immunity from governmental invasion of these interests is desired by every man regardless of his economic status. Consequently the ringingly eloquent opinions judges pronounce in support of these immunities are evidence only that those judges have embraced doctrines that have been the common thought of Americans since the Eighteenth Century. Witness the safeguards of these interests in early state constitutions and the first amendments (1790) of the national Constitution. A liberalism that is commonplace scarcely deserves the name.

Even when we consider controversial subjects, it is not every decision that sustains legislation regulating and restricting property rights that entitles the judge to a claim of occasional liberalism. This is true of the decisions of the Supreme Court sustaining the power of the states to authorize comprehensive zoning for cities. Zoning regulations, city-planning regulations, materially deprived owners of their previous rights to do as they pleased with their land. Indeed, prior rights of private prop-

"(a) When any judge of a court of the United States, appointed to hold his office during good behavior, has heretofore or hereafter attained the age of seventy years and has held a commission or commissions as judge of any such court or courts at least 10 years, continuously or otherwise, and within six months thereafter has neither resigned nor retired, the President, for each such judge who has not so resigned or retired, shall nominate, and by and with the advice and consent of the Senate, shall appoint one additional judge to the court to which the former is commissioned.

"Provided, That no additional judge shall be appointed hereunder if the judge who is of retirement age dies, resigns or retires prior to the nomination of such additional judge.

"(b) The number of judges of any court shall be permanently increased by the number appointed thereto under the provisions of subsection (a) of this section. No more than fifty judges shall be appointed thereunder, nor shall any judge be so appointed if such appointment would result in

"(1) more than fifteen members of the Supreme Court of the United States." United States News, February 8, 1937, p. 7.

erty were more drastically interfered with than by almost any other legislation. It was easy even for conservative judges to find reasons for holding zoning constitutional. The well-ordered city and especially the restricted residence district appeals to their predilections. Judicial liberalism comes into play only when the legislation in question conflicts with the social, economic or political predilections or prejudices of the judge.

I dwell upon this because it is vital in the present issue. It discloses how easily admirers of some judges make out a specious claim of reasonable liberalism by showing that these judges are found now on one side, now on the other with respect to progressive legislation.

Discontent over Supreme Court decisions centers around legislation which attempts progress in a particular direction, the improvement of the lot of the lower economic orders. This is the characteristic common to substantially all the legislation the invalidation of which has aroused dissatisfaction during the past forty years.

The present discontent really began about forty years ago and has been steadily growing. It was then that the Supreme Court put a meaning into the due process of law clauses of the Constitution, unwarranted by the words of the Constitution and unwarranted by the historical meaning of those clauses when adopted³—a meaning which enables the court to veto social and economic legislation either of the States or of Congress whenever a majority of the Court disagrees with the legislature with respect to the soundness of the social or economic policy on which a statute is based. The words of the Constitution are, "No person shall be deprived of life, liberty or property without due process of law."⁴

These words on their face and by their history do no more than forbid interference by executive and administrative officers with life, liberty or property except by the procedures authorized by law. Their historical antecedents in England were restrictions upon the executive only. The words clearly imply that life, liberty and property may be taken by government by proper procedure. These wholly procedural sounding words have been perverted by the courts.

About forty years ago the Supreme Court began to hold that a statute which puts a restriction upon liberty to contract or upon the use of private property may be unconstitutional no matter how proper the pro-

³ Reeder, *The Due Process of Law Clauses and "the Substance of Individual Rights"* (1910) 58 U. OF PA. L. REV. 191; Corwin, *The Doctrine of Due Process of Law Before the Civil War* (1911) 24 HARV. L. REV. 366, 460; Howe, *The Meaning of "Due Process of Law" Prior to Adoption of the Fourteenth Amendment* (1930) 18 CALIF. L. REV. 583.

⁴ The quotation above is from Amendment V, adopted in 1790, which lays this restriction on the national government. Amendment XIV, adopted in 1868, includes, "... nor shall any State deprive any person of life, liberty, or property, without due process of law; ..."

cedure prescribed in the statute for its enforcement. Such a statute, says the Court, is unconstitutional if it is "unreasonable." The Court's oft-repeated formula has now become that such statutes are unconstitutional if they are "unreasonable, arbitrary or capricious." Since the word "arbitrary" is merely the opposite of reasonable, and "capricious" has no definite meaning, the Court's doctrine is that "unreasonable" statutes violate the due process of law clauses. Thus, restrictions upon procedure are perverted by the Court into limitations upon the substance of legislation. The Court sets itself up as the judge of the "reasonableness" of legislation. When a statute cuts into the existing order of private rights, the Court asks whether this interference with private right is justified by the amount the statute promotes the general welfare. In short, the Court makes itself the judge of the policy or wisdom of legislation. All of its protests that it has nothing to do with the policy or wisdom of legislation are worse than meaningless in face of its decisions. Obviously, the determination of reasonableness brings into play the social, economic and political prepossessions and prejudices of the illiberal judge.

In 1905 the Supreme Court in *Lochner v. New York*,⁵ four justices dissenting, held that a State statute fixing ten hours as the maximum working day for employees in bakeries was unreasonable. The procedural provisions of the statute were unobjectionable. Certainly, such a statute cuts down the liberty of employers and employees to do as they please, but where is the lack of due process of law? What possible purpose does government have if it is not to regulate the conduct of its members? The welfare of society consists of the welfare of its members, and when any course of conduct on the part of individuals is found to be prejudicial to the welfare of many, government must step in with appropriate regulation. But a majority of the Supreme Court says that not the wisdom of legislators but the super-wisdom of Supreme Court judges shall determine whether any social or economic legislation is wise or permissible. Thus both Congress and State legislatures are stripped of their legislative functions. The Court has put itself in a position to do so by distorting the words "due process" and disregarding the inevitable inference that legislatures may do such things if they avoid improper procedures.

It was in the *Lochner* case, a five to four decision, that Justice Holmes delivered his most famous dissent. He said: "This case is decided upon an economic theory which a large part of the country does not entertain."⁶ He referred to the politico-economic theory that society thrives most under a regime of government's hands-off economic relations. He declared that the Fourteenth Amendment did not adopt any economic

⁵ (1905) 198 U. S. 45.

⁶ *Ibid.* at p. 74.

theory into our constitutional law. Three years later in *Adair v. United States*⁷ a majority of the Court invoked the due process of law clause of Amendment V to hold invalid an Act of Congress that forbade railroads to treat membership in a labor union as a ground for discharging an employee.

