

CONSTITUTION MAKING IN 1935-1936

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The year 1935-1936, that is, the period designated as the October term of 1935 of the United States Supreme Court, was a significant period in United States constitution making, and continued certain tendencies which were begun in the October term 1934.

The constitution making in the period we are discussing was not the result of a convention for proposing amendments, nor of the proposal of amendments by both houses of Congress—the rather unusual methods of amendment designated in Article V of the constitution—but it was the result of the usual method of changing our constitution, by the action of the United States Supreme Court. The “nine old men,” or perhaps we should say five of them, did a great deal of constitution making in 1935-6, for five old men, or even nine old men. The men constituting this United States constitutional Delphic Oracle revealed for the most part a wonderful amount of constitutional truth as to the outcome of various legislative and executive measures in the United States.

In its constitution making in the October term 1935, the Supreme Court did not create any new but it did modify some of the old constitutional doctrines. The old constitutional doctrines, however, were those which had formerly been made by the Court and, of course, the modification was the work of the Court, so that the changes made by it were entirely its work and related only to its own prior handiwork. In making its changes, the Supreme Court sometimes went onto new ground and sometimes retreated to old ground. In its important decisions, it almost never kept the *status quo*. For this reason it should not be called conservative so much as either reactionary or liberal.

The principal changes in constitutional law in this period related to our dual form of government, especially in its relation to the regulation of commerce; to the separation of powers; to the protection of personal liberty against social control, especially by the due process clause and by the United States privi-

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leges and immunities clause; and to the supremacy of the Supreme Court. These changes generally came about by the Supreme Court's declaring acts of Congress unconstitutional.

DUAL FORM OF GOVERNMENT

In the October 1935 term some of the most important constitution making of the Supreme Court concerned our dual form of government.

The immunity of federal agencies from taxation by the states or other subdivisions of government was upheld in the case of *Posadas v. National City Bank of New York*,¹ holding that the Philippines can not tax a branch of a national bank because such branch is a federal agency. This decision could be rationalized either as an application of the doctrine of *Collector v. Day*,² or as an application of the doctrine of federal supremacy as developed by the case of *Veazie Bank v. Fenno*.³ In the case of *Leahy v. State Treasurer of Oklahoma*,⁴ the Supreme Court held that a state might tax an Indian's share of income from restricted mineral resources held by the United States for his tribe: yet in the earlier case of *Gillespie v. Oklahoma*⁵ the Supreme Court had held that a state cannot tax the net income derived by a lessee of Indian lands, since it would hamper the United States in making the best terms for its wards; and the case should also be compared with the case of *Graves v. Texas Co.*,⁶ in which the Supreme Court held that a state cannot levy an excise tax on gasoline stored in the state, when withdrawn from storage to be sold to the United States to be used in performing governmental function. The *Leahy* case would seem to tend to enlarge the states' power of taxation and to this extent, to change the nature of our dual form of government.⁷

In the case of *Matson Navigation Co. v. State Board of Equalization, California*,⁸ the Supreme Court held that a state may tax

1. 298 U. S.—, 56 S. Ct. 349, 80 L. ed. (adv.) 318 (1936).

2. 11 Wall. 113, 20 L. ed. 122 (1871).

3. 8 Wall. 533, 19 L. ed. 482 (1870).

4. 297 U. S. 420, 56 S. Ct. 507, 80 L. ed. (adv.) 351 (1936).

5. 257 U. S. 501, 42 S. Ct. 171, 66 L. ed. 338 (1922).

6. 298 U. S.—, 56 S. Ct. 818, 80 L. ed. (adv.) 824 (1936).

7. See also the case of *Schuylkill Tr. Co. v. Pennsylvania*, 296 U. S. 113 (1935), where the Supreme Court held that a state cannot discriminate against federal securities while levying a share tax or franchise tax.

8. 56 S. Ct. 553 (1936). The case of *Norfolk etc. Ry. v. State of North Carolina*, 297 U. S. 682, 56 S. Ct. 625 (1936) upheld as a statutory formula

the privilege of exercising a corporate franchise and may tax the net income of a domestic corporation doing interstate and foreign business as well as intra-state business, where the tax is based on such portion of the entire net income as is derived from the business done within the state. Other earlier decisions of the Supreme Court had apparently allowed a state to tax a domestic corporation on its entire net income though most of it is derived from interstate commerce,⁹ and it would seem that the general theory of our dual form of government should not prohibit such taxation.

In *Bingaman v. Golden Eagle Western Lines*,¹⁰ the Supreme Court declared an excise tax on gasoline, purchased outside the state by interstate busses doing no intra-state business but to be used to propel busses over highways of the state, is invalid because a direct burden on interstate commerce, if not imposed for use of the state's highways. This case, of course, tends to uphold the federal government's side of our dual form of government. Yet in *Atlantic Lumber Co. v. Commissioner of Corporations, etc., Massachusetts*,¹¹ the Supreme Court permitted a state to levy an excise tax on a foreign holding corporation which maintained its principal office, most of its active bank accounts, corporate books and records, and treasurer in that state and also paid dividends and held its directors' meetings there. The court was of the opinion that this was not a burden on interstate commerce but a tax for the privileges granted by the state. In *Pacific T. & T. Co. v. Tax Commission of Washington*,¹² the Supreme Court held that a state may impose an occupation tax for the privilege of doing intra-state business though it is carried on by companies engaged in interstate commerce, and though there was the contention that the intra-state business and interstate business were so interwoven that the companies could not withdraw from the interstate business without with-

for determining the net income of interstate railways doing business within the state, the gross operating revenues within the state as determined on the mileage basis and deducting therefrom a proportionate average of operating expenses for their whole business.

9. *U. S. Glue Co. v. Oak Creek*, 247 U. S. 321 (1918); *McGuire v. Tretry*, 253 U. S. 12 (1920).

10. 298 U. S.—, 56 S. Ct. 624, 80 L. ed. (adv.) 600 (1936).

11. 298 U. S.—, 56 S. Ct. 887, 80 L. ed. (adv.) 908 (1936).

12. 297 U. S. 403, 56 S. Ct. 522, 80 L. ed. (adv.) 538 (1936).

drawing from intra-state. In *Fisher's Blend Station v. Tax Commission etc. of Washington*,¹³ the Supreme Court, however, denied to a state the power to levy an occupation tax measured by a company's gross receipts on a commercial radio broadcasting company engaged in interstate commerce. These last cases seem to indicate that the Supreme Court, in the October term 1935, favored the states more than in the past but did not intend to make any general change in the law as to the states' power to tax interstate commerce.

