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I shall address you as conservatives, who will probably disagree with most that I say.

The right of judges to hold acts of the Congress void is an experiment in political science. In history our time has been but brief, and the value of this experiment is not fully demonstrated.

Mr. Justice Holmes said, "I do not think the United States would come to an end if we lost our power to declare an act of Congress void."

In his lectures upon the Supreme Court (p. 95) delivered in 1928, Mr. Chief Justice Hughes stated that "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).

Able men, though perhaps extreme, avow a purpose to end the experiment in judicial review by constitutional amendment. Many of those think the Court has travelled a course of self-destruction and resent Presidential interference. Abolition of the power of judicial review is their aim.

Allied with them but not sharing in their ultimate aim, are the conservatives who want nothing done to the Court but who want it to stand as a buffer between laissez faire economics in which they believe, and the New Deal which they fear.

Between extremes stands the President's proposal which is simply to recondition the Court in its personnel, leave its powers undiminished and its independence unimpaired, and enable it to continue the American judicial experiment.

It is this conservative class that I would now invite to consider whether their own interests have not been injured by the over-zeal of the Supreme Court in times past and whether far-sighted conservatism does not require some reform within the present constitution.

The President's plan to name an auxiliary justice for one who fails to retire at full salary at age 70 will in practical effect ultimately establish a tradition of judicial retirement at 70, as free from personal implications as the present tradition of Presidential retirement after two terms. To us citizens of New York, whose Constitution has long retired all state judges at 70 years, this is no shock. We lose good judges by it, but we avoid other evils and embarrassments. Over the years the effect of the Roosevelt proposal is to assure each generation that judgment upon its acts will come from a Court more nearly contemporaneous with its problems. Surely there is nothing in this to justify the present tempest.

The passion of the hour is aroused because the immediate effect of the plan is that through retirements, or through additional judgeships, President Roosevelt will appoint six new justices. They fear that his designations for this great honor, paid for with a life of premature embalmment, may not be guided by orthodox bar association standards.

The conservatives regard the Supreme Court as their little House of Lords, as their protection from and veto over the Commons. In the selection of justices, so uniformly were the conservatives heeded that they really thought it a violation of moral law for President Wilson to appoint to the Court a lawyer who had championed labor causes. Their interest and purpose with the Court was well stated by William H. Taft in the Yale Review of October 1920. After denouncing President Wilson's appointments as "socialistic" and pointing out that "four of the incumbent justices are beyond the retiring age of seventy" he said:

> "There is no greater domestic issue in this election than the maintenance of the Supreme Court, as the bulwark to enforce the guarantee that no man shall be deprived of his property without due process of law."

On this issue Mr. Taft rallied conservative and property minded support to Harding. He won and Mr. Taft became Chief Justice. The majority have been true to the purpose stated by Mr. Taft. In fact, the Court majority went so far that Mr. Taft himself became alarmed and 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). Such respected names as those of Mr. Chief Justice Hughes and Justices Stone, Holmes, Brandeis and Cardozo have all at times uttered similar warnings.

Perhaps the most significant feature of the present debate is the almost complete absence of public defense of the most controverted of the Court's decisions. Those who say the President's plan is wrong rarely say the Court's attitude is right. Leaders like President Conant of Harvard temper their opposition to the reform by their dislike of the majority's acts.

Now What has the Court really been doing?

It has with increasing frequency been asserting a right to ignore as unconstitutional the enactments of the Congress. This power was exercised but twice in the 71 years from the adoption of the Constitution to the Civil War. In the next 72 years it was exercised in 60 cases and in the last three years from October 1933 in 12 cases. As new problems called forth the exercise of dormant powers new questions of constitutional law have arisen.

With ~~the~~ increasing frequency conservatives have crowded the Court to consider the wisdom of statutes as a constitutional question. This viewpoint was taken by Mr. Justice McReynolds in this language (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."

The spirit expressed in this minority opinion dominated what is often a majority of the Court. This extension of its jurisdiction has split the Court, and brought on the present

judicial crisis. It is hopelessly divided and is deciding cases by majorities too narrow to carry conviction, or is unable to reach a decision at all.

Appeals to the judicial power have now involved nearly every new agency of government in legal doubts. This is true of the Securities and Exchange Commission, the Tennessee Valley Authority, the Social Security Board, the Labor Relations Board and the Public Works Administration. Legal controversies delay or threaten laws of such widespread interest as old age benefits, unemployment compensation, both state and federal, relief acts, the labor relations act, the Utility Holding Company Act, and several tax acts.

Powerful interests, whose causes are lost in election or in Congress, make the Supreme Court their wailing wall. Every threatened privilege and Anti-social practice seeks the shelter of the Court. The Court is less endangered by frank and open criticism, than by the use sought to be made of it by many who are its champions.

One of the most difficult and fateful problems that has confronted the nations of the western world in this century has been that of introducing order and regulation into the whole field of labor relations. As the problems created by industrialization first began to appear they were small

and local. The States began to experiment with solutions. Employers rushed to the hospitable courts and stopped one after another of the local efforts to solve problems then of local dimensions. As a direct result we tonight face large scale problems in labor relations and we have created no peaceful technique for dealing with them. Our experience would have grown with our problems, if the Supreme Court of the United States had not, against the protest of some of its most respected members, arrested our development. Let us cite specific examples.

In 1920 Kansas created a Court of Industrial Relations to hear labor disputes and fix wages and terms for future employment in certain industries. I do not know whether it would have succeeded, nor what facts its efforts would have developed. We were not permitted to learn whatever lesson it had to teach. The Supreme Court held that the law violated the due process clause of the Constitution. Who can say how valuable that experiment might have been to us now?