Soon after these Supreme Court decisions the Court of Appeals of New York held the first New York Workmen's Compensation Act invalid as an unreasonable interference with the employer-employee relations.⁸ This New York and other similar state court decisions met with wide public condemnation, culminating in the advocacy by the Progressive Party in 1912, under the leadership of Theodore Roosevelt, of the so-called "recall of judicial decisions." The plan was that a state statute held invalid by a state court should be referred to the people of the State at an election and, if they approved it, should become a law in spite of the court's decision.⁹

While this proposal was directed at State courts only, public criticism also condemned the *Lochner* and *Adair* decisions by the Supreme Court, and the healthy airing given to the fallacy that judges have a constitutional warrant for setting up their judgment of what is good for society as opposed to legislative judgment brought about a temporary liberalism in the courts.

A few years later, in *Bunting v. Oregon*,¹⁰ the Supreme Court held valid an Oregon State law which fixed a ten-hour day for work in every kind of factory by a five to three decision, and the same year, 1917, it held valid without dissent¹¹ the second New York State Workmen's Compensation Law.¹² The membership of the Court had been changing since the *Lochner* and *Adair* cases and liberals temporarily predomi-

⁷ (1908) 208 U. S. 161.

⁸ *Ives v. South Buffalo R. Co.* (1911) 201 N. Y. 271, 94 N. E. 431, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156.

⁹ This plank in the Progressive Party platform adopted at Chicago August 7, 1912, at p. 12, read:

"The Progressive Party demands such restriction of the power of the courts as shall leave to the people the ultimate authority to determine fundamental questions of social welfare and public policy. To secure this end, it pledges itself to provide:

"1. That when an act, passed under the police power of the state, is held unconstitutional under the state constitution, by the courts, the people, after an ample interval for deliberation, shall have an opportunity to vote on the question whether they desire the act to become a law, notwithstanding such decision."

¹⁰ (1917) 243 U. S. 426.

¹¹ The Workmen's Compensation Law of Washington escaped at the same time by the narrow vote of five to four. *Mountain Timber Co. v. State of Washington* (1917) 243 U. S. 219. The Arizona law was sustained two years later by the same split in the vote. *Arizona Employers' Liability Cases* (1919) 250 U. S. 400.

¹² *New York Central R. Co. v. White* (1917) 243 U. S. 188.

nated. By 1923 the reverse had occurred. It had seemed that the *Bunting* case had overruled the *Lochner* case and established State power to go far in the regulation of hours of labor. In the District of Columbia Minimum Wage case, however, Justice Sutherland, a new member of the court, threw doubt upon this. Among other things he said that the "principles" of the *Lochner* decision "have never been disapproved."¹³ So much impressed by these remarks of Justice Sutherland was the Supreme Court of New Mexico that in 1933 it held invalid a statute of that State which fixed eight hours as the maximum work day for employees in mercantile establishments.¹⁴ At the present time it is impossible to say how far States may go in the regulation of hours of labor.

The conservative majority the Court had attained by 1923 expressed itself that year by holding unreasonable and void an Act of Congress which established a system of minimum wages for women privately employed in the District of Columbia. This is the much discussed case of *Adkins v. Children's Hospital*.¹⁵ Two years later this decision was accepted as a precedent for a decision that the States may not prescribe minimum wages for women.¹⁶

These decisions on minimum wage laws are the clearest proof that liberalism or conservatism of the members of the Court at the particular time a statute comes before it determines whether it will be held to be "unreasonable," and unconstitutional. An Oregon minimum wage statute had come before the Court in 1917 and the Court had divided four to four, Justice Brandeis abstaining because he had been employed as counsel in the cases before he joined the Court.¹⁷ Had he been in a position to vote, minimum wage statutes would have been constitutional by a five to four vote. The four to four vote left the question open. There was a period in 1921-22 when there were six judges on the Court who would have sustained minimum wage legislation had the question then come up. Changes in membership by 1923 raised the number who voted against minimum wage laws to five, so that the vote in the *Adkins* case was five to three (Justice Brandeis not participating). State supreme court judges and lower federal judges had previously voted twenty-nine to four in favor of the constitutionality of minimum wage laws.¹⁸ The Constitution may be searched line for line without finding any phrase that condemns minimum wage legislation. Such is the opinion of substantially all the professors of Constitutional law in the universities of

¹³ *Adkins v. Children's Hospital* (1923) 261 U. S. 525, at 550.

¹⁴ *State v. Henry* (1933) 37 N. M. 536, 25 P. (2d) 204, (1934) 28 ILL. L. REV. 706.

¹⁵ *Supra* note 13.

¹⁶ *Murphy v. Sardell* (1925) 269 U. S. 530.

¹⁷ *Stettler v. O'Hara and Simpson v. O'Hara* (1917) 243 U. S. 629.

¹⁸ MCGOVNEY, CASES ON CONSTITUTIONAL LAW (1935) p. 769.

the country. This is the opinion of men who have specialized for years in the study of constitutional law and constitutional history.

A wilful majority of illiberal judges disregard the teachings of scholarship and the opinions of fellow members of the Court and under the guise of finding a statute unreasonable, exercise a policy-veto on social and economic legislation. The only function which the Courts can rightly claim is to hold void statutes that are plainly in conflict with the Constitution. The policy-veto is given by all our constitutions, state and national, to the executive, and in all cases the policy-veto may be overridden by a two-thirds vote in both houses of the legislature.

Down to June 1936, the Supreme Court has taken a vote among its members five times on the constitutionality of minimum wage legislation. The first vote was in 1917,¹⁹ and stood:

Unconstitutional	Constitutional
White	Holmes
McKenna	Clarke
Van Devanter	Day
McReynolds	Pitney

Brandeis thought the law constitutional but did not vote.

The vote in 1923²⁰ was:

Unconstitutional	Constitutional
McKenna	Holmes
Van Devanter	Taft
McReynolds	Sanford
Sutherland	
Butler	

Brandeis again did not vote.