The question of the scope of the general welfare clause came up again in the case of *Carter v. Carter Coal Company*,¹⁴ but the Supreme Court repeated that this is not a separate grant of power but a limitation on the taxing power, and that Congress can legislate for the general welfare only in connection with specific powers granted it.¹⁵

The most startling tax decision in this period was that involving the important New Deal legislation known as the A. A. A. In *United States v. Butler*,¹⁶ this important piece of federal legislation was declared unconstitutional, not because it was a violation of our dual form of government in giving the federal government a tax power that it did not have—because the court took a broad view of the taxing power under the general welfare clause—but because it was in violation of our dual form of government in permitting the federal government, through its taxing power, to invade the police power of the states; and because the court held that Congress could not purchase by contract what it could not do directly. There was a hint in the case that the federal taxing power might be used for a federal police power purpose. This would harmonize the *Child Labor Case* and the *A. A. A. Case* on the one hand with the *Veazie Bank Case* and the *Hampton Case* on the other hand.¹⁷ Perhaps the Supreme Court will ultimately reach the position that the federal taxing power may be used for federal police power purposes, and it will cease to

13. 297 U. S. 650, 56 S. Ct. 608, 80 L. ed. (adv.) 615 (1936).

14. 298 U. S. 238, 56 S. Ct. 855, 80 L. ed. (adv.) 749 (1936).

15. Willis, *Constitutional Law of the United States* (1936) 216, 240, and 378.

16. 297 U. S. 1, 56 S. Ct. 312, 80 L. ed. (adv.) 287 (1936).

17. Burn's, *Income and Economic Progress* (1936) 3 U. Ch. L. Rev. 173, 197; 20 Minn. L. Rev. 413; 21 St. Louis Law Rev. 149; 30 Ill. L. Rev. 938; 10 Temple L. Q. 211 (1936).

state that a police power can not be exercised in the guise of taxation.

However, the Supreme Court's position that the federal government's taxing power cannot be used for state police power purposes would seem to be contra to all decisions of the United State Supreme Court except the A. A .A. decision and the Child Labor decision. Both the supremacy clause in the original constitution and the general trend of the decisions of the United States Supreme Court, establishing the supremacy of the federal government over state governments when the powers of each come into conflict, show that the Court was wrong.¹⁸ "The terms of the Tenth Amendment are logically insufficient to segregate to the States any subject matter whatsoever upon which governmental powers may operate, or any purpose whatsoever in the promotion of which governmental power may be employed; and the terms of the supremacy clause logically forbid any such notion."¹⁹ Hence the effect of the A. A. A. decision was nearly to destroy the doctrine of federal supremacy and to establish in the place of it a doctrine of state supremacy,²⁰ in plain violation of all good constitutional law doctrine and in plain disrespect of the courts own judicial history.

The police power cases decided in the October, 1935 term worked as great changes in our dual form of government as did the tax cases. In the case of *Hopkins Fed. S. & L. Ass'n v. Cleary*,²¹ the Supreme Court held that the Federal Home Owners Loan Act was an invasion of state rights in allowing a State Building and Loan Association to convert itself into a Federal Savings and Loan Association. This case upheld the states' side of our dual form of government and worked no change in the former doctrine. In *Hill v. Martin*,²² the Supreme Court held that a Federal statute limiting the power of Federal Courts to issue injunctions applied to a suit enjoining the collection of inheritance taxes assessed by state authorities. This case also

18. Willis, *Constitutional Law of the United States* (1936) 236, 297.

19. Corwin, *Commerce Power versus State Rights* (1936) 172.

20. Yet in this same term, the Supreme Court held that the Interstate Commerce Commission has the power to regulate a state operated belt railroad engaged in interstate commerce. *United States v. State of California*, 297 U. S. 175, 56 S. Ct. 421, 80 L. ed. (adv.) 367 (1936).

21. 296 U. S. 315, 56 S. Ct. 235, 80 L. ed. (adv.) 209 (1935).

22. 296 U. S. 613, 56 S. Ct. 278, 80 L. ed. (adv.) 270 (1935).

upheld state rights and perhaps did not destroy any federal authority. But in the case of *Pennsylvania R. R. Co. v. Illinois Brick Co.*,²³ the Supreme Court held that the Interstate Commerce Commission may prescribe intra-state rates to prevent discrimination against interstate commerce. This decision, of course, followed prior decisions of the Supreme Court but recognized federal authority as supreme over state authority.

In *Bayside Fish Flour Co. v. Gentry*,²⁴ the Supreme Court held that a state in the exercise of its police power may limit the use of sardines in reduction plants even as to fish brought into the state from another state, in order to protect the local supply of fish against covert depletion, on the theory that the state is regulating only manufacture. Of course, a state may even forbid the shipment of its own game and fish out of the state before they have been reduced to possession,²⁵ and it may conserve its natural resources, but this case seems to permit a state to exercise its police power over articles of interstate commerce (a federal power) where it is necessary to protect its own resources. This is a power which has frequently been allowed the federal government, but it is unusual to have the states given this power; and it is rather difficult to see how the federal government and the states may both be given such a power. In *Hartford A. C. & I. N. Co. v. People of Illinois*,²⁶ the Supreme Court held that in the absence of federal regulation, a state may regulate the consignment for sale of farm produce on commission by merchants located in the state though selling goods from outside the state, and thus permitted the state to exercise a general police power over goods still in the original package. This gives the states the same police power that they have been given taxing power,²⁷ but it is a long way from the decisions of *Bowman v. Chicago and N. W. Ry.*²⁸ and *Leisy v. Hardin*.²⁹ The states' police power was further upheld by the case of *Pennsylvania R. R. Co. v. Public Utilities Com. of Ohio*³⁰ in which the Supreme Court held

23. 297 U. S. 447, 56 S. Ct. 556, 80 L. ed. (adv.) 502 (1936).

24. 297 U. S. 422, 56 S. Ct. 513, 80 L. ed. (adv.) 522 (1936).

25. *Geer v. Connecticut*, 161 U. S. 519 (1896); *Foster-Fountain Packing Company v. Haydel*, 278 U. S. 1 (1928).

26. 298 U. S. 155, 56 S. Ct. 685, 80 L. ed. (adv.) 723 (1936).

27. *Brown v. Houston*, 114 U. S. 622, 5 S. Ct. 1091, 29 L. ed. 257 (1885).

28. 125 U. S. 465 (1888).

29. 135 U. S. 100, 10 S. Ct. 681, 34 L. ed. 123 (1890).

30. 298 U. S. 170, 56 S. Ct. 687, 80 L. ed. (adv.) 733 (1936).

that the Interstate Commerce Commission has not been given jurisdiction to regulate private carriers and, therefore, they come within the jurisdiction of the states; and by the case of *United States v. The State of Idaho*,³¹ in which the Supreme Court held that the Interstate Commerce Commission has no jurisdiction over spur tracks in the matter of abandonment.

The same effort to uphold state powers as against the powers of the federal government is manifested in *Ashten v. Cameron County Water Imp., District No. 1*,³² in which the Supreme Court held that an amendment to the Bankruptcy Act extending the benefits of such act to the political subdivisions of a state was an unconstitutional encroachment upon state powers, and that the state, by consenting, could not make the act valid since that would enlarge the powers of the federal government. This same tendency of the Supreme Court was also manifested in *Tipton v. Atchison T. & S. F. Ry.*³³ where the Supreme Court held that a state may provide for an exclusive remedy for violation of the Federal Safety Appliance Acts.

