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R. L. Keyser, Jr.
Johns Hopkins University
P.O. Box 309
11 W. 40th Street

# The Supreme Court and the Constitution

*Is the Constitution adequate for today?*

*Has the Supreme Court rightly interpreted it?*

*Should we change the Constitution or limit the Supreme Court?*

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# The Supreme Court and the Constitution

ROBERT E. CUSHMAN,

*Professor of Government, Cornell University*

THE AVERAGE CITIZEN has a very wholesome respect for the Constitution of the United States. His respect does not usually come from any clear or accurate knowledge of the document itself, but grows out of the belief that the Constitution sanctions those policies which he approves and forbids those which seem to him dangerous or oppressive. His reaction to the Supreme Court is similarly direct and forthright; its decisions are sound if he likes them and unsound if he does not. While this solution of our constitutional problems by the "hunch" method has the advantage of simplicity, it is rather too simple to be helpful in answering two very vital questions now before the country: (1) Is our Constitution adequate to the demands of our present day national life? (2) Is the Supreme Court preserving our Constitution or obstructing its normal and healthy expansion?

It is well to remember that the "fathers" who framed the Constitution were no more competent to manage their affairs than we are to manage ours. They relied upon what political experience they had, but much of their work was frankly experimental. Some parts of the Constitution in which they took the greatest pride, such as the intricate method of electing the President, failed completely to work as they intended. Certain inadequacies in the original document, as interpreted by the Supreme Court, had to be met by constitutional amendments. But the basic features of the Constitution of today are those of the Constitution of 1787. For pur-

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poses of the present discussion those basic features may be summed up as follows:

1. The Constitution set up the outlines of a structure of national government, while at the same time it left intact the state governments.

2. The Constitution worked out a division of powers between the new national government and the states. It did this by delegating to the new national government the powers deemed necessary for national purposes, and by declaring that the powers not thus given to the new nation were left to the states unless specifically forbidden to them. The national government had only the powers positively given to it; the states kept all the powers not taken away from them.

3. The Constitution, with its added amendments, carefully listed certain vital civil liberties which the new federal government might not invade. Most of these were set out in the Bill of Rights added in 1790. Other guarantees of civil liberty were set up as limitations upon the states. Here we find prohibition against impairment of the obligation of contracts and later the all-important due process and equal protection clauses of the Fourteenth Amendment.

4. The new Constitution declared itself to be the "supreme law of the land," a fundamental law binding upon state and federal officers alike. To make effective this concept of the Constitution, the Supreme Court, after putting out one or two hesitant feelers, boldly announced in 1803 in the case of Marbury v. Madison [1] that it was the organ of government to maintain the supremacy of the Constitution and that in the exercise of its judicial work of applying the law in cases brought before it, it would invalidate acts of Congress which were in conflict with the Constitution. Since the Constitution itself declared its supremacy over conflicting state legislation, the power of the Supreme Court to invalidate state laws deemed to violate that Constitution was even easier to defend. Whether the framers of the Constitution intended the Supreme Court to exercise this power of "judicial review"

[1] 1 Cranch 137.

in enforcing the supremacy of the Constitution, or whether the Court "usurped" it, has evoked bitter argument which we need not enter into here. Whether "usurped" or not, and the weight of historical argument is against the charge of "usurpation," the Supreme Court has exercised this important power of declaring statutes unconstitutional ever since Marshall established the precedent in 1803, and it is now as much a part of the working American Constitution as the provision that Senators shall be chosen for six years or that the President may veto bills sent to him by Congress.

### *Nation Changed Since 1789*

Thus the basic nature of our constitutional system has not changed since 1789. But the nation which it governs has vastly changed. From a fringe of jealous and struggling colonies on the Atlantic seaboard it has become a great continental empire, national in its thinking and its impulses, with an economic life pulsating through nationwide systems of markets, transportation, and communications. Congress still has its delegated power to regulate commerce, and we are told that the power is unchanged; but what a difference between the commerce of 1787 and that of today! And so with the other delegated powers: they have neither shrunk, nor expanded, but they apply to concrete problems and situations beyond the wildest imagination of the founding fathers.

This is also true of the guarantees of civil liberty found in the Constitution. No longer do they restrict the simple activities of an 18th century government, but they are used to measure the validity of the many complex rules and restrictions which the modern nation and state impose upon the daily life of the citizen. What many thoughtful people have been asking is: How adequate is the old Constitution to the needs of a 20th century nation? Are the delegated powers broad enough to permit the federal government to deal with all truly national problems? Are the old limitations in behalf of civil liberty too strict or too loose? To what

extent has the Supreme Court in construing the Constitution been able to adapt its provisions to the demands of modern life? If the Constitution, as interpreted by the Court, prevents the proper solution of our social and economic problems, should we do something to the Constitution to meet the difficulty, or should we do something to the Supreme Court?

There could be no better laboratory material for the study of these problems than is found in the constitutional issues raised by the New Deal and the decisions of the Supreme Court upon those issues. We are not concerned here with the wisdom of the Roosevelt policies, but only with the challenge of the New Deal to the old Constitution and to the Supreme Court. Under the recovery program federal power penetrated into new territory upon a dozen fronts. It brought under varying degrees of federal control industry, agriculture, mining, labor, railroads, the currency, banking, and investment securities; it put into effect new and startling policies for public works, the development and conservation of natural resources, debtor relief, charitable and work relief, social security, and the unique quasi-socialistic enterprise in the Tennessee Valley. The states, on their part, embarked upon new policies of debtor relief, price control, and improvement of laboring conditions. While a barrage of constitutional attack has been directed against practically every part of the New Deal program, the major constitutional issues involved narrow themselves down to three: (1) Did Congress in enacting the New Deal program exercise powers which are not delegated to it by the Constitution? (2) Did it exercise any of its delegated powers in a way forbidden by any of the limitations found in the Constitution? (3) Did any of the states in their recovery legislation violate the limitations upon state power found in the federal Constitution? Following this rough three-fold classification we may now explore the decisions of the Supreme Court on the constitutionality of the New Deal for the light they throw upon the adequacy of the Constitution to modern national needs and upon the Court's technique in construing the Constitution.

# THE CONSTITUTIONALITY OF THE NEW DEAL AS INTERPRETED BY THE SUPREME COURT

## *1. Did the New Deal Program Lie within the Delegated Powers of Congress?*

WE HAVE seen that Congress has only those powers granted to it in the Constitution. The power may be granted specifically, as the power to establish a postal system; or it may be implied from powers that are specifically granted, as the power to charter national banks. But there must always be some constitutional "peg" upon which Congress can hang its laws. This is in sharp contrast to the position of the state legislature which has all powers which have not been given to Congress or denied to it either by the federal or by its own state constitution.

Nor does the doctrine of delegated national power break down in time of emergency. An emergency does not create power. It does not give Congress any powers not delegated by the Constitution; the most that it does is to permit delegated powers to be used in ways that might be arbitrary, and therefore unconstitutional, in normal times. There is no way in which Congress can escape the limitations of the doctrine of delegated powers. Consequently when federal codes of fair competition were imposed upon dry-cleaning establishments and parking areas, and penalties were set up for selling more than six bushels of potatoes unless licensed, the question arose: Under what delegated power does Congress suppose it is acting in passing these laws?