In 1925²¹ and 1927,²² Arizona and Arkansas minimum wage laws

¹⁹ *Stettler v. O'Hara* and *Simpson v. O'Hara*, *supra* note 17. The official report of these two decisions on the Oregon law states only: "Judgments affirmed . . . by an equally divided court. (Mr. Justice Brandeis took no part in the consideration and decision of these cases.)" 243 U. S. 629. The alignment of the judges given in the text is almost absolutely certain as to Justices Van Devanter, McReynolds and McKenna in view of the way they voted in subsequent cases. It is highly probable that Justice White was the fourth who voted against the statute. See Powell, *The Judiciality of Minimum Wage Legislation* (1924) 37 HARV. L. REV. 545, 549-550.

²⁰ *Adkins v. Children's Hospital*, *supra* note 13.

²¹ *Murphy v. Sardell*, *supra* note 16. The official report curtly states: ". . . affirmed upon the authority of *Adkins v. Children's Hospital*, 261 U. S. 525. . . . Mr. Justice Holmes requests that it be stated that his concurrence is solely upon the ground that he regards himself bound by the decision in *Adkins v. Children's Hospital*. Mr. Justice Brandeis dissents." 269 U. S. 530.

²² *Donham v. West-Nelson Mfg. Co.* (1927) 273 U. S. 657, memorandum opinion, Justice Brandeis dissenting. It may be said that Justice Brandeis has been outspoken against close adherence to *stare decisis* on constitutional questions.

were held invalid "on the authority of *Adkins v. Children's Hospital*." The rule of following a precedent restrained the judges from voting their real opinions. Had they done so, the *Adkins* case would then have been overruled by a five to four vote. We know the Court in 1925-1927 stood thus:

<u>Unconstitutional</u>	<u>Constitutional</u>
Van Devanter	Holmes
McReynolds	Brandeis
Sutherland	Taft
Butler	Sanford
	Stone

When the Court voted in 1936 on the New York minimum wage law²³ the vote stood:

<u>Unconstitutional</u>	<u>Constitutional</u>
Van Devanter	Hughes
McReynolds	Brandeis
Sutherland	Stone
Butler	Cardozo
Roberts	

Putting together all the Supreme Court judges who had voted from time to time on the constitutionality of minimum wage laws, down to and including June 1, 1936, they stand, or stood, as follows:

<u>Unconstitutional</u>	<u>Constitutional</u>
White	Holmes
McKenna	Day
Van Devanter	Pitney
McReynolds	Clarke
Sutherland	Brandeis
Butler	Taft
Roberts	Sanford
	Stone
	Cardozo
	Hughes

Survivors of the 1917 decisions, still on the Court, are Van Devanter and McReynolds. These two, with Sutherland and Butler have been a solid bloc against minimum wage legislation since 1923. With the adherence of Roberts to this bloc in 1936 minimum wage legislation is still unconstitutional by the Constitution as read by them.

Since those words were written Justice Roberts has reversed the Supreme Court. The Supreme Court has again voted, March 29, 1937. By

²³ *Morehead v. New York ex rel. Tipaldo* (1936) 298 U. S. 587.

switching his vote over to the other column, Justice Roberts has made that constitutional which before was unconstitutional. Before I discuss this interesting episode I shall ask the reader temporarily to forget this latest development and read the next three paragraphs just as they were written before Justice Roberts switched.

Some of the judges persist in wilfully voting their "personal economic predilections." To them, they say, minimum wage legislation is an "unreasonable" invasion of liberty in spite of the fact that ten other justices from time to time have considered such legislation not "unreasonable." Liberals have come and gone, but the conservative bloc survives. Any reorganization of the Court that will reverse these decisions will be getting back to the Constitution as read by Chief Justices Taft and Hughes and Associate Justices Holmes, Day, Pitney, Clarke, Brandeis, Sanford, Stone and Cardozo.

It is silly to say that able constitutional lawyers will decline appointment in case of enlargement of the Court because they will be expected to rubber-stamp the constitutional opinions of the Administration appointing them. The constitutional views at stake, so far as minimum wage legislation is concerned, are not the views of one man, they are entertained by many, including ten of the seventeen judges who have sat in the Court in the last twenty years.

The chief purpose of the President's proposal is to counteract the illiberalism of the present Court in all those numerous lines of cases where the decision is not compelled by any words in the Constitution but turns upon the judges' opinions of reasonableness, or supposed soundness of policy, or upon the wisdom of adopting one of two or more equally tenable interpretations of the Constitution. The conservatives are not conserving the Constitution but conserving their personal opinions with respect to what legislation is good for the country.

In the case just decided by the Supreme Court on March 29, 1937, *West Coast Hotel Co. v. Parrish*,²⁴ a Washington statute establishing a system of minimum wages for women was held valid by a five to four decision. Chief Justice Hughes delivered an opinion for the majority, consisting of himself and Justices Brandeis, Stone, Cardozo and Roberts. The opinion states that the Washington statute does not differ from the statute for the District of Columbia which the Court held invalid in the *Adkins* case, in 1923, and frankly declares, "Our conclusion is that the case of *Adkins v. Children's Hospital* should be, and it is, overruled." Chief Justice Hughes says:

"... What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power,

²⁴ (1937) 57 Sup. Ct. 578.

how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end? The legislature of the State was clearly entitled to consider the situation of women in employment, the fact that they are, in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances. The legislature was entitled to adopt measures to reduce the evils of the 'sweating system,' the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition. The legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many States evidences a deepseated conviction both as to the presence of the evil and as to the means adopted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment."

This is the sort of liberalism that is desired in Supreme Court decisions, not occasionally and sporadically, but constantly and persistently.

Elsewhere in his opinion Chief Justice Hughes quotes from the dissenting opinions of Chief Justice Taft and Justice Holmes in the *Adkins* case and declares them to be correct and conclusive. If they are correct now, they were correct in 1923. The Constitution has not changed, only what the judges say it is, is now different. Why did it take fourteen years for the courts to catch up with the legislatures? Indeed, it is a quarter of a century since many state legislatures enacted minimum wage laws for women, and Congress did so nineteen years ago.

Why was the Court so late in paying deference to the legislative judgment? The Chief Justice says that "our recent economic experience" has cast "a strong light" on the social need for such legislation. He says:

"... The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. It is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land."

It is true that the darkness of depression did cast a strong light on the defencelessness, the unequal bargaining power, of wage earners, but legislators were able to see this defencelessness without the aid of so strong a light.

Besides, this is mentioned only as an "additional" consideration after stating that the dissenters in 1923 reasoned rightly. Obviously they did not have the advantage of this later illumination.