Congress' power under our dual form of government received a striking vindication in the T. V. A. decision of *Ashwander v. Tennessee Valley Authority*,³⁴ in which the Supreme Court held that Congress has the power to dispose of surplus hydro-electric energy available at Wilson Dam; but this case hardly revives the general doctrine of federal supremacy over the states, because the constitutionality of the Tennessee Valley Authority was not derived merely from the commerce power but also from the admiralty power, the war power, the power to dispose of federal property, and the spending power.³⁵ The decision on the T. V. A. is comparable with the decisions in the October 1934 term on the gold clauses legislation which upheld the money power of Congress and seemed to vindicate federal supremacy.³⁶ In the

31. 298 U. S. 105, 56 S. Ct. 690, 80 L. ed. (adv.) 677 (1936).

32. 297 U. S. 497, 56 S. Ct. 892, 80 L. ed. (adv.) 910 (1936).

33. 298 U. S. 141, 56 S. Ct. 715, 80 L. ed. (adv.) 485 (1936).

34. 297 U. S. 288, 56 S. Ct. 466, 80 L. ed. (adv.) 427 (1936).

35. Willis, *Constitutional Law of the United States* (1936) 366; 4 Geo. Wash. L. Rev. 399; 84 U. Pa. L. Rev. 787; 9 So. Calif. L. Rev. 281; 34 Mich. L. Rev. 680; 11 Ind. L. J. 368; 31 Ill. L. Rev. 78; 20 Minn. L. Rev. 798.

36. *Norman v. Baltimore & Ohio R. R.*, 294 U. S. 240 (1935); *Nortz v. United States*, 294 U. S. 317 (1935); *Perry v. United States*, 294 U. S. 330 (1935).

Sugar Institute v. United States,³⁷ the Supreme Court held that the Sherman Anti-trust Act did not prohibit voluntary price announcements but that it did prohibit concerted action to compel an open price plan.

The case of *Carter v. Carter Coal Co.*³⁸ is another case which put an important limitation upon federal power. The Supreme Court in this case, through Justice Sutherland, defined commerce, as the term is used in the constitution, to include purchase, sale and exchange of commodities between citizens of different states, as well as transportation. This was a needed correction of the doctrine that commerce includes only transportation, which was the basis of the decisions of the Supreme Court in the *Child Labor Case*,³⁹ the *Hot Oil Case*,⁴⁰ and the *Poultry Case*;⁴¹ but after taking this liberal and correct position, the court held that the commerce clause does not include production or manufacture and, therefore, held unconstitutional the labor provisions of the Bituminous Coal Conservation Act. Of course, production cannot so easily be cut off from interstate commerce, if commerce includes traffic as well as transportation. Hence it would seem that the Supreme Court nullified its own definition.⁴²

Another case even harder to rationalize is that of *Whitfield v. the State of Ohio*,⁴³ in which the Supreme Court upheld the constitutionality of a statute of Ohio prohibiting the sale in that state of prison-made goods, passed after the Hawes-Cooper Act of Congress removed the impediment of state control of goods in the original package. The Hawes-Cooper Act will have to be rationalized as an exercise of federal power under the commerce clause; and the Ohio Act, either merely as a condition in federal

37. 297 U. S. 553, 56 S. Ct. 629, 80 L. ed. (adv.) 624 (1936).

38. 298 U. S. 238, 56 S. Ct. 855, 80 L. ed. (adv.) 749 (1936).

39. *Hammer v. Dagenhart*, 247 U. S. 251 (1918). The only case supporting this decision was the discredited case of the *United States v. E. C. Knight Co.*, 156 U. S. 1 (1895).

40. *R. R. Retirement Board v. Alton R. R.*, 295 U. S. 330, 55 S. Ct. 758, 79 L. ed. 1468 (1935).

41. *A. L. A. Schechter Poultry Co. v. United States*, 295 U. S. 495, 55 S. Ct. 837, 79 L. ed. 1570, 97 A. L. R. 947 (1935).

42. Corwin, *The Commerce Power versus States Rights* (1936) 175-209.

43. 297 U. S. 431, 56 S. Ct. 532, 80 L. ed. (adv.) 527 (1936). For a comparison of the case of *Whitfield v. State of Ohio* with the case of *Baldwin v. Seelig*, 294 U. S. 511 (1935), see Sholley, *The Negative Implications of the Commerce Clause* (1936) 3 U. Chi. L. Rev. 556; 3 U. Chi. L. Rev. 636.

legislation or as an exercise of a state's general police power indirectly affecting interstate commerce when no federal legislation would be necessary.

The *Child Labor Case* held that Congress could not prohibit the shipment of goods manufactured by child labor because the act undertook to regulate something which was not interstate commerce, yet, under the Hawes-Cooper Act Congress apparently may regulate the shipment of goods manufactured by prison labor because they are articles of interstate commerce. If the federal government has the power to legislate with reference to prison-made goods, even on the condition of some later state action, it would seem that Congress has power to legislate as to child-made goods; and, if it can legislate on condition of state action, it ought to be able to legislate directly without state action. The fallacy of the Child Labor decision is further shown by the fact that the Supreme Court would undoubtedly have held unconstitutional a state statute forbidding the shipment from the state of goods manufactured by child labor. Even if Congress has a power of legislation over prison-made goods, to uphold the state legislation on the subject without violating the rule against the delegation of legislative power, it will have to be held either that the states are merely exercising their general police power though it incidentally affects interstate commerce, or that the state action is merely a condition in the federal legislation.⁴⁴

SEPARATION OF POWERS

In the case of *Bronx Brass Foundry Inc. v. Irvington Trust Co.*,⁴⁵ the Supreme Court held that under our doctrine of separation of powers the judicial power includes the regulation of procedure, so that a court may control the privilege of discontinuance of an equity suit after issue joined. The principal work of the Court in this period, however, on the doctrine of separation of powers has related to the executive power and here the Court has tended to place a limitation upon the powers of this branch of the government and to check the delegation of powers to it by the legislative branch. In the case of *Carter v. Carter Coal Co.*,⁴⁶ which we have heretofore considered in another con-

44. Willis, *Constitutional Law of the United States* (1936) 300-303.

45. 297 U. S. 230, 56 S. Ct. 451, 80 L. ed. (adv.) 468 (1936).

46. 298 U. S. 238, 56 S. Ct. 855, 80 L. ed. (adv.) 749 (1936).

nection, the Supreme Court held the Bituminous Coal Conservation Act⁴⁷ was an unlawful delegation of power in delegating to some producers and miners the power to fix maximum hours and minimum wages and thereby subjecting a dissenting minority to the will of a majority in these respects. Delegation of legislative power to private persons is the worst form of delegation and wholly indefensible.