Perhaps the major part of the New Deal program was based upon the power of Congress to regulate interstate commerce. The history of the trend toward federal centralization is very largely the history of the commerce power. The grant remains the same, but the content of the term commerce, and the methods and policies which constitute "regulation" have tended to keep pace with the growing complexities

of modern life. Interstate commerce includes virtually every form of intercourse across a state line whether it be by boat, motor car, railroad, airplane, wire, or radio. And the power to regulate that commerce includes the power to make the rules by which it is carried on, to promote it and protect it, and to prevent it from being used for purposes of public injury. Thus Congress rigidly controls our national railroad system, protects interstate commerce from monopoly and unfair competitive trade practices, and closes the channels of interstate commerce to those who try to sell impure food and drugs, distribute obscene literature, or dispose of stolen goods.

The power given is over foreign and interstate commerce and does not extend to commerce carried on wholly within a state. But in some cases purely local transactions obstruct or injure interstate commerce. A state law requiring all railroads to stop all trains at all county seats seriously burdens interstate traffic; [2] and state freight rates placed at too low a level may discriminate injuriously against interstate shipping carried on at a higher but still reasonable rate level.[3] In these cases the Supreme Court does not hesitate to step in and annul the obstructive state law or uphold Congress in doing so.

It is only a step from this to the theory that the commercial and industrial life of the nation is a unit, so that Congress is still regulating interstate commerce when it strikes at abuses superficially local in character. This, at least, was the New Deal philosophy as to the scope of the commerce power. Let us examine its concrete application.

The National Industrial Recovery Act was an ambitious scheme for the rehabilitation of American industry. Its aim was to stimulate business and improve the conditions of labor. This was to be done by boosting prices, raising wages, shortening working hours, stopping child labor, and eliminating unfair competitive practices. It was argued that an increase in purchasing power of labor would permit the higher prices and thus everyone would prosper together. The device to

[2] Illinois Central R. R. Co. v. Illinois (1896), 163 U. S. 142.
[3] The Shreveport Case (1914), 234 U. S. 342.

bring this all about was the "code of fair competition," either formulated by an industry for itself or imposed on it by the President, which specified the minimum standards of fairness in each trade and the conditions of labor required by law. Within eighteen months over 700 codes had been set up. The act provided penalties for failure to obey the codes. A wholesale poultry firm in Brooklyn, the Schechter Brothers, violated the "Live Poultry Code" and was prosecuted for so doing. They operated a poultry market and did not sell in interstate commerce, but to local retailers. One of their crimes was the selling of "an unfit chicken"; hence the name "The Sick Chicken Case." The Schechters attacked the constitutionality of the National Industrial Recovery Act and the code.

Let us examine the Supreme Court's unanimous decision [4] that the imposition of a federal code upon a local business does not fall within the delegated power of Congress over interstate commerce. The government urged that the poultry markets in New York and other large cities were "bottle necks" through which the interstate commerce in poultry normally passed and that this interstate commerce was injured and obstructed by the business abuses and bad laboring conditions which the codes forbade. The code was, therefore, a necessary and proper means of protecting interstate commerce from evils of local origin and thus fell within the power of Congress. The Court did not deny a connection between the Brooklyn poultry market and interstate commerce. The argument for the government, however, proved too much. If every local transaction in any way affecting interstate commerce falls within the power of Congress, then practically nothing remains free from that control and "we should have a completely centralized government." The problem is one of drawing a dividing line, and this is the way the Court draws it:

> "In determining how far the Federal government may go in controlling intrastate transactions upon the ground

[4] Schechter v. United States (1935), 295 U. S. 495.

> that they "affect" interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle."

The code violations in the poultry markets "affect" interstate commerce only "indirectly" and lie, therefore, beyond the reach of federal power. The N.I.R.A. and its codes are accordingly bad. They are not exercises of the delegated power to regulate interstate commerce.

This line between things which "directly" and "indirectly" affect interstate commerce is very important but very vague. In the Railroad Retirement Act case [5] the Court held by a five-to-four vote that the setting up of a compulsory system of retirement and pensions for railroad workers "is in no proper sense a regulation of the activity of interstate transportation." Chief Justice Hughes, dissenting, branded the Court's decision "an unwarranted limitation upon the commerce clause of the Constitution." In 1937, however, the Court upheld the National Labor Relations Act.[5a] This act assumed that interstate commerce is seriously obstructed by labor disputes in industries concerned in that commerce, and that Congress may properly use its commerce power to prevent such disputes. It accordingly provided elaborate safeguards for collective bargaining between employers and employees; it forbade certain carefully defined "unfair labor practices" upon the part of employers; and it set up the National Labor Relations Board to administer the act. A majority of the Court agreed that the act dealt with matters which "directly" affect interstate commerce, even when applied to labor relations in industries producing goods for interstate markets.

Another New Deal measure hung on the commerce clause "peg," was the Guffey Coal Act of 1935. This sought to stabilize labor conditions and prices in the soft coal industry after the earlier coal code had gone down with the con-

[5] Railroad Retirement Board v. Alton R. Co. (1935), 295 U. S. 330.

[5a] National Labor Relations Board v. Jones & Laughlin Steel Corporation (with four cases decided the same day), (1937), 301 U. S. 1-147.

stitutional wreckage of the N.R.A. decision. A heavy tax was levied on the production of soft coal, but 90% of this tax was rebated to producers who signed the Bituminous Coal Code. Some 70% of the industry signed. It was agreed on all sides that the tax itself was a regulatory device and that the act must rest for its validity on the commerce power. The Court held, however,[6] that the labor provisions of the code could not be upheld under the commerce power. It referred to earlier decisions which had held manufacturing and mining to be sharply distinct from interstate commerce in the goods thus produced, and then declared that the labor provisions of the act constituted a use of the commerce power for a purpose falling within the reserved powers of the states, and were therefore bad. This interesting doctrine will be explored more fully in commenting on the A.A.A. decision. In 1937 Congress passed a new Coal Act with the invalid labor sections left out.[7]

*When Is a Tax Not a Tax?*

A second delegated power of Congress upon which New Deal measures rested for constitutional support was the taxing and spending power. This was the "peg" upon which the Agricultural Adjustment Administration program was hung. The statute aimed to raise farm prices by crop reduction. Farmers who would agree to limit their production of certain basic commodities were to be paid for so doing out of money raised by a processing tax levied on those who prepared the products for market. Over a billion dollars flowed into the Treasury from these taxes. In the A.A.A. case[8] the Court, again sharply divided, held the act was invalid since it lay outside the proper scope of the delegated power to tax and

[6] Carter v. Carter Coal Co. (1936), 298 U. S. 238.

[7] The Court's decision on the validity of the Tennessee Valley Authority held, among other things elsewhere discussed, that the Government's construction of the Wilson Dam in the Tennessee Valley was a proper exercise of its war power and also its power (under the commerce clause) to promote the navigability of the river. This is merely a routine exercise of the commerce power, not open to question.