When one reads the Chief Justice's opinion, adopting the reasons given by the dissenters of 1923, amazement grows why these reasons did not persuade a majority of the Court in 1923 as they have a majority in 1937. A minor amazement is why they failed to persuade Justice Roberts in June 1936 and persuaded him less than a year later.

In neither case did Justice Roberts give any reason for his vote. He was a silent voter. This silence leaves us to speculation. It may be futile.

Has history merely repeated itself? Widespread public criticism of illiberal constitutional interpretation, in 1912, led as we have seen to a temporary liberalization of the courts. Has Justice Roberts bent to avoid the force of the present storm? Has the attack on the illiberalism of some of the justices launched by the President in February and followed up in March by the opinions expressed by witnesses before the Senate's investigating committee had an effect? Has the fact that the Republican candidate for the presidency said last summer that he believed in minimum wage legislation and would favor a constitutional amendment, if necessary, to authorize it—has that had an effect? Has the statement of Senator Borah, dread menace to Republican solidarity, that he believed minimum wage laws constitutional—has that had an effect?

It may be said in explanation of Justice Roberts' apparent switch, that it is only apparent. It may be said that we have no evidence how he stood last June, and that in voting to nullify the New York law last June, in *Morehead v. New York ex rel. Tipaldo*,²⁵ he was not called upon to say whether or not he favored overruling the *Adkins* case. A plausible but doubtful contention can be made for that. But Justice Roberts concurred without qualification in the majority opinion delivered by Justice Butler. The opinion starts by holding that the New York law is not distinguishable from the law held invalid in the *Adkins* case, and that that precedent requires the New York law to be held unconstitutional. He adds that, "No application has been made for reconsideration" of the holding in the *Adkins* case, and that counsel for New York relied wholly upon the contention that the New York statute was different. If the Supreme Court's consideration of the New York statute was limited to that issue, Justice Roberts' concurrence is explainable as a vote merely that there was no essential difference between the two statutes. Justice Stone, however, with the concurrence of Justices Brandeis and Cardozo, pointed out that it was pleaded in the case that the New York statute violated the due process clause of the Fourteenth Amendment, that the New York Court of Appeals had sustained this contention, that the application to the Supreme Court for review specifically stated that the case called for a reconsideration of the *Adkins* case.

²⁵ *Supra* note 23.

Chief Justice Hughes delivered a separate dissenting opinion. He contended that the New York law was different, that the *Adkins* case was not a square precedent, that the law was not unreasonable and, therefore, not unconstitutional. It is true the Chief Justice did not expressly say that he favored overruling the *Adkins* case. Justices Stone, Brandeis and Cardozo agreed that the New York law was different but also said the *Adkins* case was wrong and should be overruled.

Justice Roberts in June was not sufficiently liberal to take the middle ground with Chief Justice Hughes.

Moreover, Justice Butler in the majority opinion, after saying that reconsideration of the *Adkins* case was not before the Court, devoted twelve pages of his opinion to defense of the decision in the *Adkins* case. He quoted and summarized Justice Sutherland's majority opinion in that case with approval. He said:²⁸

"The decision and the reasoning upon which it rests clearly show that the State is without power by any form of legislation to prohibit, change or nullify contracts between employers and adult women workers as to the amount of wages to be paid."

Justice Roberts concurred without expressing any qualification. If he was shocked by that interpretation of the Constitution, he should have resorted to a not infrequent practice of saying, "I concur in the result." When we see that in the Supreme Court reports, we understand that there was something in the opinion to which the judge did not subscribe although he agreed for other reasons in the result, which in this case was an affirmation of the judgment of the New York Court of Appeals.

Unfortunately for his reputation as a judge, Justice Roberts did not do so. He leaves his conduct without explanation on the record. It makes plausible the inference that something occurred between June 1, 1936 and March 29, 1937 to influence his conduct. Even assume that on June 1, 1936 he would have voted to overrule the *Adkins* case if he had considered himself squarely confronted with that question, of which we have no evidence whatsoever, even so he refused to take the middle ground pointed out by the Chief Justice, and closed his mind against the opinion of three of the Justices that that question did squarely confront the Court. Was he willing to see a long desired social remedy left under a cloud of unconstitutionality as long as the issue could be dodged? Was he willing that a bare Supreme Court majority in 1923 should as long as possible thwart a reform that ten Supreme Court judges had previously said was constitutional?

But Justice Roberts has now added one more vote to the side of constitutionality of minimum wage laws. The total count has now become eleven Supreme Court judges voting "constitutional" and seven voting "unconstitutional."

²⁸ *Supra* note 23, at 611.

Four justices, McReynolds, Van Devanter, Sutherland and Butler dissented in this latest decision. They adhere to their conservative position. They and all the Court agree that the rule of the Constitution, as established in their decisions, is that a statute restricting liberty is not unconstitutional unless it is "unreasonable, arbitrary or capricious." That rule may not be visible in the words of the Constitution, but it is the interpretation that all of the present Court profess to act upon. Testing them by their own rule, how can the four deny that they are stubbornly voting their "economic predilections" in holding minimum wage laws an unreasonable interference with liberty in the face of wide spread public opinion and eleven Supreme Court judges to the contrary?

Does the remarkable episode that Justice Roberts has joined, as he has sporadically before, the group of liberal constructionists mean that the Court is now liberalized and we need do no more about it? Shall we stand pat, holding our breaths, praying or whatever else it is we do, that one of the five shall not hereafter slip? Or shall we take steps to assure ourselves that the Constitution will not be distorted, but that it shall be liberally construed as a charter of effective democratic government?

The history of the Supreme Court's ruling on minimum wage legislation is the best but far from the only illustration of the effect of illiberal application of the Constitution as construed by the Court. Every statute seeking to regulate better the social and economic order has to run the same gauntlet of the Court's interpretation and application of the due process of law clauses.

