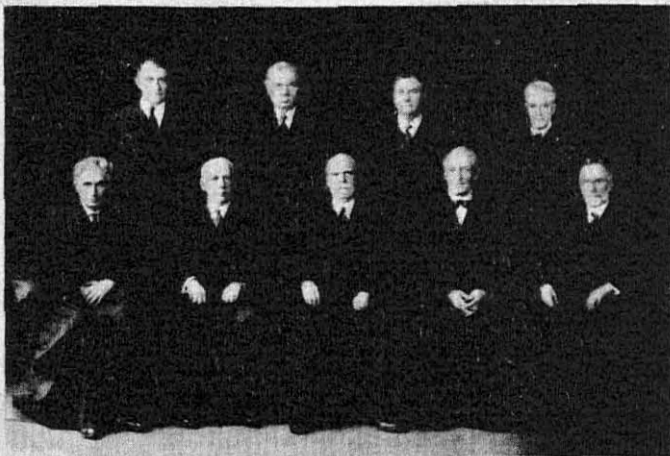


THREE EPOCHAL SPEECHES
ON
THE SUPREME COURT ISSUE

BY
PRESIDENT FRANKLIN D. ROOSEVELT
In a "Fireside Talk"

SENATOR GEORGE W. NORRIS
In the Senate

ASSISTANT ATTORNEY GENERAL JACKSON
Before Senate Judiciary Committee



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"THE CONSTITUTION IS WHAT THE JUDGES SAY IT IS"
1 2 3 4 5 6 7 8 9
CHIEF JUSTICE HUGHES

UNITED STATES SUPREME COURT

- Mr. Chief Justice Hughes..... 2223 R Street.
- Mr. Justice Van Devanter..... 2101 Connecticut Avenue.
- Mr. Justice McReynolds..... 2400 Sixteenth Street.
- Mr. Justice Brandels..... 2205 California Street.
- Mr. Justice Sutherland..... 2029 Connecticut Avenue.
- Mr. Justice Butler..... 1229 Nineteenth Street.
- Mr. Justice Stone..... 2340 Wyoming Avenue.
- Mr. Justice Roberts..... 1401 Thirty-first Street.
- Mr. Justice Cardozo..... 2101 Connecticut Avenue.

100-19,0007

ASSISTANT ATTORNEY GENERAL JACKSON
Before Senate Judiciary Committee

Reorganization of Federal Judiciary

I. A RESPONSIBILITY FOR THE PROPER FUNCTIONING OF THE SUPREME COURT HAS BEEN PLACED BY THE CONSTITUTION UPON CONGRESS

When a situation exists in the Supreme Court which the President feels he cannot continue to ignore it is to the Congress that he may properly bring the problem.

The responsibility upon Congress for seeing that the American people have a workable, harmonious, and cooperative judicial system is so usually overlooked by those engaged in building up the tradition of judicial supremacy that the burden of constitutional responsibility on Congress deserves examination.

A sentiment has developed that sole responsibility for the functioning of the Supreme Court as an institution is upon the Justices, and that their independence requires that a majority of them be let alone to shape the institution as they will. In short, it is urged that the Court belongs exclusively to the Justices and that the President and the Congress must keep hands off.

The fact is that the Supreme Court cannot function without the periodic aid of the Congress and that Congress, by its inactivity, may be assuming responsibilities for the Supreme Court's acts as great as any responsibility it may assume by exerting its power.

The Constitution leaves with Congress and the Executive the whole responsibility for the personnel of the Court. The Senate must share responsibility for the selection of the Justices and is the sole judge of their "good behavior." The Court is without means to house itself or to obtain its clerks, secretaries, and marshals unless the House of Representatives takes the responsibility of initiating appropriations for the purpose. The House of Representatives is the only accuser to which the Justices must answer. Moreover, the Court is powerless to make its decisions effective unless Congress or the Executive provides for carrying out its judgments and decrees.

Moreover, the jurisdiction of the Court, except as to cases affecting foreign representatives and states, is left to Congress to decide.

This power to reduce the Supreme Court to a mere phantom court was not an accident. Our forbears knew the story of judicial abuse and tyranny as well as the story of legislative and executive abuses. These checks and balances were therefore embodied in the Constitution to enable Congress to check judicial abuses and usurpations if the same should occur. If there are abuses in the Court, with which I will deal later, their continuance can only be due to default in the exercise of checks and balances placed in the hands of Congress and the Executive.

The power of Congress to exercise checks against the overreaching of the Court is so generally overlooked or minimized that the alternatives that faced the Constitution writers deserve examination in detail.

1. The Constitution might have made the Supreme Court the sole custodian of judicial power. It did not. The judicial power is vested in the Supreme Court "and in such inferior courts as the Congress may from time to time ordain and establish."