This decision is in line with recent decisions of the Supreme Court. For a long time, the Supreme Court had been very liberal in permitting the legislative branch of government to delegate legislative powers either under the guise of determining conditions, or making regulations, or administering standards. It even upheld the provisions of the flexible tariff law permitting the President to raise and lower tariffs within certain limits.⁴⁸ But in the October term 1934, the Supreme Court evidently came to the conclusion that it had gone too far in the past, and, in connection with some important New Deal legislation, began to modify the earlier decisions. It did this first in connection with the so-called *Hot Oil Case* which involved Section 9 (c) of the N. R. A., giving the President the power to prohibit the transportation in interstate and foreign commerce of petroleum in excess of the amount permitted by the state.⁴⁹ This position was further strengthened by the decision holding unconstitutional the general delegation of legislative power under the N. R. A.⁵⁰ because, so far as it gave power to the President, it was a violation of the doctrine of separation of powers; and because, so far as it gave power to private trade associations, it was a violation of the rule against the delegation of delegated powers, in that Congress undertook to delegate the power to make law rather than the power to administer standards. The case of *Carter v. Carter Coal Co.* is in harmony with these other later decisions. Perhaps these recent decisions should not be criticised on this point. However, their effect probably will be merely to require Congress in the case of delegation of power to the President to

47. 49 Stat. 991, 15 U. S. C. A. sec. 801 (1935).

48. *Hampton v. United States*, 276 U. S. 394, 48 S. Ct. 348, 72 L. ed. 624 (1928).

49. *Panama Ref. Co. v. Ryan*, 293 U. S. 388, 55 S. Ct. 241, 79 L. ed. 446 (1935).

50. *A. L. A. Schechter Poultry Co. v. United States*, 295 U. S. 495, 55 S. Ct. 837, 79 L. ed. 1570, 97 A. L. R. 947 (1935).

be more careful in formulating standards in future legislation.⁵¹ It is to be hoped that they have stopped forever attempts to delegate governmental power to private agencies.

It is difficult to determine the purpose of the Supreme Court in these recent decisions on the separation of powers. So far as it forbade delegation of legislative power to private organizations, its decisions may have been dictated by a purpose to ban plutocratic fascism, as manifested in the provisions inserted in the N. R. A. by those members of the United States Chamber of Commerce who worked this scheme up.^{51a} So far as it forbade delegation of power to the President, it was not clear whether the Supreme Court was trying to protect our doctrine of separation of powers or to protect the capitalistic system. The purpose of the Supreme Court might easily be held to be the protection of our doctrine of separation of powers if we had any one clear doctrine on the subject, but, with the doctrine of confusion of powers which now prevails, apparently it is not so important which branch of the government exercises the power.

SOVEREIGNTY

In the case of *Carter v. Carter Coal Company*,⁵² the Supreme Court again added insult to injury by informing the states that they are not sovereign in any true sense. Of course, the states as entities are not sovereign in any sense in which that term can be defined, and have never been sovereign. This in general has been the position of the United States Supreme Court throughout its history.⁵³ This recent pronouncement of the Supreme Court, therefore, is consistent with its prior position.

PROTECTION OF PERSONAL LIBERTY AGAINST SOCIAL CONTROL

In the protection of personal liberty against social control under the written guarantees found in the original constitution and the formal amendments thereto, and under the additional guarantees which have been read into our constitution by the Supreme Court, the latter body, in the October term 1935, con-

51. 45 Yale L. J. 293. Powell, *The Processing Tax and the Social Security Act* (1936) 5 Brook. L. R. 125.

51a. Willis, *The Constitution and the Roosevelt New Deal*, 22 Ind. U. Alumni Q. 123, 258.

52. 298 U. S. 238, 294, 56 S. Ct. 855, 865, 80 L. ed. (adv.) 749 (1936).

53. Willis, *Constitutional Law of the United States* (1936) 29, 59.

tinued its prior policy of being sometimes conservative or reactionary and sometimes liberal. We shall hastily consider the decisions in this term in order to note these two tendencies on the part of the court.

DUE PROCESS OF LAW

One of the liberal decisions on due process of law in this term was that of *Gulf Refining Company v. Fox*.⁵⁴ In this case, the Supreme Court held that gasoline filling stations, operated and controlled by oil companies under modified leases and agency agreements, were stores; and came within a chain store tax act imposing a graduated license tax upon stores owned, operated, maintained, or controlled by the same person, firm, or corporation, co-partnership or association. This case manifests the same liberality as was manifested in the case of *Fox v. Standard Oil Company of New Jersey*,⁵⁵ which was decided in the October term 1934, and which held that a chain store license act as applied to filling stations was due process of law. Another liberal decision was that of *Pacific States Box and Basket Co. v. White*,⁵⁶ in which the Supreme Court held that the prescription of standard containers for strawberries and raspberries may be a proper exercise of the police power, and, therefore, due process of law. This decision should be compared with such older decisions as the decision of *Frost v. Chicago*⁵⁷ by the Supreme Court of Illinois and the decision of *Jay Burns Baking Company v. Bryan*⁵⁸ by the United States Supreme Court. A very liberal decision of the October term 1935 was that holding that the guarantee of due process of law includes the guarantee against a confession obtained by torture (a phase of self-incrimination). This decision occurred in the case of *Brown v. State of Mississippi*.⁵⁹ This case continued the tendency to make due process of law include all other constitutional guarantees against the social control of personal liberty. One of the most conspicuous illustrations of this tendency was found in the decision of *Mooney v.*

54. 297 U. S. 381, 56 S. Ct. 510, 80 L. ed. (adv.) 561 (1936).

55. 294 U. S. 87, 55 S. Ct. 333, 79 L. ed. 780 (1935).

56. 296 U. S. 176, 56 S. Ct. 159, 80 L. ed. (adv.) 133 (1935).

57. 178 Ill. 250, 52 N. E. 869 (1899).

58. 264 U. S. 504 (1924). But cf. *P. F. Petersen Baking Company v. Bryan*, 290 U. S. 579 (1934).

59. 297 U. S. 278, 56 S. Ct. 461, 80 L. ed. (adv.) 479 (1936).

Holohan,⁶⁰ decided in the October term 1934 of the Supreme Court, in which the Supreme Court made due process as a matter of procedure include, as a part of the essentials of an orderly course of procedure, protection against the known use of perjured testimony by the prosecution. The case of *Wheeling Steel Corporation v. Fox*⁶¹ showed a liberal tendency, in the matter of state taxation, in permitting a state to tax intangibles where they had acquired a situs because they were an integral part of some local business, even though they were all taxed under the rule *mobilia sequuntur personam* in the state of the corporations creation.