[8] United States v. Butler (1936), 297 U. S. 1.

to spend. Let us explore this further. In earlier cases, notably the Child Labor Tax Case,[9] the Court had asked itself the riddle "When is a tax not a tax?" and the answer had been "When it punishes or destroys rather than raises revenue." But A.A.A. processing taxes, with their billion dollars of proceeds, were certainly not destructive or punitive. The Court, therefore, gives us another answer to the riddle. A tax is not a tax when the money it raises is used to finance a scheme of regulation not delegated to Congress. The processing taxes are not taxes, therefore, but "expropriations." But what of the spending power? The Constitution says that Congress may "lay and collect taxes . . . to pay the debts and provide for the common defense and general welfare of the United States." No earlier decisions of the Court construe the spending power, but it has been generally agreed since the days of Hamilton and Story that "to provide for the common defense and general welfare" is the purpose for which Congress may lay taxes, or spend the money raised by taxation. It is not seriously contended that Congress has any general, nonfiscal power to "provide for the general welfare." But are not the funds raised by the processing taxes being used to "provide for the general welfare" in rehabilitating American agriculture?

Mr. Justice Roberts, speaking for the majority, evades that delicate question, but proceeds to hold the expenditures bad because the money is being used to pay for regulation lying within the reserved powers of the states. This doctrine, dubbed by Professor E. S. Corwin of Princeton, the doctrine of "Dual Federalism" is vitally important.[10] It may be stated thus: The scope and purpose of the delegated powers of Congress are limited by the existence of the reserved powers of the states. In other words, Congress must not use its powers for objects falling within the range of state reserved power. This theory seems to have originated in Madison's later-day reaction against the strong nationalism of Marshall. After a

[9] Bailey v. Drexel Furniture Co. (1922), 259 U. S. 20.
[10] Corwin, E. S., *The Twilight of the Supreme Court*, Chapter 1.

very checkered career it is now elevated to the dignity of a controlling doctrine of constitutional law. The reserved powers of the states are those left over after the powers of Congress have been delegated. If a power is delegated to Congress, then, by definition it cannot be a power reserved to the states. But under this logically intriguing theory the delegated powers are nevertheless limited by the reserved powers. "Dual federalism" was used a few months later to invalidate the municipal bankruptcy act under which insolvent municipal corporations could take advantage of the federal bankruptcy statutes. By a five-to-four division the Court held that the act was an exercise of the federal bankruptcy power which intruded upon the reserved powers of the states over their local governmental units.[11]

In 1937, however, the Court, by a five-to-four vote, refusing to invoke the doctrine of "dual federalism," upheld the Social Security Act which levied federal taxes to finance unemployment compensation and old age benefits.[11a] Mr. Justice Cardozo said: "It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare."

Other delegated powers of Congress have been construed by the Supreme Court in cases arising under the New Deal. Space does not allow a discussion of the important and complicated Gold Clause decisions,[12] but in them the Court reaffirmed and strengthened earlier broad constructions of the delegated power of Congress to regulate the currency system of the United States. The decision in the Tennessee Valley Authority case[13] rested on so narrow a factual basis that most of the more interesting constitutional questions

[11] Ashton v. Cameron County Water Improvement District No. One (1936), 298 U. S. 513.

[11a] Steward Machine Co. v. Davis (1937), 301 U. S. 548.

[12] Norman v. B. & O. R. R. Co. (1935), 294 U. S. 240; Perry v. United States (1935), 294 U. S. 330; Nortz v. United States (1935), 294 U. S. 317.

[13] Ashwander v. Tennessee Valley Authority (1936), 297 U. S. 288.

involved in the government's broad social and economic program in the Tennessee Valley were not answered. It was, however, held that Congress under the war and commerce powers could lawfully construct hydroelectric plants and that under the delegated power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States" it could sell, lease, or otherwise dispose of surplus power generated at government plants. Here again we have a broad construction of a granted power.

We have in the foregoing analysis the Court's answer to our question: Did the New Deal program lie within the delegated powers of Congress? The answer is threefold. Part of the program was well within delegated powers liberally construed. Part of the program lay outside the delegated powers and tried to reach things only "indirectly" connected with subjects on which Congress may legislate. Part of the program lay technically within the delegated powers of Congress, but was bad because its purpose lay outside. The sharp dissents indicate how difficult these lines are to draw and how widely varied may be the individual judgments that enter into the drawing of them.

### 2. *Did the New Deal Program Violate any of the Constitutional Restrictions on Federal Power?*

We have seen that Congress may only exercise granted powers. But it may not exercise granted powers in forbidden ways. The specific ways that are forbidden are listed in the Federal Bill of Rights and one or two other clauses of the Constitution. Thus Congress could not use its delegated postal power to set up a censorship of newspapers carried through the mails because the First Amendment forbids Congress to restrict the freedom of the press. In like manner the Frazier-Lemke Farm Bankruptcy Act was held void by a unanimous Court [14] not because it was an exercise of an undelegated

[14] Louisville Joint Stock Bank Co. v. Radford (1935), 295 U. S. 555.

power (the Court was willing to assume that it was an exercise of the bankruptcy power) but because it deprived mortgage creditors of their property without due process of law and took private property for public use (or even worse for private use) without just compensation as forbidden by the language of the Fifth Amendment. It seemed fairly clear that the Frazier-Lemke Act legislated property rights out of existence in a harsh and arbitrary manner. In 1935 Congress passed a new Farm Bankruptcy Act. While this deferred certain rights of creditors it did not destroy them or seriously impair them, and the Court held, in a unanimous decision in 1937, that the statute does not violate the Fifth Amendment.[15]

There are forbidden ways of exercising federal delegated powers which are not specific but implied. Of these implied limitations the one which figured most conspicuously in the New Deal decisions was the one which forbids Congress to delegate its legislative power, a corollary of the basic American doctrine of the separation of powers. The complex nature of the problems Congress must deal with, makes it impossible to put into formal statutes every rule, regulation and form of procedure by which national laws are to be put into effect. The Civil Service Act, the naturalization acts, and countless others have to be supplemented by rules and orders issued by the President or other administrative agencies. These rules and regulations are said to fill in the details of the legislative program or policy embodied in the statute. Sometimes also Congress adopts a legislative policy which needs to be adjusted in its details to changing conditions. Thus the President was authorized in certain tariff acts to raise or lower tariff schedules to meet changing differentials in costs of production here and abroad. Prior to the New Deal none of these exercises of "sub-legislative" power by the executive branch had been found by the Court to violate the rule against the delegation of legislative power. There was no unlawful delegation, said the Court in numerous cases, as long as the law passed by Congress set up a sufficiently clear

[15] Wright v. Mountain Trust Bank (1937), 300 U. S. 440.

standard to guide the executive officers in issuing their rules and regulations. Just how definite that standard had to be the Court did not explain.

Three New Deal measures fell afoul of this vague implied limitation. In the "Hot Oil Cases" [16] the Court, with the single dissenting voice of Mr. Justice Cardozo, held that the oil section of the N.I.R.A. authorizing the President to prohibit the interstate shipment of "hot oil" [17] invalidly delegated legislative power because it set up no guide to the President's discretion. There was nothing in the statute to indicate, if, when, how or why the President was to prohibit such shipments. In the body of the National Industrial Recovery Act itself the President was empowered to put into effect codes of fair competition to carry out the broad purposes of the act. The Court concluded, in the Schechter case, that the discretion of the President in the setting up of codes was "virtually unfettered" and that legislative power was therefore unconstitutionally delegated. In the words of Mr. Justice Cardozo, in a concurring opinion, the statute gave the President "a roving commission to inquire into evils and upon discovery to correct them." The Guffey Act placed the power to fix maximum hours of labor and minimum wages in the joint hands of representatives of the miners and coal producers. Said the Court, "this is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons. . . . In fact this delegation is so arbitrary as to amount to a denial of due process of law."