NARROW CONSTRUCTION OF THE POWERS OF CONGRESS

Recently, but not confined to the last four years, discontent has arisen because of the Court's narrow construction of the express grants of power to Congress. In 1918 the Court held invalid an act of Congress which prohibited the shipment in interstate commerce of the products of factories in which children under fourteen were employed.²⁷ A minority of the Court pointed out that the statute was clearly a regulation of interstate commerce and within the express power to regulate that commerce. The majority said that this express grant was to be read with an implied exception, that Congress was not to exercise it for purposes which they said the Constitution reserved to the States. They said the effect of the act was to regulate the employment of children, to which one answer is that the act did not restrict employment of children unless the employer desired to ship his products to other states, that is, unless he wanted to market them in interstate commerce. Of course, no one doubted that the Constitution reserves to the States the power to regulate the employment of children in all employments in which interstate commerce is not in-

²⁷ *Hammer v. Dagenhart* (1918) 247 U. S. 251.

volved. The majority of the Court was forced to very narrow and technical distinctions to justify this decision in view of decisions in other cases that Congress could forbid shipment in interstate commerce of lottery tickets, prostitutes, stolen automobiles—although lotteries, prostitution and stealing, within the States, are exclusively within State control except in so far as Congress can control them by regulating interstate commerce. A still more damning criticism of the decision is that the majority reversed a long-standing doctrine of the Court. The Court had long maintained that the power of Congress over interstate commerce was as broad as its power over foreign commerce.²⁸ It had frequently pointed out that the grant to Congress of power over these two types of commerce was made by the same words in a single sentence. The Constitution says, "The Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States."²⁹ The word "regulate," occurring but once, is now given two meanings. When Congress forbids shipment into the United States from a foreign country of any commodity whatsoever, that is a regulation of foreign commerce, no matter what is the purpose in view, or the effect of the prohibition. But when Congress forbids the interstate shipment of something, whether that is a regulation of commerce is to be determined by its purpose or effect. It is these technical distinctions that cause dissatisfaction with the Court's decisions. They are at war with the oft-repeated rule of construction that a statute should be held valid unless its conflict with the Constitution is beyond reasonable doubt—and that a Constitution should be construed as laying down broad principles, not hair-splitting distinctions.

In three decisions on New Deal legislation the Court has continued to give the power of Congress over commerce narrow and power-denying interpretation. In previous decisions the Court had held that the power of Congress to regulate interstate commerce extends to regulating any conduct that substantially affects interstate commerce. Two examples must suffice. The Court had held that Congress can regulate railroad rates for transportation wholly within a single state, not interstate commerce at all, because what a railroad charges for that kind of business affects what it will have to charge for interstate transportation, that is, Congress can regulate intrastate rates because of their effect upon interstate rates.³⁰ The Court has also held that under the Sherman Anti-Trust Act

²⁸ CORWIN, *THE COMMERCE POWER VERSUS STATES RIGHTS* (1936), c. II, especially p. 33.

²⁹ U. S. CONST., Art I, § 8, cl. 3.

³⁰ *R. R. Commission of Wisconsin v. Chicago, Burlington & Quincy R. Co.* (1922) 257 U. S. 563; *Houston, East & West Texas R. Co. v. United States* (1914) 234 U. S. 342.

Congress can regulate or penalize persons engaged in production, manufacturing, mining, including the conduct of workers employed therein, where their conduct though primarily affecting production also has the effect of restraining interstate or foreign commerce.³¹

It is a sensible interpretation of a power to regulate interstate commerce that it includes power to regulate whatever substantially affects interstate commerce. But, the Court has recently announced a new formula, or a return to a formula announced in the *Sugar Trust* case³² which seemed overruled by later decisions. In the *Schechter* case,³³ after first holding the National Industrial Recovery Act invalid because it violated the implied rule of the Constitution against a delegation by Congress of an unrestricted power to legislate, the opinion of Chief Justice Hughes went on unnecessarily to hold that the Act violated the Commerce Clause. The formula he laid down was later restated and applied by a majority of the Court in holding the Bituminous Coal Conservation Act of 1935 to be beyond the power of Congress under the Commerce Clause.³⁴ The new formula is, that where conduct is not a part of interstate or foreign commerce, Congress cannot regulate it, no matter how substantially it affects interstate or foreign commerce unless it *directly* affects it. Lawyers are now guessing when a substantial effect is not a direct effect. Justice Sutherland's explanation of the new rule, in *Carter v. Carter Coal Co.*³⁵ gives no guide to Congress. Indeed, he says, "Whether the effect of a given activity or condition is direct or indirect is not always easy to determine."³⁶ In short, it is obvious that a majority of the Court has evolved another obscure formula, an obscure interpretation of an important grant of power to Congress that puts future legislation more completely under the control of the Court.

The decision of a majority of the Court in *Railroad Retirement Board v. Alton Railroad Co.*³⁷ holding invalid the act of Congress requiring railroads to provide old age retirement pensions for their employees is an astonishing performance. Five provisions or features of this act were held by the majority to impose unreasonable burdens on the railroads, that, therefore, they violated the due process of law clause of the Fifth Amendment, and that these bad parts of the statute tainted the whole and rendered it invalid.

³¹ *Coronado Coal Co. v. United Mine Workers of America* (1925) 268 U. S. 295; *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association* (1927) 274 U. S. 37.

³² *United States v. E. C. Knight Co.* (1895) 156 U. S. 1.

³³ *A. L. A. Schechter Poultry Corp. v. United States* (1935) 295 U. S. 495.

³⁴ *Carter v. Carter Coal Co.* (1936) 298 U. S. 238.

³⁵ *Ibid.*

³⁶ *Ibid.* at 307.

³⁷ (1935) 295 U. S. 330.

But secondly, said the majority, Congress did not have power under the Commerce Clause to enact any statute requiring railroads to pension their employees, no matter how fair and reasonable might be its provisions.

This was the case in which Chief Justice Hughes delivered a trenchant dissent, concurred in by Justices Brandeis, Stone and Cardozo. The Chief Justice could not see how an act of Congress which required railroads engaged in interstate commerce to provide pensions for their employees was not a regulation of interstate commerce. No more can you or I. Besides the dissenters disagreed with the majority on four out of the five due process of law points. Only one minor provision they agreed was bad, and it could be cut out leaving the statute valid.

Think of it! Out of the six constitutional points in the case, there was agreement on one alone. Surely the Constitution as interpreted by the Supreme Court must be very obscure, if such splits can occur over not merely what the Constitution means, but over what the Court in past cases has said it means.