2. The Constitution might have determined, or left to the Supreme Court to fix, its own jurisdiction. It did not. It has only a limited original jurisdiction, and except, in cases affecting ambassadors, ministers, and consuls, and those in which a State shall be a party, the Supreme Court has appellate jurisdiction

only "with such exceptions and under such regulations as the Congress shall make."

3. The Constitution might have fixed the size of the Supreme Court or left the Court to determine its own size, but the Constitution deliberately left the number of Justices to be fixed from time to time by Congress.

4. The Constitution might have named the original members of the Court or might have given the Court power to fill its own vacancies. It did not. The Constitution placed the continuing power of appointment in the President and in the Senate.

5. The Constitution left the amount of compensation of the Justices entirely to Congress, with no restriction except in the provision that whatever compensation Congress may once give them shall not be diminished during their continuance in office.

6. The Constitution could have provided some source of revenue for the Court, its Justices, Marshal, Clerk, and appointees. But it leaves it entirely to appropriations to be initiated in the House of Representatives.

7. The Constitution could have authorized the Court itself to appoint the personnel necessary to execute and enforce Court decrees. But it did not. For the enforcement of the Court's decrees, the Congress and the Executive branch of the Government must be relied upon.

8. The Constitution could have given to the Court the power to judge the conduct of its own members. The power to judge the qualifications and to discipline its own members was given to each House of Congress. But the Supreme Court was entrusted with no such power to either accuse or judge its members. Impeachment can be only by the House and trial by the Senate.

When the Congress, as the supreme legislative and policy-making body of the United States, was granted such conclusive powers over jurisdiction and enforcement of decrees of the Court, and over appointment and behavior of its personnel, it is idle to contend as many of the advocates of judicial supremacy do, that it was ever intended that the Supreme Court should become a super-government. From these powers it is apparent that Congress by failure to exert its checks and balances, assumes responsibility for the functioning of the Court. It is clear that Congress has the power to see that the personnel of the judicial system is adequate, both with respect to number and to neutrality of attitude. It is a responsibility of Congress to see that the Court is an instrumentality in the maintenance of a just and constitutional government and that it does not become an instrumentality for the defeat of constitutional government. The duty of cooperation is not cast upon Congress and the Executive alone.

Congress throughout our history has made sparing use of its checks and balances against the Court. It made one abortive attempt to use impeachment as a check. It once withdrew jurisdiction of the Court to hear and determine a case that had already been submitted, and its power to do so was recognized. Three times the device of constitutional amendment has been used to correct the Court. Six times we have effected changes in the size of the Court, with resulting changes in the Court's attitudes.

I will briefly recount our experience in changing the size of the Court and our experience with amendments to overcome its decisions.

II. EXPERIENCE WITH ALTERATIONS OF THE SIZE OF THE COURT

Legislation creating or abolishing vacancies in the Court is authorized by the Constitution and validated by historical practice as a method of bringing the elective and nonelective branches of the Government back into a proper coordination.

Its frequent use has avoided amendments which would make the Constitution a document of patches and details. It does not change the constitutional powers of the courts, or the distribution of powers between the legislative and judicial branches. It does not eliminate any check or balance of the constitutional system.

Changing the size of the Court has never deprived it of independence or prestige. It was obvious at the founding of the Government that the Court would not always remain of the same size, and that changes in its size would be made, as they have been made, at those times when its decisions caused dissatisfaction. It is just as constitutional to add members to keep the Court up with the country as it is to add members to keep the Court up with its business. The power of the Congress to avert constitutional stagnation is as great as its power to prevent congested dockets. And whatever other motives have influenced the changes that have been made in the composition of the Court, the dominant one has always been to keep the divergence between the Court and the elective branches from becoming so wide as to threaten the stability of the Government.

There have been six instances.

A reduction of the Court from six to five was effected by what is known as the "midnight judges" law rushed through Congress by President Adams just before Jefferson took office. Justice Cushing was not expected to live, and it was thought by this device to prevent Mr. Jefferson from appointing a successor.

The number was restored to six in 1802, and raised to seven in 1807, which enabled Jefferson to appoint new Justices.

Charles Warren has collected (Supreme Court in United States History, vol. 1, pp. 210-212) the comments of the press on Mr. Jefferson's move which read like this morning's paper. I quote characteristic comment. One paper said, "By this vote the Constitution has received a wound it cannot long survive." Another stated that a "mortal blow had been struck at the independence of the judiciary." One said, "The judicial system has received its death warrant"; another termed it "The death warrant of the Constitution"; and an editor announced the "Alarming destruction of the great charter of our national existence." James A. Bayard wrote, "The independence of the judicial power is prostrated. A judge, instead of holding his office for life, will hold it during the good pleasure of the dominant party. The judges will of course become partisans, and the shadow of justice alone will remain in our courts."