### 3. *Has State Recovery Legislation Violated Federal Constitutional Limitations?*

The efforts of state legislatures to deal with the depression brought to the Supreme Court constitutional issues as to state power which may be briefly noted.

[16] Panama Refining Co. v. Ryan (1935), 293 U. S. 388.

[17] "Hot oil" is oil produced or withdrawn from storage in violation of state law.

First, Minnesota established a two-year moratorium for mortgage debtors. The rights of creditors were not destroyed, as in the Frazier-Lemke Act, but deferred, and a fair interest rate provided during the period of delay. This was attacked as a law impairing the obligation of contracts, forbidden to the states by the Constitution. By a five-to-four vote the Court upheld the law as a reasonable exercise of the State police power to meet an acute emergency situation.[18] Private contracts are subordinate to the police power of the state when that power is reasonably exercised.

Second, New York established a state Milk Commission with power to fix the retail price of milk. Such prices were fixed and a grocer was prosecuted for charging less. Could the state validly fix the price of milk? Till 1935 the Court's position had been that prices could be fixed by law only in those businesses which are "affected with a public interest." Price fixing in businesses not so "affected with a public interest" was a denial of due process of law. Judicial attempts to distinguish which these businesses were had not been very successful, but the Court had been unwilling to abandon the criterion even if it could not state it clearly. In the New York milk price case,[19] however, in another five-to-four decision, the Court threw overboard as the essential test for price regulation that the business must be "affected with a public interest" and announced that price regulation is a simple exercise of the police power of the state to be resorted to when the public welfare of the state demands it regardless of any peculiarities of the business so dealt with. The use of the power is of course limited by the usual restraints of equality and due process of law under which all state police power is exercised.

### *The Minimum Wage Cases*

Finally, New York in 1933, passed a minimum wage law applicable to women and children. The establishment of mini-

[18] Home Building & Loan Association v. Blaisdell (1934), 290 U. S. 398.
[19] Nebbia v. New York (1934), 291 U. S. 502.

mum wages for women and minors by law is not a new idea. At one time or another Congress, seventeen state legislatures, and the legislative bodies of twenty-one foreign countries have passed such laws in an effort to protect a group of workers commonly believed to be too weak to drive fair wage bargains. In a five-to-four decision [20] the Supreme Court reaffirmed an earlier decision of 1923 [21] and held that the New York statute was an arbitrary, and oppressive exercise of the police power because it infringed the "freedom of contract" of the workers and their employers, and was, therefore, a deprivation of liberty and property without due process of law.

No decision of the Court in a generation aroused more widespread criticism from all parties and classes. It gave effective ammunition to those who were defending the President's proposal to "liberalize" the Supreme Court by the appointment of additional justices to counterbalance those past seventy who declined to retire. There was still on the Court's docket a case involving the validity of the minimum wage act of the state of Washington passed back in 1913. There were minor differences in the detailed provisions of these statutes but the basic features were the same. The Court thereupon re-examined the issues involved; Mr. Justice Roberts changed over; and by a five-to-four decision the Washington act was held valid.[21a] In the majority opinion written by Chief Justice Hughes the Adkins case of 1923 was expressly overruled and, by implication, the New York Minimum Wage case which had followed it as authority. Thus minimum wage laws suddenly became constitutional.

How could the shocking view have prevailed for fourteen years that the U. S. Constitution guarantees the right to pay women and children starvation wages? Let us begin with the police power. The police power is that vital power of the American state to legislate for the public welfare. More specifically it is the power of the state to restrict the individual's freedom of action, or free use of his property, in order to

[20] Morehead v. New York ex rel. Tipaldo (1936), 298 U. S. 587.
[21] Adkins v. Children's Hospital (1923), 261 U. S. 525.
[21a] West Coast Hotel Co. v. Parrish (1937), 300 U. S. 379.

protect the health, safety, morals, good order, convenience, or general welfare of the state. A traffic ordinance, a quarantine regulation, a movie censorship law, and a minimum wage law are all exercises of the police power. Congress does not possess a general police power, but only delegated powers. It does, however, enjoy delegated police power over the District of Columbia and it was exercising this police power when it passed the minimum wage act held void in 1923. Every exercise of the police power contains two elements. One is a restriction upon the individual; the other is a social objective, or general welfare purpose, supposed to justify that restriction. The relation between these two elements is the heart of the due process problem.

*The "Due Process" Clause*

Now let us turn to due process of law. There is no definition of the term, but there is a history which illuminates its meaning. Due process of law traces its ancestry back as far as Magna Charta. Without diagramming its family tree in any detail, we find it set forth in the Fifth Amendment of the Federal Bill of Rights. There we read "no person shall be deprived of life, liberty, or property without due process of law." Similar guarantees are in nearly every state constitution, and the Fourteenth Amendment in 1868 included an identical due process clause applicable to the states. The early history of the due process clauses is not spectacular. Due process was held to be a limitation upon governmental procedure and not upon the substance or content of legislative policy. It might require notice and hearing, or a fair trial, but it did not forbid the state to regulate a social or economic problem. After the Fourteenth Amendment was adopted the Supreme Court, in its first case construing it,[22] held that the due process clause had no relevance to, and could not be invoked to forbid, an arbitrary state police regulation setting up a slaughterhouse monopoly in New Orleans. It looked as though due process might continue to be the "forgotten

[22] The Slaughterhouse Cases (1873), 16 Wallace 36.

clause" of the Constitution. But vast economic changes were taking place. To deal with social and economic problems of ever increasing complexity and variety the states passed new and drastic police regulations. Factory conditions called for legislative protections to the health and safety of laborers. This expansion of the police power was a challenge to our American pioneer philosophy of *laissez faire*. The Courts themselves had been bred in the philosophy of individualism, so salient an element in the spirit of the common law. Was there no constitutional weapon with which to combat the onward march of the new social control—the new police power? The stone that the constitutional interpreters had rejected for a hundred years now became the head of the corner. The due process clause, practically overnight, was turned into a limitation upon the substance of the police legislation enacted by the states. This judicial about-face of the eighties and nineties put the Supreme Court in a position to test the validity of the social laws of the states and represented a vast augmentation of the Court's authority.