Finally in the *A.A.A.* case³⁸ the Court gave a narrow interpretation of another express grant of power to Congress. The Court held that an act of Congress which appropriated money to be paid to farmers for reducing their production of certain products in accordance with regulations made by Congress and the Secretary of Agriculture was unconstitutional. The Court conceded that Congress might spend tax-raised money somehow in aid of agriculture, but to do it in the particular manner was forbidden. It was unconstitutional, a majority of the Court said, to induce farmers to make contracts whereby they agreed to abide by federal regulations, because Congress had no grant of power to regulate agriculture. True Congress had not enacted any law regulating agriculture. It had merely exercised its granted power to appropriate money to promote the general welfare. Justices Stone, Brandeis and Cardozo, dissenting, thought that Congress had acted squarely and literally within the plain terms of this grant of power. Justice Roberts, for the majority, said that the Court did not decide that Congress could not pay money to farmers on condition that they reduce production, but that it did decide that Congress could not authorize the making of contracts whereby farmers were to be paid money if they reduced production. This is the narrow, and fine-drawn distinction upon which the majority rested the decision. I will not say that the majority would not have created some other reasons for the decision if this narrow ground had not been available.

Why this narrow distinction? The truth is that the Court was faced with the fact that for a century Congress had been spending money to

³⁸ *United States v. Butler* (1936) 297 U. S. 1.

promote purposes to which its other legislative powers do not extend. It had been settled by long practice that the spending power of Congress extended to many purposes beyond what it could reach by its other legislative powers. This was in accord with the interpretation of the general welfare clause³⁹ given by Alexander Hamilton during Washington's administration. Justice Roberts declared that Hamilton's interpretation was correct. From that we might expect Justice Roberts to apply Hamilton's interpretation as Hamilton applied it. But not so. Hamilton gave his interpretation in a report to Congress urging federal legislation to promote manufacturing. He said agriculture was then the chief industry in the United States, and in aiding manufacturing, care should be taken not to hurt agriculture. This could be accomplished in this manner:—Congress could lay import duties to protect domestic manufacturers and use a part of the proceeds to pay bounties to manufacturers on condition that they used raw materials produced by American farmers, or bounties should be paid directly to farmers on condition that they produced certain raw materials which were not then produced in sufficient quantity to meet the needs of American manufacturers. In the former case the subsidized processor would be able to pay higher prices to the farmer to induce him to produce, in the latter case the farmer would get his subsidy direct from the government on condition that he produced.

There you are—a planned economy to be set up by Congress by exercising its power under the general welfare clause. There is an economic difference between Hamilton's plan and the A.A.A., but no legal difference. Hamilton was planning increase of production in an era of scarcity, the A.A.A. a reduction in an era of maldistributed surpluses. The Supreme Court claims it has nothing to do with the economics of Congressional legislation.

Justice Roberts did not attempt to distinguish Hamilton's plan from the A.A.A. Justice Roberts ignored Hamilton's example of the Hamiltonian doctrine. Justice Roberts ignored comparison of the A.A.A. with the very plan which led Hamilton to announce the interpretation which Justice Roberts professed to accept.

Again, I say that when acts of Congress stand or fall on such technical distinctions, the Supreme Court's power to pass upon constitutionality has changed into a veto power, a power to nullify a statute on grounds of policy, supposed wisdom or expediency.

WHAT IS THE REMEDY?

Fundamentally, the objective of all forward looking people is to give America a more democratic government—to strike the shackles off of

³⁹ U. S. CONST., Art I, § 8, cl. 1. "The Congress shall have Power . . . To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States. . . ."

legislatures, national and state, so that representatives of the people may enact the people's will into law, without restrictions, or at least with less restrictions, checks and vetoes. The framers of the Constitution feared an unrestrained democracy. Government by, of and for the people must, they thought, be subjected to checks and limitations. Chief of these were the two-chambered legislature, each house a check upon the other; the executive veto; and express constitutional limitations on legislative power to be enforced by the Courts. Regarding the Constitution as the will of the people in the Eighteenth Century, it cannot be denied that they intended these departures from pure democracy. The adoption of the Seventeenth Amendment, making Senators elective by the people, reduced the undemocratic feature of the bi-cameral legislature. On the other hand, the Supreme Court's narrow interpretation of grants of legislative power and stringent interpretation of limitations on that power have exaggerated the position of the Court as an undemocratic feature of our system, far more undemocratic than the framers intended. Their slight experience with judicial enforcement of constitutions makes it reasonable to assume that they supposed the judicial task to be to check only plain and obvious violations of the Constitution. They did not foresee the tremendous possibilities of judicial interpretation.

To counteract the debilitation of government, state and national, by the Constitution as misinterpreted by a majority of the Supreme Court, resort might be made to piece-meal constitutional amendments each reversing an objectionable interpretation. The American people have done that three times. In 1794 the Eleventh Amendment was adopted to reverse a decision of the Court made the year before.⁴⁰ In the *Dred Scott* case⁴¹ in 1857, one point laid down by the Chief Justice and some of his associates was that a negro's birth in the United States did not give him citizenship. One sentence of the Fourteenth Amendment reversed that.⁴² In 1895 the Court held invalid the Federal Income Tax Act of 1894 by a five to four vote.⁴³ The majority held that Congress could not levy a tax on incomes derived from property without apportioning to each of the States a quota of the whole amount in proportion to their respective populations. Compliance with this rule made a federal income tax impractical, for it required different rates on taxpayers residing in different states. The Act of 1894 was a Democratic measure. In 1909 Republicans and Democrats in Congress joined in proposing the Sixteenth Amendment to reverse the decision. It was ratified in 1913. Thus it took

⁴⁰ *Chisholm v. Georgia* (1793) 2 U. S. (2 Dall.) 419.

⁴¹ *Dred Scott v. Sandford* (1857) 60 U. S. (19 How.) 393.

⁴² "All persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

⁴³ *Pollock v. Farmers' Loan and Trust Co.* (1895) 157 U. S. 429, 158 U. S. 601.

eighteen years to get this reversal. In fact, in 1911 the Court rendered a decision which practically undermined the decision in the *Pollock* case.⁴⁴ The Court claimed to be able to distinguish between a tax "on income" and a tax "measured by income," although the amount paid by the taxpayer should be the same. The distinction was that between tweedle-dee and tweedle-dum. This decision showed that the language of the Constitution reasonably construed supported the tax held invalid in 1895. The argument of "learned counsel" in that case that income taxation was "socialistic" explains what affected an illiberal majority of the Court. The illiberal majority forced the people to resort to the slow and cumbrous process of constitutional amendment.