Supporters of President Jefferson in Congress were subjected to attack as "highly drilled" "mutes" who "stand ready to pass it without debate." In spite of the predictions of President Jefferson's enemies, the judiciary did not lose its prestige, but on the contrary it gained, and it did not lose its independence, but on the contrary became more aggressive.

The Jacksonian revolution was signaled by the addition of two new judges in 1837. There was an increase in judicial business, but Congress had refused successive demands of prior Presidents for an increase.

In 1863 the Court was enlarged to 10, in part, to assure that Mr. Lincoln's war policy would not be injured by judicial attacks. The vacancy was filled by the appointment of Justice Field, who was recognized as "a strong Union man." That Lincoln had a purpose to strengthen his position with the judiciary may be inferred from his confiding to Congressman Boutwell as to the appointment of Chief Justice Chase that "We wish for a Chief Justice who will sustain what has been done in regard to emancipation and the legal tender."

Since the preparation of this statement I have been told that the correspondence between Theodore Roosevelt and Henry Cabot Lodge shows that before appointment of Oliver Wendell Holmes to the Supreme Court he was invited to spend a week end at the White House. After that, President Roosevelt wrote to the effect that he was satisfied with the economic and social views of Mr. Justice Holmes.

The Court was reduced in 1866 from 10 to 8 to prevent the vacancies from being filled by President Johnson with appointments which it was feared might be unfavorable to the "reconstruction" policy.

In 1869, under President Grant, the Court was again enlarged to nine. The Court then stood at eight with one vacancy, and the validity of the Legal Tender Act had been argued. As the Court was reading the decision holding the Legal Tender Act by which the War between the States had been financed to be unconstitutional, Grant sent to the Senate the names of two Justices. Promptly after the confirmation of the new Justice the Court reversed its former decision and restored to Congress power over the finances of the Union, which again in 1935 came perilously near being denied.

President Grant took pains to appoint Justices who, honorably but frankly, favored his policy.

In all the foregoing cases there was a real danger that the non-responsive, nonselective branch of the Government might impose its unsympathetic predilections on the country to nullify the policy of the elective branches. When immediate and effective action has been necessary, the method which the President now proposes has been used throughout our constitutional history.

III. EXPERIENCE WITH AMENDMENTS TO CORRECT COURT DECISIONS

The amendment method to correct the Court has been used three times. The eleventh amendment was adopted to correct the Court on suits against the States; the thirteenth, fourteenth, and fifteenth amendments to eradicate the philosophy of the Dred Scott decision and effectuate the policy of reconstruction; and the sixteenth to alter the result produced by the Court's ruling on income taxes.

I am not urging that amendment method shall not now be tried. But I do point out certain problems which draftsmen and advocates of amendment will need to consider.

Experience has shown that it is difficult to amend a constitution to make it say what it already says. That was attempted first in the eleventh amendment. The Court held, in *Chisholm v. Georgia* (2 Dallas, 419), that the Supreme Court had jurisdiction of a suit against Georgia by a citizen of another State. An amendment was then adopted saying that the judicial power shall not be construed to extend to a suit against a State by citizens of another State. Ninety years later, a smart lawyer brought a suit in the Supreme Court against a State on behalf of one of its own citizens, pointing out that the eleventh amendment was so drawn as to apply only to suits brought by citizens of a different State or a foreign country. And in *Hans v. Louisiana* (134 U. S. 1), the Supreme Court decided that the Constitution as it was originally written, in spite of its prior decision to the contrary, did not

authorize a suit against a State by any private citizen without its consent. It thus appeared first that no amendment was needed and second that it was defective.

The fourteenth amendment was also a clarifying amendment intended to uproot the constitutional errors involved in the Dred Scott decision. There is no doubt that the Congress which submitted and the States which ratified language, which said, "Nor shall any State deprive any person of life, liberty, or property, without due process of law", thought they were protecting the civil rights to a fair trial and hearing. The Supreme Court extended the amendment to protect corporations, although its language only includes persons, and it then extended it from a guaranty of procedural fairness to prevent the State from enacting almost any kind of economic legislation. Thus the fourteenth amendment, far from clarifying the great constitutional principle of human rights, has brought forth a crop of new difficulties, and the amendment in the interest of freedom has brought forth new kinds of oppression.