A case showing a conservative or reactionary attitude on the part of the court in this term was *Great Northern Ry. v. Weeks*.⁶² In this case, the Supreme Court held that an over-assessment of property for taxation was not due process of law even though there was no discrimination. This case has been severely criticised.⁶³ Another conservative decision was that of *St. Joseph Stock Yards Co. v. United States*⁶⁴ which held that the findings of the Secretary of Agriculture are subject to independent judicial review by courts upon both the facts and the law, to determine whether or not constitutional protection has been violated. This case only followed some comparatively recent decisions,⁶⁵ but it should be compared with the decision of *Morgan v. United States*⁶⁶ and the decision of *Baltimore & Ohio R. R. v. United States*⁶⁷ in which the Supreme Court held that the fact-findings of the Secretary of Agriculture under the Packers and Stock Yards Act are conclusive, and that the Interstate Commerce Commission alone is authorized to decide on the weight of evidence and significance of facts in determining divisions of joint rates. Another somewhat conservative decision was that of *Southern Ry. v. Lunsford*⁶⁸ in which the Supreme Court held that the Boiler Inspection Act imposes an absolute and continu-

60. 294 U. S. 103, 55 Ct. 340, 79 L. ed. 791, 98 A. L. R. 406 (1935).

61. 298 U. S. 193, 56 S. Ct. 773, 80 L. ed. (adv.) 809 (1936).

62. 297 U. S. 135, 56 S. Ct. 426, 80 L. ed. (adv.) 396 (1936).

63. 49 Harv. L. Rev. 1012; 84 U. Pa. L. R. 784; 1 Mo. L. R. 205; 4 George Wash. L. R. 538.

64. 298 U. S. 38, 56 S. Ct. 720, 80 L. ed. (adv.) 679 (1936).

65. Willis, *Constitutional Law* (1936) 669-672.

66. 298 U. S.—, 56 S. Ct. 906, 80 L. ed. (adv.) 901 (1936).

67. 298 U. S.—, 56 S. Ct. 797, 80 L. ed. (adv.) 853 (1936).

68. 297 U. S. 398, 56 S. Ct. 504, 80 L. ed. (adv.) 536 (1936).

ing duty to maintain a locomotive and all its parts in proper condition but this does not include experimental devices which may prove helpful in emergencies.

The most reactionary due process decision of this period was probably that of *Morehead v. People ex rel. Tipaldo*.⁶⁹ In this case the Supreme Court again upheld freedom of contract, and held that there was not sufficient social interest in a minimum wage law to permit a state to delimit the personal liberty in freedom of contract. This case follows the decision in *Adkins v. Children's Hospital*,⁷⁰ in which the Supreme Court held that a federal minimum wage law was not due process of law. The result of these two decisions is to free the capitalistic system from social control, in the respect of minimum wage legislation, both by the federal government and by the state governments. This case, therefore, is as reactionary as the A. A. A. decision and the Bituminous Coal decision rendered in this same period and as reactionary as the decisions declaring the Frazier-Lempke Act⁷¹ and the Railroad Retirement Act⁷² unconstitutional, both decided in the October, 1934 term. All of these cases should be compared with the recent liberal decision of *Nebbia v. People of New York*,⁷³ in which the Supreme Court broke the general taboo against price-fixing by permitting the regulation of prices outside of the field of public utilities.

EQUALITY

The Supreme Court rendered a conservative decision in *Colgate v. Harvey*⁷⁴ in holding that a state income and franchise

69. 298 U. S.—, 56 S. Ct. 918, 80 L. ed. (adv.) 921 (1936).

70. 261 U. S. 525 (1923). In the three minimum wage cases which have come before the Supreme Court, ten justices have votes for and seven against the constitutionality of minimum wage laws. The justices who have been of the opinion that such laws are constitutional were Hughes, Stone, Cardozo, Holmes, Brandeis, Taft, Clarke, Day, Pitney, and Sanford. The seven justices of the contrary opinion were Van Devanter, McReynolds, Sutherland, Butler, White, McKenna, Roberts. There is no question that the ten include the greatest jurists. Therefore, the constitution is not what the majority of the jurists say nor what the best jurists say, but what the jurists who happen to stay on the bench the longest time say. Dillard, "A Supreme Court Majority," 173 Harpers 598.

71. *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555, 55 Ct. 854, 79 L. ed. 1593, 97 A. L. R. 1106 (1935).

72. *Railroad Retirement Board v. Alton R. R.*, 295 U. S. 330, 55 Ct. 758, 79 L. ed. 1468 (1935).

73. 291 U. S. 502, 54 S. Ct. 505, 78 L. ed. 940, 89 A. L. R. 1469 (1934).

74. 296 U. S. 404, 56 S. Ct. 252, 80 L. ed. (adv.) 225 (1935).

tax, exempting from the tax the net income from money loaned within the state at not more than 5%, was a violation of the equal protection clause. It rendered another conservative decision in the case of *Mayflower Farms v. Ten Eyck*⁷⁵ where it held that there was not a proper basis for classification between well advertised trade name dealers, engaged in business before the statute became effective, and unadvertised dealers, who became such subsequent to that date. This decision was somewhat counteracted by the decision of *Borden's Farm Products Co. v. Ten Eyck*⁷⁶ where the Supreme Court held that there was a proper basis for classification between dealers in unadvertised milk, selling fluid milk to stores, and dealers selling under a well advertised trade name, in the matter of sales at a differential of 1c per quart. The case of *Terminal Warehouse Company v. Pennsylvania Railroad*⁷⁷ held that even though a warehouseman had been discriminated against by a railroad in favor of another warehouseman, if he was denied reparation by the interstate Commerce Commission against the railroad, this precluded him from maintaining suit for damages. The case of *Georgia Railway and Electric Co. v. City of Decatur*⁷⁸ held that the equal protection clause forbids a municipality to authorize paving assessments against the street railway company without regard to benefits. This last case can not be said to be illiberal.

FREEDOM OF SPEECH AND OF THE PRESS

One of the most progressive and important decisions rendered in the October 1935 term was that of *Grosjean v. American Press Company*,⁷⁹ which upheld freedom of the speech and the press by extending the due process clause to include the protection of freedom of the press against unlawful taxation. The Supreme Court had already extended the due process clause of the Fourteenth Amendment to the protection of freedom of speech and the press.⁸⁰ This decision protected newspapers against taxation as no one else is protected, but this does not detract from the

75. 297 U. S. 266, 56 S. Ct. 457, 80 L. ed. (adv.) 475 (1936).

76. 297 U. S. 251, 56 S. Ct. 453, 80 L. ed. (adv.) 469 (1936).

77. 297 U. S. 500, 56 S. Ct. 546, 80 L. ed. (adv.) 494 (1936).

78. 297 U. S. 620, 56 S. Ct. 606, 80 L. ed. (adv.) 614 (1936).

79. 297 U. S. 233, 56 S. Ct. 444, 80 L. ed. (adv.) 459 (1936); 49 Har. L. Rev. 998; 4 Geo. Wash. L. Rev. 347.

80. *Near v. Minnesota*, 283 U. S. 697, 51 S. Ct. 625, 75 L. ed. 1357 (1931).

merits of the decision. Newspapers are the only ones who can invoke the protection of freedom of the press.