But none of these happenings had produced any clear definition of due process of law. The essential meaning of the term is, however, clear if not specific. That meaning takes form in the twofold nature of the police power—restriction of individual liberty versus social policy or justification. In determining whether a piece of social legislation denies due process of law the Court strikes a balance between these two elements. If the restriction on the individual's liberty seems to the Court to outweigh the social advantage claimed for it, then it is a denial of due process of law. If on the other hand the social objective is obvious and important then fairly sharp restraints on individual conduct will be upheld. Thus a vaccination statute is held a reasonable legislative device to combat a smallpox epidemic.[23] But a requirement that drugs may not be sold unless all the stockholders owning the drug stores are registered pharmacists seems hardly a reasonable

[23] Jacobson v. Massachusetts (1905), 197 U. S. 11.

way of protecting public health and therefore denies due process.[24]

It is easy to see that the task of deciding whether the New York minimum wage law deprived workers and employers of due process of law is not one of technical constitutional construction. The language of the Constitution throws no light on the problem. Nor is any help to be had from the views and intentions of the founding fathers. They had never heard of minimum wages, and what they thought about due process of law turned out to be, if not actually wrong, at least irrelevant. The Court, therefore, decides the problem in the light of its own convictions upon whether the needs of modern society justify the invasion of "freedom of contract" involved in setting up a legislative minimum wage. Certainly that is not a legal question. It is a question of individual judgment and opinion. A man with the training and background of Mr. Justice Butler is not likely to reach the same answer to the question as Mr. Justice Brandeis, the former "people's lawyer," for one's answer will be governed by his social and economic philosophy which in turn will depend upon his early environment and education and his business or professional associations. This is what Mr. Justice Stone was driving at in his dissenting opinion when he said:

> "It is difficult to imagine any grounds, other than our own personal economic predilections, for saying that the contract of employment is any the less an appropriate subject of legislation than are scores of others in dealing with which this Court has held that legislatures may curtail individual freedom in the public interest."

It seems, then, hardly possible to say that in any real sense the minimum wage law was ever contrary to the Constitution. What we mean is that it was contrary to the Supreme Court. And this is not a criticism of the judges, who do their job honestly and sincerely. It is merely an observation on the nature of the job they do.

In the light of these New Deal decisions we may now

[24] Liggett Co. v. Baldridge (1928), 278 U. S. 105.

summarize certain general facts about the Supreme Court's work in our modern constitutional system. In the first place, no constitutional question affecting the New Deal came up for decision under any clause of the Constitution which by its own words provided any answer to that question. What constitutional provisions were said to be violated? The commerce clause, the spending clause, due process of law clause. In every case the Court had to read concrete meaning into words so vague and general as to be in themselves virtually without meaning, and with no guide but its own past decisions and present "hunches." The issues in nearly every case narrowed down to the drawing of lines in close cases—questions of degree—such as decisions between "direct" and "indirect" relations to interstate commerce. It is clear that in construing these vague clauses and deciding these questions of degree the Court is deciding questions of legislative policy. It cannot in the nature of the case avoid doing so. In the A.A.A. case Mr. Justice Roberts denies this and assures us:

> "When an act of Congress is appropriately challenged in the Courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the Court does, or can do, is to announce its considered judgment upon the question."

But merely putting the statute and the Constitution side by side, like the pieces of a jig-saw puzzle, does not answer any concrete question of constitutional law. The crucial question is where and how the Court reaches "its considered judgment" and there is no escape from the conclusion that in doing so it has the opportunity of embodying in a rule of constitutional law its own belief that minimum wage statutes are economically unsound and that the agricultural adjustment program is worse. In determining the nature and scope of the delegated powers of Congress, the Court may choose between Hamiltonian nationalism or Madisonian states rights.

In interpreting due process of law in police power cases it may choose between the philosophy of governmental control of social interests and the philosophy of laissez faire. These choices are in the broadest sense political, just as Marshall's great decisions were political; they are also economic; they are also personal. And the vital importance of these decisions is increased by their practical finality. The Supreme Court may change its mind and reverse a decision, and it was encouraging to see the Court do this on the occasion of the last minimum wage case. Its decisions may be reversed by an amendment to the Constitution and this has happened twice,[25] unless the Fourteenth Amendment be deemed a reversal of the Dred Scott Case,[26] in which case it has occurred three times. But barring reversal by decision or amendment, the Court's rulings stand as the Constitution itself for better or for worse.

## PROPOSALS FOR CONSTITUTIONAL OR JUDICIAL REFORM

THE PURPOSE of the preceding pages has not been to attack either our Constitution or the Supreme Court. It has been rather to show as clearly as possible how questions arise as to the adequacy of the Constitution to the challenging demands of the 20th century and how great is the final authority of the Court in answering those questions. Whatever we may feel about the wisdom of the statutes involved it is a sobering thought that Congress cannot devise a general program of agricultural rehabilitation because six of our nine Supreme Court justices so rule, and that neither the nation nor the states can protect women and children from starvation wages when five of the same nine justices find something in the words "due process of law" which prevents it. And this pushes to the front the question whether, viewing the whole situation, we think something

[25] The Eleventh Amendment reversed Chisholm v. Georgia (1793), 2 Dallas 419; the Sixteenth Amendment reversed the Income Tax Cases (Pollock v. Farmers' Loan & Trust Co. (1895), 158 U. S. 601.

[26] Dred Scott v. Sandford (1857), 19 Howard 393.

ought to be done about it. And if we assume that something ought to be done, that raises a whole row of questions as to what can be done. Let us, then, examine the various positions which an intelligent citizen might take on this important question and see what ways are open to him to make his views effective.

1. In the first place there is the viewpoint that the Constitution is fully adequate to present-day needs and that the Supreme Court is performing wisely and efficiently its difficult task of interpreting it. Those holding this opinion, and there are many, will naturally propose no changes in our constitutional or judicial system, but will, on the contrary, fight any changes that may be proposed.

2. In the second place there are those who view with concern the whole constitutional picture presented in the earlier pages but who feel that no change in the Constitution is needed and that any "tinkering" with the Supreme Court will be dangerous and unsatisfactory. These critics of the present system believe that the Constitution with its broad and generous clauses is sufficiently flexible to meet the changing demands of the modern nation. That flexibility must be recognized and accepted by the Supreme Court in the work of constitutional construction. And we must "educate" the Court through criticism, public discussion, and the various techniques of an informed public opinion to a more enlightened view of their task. A person thus minded is apt to quote Mr. Dooley's comment that the Supreme Court follows the election returns and, if more fully informed, alludes to the fact that the Supreme Court has actually reversed or drastically modified its decisions in about forty cases.[27] This shows that judicial opinions can be and sometimes are changed gradually and it is urged that such a process of evolution and adjustment is likely to be more satisfactory than any jerky and uncertain results attained by altering either the Constitu-

[27] These are listed in a footnote in a dissenting opinion by Mr. Justice Brandeis in Burnet v. Coronado Oil & Gas Co. (1932), 285 U. S. 393.

tion or the Court. In reply it is urged that very few reversals of the decisions of the Court have come about in answer to any immediately expressed public opinion, that the recent decisions indicate a trend toward judicial ruthlessness rather than judicial tolerance of legislative policies, and that such a program of judicial education is at best slow and uncertain. However, the apparent change in the Court's attitude since 1936 may well give encouragement to those seeking results by this method.

3. A third position is that the Constitution, properly interpreted, is fully adequate to our present-day national needs, that the Supreme Court is at fault either in assuming the vast power it exercises, or in the way in which it uses it, and that we should, therefore, let the Constitution alone and reform the Court. Having agreed that something ought to be done to the Court, these reformers split up into at least five groups on the question of what to do.

### *"Packing" the Court*

One thing that can be done to the Court is to "pack" it. By this is meant to increase the number of judges on the Court and fill the new places with men who have a more "liberal" point of view. For those who like speedy action this plan has the advantage of getting immediate results and of being a change which can be made by Congress without the aid of a constitutional amendment. The Constitution provides that there shall be a Supreme Court but leaves it to Congress to determine its size by statute. We started out with six justices, we have had as many as ten, and since 1869 we have had nine. There is no constitutional reason why we should not have fifteen or twenty-five. This scheme to "pack" the Court has a certain childlike simplicity. If we have judges whom we regard as bad, let us add to the Court enough good judges to outvote the bad ones and all will be well.