The income-tax amendment was also intended to clarify the Constitution. An income tax had been levied and sustained during the Civil War. But in 1895, after one Justice made a somewhat mystifying shift in his vote, the Supreme Court by 5 to 4 held the income tax to be constitutional to tax wages and salaries, but unconstitutional to tax income from invested capital in the form of rent, interest, and income from real or personal property.

This inequality we attempted to correct by the sixteenth amendment, which provided, "Congress shall have the power to levy and collect taxes on incomes, from whatever source derived, * * *." Despite its broad language, the courts now refused to apply it to their own salaries, or to income from State and municipal bonds, or to salaries from State and municipal sources, or to stock dividends.

Even if this amendment were permitted to mean what it says, it gave us no more, after a delay of 18 years, than could have been obtained if a single Justice had stood by his original vote in the Pollock case.

Our constitutional history abundantly demonstrates that it is impossible to foresee or predict the interpretation or effect which may be given to any language used in an amendment. The difficulty of enacting an amendment to overcome a single decision of the Court such as the Dred Scott decision or the income-tax decision becomes more difficult when the problem is not to meet a single concrete decision but to meet a state of mind or mental attitude which pervades the whole course of recent judicial decisions. It may be possible by more words to clarify words, but it is not possible by words to change a state of mind hostile to the exertion of governmental powers. To offset the effect of the judicial attitude reflected in recent decisions, it would be necessary to amend not only the commerce clause and the due-process clause but the equal-protection clause, the privilege and immunities clause, the tenth amendment, the bankruptcy power, and the taxing and spending power. Each one of these clauses has during the past 2 years been so unwarrantably construed as to call forth indignant dissents from the liberal minority of the Court.

Judges who resort to a tortured construction of the Constitution may torture an amendment. You cannot amend a state of mind and mental attitude of hostility to exercise of governmental power and of indifference to the demands which democracy, attempting to survive industrialism, makes upon its Government.

IV. JUDICIAL POWER OVER FEDERAL LEGISLATION IS EXPANDING RAPIDLY AND ASSUMING THE NATURE OF A VETO

The outstanding development in recent constitutional history is the growing frequency with which the Supreme Court refuses to enforce acts of the Congress on the ground that such acts are beyond the constitutional powers of the Congress.

While we see no limits upon the power to nullify acts of the Congress, we can see that, as each instance becomes a precedent for more, self-restraints are proving no restraints, and the power is in constant process of extension.

In the 71 years from the adoption of the Constitution to the War between the States the Supreme Court so nullified only two acts of Congress. One of these two nullifications was the Dred Scott case, which precipitated that war.

In the 72 years from the beginning of that war down to the close of the October 1932 term, the Supreme Court refused to recognize the power of Congress in approximately 60 cases, and it is significant that one-third of these occurred during the decade before the New Deal, when the country as a whole was supposed to be content with a period of normalcy. Enumerated by decades, the number of laws of the United States nullified by the Supreme Court runs as follows:

1790-1800	0
1800-10	1
1810-20	0
1820-30	0
1830-40	0
1840-50	0
1850-60	1
1860-70	4
1870-80	9
1880-90	5
1890-1900	5
1900-10	9
1910-20	7
1920-30	19

But in just the last 3 years from the October 1933 term on the Court has refused to recognize the power of Congress in 12 cases; and 5 of these 12 decisions have occurred during a single year, i. e., the October 1935 term, 4 of the 5 by a sharply divided Court.

The outstanding constitutional development of the Roosevelt administration has been the increasing tendency of the Supreme Court to judge legislation according to the majority view of the wisdom of the legislation. The early policy of judging constitutionality without weighing the wisdom of the act has departed, and the attitude that has come to prevail is that stated by Mr. Justice McReynolds (*Nebbia v. New York*, 291 U. S. 502, at 556):

"But plainly, I think, this Court must have regard to the wisdom of the enactment. At least we must inquire concerning its purpose and decide whether the means proposed have reasonable relation to something within legislative power—whether the end is legitimate and the means appropriate."

Each success in thwarting congressional power, or each effort that comes so near success as to lack but a vote or two, stimulates competing lawyers and aggrieved interests to new attack.

Nearly every newly organized institution of the Government rests under a legal cloud. This is true of the Securities and Exchange Commission, the Social Security Board, the Public Works Administration, the Tennessee Valley Authority, and the Labor Relations Board.

The acts of Congress involving the hopes and fears of a great proportion of the American people are likewise clouded in legal doubt. Old-age benefits, old-age assistance, unemployment compensation, the Securities Act, the relief acts, the Labor Relations Act, the Public Utility Holding Company Act, the Tennessee Valley Acts, as well as many taxing acts, are involved in litigation, and there is no definite assurance what their fate will be. The whole program overwhelmingly approved by the people in 1932, 1934, and 1936 is in danger of being lost in a maze of constitutional metaphors.