Piecemeal amendment to reverse the Supreme Court is a slow and tedious process. The chief difficulty seems to have been getting proposed amendments through Congress because of the two-thirds vote requirement. Thousands have been introduced in Congress and only twenty-six submitted by Congress to the States. Of these twenty-six all but five have been ratified by three-fourths of the States. Four of the lost amendments were lost long ago and are now forgotten. The fifth, the Child Labor Amendment, is perhaps not yet lost, though it was submitted thirteen years ago. Even if enough States ratify it this year or next to make the necessary three-fourths, there is the possibility that the Supreme Court may hold that it has not been ratified within a reasonable time. The Court has already unnecessarily invented a doctrine that will enable it to do so.⁴⁵

Piecemeal amendment would be a more practical remedy if Article V of the Constitution were changed to make amendment easier. In California and some other states a majority vote of the people at any election is sufficient to make any change in the State Constitution. These States would have an almost pure democracy were it not for the limitations on the States in the national Constitution, enforced as they are by over-stringent decisions of the Supreme Court. Informed observers agree that the California electorate in recent years has voted very intelligently upon numerous measures submitted to them.

The remedy proposed by Senator Norris⁴⁶ in the last Congress—that

⁴⁴ *Flint v. Stone Tracy Co.* (1911) 220 U. S. 107.

⁴⁵ *Dillon v. Gloss* (1921) 256 U. S. 368. The statement of the Court, that *any* proposed amendment must be ratified by the last of a sufficient number of States *within a reasonable time* from the date of submission by Congress, was unnecessary to the decision because the Court had before it in that case an amendment which by its own terms declared itself inoperative if not ratified within seven years. If ratification had been completed after seven years, the amendment would have been void not because an unreasonable time had elapsed but by force of the words of the amendment. The proposed Child Labor Amendment contains no such words but the Court might declare its *dictum* in *Dillon v. Gloss* to have become a rule of the Constitution.

⁴⁶ "The Supreme Court shall have original and exclusive jurisdiction to render

the Supreme Court shall not hold an act of Congress invalid except by more than a two-thirds vote is decidedly appropriate to check the evil above discussed. That evil is the invalidation of legislation by reading inferences, implications and strained constructions into the Constitution. If conflict of a statute with the Constitution is not plain and obvious enough to convince more than two-thirds of the Court, the judgment of Congress and the President should prevail. I say the President also, because the declination of the executive to veto a bill inferentially indicates his judgment that the statute is constitutional. The more-than-two-thirds rule for the Court will establish a better balance between the three departments in the interpretation of the Constitution. Senator Norris' proposal also provides for taking away from State courts and all federal courts inferior to the Supreme Court the power to pass upon the validity of acts of Congress, and gives this authority exclusively to the Supreme Court. That concentration is almost essential to any plan requiring more than a majority of the Court to invalidate an act of Congress, otherwise acts of Congress might be held valid in some states or districts and invalid in others, in cases where the Supreme Court might not muster sufficient votes to produce uniformity—witness the Ohio experience.⁴⁷

Senator Norris proposes to bring about that reform by constitutional amendment, subject, therefore, to the probability of long delay. My personal judgment is that that amendment should be pushed. There will, of course, be many objections offered. In my opinion, Congress, under the authority it will have to work out the details, can evolve proper procedure for carrying up the constitutional issues from the lower courts, state and federal, and make the Norris proposal workable.

It should be noted that the Norris proposal is just as appropriate to a fifteen man court as to a nine man court. There is no inconsistency between it and the President's proposal. As a measure of permanent relief the Norris proposal is the more certain remedy.

judgment declaring that any law enacted by Congress in whole or in part is invalid because it conflicts with some provision of the Constitution; but no such judgment shall be rendered unless concurred in by more than two-thirds of the members of the Court, and unless the action praying for such judgment shall have been commenced within six months after the enactment of the law." S. J. RES. 159, 74th Cong. 1st Sess. (1935).

⁴⁷ The State Constitution of Ohio requires the State Supreme Court to muster a six to one vote to hold an Ohio statute invalid, "except in the affirmance of a judgment of the Court of Appeals declaring a law unconstitutional and void." If the Court of Appeals in one district of the State holds a State statute void, the Supreme Court can affirm by a four to three vote. If the Court of Appeals in another district holds the same statute valid, the Supreme Court cannot overrule it by less than a six to one vote. It may result from the system that a statute will remain operative in one district and void in another. See *State of Ohio ex rel. Bryant v. Akron Metropolitan Park District* (1930) 281 U. S. 74.

On the other hand, I favor the President's proposal as likely to give relief in the present emergency. Leaving aside all details and facing the heart of the President's proposal frankly, it is that the membership of the Court be increased,⁴⁸ and that the President with the consent of the Senate appoint some additional judges. It is hoped and prayed that the President will nominate men of broad-minded liberalism, who will read the Constitution sensibly, and concede to Congress and the State legislatures the full measure of power that the Constitution fairly construed permits.

The truth is that unconsciously on the part of past Presidents and Senates the Supreme Court has become packed with an undue number of backward looking judges. If I were to choose between the various epithets that are hurled about, I would say that the President's proposal is to unpack the Supreme Court.

If vacancies had occurred in the present membership, there could have been no criticism of the President's selection of his nominees. Confirmation by the Senate is the constitutional check and the only one. Presidents have not given enough attention to the selection of broad-minded constitutionalists. The effect of early training and associations and the effect of social, economic, and political outlook of candidates upon their constitutional decisions has not been sufficiently considered, until relatively recent years. President Grant wisely looked up the records of Justices Bradley and Strong to assure himself that they believed the Legal Tender Acts valid. Opponents applied the derogatory term "packing" to this praiseworthy intelligence. The result, the overruling of the first Legal Tender decision,⁴⁹ rescued the finances of the country from confusion. Nothing but injustice and financial chaos would have resulted from invalidating those statutes ten years after the greenbacks had become the accepted standard of monetary transactions.

⁴⁸ Under the President's proposal the number of justices will be increased unless all present members over seventy years of age voluntarily retire, and provided that thereafter no member should persist in retaining his seat after reaching seventy.

⁴⁹ The first Legal Tender decision, *Hepburn v. Griswold* (1869) 75 U. S. (8 Wall.) 603, holding the Legal Tender Acts invalid was decided upon in conference on November 27, 1869, by a vote of five to three, the Court then consisting of eight. Justice Grier, one of the five, resigned because of his debility, at the suggestion of fellow members of the Court, on February 1, 1870. The decision was not announced in open court until February 7. Since Grier was not then on the Court, the decision, technically speaking, was by a four to three vote. Fortunately for the administration Congress had already, by an Act of April 10, 1869, increased the Court to nine. By its terms this Act was to take effect on the first Monday of December, 1869. The vacancy created by Justice Grier's resignation and the new seat were filled by the appointment of Justices Strong and Bradley. In the Legal Tender Cases (1872) 79 U. S. (12 Wall.) 457, these new judges joined with the three who had dissented in *Hepburn v. Griswold* and overruled that decision. The best account is by Ratner, *Was the Supreme Court Packed by President Grant?* (1935) 50 *Pol. Sci. Q.* 343.