SELF-INCRIMINATION

The case of *Brown v. State of Mississippi*⁸¹ extended the protection of the due process clause to include protection against self-incrimination. This case has already been referred to.

OBLIGATION OF CONTRACTS

Treigle v. Acme Homestead Ass'n,⁸² held that a state act codifying building and loan association statutes and altering shareholders withdrawal rights was an unconstitutional impairment of the obligation of contracts, since the act was not aimed at conserving or equitably administering the assets in interest of all the members. *International Steel and Iron Company v. National Surety Co.*,⁸³ held that the obligation of contracts in the bond of a contractor for the benefit of a subcontractor was impaired by a state statute discharging the obligation of such bond and substituting another bond without acquiescence of the obligee, since the court could not find any proper exercise of the police power in such an act. *Phillips Petroleum Co. v. Jenkins*,⁸⁴ held that the reservation of power to amend a corporation's charter in a state constitution, being a part of the contract, makes the provision in the federal constitution prohibiting the impairment of the obligation of contracts inoperative, so that a state may abrogate a common law fellow servant rule though included in a corporation's charter, at least if it is a proper exercise of the police power. These cases are mine run cases on the subject of impairment of the obligation of contract and do not call for special comment.

SEARCHES AND SEIZURES

The Supreme Court rendered a reactionary decision involving the guarantee of searches and seizures in *Jones v. Securities and Exchange Commission*.⁸⁵ In this case the Supreme Court held that the Securities and Exchange Commission was without power

81. 297 U. S. 278, 56 S. Ct. 461, 80 L. ed. (adv.) 479 (1936); 36 Col. L. Rev. 832 (1936).

82. 297 U. S. 189, 56 S. Ct. 408, 80 L. ed. (adv.) 391 (1936).

83. 297 U. S. 657, 56 S. Ct. 619, 80 L. ed. (adv.) 585 (1936).

84. 297 U. S. 629, 56 S. Ct. 611, 80 L. ed. (adv.) 642 (1936).

85. 298 U. S. 1, 56 S. Ct. 654, 80 L. ed. (adv.) 655 (1936).

to compel a person to submit to an examination pursuant to a subpoena issued following a first *subpoena duces tecum* when a registrant had withdrawn his registration statement on the day of the second subpoena, on the theory that the registrant had the unqualified power to withdraw his registration statement pending proceedings; and that it would amount to little more than a roving fishing expedition. This decision may have some bearing upon the validity of Senatorial investigations.

CRUEL AND UNUSUAL PUNISHMENTS

In the case of *Hill v. United States ex rel. Wampler*,⁸⁶ the Supreme Court held that imprisonment for debt did not amount to a cruel and unusual punishment. People who have been laboring under the impression that imprisonment for debt had long since been abolished in the United States may be surprised to know that it continues constitutionally in the case of non-payment of alimony, in the case of non-payments of a fine for contempt, in the case of a violation of an order of an equity court to pay money, and in the case of non-payment of a criminal fine. Hence if the people of the United States desire completely to abolish imprisonment for debt, they must do more than bar cruel and unusual punishments.

COMPENSATION IN EMINENT DOMAIN

McCandless v. United States,⁸⁷ held that in condemnation by eminent domain, the owner is entitled to the most profitable use to which his land can profitably be put in the reasonably near future even only if such use can be made in connection with other lands. This decision was in harmony with prior decisions on this point.

FEDERAL PRIVILEGES AND IMMUNITIES

One of the most reactionary and startling decisions of the judicial period under consideration was that of *Colgate v. Harvey*,⁸⁸ in which the Supreme Court extended the scope of the privileges and immunities clause to include the protection of the "privilege of acquiring, owning, and receiving income for investments outside a state." This case reversed a policy which

86. 298 U. S.—, 56 S. Ct. 760, 80 L. ed. (adv.) 849 (1936).

87. 298 U. S.—, 56 S. Ct. 764, 80 L. ed. (adv.) 797 (1936).

88. 296 U. S. 404, 56 S. Ct. 252, 80 L. ed. (adv.) 225 (1935).

had continued from the time of the *Slaughter-House* cases⁸⁹ to this recent decision. The Supreme Court had confined the scope of the United States privileges and immunities clause to the protection of only those interests which grow out of the relationship between the citizen and the national government. This recent decision seems to open the door to the protection of all the fundamental rights, powers, privileges, and immunities of the Bill of Rights and all of the fundamentals, rights, powers, privileges, and immunities of the common law, as privileges and immunities of the United States citizenship. If so, there is the danger that the social control permitted under the contract clause, commerce clause, and the due process clause will be denied under the United States privileges and immunities clause and personal liberty protected against what have come to be regarded as proper exercises of the police power, the power of taxation and the power of eminent domain. However, in *Whitfield v. State of Ohio*,⁹⁰ the Supreme Court held that a state statute prohibiting the sale of prison made goods from other states was not a violation of the United States privileges and immunities clause, where the statute also prohibited such sales of goods made by convict labor in that state, so that the final position of the United States Supreme Court is still somewhat of a matter of doubt.

EIGHTEENTH AMENDMENT

In this term there was one other case on the effect of the repeal of the eighteenth amendment. In *United States v. Rizzo*,⁹¹ the Supreme Court held that the repeal of the eighteenth amendment did not preclude the collection of taxes on alcohol since they were not penalties but basic taxes.

SUPREMACY OF THE SUPREME COURT

The recent tendency towards curbing government control either by the states or the nation has resulted in expanding the judicial power of review. Hence whatever limits the Supreme Court may have put upon the states or upon other branches of the federal government, it apparently does not believe in putting a limit upon itself. In the past, the Supreme Court rendered some decisions which were so unpopular that they threatened

89. 16 Wall. 36, 21 L. ed. 394 (1873).

90. 297 U. S. 431, 56 S. Ct. 532, 80 L. ed. (adv.) 527 (1936).

91. 297 U. S. 530, 56 S. Ct. 580, 80 L. ed. (adv.) 571 (1936).

to affect its supremacy, but in spite of the *Dred Scott* decision, the *Income Tax Cases*, the *Legal Tender Cases*, and the *Prohibition Cases*, the Supreme Court was able to steer a course that enabled it to maintain its own authority. It has recently again rendered some very unpopular decisions against social control either by the states or the nation and against the authority of the national government over the control of industry and agriculture. These decisions again are raising the question of whether the Supreme Court has at last made such egregious blunders that it will be impossible for it to continue in the future to maintain the supremacy which it has succeeded in maintaining throughout our prior history.

CONCLUSIONS

Most of the decisions of the United States Supreme Court during the past year have been commendable and can invoke nothing but praise. There will be general agreement that the Supreme Court was extending our constitutional law in the right direction when it enlarged the states' general police power and the states' power of taxation. There will be general agreement that the Supreme Court rendered the right decisions when it upheld the federal government's general money powers and its powers to operate the Tennessee Valley Authority. There will be no objection to the effort on the part of the Supreme Court to put more vitality into our doctrine of separation of powers and to check the process of delegation of legislative authority. There will have to be acquiescence in the court's pronouncements upon the subject of sovereignty. The court's extension of due process of law to protect the freedom of the press and to protect against self-incrimination will meet with applause. Most of the other decisions continue tendencies of which the thinking people of the United States generally approve.