For a century and a half it was settled doctrine that an act of the Congress was a law to be obeyed until set aside by the Supreme Court; that even in that Court it was presumed to be constitutional, and a heavy burden rested on one who would prove it otherwise.

The Public Utility Holding Company Act was to take effect December 1, 1935. Although the Supreme Court had not acted, and lower courts were in conflict, practically the entire industry advised by eminent constitutionalists, refused obedience unless and until the Supreme Court should have declared the law constitutional.

No more threatening development in law enforcement has occurred than the sight of the Government defined by the whole utility holding company industry, obliged to abdicate enforcement until a Supreme Court decision could be had. If this attitude shall spread, then a subtle change has come about that transforms completely the function of the Supreme Court in our Government.

Such an attitude reverses a century of legal opinion. It throws the burden on Congress of getting a favorable decision before its laws can be enforced. Within the last few weeks the Supreme Court in a 5-to-4 decision has held that even if a State statute is valid on its face, those State officials charged with its administration must affirmatively sustain the burden of proving that it has been constitutionally administered (*Great Northern v. State of Washington*, Feb. 1, 1937). This attitude, if applied to Federal legislation, will hold up law enforcement and, in effect, require Court approval, as well as Presidential approval, for acts of Congress with this important difference: The veto of the Executive can be overridden if a sufficient vote in the Congress favor it, the veto of the Court has the finality of fate.

That the conflict between the Court and the elective branches of the Government is entering a new phase is apparent from the extensive assertion of the right to disregard acts of Congress which is subtly transferring the process of judicial review into a veto power over legislation.

I am confident that the Supreme Court has no wish to take unto itself a veto power. It has heretofore condemned the theory that "parties have an appeal from the legislature to the courts" (*Chicago v. Wellman*, 143 U. S. 343). But powerful interests, by carrying all causes lost in Congress to the Supreme Court, and by resisting lawful authority, meanwhile, are forcing that consequence upon the Court with its effective, if unconscious, consent.

V. THE FEDERAL JUDICIAL POWER IS ALSO IMPAIRING STATES' RIGHTS

It is often assumed that the powers which the Court denies to the Federal Government fall to the State governments, and that the Supreme Court is therefore a protector of the States.

Few decisions of the Supreme Court can be cited in which any State of the Union has been able to obtain any protection of its own constitutional rights upon its own demand from that Court. Instead, States have met with little success attempting to assert their own rights before the Court.

The two outstanding cases in which a State asked the Supreme Court to stop invasions of their rights arose, not against this administration, but against Secretary Mellon, the defendant in both cases.

The State of Massachusetts in 1922 sued Mellon. The Court's opinion describes the plea of the State:

"The State of Massachusetts, in its own behalf, in effect, complains that the act in question invades the local concerns of the State, and is a usurpation of power, viz: power of local self-government reserved to the States."

The Court answered that plea by holding:

"The State of Massachusetts presents no justiciable controversy either in its own behalf or as the representative of its citizens."

And the Court dismissed the plea of Massachusetts for want of jurisdiction without considering the merits of the constitutional questions.

A little later, in 1926, the State of Florida asked to enjoin Mellon to enjoin enforcement of a law which Florida said, according to the Court's opinion:

"Constitute an invasion of the sovereign rights of the State and a direct effort on the part of Congress to coerce the State."

The Court, however, refused to allow Florida even to bring its suit, because it said the threatened acts would not constitute "a direct injury" to the State, and that the State could not sue to prevent injury to it through its citizens.

The decisions are *Massachusetts v. Mellon* (262 U. S. 447) and *Florida v. Mellon* (273 U. S. 12). Their effect is that the States will not be heard in Supreme Court to assert against the Federal Government, its own rights, or the collective rights of its citizens based on the Federal Constitution.

In the Carter Coal case seven States appeared and joined with the Federal Government in support of the Guffey Coal Act—no State appeared against it. Nevertheless, the Court struck down the Guffey law on the plea by the owners of the Carter Coal Co. that the law invaded States' rights. The Court spoke of the danger of the States being "despoiled of their powers" and being reduced to "little more than geographic subdivisions of the national domain." This enthusiasm for States' rights, when urged by the Carter Coal Co. owners, is in contrast with the refusal of the Court to hear such plea when urged by the State itself. When the State makes the plea it is told that it presents a political question. When the owners of the Carter Coal Co. make the plea it is transmitted into a judicial question.

The same thing happened in *U. S. v. Butler* (297 U. S. 1), in which the farm-relief program was struck down as coercing the States, although Mr. Justice Stone points out that no such contention was made by the taxpayer, and hence could not have been answered by the Government. Here, again, no State complained that its rights were being injured by aid to the farmers. The packers, processors, and manufacturers were the beneficiaries of any rights the States may have had.