In 1870 the Supreme Court declared the Legal Tender

Act invalid by a vote of four to three.[28] There were two vacancies on the Court at the time. President Grant filled these places with two men who promptly voted with the minority of three to reverse the decision by a vote of five to four.[29] Historians still argue as to whether Grant "packed" the Court, a question which we are not called upon to settle. It is more important to note that the incident cost the Court heavily in public confidence. Mr. Hughes calls the reversal under these circumstances "a self-inflicted wound." Those who urge that we "pack" the Supreme Court should bear in mind that packing may well be a two-edged sword. If we "pack" the Court with liberals there is nothing to prevent reprisal by the conservatives when they come into power, and the process may go on until all sound traditions of judicial independence are undermined. Furthermore, the packing of the Court with justices of a particular breed or color of view promises very uncertain results. If these men are really the kind whose judicial work will be directly governed by their political and economic affiliations, who will in short live up to the implied understanding which led to their appointment, they would appear to be unfit for judicial service. Nothing but calamity can be expected from a definitely biased Court. If, on the other hand, judicially minded men are appointed in the expectation that their known predilections and hunches will color their work on the bench, it should be noted that experience does not bear this out sufficiently to make the method a very reliable instrument of specific reform. Judges so chosen have usually disappointed their sponsors. President Roosevelt proposed in 1937 that new justices up to six be added to the Supreme Court for every justice seventy years of age who refused to retire. This would inject "new blood" into the Court. The plan was generally viewed as a device for "packing" the Court and was defeated.

But it is not necessary to swamp the Court in order to

[28] Hepburn v. Griswold (1870), 8 Wallace 603.
[29] Legal Tender Cases (1871), 12 Wallace 457.

change its personnel. In 1936 five justices were seventy-four years of age and a sixth was seventy.[30] President Roosevelt since his reelection has had three Supreme Court appointments to make and may possibly have others. He will thus affect the trend of the Court's decisions for many years. If he appoints men with the broad judicial tolerance of a Brandeis, Stone, or Cardozo, the Constitution may prove flexible enough to meet the demands we are making on it. If he appoints hardminded judicial dogmatists from the ultra-conservative school, we may find ourselves facing the issue of drastic constitutional revision. Those who believe the Constitution is adequate to our present needs, if flexibly construed, will do well to exert every ounce of influence toward the selection of justices who share their views, not on specific questions, but on the broad principles of liberal construction.

*Limiting the Court's Jurisdiction*

Another quick and easy method of dealing with the Supreme Court is to deprive it of its jurisdiction to decide cases in which constitutional questions are most likely to arise. This also may be done by act of Congress without amending the Constitution. Many who favor this plan are not wholly sure of their ground and are prone to lose track of certain basic facts. The Supreme Court has two kinds of jurisdiction, original and appellate. The original jurisdiction of the Supreme Court is fixed by the Constitution and cannot be increased or diminished by Congress. But that original jurisdiction does not figure in our present problem since it includes only cases affecting ambassadors, ministers and consuls, and cases between states of the union. The appellate jurisdiction of the Supreme Court, however, while it cannot be enlarged by Congress beyond the limits set forth in the Constitution, can be cut down or even abolished by statute. The Constitution plainly states that such appellate jurisdiction

[30] An act of 1937 allows a Supreme Court justice who has served ten years to retire on full pay at seventy. If willing he may thereafter be assigned to duty as a circuit justice.

shall be exercised subject to "such exceptions and under such regulations as the Congress shall make."

Congress has frequently changed this appellate jurisdiction, sometimes extending it and sometimes cutting it down. In one notable case Congress cut off the Court's appellate jurisdiction for the admitted purpose of preventing a decision on a constitutional question. This was the famous case of *ex parte* McCardle decided in 1869.[31] The case had already been argued in the Supreme Court on a question involving the constitutionality of the Reconstruction Act of 1867, an act which Congress had reason to suppose the Court might hold void. Before the Court could render a decision (although there is some evidence that the Court delayed to permit Congress to act) Congress repealed the statute giving the Court jurisdiction to hear the case on appeal. The Court decided that Congress had the power to do this and dismissed the case forthwith. Congress could constitutionally take from the Supreme Court all appellate jurisdiction, although this would leave a very peculiar judicial system. Or Congress could lop off the appellate jurisdiction of the Court in particular kinds of cases as it did when it made the jurisdiction of the Circuit Courts of Appeals final in all federal criminal cases not involving constitutional questions. But this vitally important fact must be kept in mind. As long as the Supreme Court is left with *any appellate jurisdiction whatever, Congress cannot constitutionally keep the Court from passing upon the validity of acts of Congress in any and all cases lying within that jurisdiction in which such constitutioal questions can possibly arise.*

Let us see why this is true. There is a difference between the jurisdiction of the Supreme Court and the judicial power exercised inside that jurisdiction. The actual substantive power which the United States Courts exercise is the "judicial power of the United States," and this they get from the Constitution, and not from Congress. The jurisdiction of the Courts, on the other hand, is the area or enclosure within

[31] 7 Wallace 506.

which the judicial power is exercised. A federal judge put it very neatly when he said: [32]

> "We see that Congress . . . can as a potter shape the vessel of jurisdiction, that is, the capacity to receive, but having been made, the judicial power of the United States is poured into the vessel not by Congress but by the Constitution."

Congress, in other words, can determine whether the Supreme Court shall have any cases to decide on appeal, but if it allows it to decide any at all, it has nothing to say about the nature of the judicial power exercised in deciding them. Now the power of the Supreme Court of the United States, to pass on the validity of laws (and the same is true of lower federal courts as well) is *an inherent element of the judicial power of the United States*. That is the orthodox theory of judicial review. That being true the power of judicial review cannot be impaired or taken away by Congress. Congress does not confer it and may not destroy it. That power, therefore, will still be exercised by the Supreme Court, and every other federal court, within the limits of any jurisdiction, however small, that Congress may permit these courts to exercise. Congress can prevent the Court from exercising judicial review of legislation only at the price of cutting off its power to exercise all judicial power. It follows that any legislative tampering with the appellate jurisdiction of the Supreme Court is a very left-handed and unsatisfactory method of dealing with the power which the courts exercise in construing the Constitution.

### *Preventing five-to-four Decisions*

Still another proposal for "reforming" the Court is to provide that no act of Congress shall be invalidated by the Supreme Court unless seven of the nine justices agree. There is no sanctity about seven as the required majority, but that is the number most commonly proposed. Since this would be a change in the Court's exercise of its judicial power, rather

[32] Michaelson v. United States (1923), 291 Federal Reporter 940, 946.

than its jurisdiction, it would probably be necessary to amend the Constitution in order to bring it about, although there are able constitutional lawyers who believe that Congress could make this change by statute. This proposal is aimed at the evil of five-to-four decisions and has been strongly urged from time to time. Its underlying philosophy is simple and plausible. It is an accepted principle of constitutional construction that an act of Congress is presumed to be constitutional and should not be held void unless its invalidity is beyond all reasonable doubt. It is ridiculous, urge the advocates of this seven-to-two requirement, to say that a statute is void beyond reasonable doubt when four judges or even three believe it to be valid. If the constitutional issue is as close as that, the judgment of Congress should be upheld. Such a rule (the concurrence of seven judges) would have saved the A.A.A., the Guffey Act, the Railroad Retirement Act (on its broader merits), and the Municipal Bankruptcy Act. It would not have saved the N.R.A. or the Frazier-Lemke Act.