But this commendation does not extend to all of the decisions of the court rendered in this period. In the past year, as in decisions for the past two or three years, there has been a tendency to confine the meaning of commerce to transportation. Such decisions are only leading to confusion and can not meet with approval. These decisions and other decisions are tending to exempt big corporate business from all social control either by the states or by the nation. Such a tendency can not but ulti-

mately have unsocial effects. Much of our business has now become national in scope. Recent decisions have refused to give the federal government control over such business. These decisions do not mark a forward but a backward movement in constitution making. Not only this, but recent decisions of the United States Supreme Court have tended to destroy the doctrine of federal supremacy over the states and in place thereof to set up something, which at first looks like state supremacy, but which finally fades out into a vicious doctrine of *laissez-faire*. The doctrine of federal supremacy should be again revived and established, and capitalistic business should be taught that in the United States there is no business or class superior to the constitution.

The bad effects to which we have just referred have been the result of three classes of decisions. (1) Those involving the United States privileges and immunities clause; (2) those involving the due process clause; and (3) those involving our dual form of government.

The decision enlarging the scope of the United States privileges and immunities at first seems to have the effect of destroying our dual form of government by destroying the power of the states and establishing that of the federal government; but a more careful analysis of this decision reveals that the only power of the federal government established is the power of the Supreme Court, and this is not a constructive power to establish social control by the federal government, but a negative power merely to destroy social control by the states. When all this is realized, of course, it is seen that the real result of this decision is simply to protect the capitalistic system.

The denial to the states under the due process clause as a matter of substance of the power to pass minimum wage laws in the exercise of the police power, when coupled with the fact that the federal government is also denied the power to pass minimum wage laws, again shows that the Supreme Court is more concerned with the interests of certain great industrialists than it is with social progress in the United States.

The recent decisions on our dual form of government seem to have a two-fold tendency. In the first place, they tend to establish a doctrine of state supremacy in place of a doctrine of fed-

eral supremacy. In the second place, they tend to establish an immunity for business national in scope against all social control.

The doctrine of federal supremacy is one that has been adhered to from the time of Chief Justice Marshall down to these latest decisions of the Supreme Court. The Supreme Court still adheres to the position that the commerce power may regulate intrastate rates, the safe conduct of transportation, a compensation for injury, hours of labor, and shipment of prison-made goods; but now it takes the position that the commerce power may not regulate deferred payments in the form of pensions, nor goods manufactured by child labor, nor labor conditions in the production of coal. Mr. Justice Roberts acted with Justices Stone, Brandeis and Cardozo in the case of New York regulation of the price of milk, the Minnesota Mortgage Moratorium law, and Congressional Devaluation of the Standard of the Gold Dollar (and, of course, in the T. V. A. decision); but when it came to labor legislation as in the Railway Pension Act, the Guffey Coal Act and the New York Minimum Wage Law, he found that he must act with Justices Butler, McReynolds, Sutherland, and Van Devanter. The doctrine of federal supremacy is not only clearly stated in the original constitution and in important decisions of the United States Supreme Court, but it is one that the nature of our form of government makes an impelling necessity. Any doctrine of state supremacy will lead only to chaos. Forty-eight separate states are not in a position to exercise social control over a capitalistic system national in scope. Any social control to be adequate will also have to be national in scope. This was seen by the genius of Chief Justice Marshall. Our constitution making will never be finished until this doctrine is again revived and placed on the exalted level where it belongs.

Probably the purpose of the Supreme Court in the decisions which are being criticized was not so much to establish a doctrine of state supremacy as to give an immunity to big business from social control. The result of the commerce decisions was to create a no-man's land where neither the federal government nor the states have power to exercise social control over the activities of businesses national in scope, no matter how unsocial

they may tend to be. These decisions have been some of the most pernicious ever rendered by the Supreme Court. A majority of the Supreme Court has been and is perfectly willing to have personal liberty delimited by social control where there is sufficient reason for so doing provided such control does not apply to the capitalistic system, but apparently it regards the capitalistic system as so sacrosanct that it must not be touched by anything so unholy as governmental regulation. This, of course, is just what is desired by the American Liberty League, the Constitutional Democrats, and the other disciples of the fetish of *laissez faire*. Justices Roberts, Butler, McReynolds, Sutherland, and Van Devanter, therefore, are spokesmen for this class in our economic order. Of course, if these five majority justices had undertaken to establish such a doctrine by Congressional legislation, their position would soon have been reversed at the polls by the people of the United States, but when they established this doctrine as Justices of the United States Supreme Court, it is not so easy to reverse their position. No one can give any valid reason for exempting the personal liberty of capitalists from social control where social interests demand such control, and it would seem that the people of the United States must ultimately find some method for subjecting their personal liberty to social control.

The identification with Bolshevism and Russia of the social control attempted by the Roosevelt administration over our economic order would be ludicrous if it had not been received so seriously by the great mass of business men. It would have been nearer the truth if this social control had been identified with the social control over economic matters found in England, Sweden and other democratic countries. Practically all of the various schemes of social control found in the Roosevelt program including the Securities and Exchange Act, housing program, subsidies to agriculture, processing taxes, quota system, income and inheritance taxes, social insurance, public works programs, collective bargaining, and other forms of labor legislation are found in these other countries, if the United States legislation did not actually copy the legislation of these other countries. These other countries have a more highly managed economy than the Roosevelt administration ever thought of attempting,

and have adopted many elements of Socialism when the Roosevelt administration went in this direction only in the case of the Tennessee Valley Authority.⁹² Yet the very men who have damned the Roosevelt administration have praised the English system and compared the Roosevelt system unfavorably with it. What is the reason for this? The reason must be either deliberate falsification or the densest kind of ignorance on the part of the business class in the United States, including the newspaper men. It is probably a case of sheer ignorance. The "economic royalists" only know that they are opposed to Roosevelt and know little else. They want no social control, but they do want personal liberty, and they propose to defeat any and all social control even if it is necessary to go to the length of damning as devices of Bolshevistic and Fascistic governments forms of social control adopted by the most democratic countries on earth. Whether there is any truth in their statements is a matter of least concern.