It was not Congress, nor the Executive, but it was the Supreme Court which denied the rights of any of the States of the Union to make any law whatever dealing with minimum wages, and it was in that case that the Chief Justice said:

"And I can find nothing in the Federal Constitution which denies to the State the power to protect women from being exploited by overreaching employers through the refusal of a fair wage as defined in the New York statute and ascertained in a reasonable manner by competent authority" (*Morehead v. Tipaldo*, 298 U. S. 587).

He said further:

"We have not yet arrived at a time when we are at liberty to override the judgment of a State to decide that women are not the special subject of exploitation because they are women and, as such, are not in a relative defenseless position."

The majority, however, not only overrode the State but overrode the Chief Justice of the Court and three of its ablest members. Instead of saying the time has not yet arrived, the Chief Justice might properly have said, "The time has just this minute arrived."

State legislation inaugurating conservative reforms has, with increasing frequency, been set aside by a majority of the Supreme Court ever since 1920, even though these State reforms did not encroach upon the powers of the Federal Government, but simply failed, in the opinion of a majority of the Court, to come within the vague contours of the fourteenth amendment. In vain did Mr. Justice Brandeis in 1924 protest that the Court was assuming the "exercise of the powers of a superlegislature—not the constitutional function of the judicial review" (*Jay Burns Baking Co. v. Bryan*, 264 U. S. 504, 534). And by 1930 Justice Holmes was driven to exclaim: "I have not yet adequately expressed the more than anxiety that I feel at the ever-increasing scope given to the fourteenth amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions" (*Baldwin v. Missouri*, 281 U. S. 586).

Experiments by the States with laws to settle industrial disputes, minimum-wage acts, and acts to regulate public-utility and other business enterprises were frequently stopped by the Federal courts. Had they been allowed to proceed, demands for the exercise of Federal power later would have been less imperative.

On the other hand, the Congress came to the aid of States' rights by enacting a law that forbids Federal judges to set aside an act of the State legislature, except after hearing by a three-judge court. This is greater protection to State legislation than Congress has enacted for its own laws, which are still freely nullified by a single judge. When Congress was obliged to intervene to protect the State from aggressions of Federal judges it can, with little grace, be contended that the judiciary are the defenders of the States.

The Supreme Court has even denied the Congress the right to make enactments in aid of States' rights. The States, of course, cannot set up machinery to provide for the adjustment of municipal indebtedness because the States have no jurisdiction over the claims of nonresidents. Yet, the Supreme Court, dividing 5 to 4, recently held in *Cameron v. Ashton County* (298 U. S. 513) that Congress could not provide, even with the express consent of the State, a procedure by which municipalities could avail themselves of bankruptcy privileges. It thus seems that States' rights cannot be exercised by the States themselves; the States apparently are not of age and are to be regarded as sort of wards of the Court, which determines in its own wisdom what is for their good.

The tenth amendment, as to power reserved to the States, has not been used to assure the power of the States. It has been used to cut down the power of the Federal Government. Then, when those same powers are asserted by the States, the "due-process clause" is used to cut down the State power. The States have no rights which the courts have been bound to respect. The States' rights argument is heard sympathetically only when pleaded by private interests in support of *laissez faire* economics to create a "no man's land" beyond the reach of both Federal and State power. The States' rights have become private privileges.

Is it any wonder that Justice Holmes said the sky is the limit?

VI. THE COURT IS NOW IMPAIRED IN ITS FUNCTIONING AND PRESTIGE BY A SERIOUS DIVISION—ONLY THE ADDITION OF NEW MEMBERS CAN RESTORE IT TO ITS PROPER FUNCTIONING

The present controversy over the Court reflects a controversy within the Court. Neither the Congress nor the President has sought the present dissension. Neither the Congress nor the Executive has in any manner sought to interfere with the judicial function, and neither has failed to obey any decision of the Court.

A majority of the Justices have made it apparent that the great objectives of this administration and this Congress offend their deep convictions and that the methods of this day violate their conceptions of good government. Prediction of "impending moral chaos", grief over the fear that "the Constitution is gone", characterization of the Securities and Exchange Commission as a "star chamber", accusation that the Congress and the Executive have coerced farmers, taken freedom of contract away from working women, and despoiled the States indicate an implacable, although unquestionably sincere, opposition to the use of national power to accomplish the policies so overwhelmingly endorsed by the voters.

This frank hostility of these Justices has been openly counted on by interested groups to defeat much important legislation.