Let us examine the plan more closely. Does not the "reasonable doubt" argument, in the form used, prove too much? All the courts have ever meant in saying that the unconstitutionality of a statute should be free from reasonable doubt before the act is held void, is that there should be no reasonable doubt in the minds of the judge or judges rendering the decision. Mr. Justice Roberts ought not to hold the A.A.A. void if he has doubts about its invalidity; but if he is not doubtful why should he vote to uphold it because Mr. Justice Stone has doubts, or believes it valid? There will always be some doubt somewhere or there would be no issue in the first place. This is the reason why a court which claims to be governed by the "reasonable doubt" test of validity continues to hand down five-to-four decisions. It does not, however, prove that we ought not to prevent such decisions. The seven-to-two rule might increase public confidence in the decisions of the Court and allay resentment. Exasperation at a decision one does not like is increased when it is a

five-to-four decision. Then there is the other side of the picture which would appear when an act of Congress, attacked as invalid, is upheld and enforced when six members of the Court believe it to be unconstitutional. That would hardly produce widespread confidence in such a decision. It seems probable that more acts of Congress would be upheld than at present. Which ones they would be could not, of course, be foretold. The results of the rule would be neither very serious nor very helpful; but it is doubtful if they would be important enough to warrant passing a constitutional amendment.

*Overriding the Court by Two-Thirds Vote of Congress*

A much more drastic change in the power of the Supreme Court would be made by those who propose that decisions of the Supreme Court holding acts of Congress invalid could be overridden by a two-thirds vote of both houses of Congress. If this were done the act would be in effect in spite of the Court's decision. This is substantially the scheme advocated by the late Senator LaFollette in his campaign for the Presidency in 1924. This appears to be a sort of short-cut method of amending the Constitution on particular points brought up in particular cases. It reads into the Constitution the congressional construction embodied in the statute. It differs from the normal method of amending the Constitution in several ways. In the first place it permits amendment of the Constitution without ratification of the states. Take a concrete example. Congress passes a law making it a federal felony to participate in a lynching. This is the exercise of a power not delegated to Congress by the Constitution. Try to find such a delegation! The Supreme Court holds the act void on this ground. Two-thirds of both houses of Congress re-enact the law over the veto of the Court and it thereby becomes valid and effective. The result is that we have amended the Constitution by delegating a new power to Congress but without giving the states their

present power to ratify or reject the change. It is not our present purpose to decide whether or not that is a good thing to do; but we ought to understand clearly that that is just what the proposal involves.

Secondly, these short-cut amendments do not originate as proposals for amendments and are not debated as such. They begin as ordinary statutes and the effect of the overriding action of Congress is to make part of the Constitution the principle of constitutional law embodied in them. A good deal of confusion would be injected into our constitutional law by this method of piecemeal amendment. It would seem to be more satisfactory, if we want Congress to punish those guilty of lynching, to amend the Constitution by the usual process, rather than to put beyond judicial reach a statute passed by Congress and invalidated by the Court. If we need an easier method of constitutional amendment, various ways could be found of getting it. It is doubtful if the present plan would be one of them.

The sponsors of this plan, however, will hardly let the argument rest here. They will emphasize that it is only our judicial tradition, and not inescapable logic, which leads us to assume that the Constitution must mean what the Supreme Court says it means, rather than what Congress says it means. We are not necessarily changing the Constitution in overriding the Court. They point out that Congress has been highly conservative in proposing amendments by a two-thirds vote. It has been possible to muster the two-thirds vote necessary to override the presidential veto very infrequently, and there is every reason to suppose that Congress would treat with great respect any really convincing opinion of the Court invalidating a law. The proposal, in short, would probably be much less revolutionary in operation than it sounds on paper.

### *Curbing the Court's Power by Constitutional Amendment*

Lastly it is proposed that we pass a constitutional amendment which would take away from the Supreme Court (and

all the other courts presumably) all power to declare acts of Congress unconstitutional. This plan is simple and thorough. It makes Congress the final judge of its own powers under the Constitution. It is foolish to urge that the country would go to the dogs or to the reds, if this important change were made. No other constitutional government in the world gives to its courts the broad power of judicial review which our Supreme Court enjoys. The British Parliament is sovereign and no English court can declare an act of Parliament unconstitutional. In France there is a written constitution under which the French Parliament functions, but no French court has the power to invalidate any act of Parliament. To say that constitutional government cannot work satisfactorily without judicial review gives the lie to the constitutional experience of all the rest of the world. But that does not mean that the abolition of judicial review would not be a fundamental change in the American system. In passing judgment on the proposal there are a number of things to remember. In our entire history less than eighty acts of Congress have been held void by the Supreme Court, but those seventy odd decisions are no index of the practical effect of the power of judicial review. Our whole law-making system is profoundly influenced by the fact that Congress does not have the last word on constitutional questions. The congressman works in the knowledge that the laws he enacts will sooner or later be passed on by the Court. That may make him conservative, perhaps too conservative, since he may be unwilling to support needed legislation which he believes the Court will invalidate. It often centers legislative debates more sharply on constitutional questions than on issues of general policy. On the other hand, the knowledge that there is an ultimate reviewing power in the Court offers the less scrupulous congressman the chance to build his political fences by supporting popular laws without worrying about their constitutionality. He has the comforting assurance that the Court will invalidate them if they are enacted. He evades his own responsibility to support the Constitution and passes the buck to the

Court. Those favoring the abolition of judicial review of acts of Congress would do well to make a realistic appraisal of Congress not only when it is on its best behavior, but when it is in its less inhibited moods. Does it have or can it develop a sense of constitutional responsibility anywhere near approaching that of the British Parliament?

Another fact should be kept in mind. The Supreme Court does not confine itself to invalidating acts dear to the hearts of social and economic reformers. Sometimes it has occasion to hold void laws which invade the constitutional civil rights of the citizen, his freedom of speech, his religious liberty, his equality before the law, his right to a fair trial. If judicial review is abolished these rights also are left to the legislative discretion for their protection. In the Spring of 1936 the writer heard Mr. Norman Thomas declare (and herein he apparently differs from the platform doctrines of the party of which he was a candidate) that we cannot afford to lose the protection which judicial review gives to our civil liberties and he was unwilling to advocate the abolition of that power. It is also well to remember that after a century and a half of political experience we have become a very "judicially minded" people. We have not developed any very deep admiration for our legislative bodies. In fact we accord them much less respect than they deserve. And even the common citizen who feels free to criticize particular Supreme Court decisions which he does not like is going to feel very insecure when he finds that there is no Supreme Court to which he can appeal against what he believes to be a legislative invasion of his rights and liberties. The extent to which the judicial review of legislation is embedded in our fundamental American tradition and mode of thinking about our government, is a factor which we cannot ignore in evaluating the merits of this present proposal. If we were starting from scratch, undeterred by our long political and judicial experience and our subconscious reliance upon our courts for the protection of our rights we might feel much freer to set up a new constitutional system without judicial review, than we

can possibly feel to remove the power of judicial review from a constitutional system which has been dominated by it for so long.