In 1913 Arizona passed an act placing drastic restrictions on the issuance by its own courts of injunctions in labor disputes. The Supreme Court denied its right to thus control the process of its own State Courts. An effort to try settlement of labor disputes without Court interference came to an end. Whether the injunction is an aid to industrial peace, or a clumsy provocation to violence the state experiment might have taught. But the Court held that the State must

place injunctions at the service of employers.

In the dissent in that case came this memorable warning from Mr. Justice Holmes:

> "There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect."

These wise words have not been heeded. Collective bargaining, minimum wage laws, maximum hour legislation, factory inspection, unemployment insurance, railway retirement pensions, limitation of child labor and regulation of employment exchanges, all subjects of extensive exporiment in Europe, have been foreclosed here, sometimes in the States, sometimes in the nation, not on their merits, not because they were specifically forbidden by any provision of the Constitution, but because the legalistic logic of the majority found them violating vague admonitions such as the due process clause.

In the field of labor relations our judges sowed repression and we reap violence, they scattered injunctions and we harvest contempt. It would be possible if time permitted to show that the conservative elements have used the Courts also to defeat public policy as embodied in anti-monopoly legislation, in taxing amendments and statutes and have generally invoked the Court's power to stay the advance of government.

There are reasons, generally overlooked, why, even if the conservatives seek an institution to veto progressive legislation, the Court can not permanently be used as a veto power. It has no technique, even if it had all other qualifications, for such a task.

The Supreme Court functions only by the litigation method. Even when not abused, it is not adapted to settlement of economic and social problems. The Court acts upon a record made up under the technical rules of pleadings and of evidence. It hears only that which one party or the other to the litigation finds to his interest to offer. The investigation is often restricted by the means of the litigating parties. And always, while Congress was establishing a general rule, the parties seek to have the law set aside by proving an exceptional case.

Subjects such as the "general welfare," or what is so arbitrary and capricious as to deny "due process", or what activities are merely local, and what directly affect interstate commerce, cannot be settled satisfactorily by a lawsuit. The facts are too numerous and cover too wide a front to be presented by the conventional evidentiary processes.

The rendering of constitutional opinions as a by-product of private litigation leads to this peculiar result. The President of the United States, with the welfare of 120,000,000 people as his trust, is unable to ascertain by any direct application the views of the Supreme Court. The Court early determined to announce its views only in a case or controversy. But

one citizen called to judgment the whole monetary policy of the United States in a private controversy as to whether the Baltimore & Ohio Railroad Co. should pay him $38.10 or only $22.50 upon his interest coupon.

Whether advisory opinions should be rendered at the request of Congress or the Executive, as is done in Canada, is a controversial question.

In any event, under present practice the sovereign must become a private litigant. The broad and impersonal policy of Congress disappears or is subordinated in the courts and a narrow and very individual controversy becomes the basis for the court's edict.

There will be general agreement that retroactive application of the law is to be avoided and is likely to do injustice. Yet the only procedure worked out by our courts or by the legal profession for the application of constitutional law is retroactive.

The nature of our litigation procedure renders long delay in learning the opinions of the Court unavoidable. Decision in the Gold Clause cases was handed down over a year and eight months after the adoption of the joint resolution. The decision in the N.R.A. case came after almost two years of costly organizing and adjusting by most of the nation. The farmers learned that the Agricultural Adjustment Act was unconstitutional after operating under it for two and one-half years.

This lag between the effective date of legislation and the revelation of a final judicial opinion as to its validity creates a period of suspense, during which conflicting lower court opinions confuse the public and create an impression that the branches of the government are not orderly and cooperative.

Another peculiarity of legal philosphy is an almost oriental devotion to precedent.

Precedents are the most powerful influence in aiding and supporting reactionary conclusions. The judge who can take refuge in a precedent does not need to reason.

This is not the worst. Under this doctrine the decision of today becomes an authority in future cases. When the Court strikes down a law it renders a decision, from which there is no appeal, and which binds the executive and the legislative departments. But it does far more than this. The Court binds itself and its successors and all inferior courts and future judges to decide similar future cases by the same logic. It not only destroys the discretion of others, but, if the rule can be applied, it binds itself.

Because of the subtle and persistent operation of the doctrine of precedent I view with concern the many recent decisions, each crowding a little further than the last, into the domain of congressional discretion. Each such adverse decision goes ringing down legal history as a probable restriction for all time upon the power of future Congresses and future generations--at least until some majority of the Court

has the courage to throw overboard the doctrine that precedents rule constitutional decisions. A minority has already indicated a will to relax this dead hand. They are overruled by the present majority. Archaic procedure, musty precedents and endless procrastination, make government by litigation impossible.

We have the most complicated governmental system in the world. Democracy in any form is complicated and makes heavy demands upon its citizens. It requires the citizen to understand, as well as to obey, and to give orders to government as well as to take orders from government. On top of the 48 State democracies we have a federal government which adds enormous complexity to all our problems. Our need is to make Democracy work in this complicated form, to reduce the frictions among these several governments, to keep government simple enough to be understood and effective enough to be respected.

Democracy functions by finding legislative ground on which opposing interests can be reconciled. Contending social forces came to rest and equilibrium, at least temporarily, in compromises such as the Guffey Coal Bill, the AAA, Minimum Wage Laws, Labor Relations Acts and the Social Security Acts. The value of any one or of all of these may be debated, but the right to try them is a safety valve in our system. We were once nearly wrecked by the rigid and unyielding legal philosophy which in the Dred Scott decision outlawed the Missouri compromise, designed by Congress to avoid war between the States. The Courts have lately been closing the ways to political compromise of basic problems arising out of the depression and out of troubled industrial relations. The President is seeking, in his policy and in his Court proposal to open the highway to economic and social peace. The closed road may mean a rough detour.