On the other hand, a minority of the Justices, whose patriotism and competence no one questions, have made it apparent that they feel that justice to their own records with posterity requires them to protest publicly and sharply against the overriding decisions of the majority. Included among those who have seen fit to protect their place in judicial history by recorded protests are Chief Justice Hughes, Justices Holmes, Brandeis, Stone, and Cardozo.

Under this stress and contention an inability to reach a decision developed in the case of the New York Unemployment Compensation Act, and the Court split 4 to 4, one Justice being absent from illness. This left a cloud upon the Social Security program of many States and is a possible threat to the Federal Social Security Act. Petition for rehearing has long awaited decision. The Washington Minimum Wage Act was argued some 3 months ago, and while I can only guess at the cause of the delay, the difficulties apparent in this case lead to the suspicion that the Court is badly divided.

When the decision of crucial constitutional issues may turn on the death or illness of a single Justice, it would seem that our constitutional progress is governed by a blind fate instead of by human reason. For a Justice of the Court to know that even a temporary indisposition may turn the course of his Nation's history must add to the ordinary anxieties about health. Nobody, no matter where his sympathies lie, or what his views of constitutional doctrine may be, can view this situation with composure.

Even Government victories by 5-4 decisions are unsatisfactory. A state of the law which depends upon the continuance of a single life or upon the assumption that no Justice will change his mind is not a satisfactory basis on which the Government may enter into new fields for the exercise of its power.

Government defeats which keep the Government out of the exercise of power for an indeterminate time which may be reversed after a single death, or resignation, or change of mind, is not a stable basis upon which any administration, or any Congress, can permanently renounce power.

Amendments, however worthy and well drawn, are of uncertain value while the judicial house is so stubbornly divided against itself.

The following table shows the persistent and dramatic split among the Justices:

Federal statutes

Hot Oil (sec. 9c, N. I. R. A.)	-----	void	8-1
Gold Clauses	-----	valid	5-4
Railroad Pensions	-----	void	5-4
Farm Mortgages	-----	void	9-0
N. R. A.	-----	void	9-0
A. A. A.	-----	void	6-3

T. V. A.-----	valid	8-1
Guffey Act.-----	void	6-3
Municipal Bankruptcy-----	void	5-4
Silver Tax-----	valid	9-0
Second Gold Clause case-----	valid	5-4

State statutes

Mortgage Moratorium-----	valid	5-4
Milk Price Act-----	valid	5-4
Minimum Wage-----	void	5-4
Washington Utility Regulation Fund case-----	void	5-4
New York Unemployment Compensation-----	no decision	4-4

As long ago as 1922, Mr. Chief Justice Taft protested the Court's first minimum-wage decision because, as he said, "it is not the function of this Court to hold congressional acts invalid simply because they are passed to carry out economic views which this Court believes to be unwise and unsound" (*Adkins v. Children's Hospital*, 261 U. S. 525, 564). But the passion with which economic views have been thrust into legal decision have been intensified by the depression.

In 1935 a bare majority of the Court made a decision in the Railway Pension case that seemed to strip the Federal Government of all power to deal with pensions for interstate-railway employees. Mr. Justice Hughes, speaking for himself and Justices Brandeis, Stone, and Cardozo, uttered a protest that those who respect his sincerity and judgment know proceeded only from great provocation and deep sense of responsibility. He said:

"* * * The majority finally raise a barrier against all legislative action of this nature by declaring that the subject matter itself lies beyond the reach of the congressional authority to regulate interstate commerce * * *. I think that the conclusion thus reached is a departure from sound principles and places an unwarranted limitation upon the commerce clause of the Constitution." [Italics supplied.] (*Railroad Retirement Board v. Alton*, 295 U. S. 330, at 375.)

When a small majority of the Court invalidated the Agricultural Adjustment Act last year, Mr. Justice Stone, who was President Coolidge's Attorney General, felt impelled to remind the Court that while legislative power may be unwisely used, "so may judicial power be abused", and that "a tortured construction of the Constitution is not to be justified", and that "courts are not the only agency of government that must be assumed to have capacity to govern" (*United States v. Butler*, 297 U. S. 1, at 87).

The climax was reached in the recent decision that a "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" (*Morehead v. New York ex rel. Tipaldo*, 298 U. S. 587, 611). In vain did the minority protest that "it is difficult to imagine any grounds other than our own personal economic predilections for saying that the contract of employment is any less an appropriate subject of legislation than are scores of others in dealing with which this Court has held legislatures may curtail individual freedom in the public interest" (298 U. S. at 633).

Only 10 days after the Court had tossed aside the New York Minimum Wage Act on the ground that the State was "without power by any form of legislation" to establish minimum wages for women the Republican Party pledged itself to support such legislation and avowed its belief that such legislation could be enacted "within the Constitution as it now stands." This was exactly what the Court said could not be done.