*Must the Constitution be Amended?*

4. This brings us to the fourth and final position which may be taken by those who believe that our constitutional and judicial system calls for some change. This position is that we should change our Constitution to meet new demands rather than change the Court. Accepting judicial review as a going concern we can all agree that it is most open to attack where the Supreme Court is interpreting the vague and general clauses of the Constitution or is applying an ancient provision to conditions lying beyond the contemplation of the founding fathers. This is clear from our earlier analysis of the New Deal decisions. Now it is wholly intelligent to suggest that if the results we are getting from judicial review under these circumstances are not satisfactory then the thing to do is to sharpen and clarify the constitutional provisions which the Court has to interpret. Since wise men disagree as to whether the due process clause forbids the enactment of a minimum wage, a simple solution would be to put into the Constitution a definite grant of authority to fix wages and working conditions. That would take the matter out of the realm of judicial debate and put it where it belongs, in the field of political debate. Are there to be no limits to the amount of "stretching" of the delegated powers of Congress to meet the growing demands of our national life? Must they inevitably be construed to cover all the emerging problems calling for centralized control?

In demanding that the Supreme Court permit the commerce clause, the taxing clause, or other constitutional clauses to serve as constitutional pegs upon which to hang new and drastic regulatory programs penetrating into hitherto unoccupied fields of governmental power we are asking them to exercise very broad discretion. If they refuse to do the neces-

sary stretching we may well consider whether the powers of Congress ought not to be frankly and openly increased rather than stretched. The writer is one of those who finds the dissenting opinions in the A.A.A. and Guffey Act cases much more convincing on constitutional grounds than the opinions of the Court. At the same time if American agriculture and mining demand national regulation there is much to be said for giving to Congress clearly and unmistakably the powers we feel it should have. It will hardly be denied that if Congress ought to have the power to prohibit child labor we should do much better to ratify the pending child-labor amendment than to use the backstairs method of driving child labor out of existence by destructive taxation or by denying the employers of children the privileges of interstate commerce.

The Court now occupies the position of exercising a very broad discretion in drawing the limits of governmental power granted in vague terms and under vague limitations. If we do not like the way it does that job it is quite possible to change the Court's job by defining those powers with some precision and sharpening the terms of the limitations. We might give to Congress, free from all doubt, the powers which it needs in order to deal with the pressing problems of present day national life. The uncertainties of the due process limitation may be met by specific clauses clarifying its application.

It is no adequate objection to this proposal to point out the difficulty of drafting such amendments. It is always difficult to draft constitutional provisions which mean exactly what we wish them to mean—and no more. The difficulty, though great, is not insuperable. To refrain from making such grants of power merely because of the difficulty of phrasing them is to confess either lack of skill in the art of draftsmanship, or our inability to make up our minds what we wish to accomplish. But if we do not really know what new powers we wish to grant we should probably refrain from granting them.

There are many, however, who are skeptical of this proposal. They ask whether we can give Congress enough power to control industry and handle all our truly national problems effectively without destroying the basis of federalism, without virtually destroying the states. This may be met by suggesting that we are merely making a formal transfer from state to nation of powers of economic and social control which by their very nature and scope the states have never exercised and never can. A more serious criticism is that which urges, in the light of the history of the Child Labor Amendment, that it is politically impossible to secure the adoption of any constitutional amendment affecting vital economic questions. But while argument can be made for an easier method of constitutional amendment, those who favor constitutional change by the present process of amendment will hardly be shaken from their position by being told that the amendments they propose will not be readily adopted.

*Conclusion*

The New Deal cases emphasize the position of supremacy which the Supreme Court occupies in the American constitutional system. Chief Justice Hughes is doubtless bored by the constant repetition of his epigram "We are under a Constitution, but the Constitution is what the judges say it is." It is a practical man's appraisal of the realities of the constitutional system under which we live. This judicial supremacy has arisen in part from the very nature of the judicial process of interpreting and applying the law, and it has been increased by the vagueness and generality of the constitutional clauses which have to be construed.

If we are satisfied with the present system and its results we will naturally have no proposals to make. If we feel that the constitutional wreckage left by the New Deal decisions is due to the abuse of judicial power rather than to the inadequacy of the constitution to modern needs, then we may logically demand some limitation on the power of the Su-

preme Court. We shall in this case need to be cautious to see that we do not create more problems than we solve. We may, however, feel that our present difficulties are due partly to an over-zealous extension of judicial power and partly to the failure of an 18th century constitution to meet adequately the demands of the 20th century. In this case we may attempt to solve both problems by clarifying amendments to the Constitution. This will not only modernize the Constitution, but it will also narrow the field of judicial review by sharpening the vague clauses of the Constitution under which the Supreme Court is now engaged, almost of necessity, in the work of national policy determination.

This plan might well be tried before anything is "done to" the Court, since it promises not only an immediate adjustment of the Constitution to the current of our present national life, but also a forced retirement of the Court from the fields of constitutional construction in which it faces the greatest difficulty and incurs the sharpest criticism.

## Reading Suggestions

The subject of judicial review is dealt with adequately and dispassionately in Haines, C. G., *The American Doctrine of Judicial Supremacy*, 2d Ed., 1932. The ablest defense of judicial review is that of Warren, C., *Congress, The Constitution, and the Supreme Court*, 2d Ed., 1936. An able attack is found in Boudin, L., *Government by Judiciary*, 2 vols. 1932.

An excellent short book on the Court and its work is that by Hughes, C. E., *The Supreme Court of the United States*, 1928.

A valuable exposition of the Constitution, clause by clause, is given in E. S. Corwin's little volume, *The Constitution and What It Means Today*, 5th Ed., 1937. The standard treatise on the Constitution is the three-volume work by W. W. Willoughby, *On the Constitution*, 1929, of which there is a compact edition, 1931. About sixty representative

cases on constitutional problems, including New Deal decisions, are printed with background notes in Cushman, R. E., *Leading Constitutional Decisions*, 6th Ed., 1937.

Corwin, E. S., *The Twilight of the Supreme Court*, 1934, is a brief penetrating analysis of current problems of constitutional law.

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## Constitution of the United States of America

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

### Article I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have ^the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

SECTION 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the is tried,
President of the United States ∧ the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

SECTION 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

SECTION 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their Respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

SECTION 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION 8. 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; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill or Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the

Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SECTION 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of ^the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of ^the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as well not admit of delay.

## ARTICLE II

SECTION 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President,

the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

SECTION 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper;

he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

SECTION 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

## ARTICLE III

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

## ARTICLE IV

SECTION 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

SECTION 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

SECTION 3. New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

SECTION 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

## ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of it's equal Suffrage in the Senate.

## ARTICLE VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever

be required as a Qualification to any Office or public Trust under the United States.

### Article VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

### Amendments

I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble; and to petition the Government for a redress of grievances.

II. A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

III. No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on the presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

VII. In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

VIII. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

IX. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

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

XI. The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against

one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

XII. The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

XIII. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation.

XIV. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof,

is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

XV. SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude——

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.——

XVI. The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

XVII. The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

XVIII. SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SECTION 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

XIX. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

XX. SECTION 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

SECTION 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

SECTION 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

SECTION 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

SECTION 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

SECTION 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

XXI. SECTION 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

SECTION 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

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