President Theodore Roosevelt wisely inquired into the judicial tendencies of Oliver Wendell Holmes before nominating him. None but reactionaries were dissatisfied with that appointment. President Wilson was unfortunate in that the vote of one of his nominees so frequently nullifies that of another.

Formerly it seems to have been thought that a reasonable degree of eminence as a lawyer was the sole qualification. This was emphasizing the purely judicial function of the Court to decide legal cases involving no issue of constitutional law, and minimizing its political function of passing upon constitutional questions. All this is changed by the Court's assumption of a policy-veto on legislation.

The President hopes that we can get along under the Constitution as it is, provided the Supreme Court ceases to interpret it illiberally. If the powers given our governments under the Constitution when properly construed are adequate to enable them to solve the complex problems of our times, obviously we do not need to amend the Constitution. It may be that eventually we shall have to do so to give Congress a direct power to regulate industry and agriculture. We may find that its power to promote the welfare of industry and agriculture through exercise of its powers to tax, to regulate commerce and to spend for the public welfare will be inadequate, even when liberally construed. When that becomes obvious, some amendment like that proposed in the last Congress by Senator Costigan⁵⁰ will become necessary. The gradual approach, by trying the milder remedy first, however, has much to commend it.

Every judicial decision of a constitutional question gives a meaning to the Constitution. This is inherent in the power to interpret. Every subsequent decision inconsistent with the first is an amendment of that meaning. Thus judicial interpretation involves making and amending the Constitution. In a speech delivered in 1896 Senator Beveridge, commenting upon a then recent decision of the Supreme Court, said that under the Court's interpretation the Constitution expanded from period

⁵⁰ Senator Costigan's proposal, S. J. RES. 3, 74th Cong. 1st Sess. (1935) was as follows:

"SECTION 1. The Congress shall have power to regulate hours and conditions of labor and to establish minimum wages in any employment, and to regulate production, industry, business, trade, and commerce to prevent unfair methods and practices therein.

"SEC. 2. The due process of law clauses of the fifth and fourteenth amendments shall be construed to impose no limitations upon legislation by the Congress or by the several States with respect to any of the subjects referred to in section 1, except as to the methods or the procedure for the enforcement of such legislation.

"SEC. 3. Nothing in this article shall be construed to impair the regulatory power of the several States with respect to any of the subjects referred to in section 1, except to the extent that the exercise of such power by a State is in conflict with legislation enacted by the Congress pursuant to this article."

to period to enable the government to cope with new problems. Indeed many legal philosophers have looked upon judicial interpretation as a forward moving process by which the law of yesterday is slowly but surely molded to new conditions as they arise. They would concede that this is judicial amendment of the Constitution, but they would praise it as the wisest process of amendment. A Court filled with John Marshalls would indeed accomplish this. Senator Beveridge, if living today, would be sadly disillusioned.

If the President's proposal were a flat one to increase the Supreme Court to fifteen, by an immediate and unqualified enlargement, I would endorse it as heartily as I endorse his present proposal. The Court has a double function: one, as the court of last resort in all purely legal questions arising under federal laws; the other, the function of interpreting the Constitution, in passing upon the constitutionality of acts of government, state and national. In exercising this latter function, the Court has manipulated many phrases of the Constitution to give itself a policy-veto in legislation. If that were its sole function, there would be no doubt whatever that nine are too few. A much larger number, more fully representative of all the elements of our social and economic life would be more appropriate.

If the President's proposal, or an outright enlargement of the Court, should be adopted, the Norris proposed amendment should also be adopted, with an addition giving Congress power, if it sees fit, so to organize the Court that it may sit in divisions to decide ordinary legal questions, but to sit as a whole when passing upon the validity of acts of Congress, and perhaps also when passing upon the validity of State legislation. The distinction rests upon the difference between the purely legal and the political function of the Court.

The proposal of the President to appoint new members to the Supreme Court, not enlarging the Court beyond fifteen, under a requirement that he shall appoint a new member for every sitting member who attains seventy years of age and does not retire within six months thereafter is an appropriate and a clearly constitutional remedy for overcoming the present illiberalism of the Supreme Court. There is indeed a relation between age and conservatism that has always been admitted as a general rule. There are obvious exceptions. It is an accepted platitude that ordinary mortals as they grow older fail more and more to appreciate the demands of new times and new conditions. Even professors of Constitutional Law in American universities, such as I, in spite of their contacts with inspiring youth, are subject to retirement at sixty-five or seventy by the rules of university trustees and regents. I do not believe that this is because the regents believe that the decisions of the Supreme

Court will be so progressive that we cannot keep up with them, but because we shall no longer be inspiring guides of the men of the future. I agree, and I also believe that a policy-veto on legislation should not be entrusted to the hands of aged judges who by and large are apt to cast the future into the molds of the past.

The Congress, under the Constitution, is the organ of government to whom the people have given the duty of determining our legislative policy. It is to them that the people look to exercise discretion and wisdom in law-making. When a majority of the Supreme Court assumes a policy-veto, a right to invalidate laws because they disagree with the legislature on the wisdom or policy of the laws, it is the duty of Congress to protect itself against this distortion of the Constitution. The adoption of the President's proposal, and wise selection of broad and sound constitutional lawyers, by the President and the Senate, will restore, at least temporarily, the proper balance between the departments.

I repeat, however, that in my judgment, the Norris proposed amendment, with modifications, is highly desirable as a permanent solution.

To the claim that the President seeks power to pack the Court, whether it be packing or unpacking, it may be said that the proposal looks not to decisions on particular legislation but seeks only that liberalism of decision that actually puts in operation the oft-repeated statement of the Court that statutes should never be held void unless clearly unconstitutional.

As to an evil precedent, should the country ever go conservative, say by a vote of twenty-five to fifteen million, and the Supreme Court's decisions should grow out of keeping with those conservative times, what objection would there be to another application of the remedy by Congress to prevent the Court's defeating the hopes of the country?

D. O. McGovney.