It thus becomes evident that there is a serious lag between public opinion and the decisions of the Court. A majority of the Justices have too frequently failed to recognize, as Justice Holmes so aptly stated, "what seemed to them to be first principles are believed by half of their fellow men to be wrong."

Nothing in history would justify a belief that the Court's opinion as to legislative policy is more likely to be right than that of the legislative body.

In his lectures upon the Supreme Court (p. 95) delivered in 1928, Mr. Chief Justice Hughes stated that "few of these cases (holding acts of Congress invalid) have been of great importance in shaping the course of the Nation." While emphasizing that "the existence of the function of the Supreme Court is a constant monition to Congress" (p. 95), he added, "it must be conceded, however, that up to the present time far more important to the development of the country than the decisions holding acts of Congress to be invalid, have been those in which the authority of Congress has been sustained and adequate national power to meet the necessities of a growing country has been found to exist within constitutional limitations" (ib. 96).

Decisions that have provoked the greatest controversy between the Congress and the Court, such as the Dred Scott decision, the Legal Tender cases, or the Income Tax cases, have been those involving matters of policy and of statesmanship, as to which the members of the Court entertained a difference of opinion among themselves, and in which there is no reason to expect judges to excel over legislators. Few, if any, such decisions have settled the issues which they attempted to foreclose. And sooner or later after an unpredictable lag, every such decision has been reversed, by war, by amendment, or by subsequent decisions of the Court itself.

It is true that the decisions already made constitute precedents which, under the legalistic doctrine of *stare decisis*, if it is to be rigorously applied, would fetter the discretion and cramp the

reason of all future Justices. A working majority of the Court could shake the fetters of precedents and, within the present language of the Constitution, remove most of the causes of the long-standing conflict with the elective branches of the Government.

The Supreme Court has never waited for a constitutional amendment when its majority wanted to overcome the effect of its past decisions. It has qualified and even expressly overruled important decisions in constitutional issues (*Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 406-410). As Mr. Chief Justice Taney had occasion to remark in *The Passenger Cases* (7 How. 283, 483): "After such opinions, judicially delivered, I had supposed that question to be settled, so far as any question upon the construction of the Constitution ought to be regarded as closely by the decision of this Court. I do not, however, object to the revision of it, and am quite willing that it be regarded hereafter as the law of this Court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of its reasoning by which it is supported."

It is true that the precedents of the past hang like a shroud about the Court. But the degree of devotion to precedent in lieu of reason is in that Court's discretion, even by its own precedents. A minority of the Court has expressed a will to freedom. Justice Brandeis has said, "The rule of stare decisis, though one tending to consistency and uniformity of decision, is not decisive. Whether it shall be followed or departed from is a question entirely within the discretion of the Court which is again called on to consider a question once decided" (*Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393 at 405-409).

Justices Stone and Cardozo agreed that "The doctrine of stare decisis, however appropriate and even necessary at times, has only a limited application in the field of constitutional law" (*St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38).

Conflict between Congress and the courts is in large part due to the refusal of the courts to permit Congress to have any share in defining the present-day application of such indefinite terms as "general welfare", "due process", "commerce among the several States", and the things which directly affect it. The Court majority insists on a rigid, permanent, and legalistic definition. All that is needed is the same attitude of mind on economic questions that the Court had on the liquor question. When it came to defining "intoxicating liquor" as used in the eighteenth amendment the Court was ready to leave it to Congress. There is no reason why similar deference should not be paid to congressional definitions of other constitutional terms.

If this split were decisively resolved by the addition of new members, the Court could proceed to mark out a less ambitious course for itself and bring about greater harmony within the Government.

The industrialization of society and the movement toward city dwelling, foreign political and economic dislocations, together with depression and distress, have generated an unrest which has put the whole complicated Federal System under severe strain. The ability of a federated form of government to withstand these pressures is greatly impaired by any dissension between branches that were intended to be cooperating and coordinate.

The Supreme Court's power over legislation is not defined or bounded, or even mentioned in the Constitution, but was left to lurk in inference. As Mr. Justice Stone has well said, "The only check upon our own exercise of power is our own sense of self-restraint" (*United States v. Butler*, 297 U. S. 1 at 79). Chief Justice Hughes, when Governor of New York, put in a single sentence our whole constitutional law, when he said, "We are under a Constitution, but the Constitution is what the judges say it is."

I have attempted to review dispassionately some of the failures of judicial self-restraint by which the Constitution "as the judges say it is" has departed from the Constitution which Woodrow Wilson said, "is not a mere lawyer's document; it is a vehicle of life, and its spirit is always the spirit of the age."