It was not necessary for the Supreme Court to render the decisions which we have criticized although the majority rendering them has pretended there was such necessity. One Justice even went so far as naively to maintain that what the Supreme Court did was to put the constitution and the statute side by side and to compare the statute with the constitution; and, if the statute did not correspond with the constitution, to declare the statute unconstitutional. Of course, it should be noted in the first place, that the constitution with which the statute was compared was a constitution made by the Supreme Court. This was a fact which apparently the justice overlooked. In the second place it should be noted that during the course of United States history the Supreme Court, at different times, has made different constitutions. There were, therefore, many constitutions for the Justice to choose from. If he had wanted to, he could have chosen a different constitution than the one he did choose. Whatever constitution or law he applied was a law which the Supreme Court had made. The Supreme Court (majority) in important cases has not applied the law as it stood at the time of its pronouncements, but has gone back to such cases as *Lochner v. New York*, 1905; *Adkins v. Children's Hospital*, 1923; *Hammer v.*

92. Lindley, "If This Be Despotism." 100 *Scribner's Magazine* 129.

Dagenhart, 1918; *United States v. E. C. Knight Co.*, 1895; and *Collector v. Day*, 1870. With the exception of *Hammer v. Dagenhart* and *Adkins v. Children's Hospital*, all of these cases were cases which it was supposed had been overruled and these two cases it was supposed the Supreme Court would sometime overrule. After having selected this constitution to compare the law with, of course, the Supreme Court could declare that the law was contrary to the constitution. It was not contrary to the constitution which the four dissenting justices believed in nor to the constitution which most of their predecessors believed in, but it was contrary to the constitution which the five justices constituting the majority at this particular time believed in.

What these justices really meant was that the law was contrary to the American economic system recently created by a few financial magnates. This American economic system had not existed throughout our history and was not peculiar to all Americans, but only to that of the new financial magnates who now control the capitalistic system. This apparently is what others today mean when they talk about "standing by the constitution" and "going back to the constitution." Our constitution once guaranteed one economic system—slavery. It is to be hoped it does not now guarantee another. It is very convenient for the people to talk about going back to the constitution when they have a choice of, or can make, the constitution to which they can go back.

Our constitution is not today what it was a year ago. Whatever changes it has undergone are the work of the Supreme Court. Some of the constitution has been improved. Some of the Constitution has been made worse. Much of the work of the Supreme Court has been unsatisfactory and should be repudiated. How can this be done? And how can work of this sort be prevented in the future?

Various schemes have been suggested. One scheme would be the packing of the court. It has been claimed that bad decisions of the court in the past have been cured in this way.⁹³ This method of attaining the result desired would be constitutional. The constitution does not prescribe the number of justices. Con-

93. Bradner-Smith, *Congress vs. The Supreme Court—A Constitutional Amendment* (1936) 22 Va. L. Rev. 665.

gress could increase the number of justices for that august tribunal. The President could then appoint enough new justices to obtain a majority opposed to the position of the present majority and thereby could obtain a reversal of the position of the Supreme Court as to United States privileges and immunities, due process as a matter of substance and our dual form of government. However, this method of obtaining the result is very dangerous and not one that can be advocated. It would weaken the standing of the United States Supreme Court if this practice was frequently resorted to.

Another method of curbing the Supreme Court which has been suggested would be the requirement by Congress of a seven to two vote for nullification of an act of Congress and perhaps acts of state legislatures. This method of curbing the Supreme Court, if constitutional, would not correct past mistakes but would tend to curb the power of the Supreme Court in the future. If it only related to matters of social legislation, this method of curbing the Supreme Court might not be objectionable; but if it were to relate to legislation involving our dual form of government, or the doctrine of separation of powers, or constitutional guarantees, it would be pernicious. In such cases, the Supreme Court should be able to declare an act of legislation either by Congress or by the states unconstitutional by a majority vote. However, any such piece of legislation would be unconstitutional as an invasion of the power of the Supreme Court and a violation of the doctrine of separation of powers and the Supreme Court would so declare. If the Supreme Court would put a voluntary limitation of this sort on itself, so far as concerns due process as a matter of substance, the limitation would not only be constitutional but a result devoutly to be wished for.

Another method of curbing the Supreme Court which has been proposed is the recall of judicial decisions. What has been said about the constitutionality of a requirement of a seven to two vote, without an amendment to the constitution, would apply to the recall of judicial decisions. There does not seem to be much sentiment for this method of curbing the Supreme Court at the present time and it will not be discussed further herein.

It has been proposed to curb the Supreme Court by taking from it, and perhaps from other federal courts, by act of Con-

gress jurisdiction over questions of due process as a matter of substance.⁹⁴ It has been argued that a large number of frequently elected members of the legislative branch of the government are in a better position to determine questions of social policy than a few members in the judicial branch of the government appointed for life. It may also be added that this is a power which has been exercised by the judicial branch of the government for only about fifty years. We got along very well without the judiciary's exercise of this power up to that time and we might get along well without its exercise of this power in the future. Of course, taking this power away from the Supreme Court now would not cure past decisions but it might prevent some bad decisions in the future. Most of the criticism of the Supreme Court until the past year has related to its decisions on due process as a matter of substance. This plan of curbing the Supreme and other federal courts would be constitutional under Art. III, Sec. 1, and Sec. 2 par. 2. This method of reform, however, would not correct the decisions of the last year on our dual form of government.

It has also been proposed to change the constitution made by the Supreme Court by express amendments to the constitution. If this method of curbing the Supreme Court was resorted to amendments would have to be formulated, (1) changing the meaning of the United States privileges and immunities clause as it now stands, (2) either changing the doctrines announced by the United States Supreme Court in its decisions on due process as a matter of substance or taking this power entirely away from the Supreme Court, and (3) giving the federal government a police power, or a power of regulation, over all economic matters national in scope, either by an enlargement of its commerce power and tax power, or by a general delegation of power.⁹⁵ Of course, these amendments would be constitutional if adopted according to the constitutional method. This also would be an effective way of getting the kind of a constitution

94. Martig, *Congress and the Appellate Jurisdiction of the Supreme Court* (1936) 34 Mich. L. Rev. 650.

95. Loeb, *Constitutional Interpretation in a Transitional Period* (1936) 21 ST. LOUIS LAW REV. 95; 4 Geo. Wash. L. Rev. 381; Haines, *Judicial Review of Acts of Congress and the Need for Constitutional Reform* (1936) 45 Yale L. J. 816.

that we ought to have, but it seems absurd to have to amend the constitution every time that the Supreme Court makes a wrong decision. Of course, this has been done in the past in the case of the slavery amendments, the income tax amendment, and the prohibition amendment.⁹⁶ If this practice were to be continued, however, as a definite policy, it would in the course of time make our federal constitution a monstrosity. For this reason, it would seem that this method of curbing the Supreme Court and changing wrong constitution making should be abandoned.

Still another method of obtaining better constitution making by the United States Supreme Court would be by obtaining better justices for the Supreme Court. If it would be possible to obtain better justices than those we have had, of course, they should be obtained. So far as our present Supreme Court needs a change in this respect, the change would have to wait for vacancies in the personnel of the court. As these vacancies might occur, if the President and the Senate in cooperation would select the right kind of justices, probably this would solve the problem which we are facing. The reason why we have been getting during the past year or two the undesirable decisions which have been handed down by the Supreme Court is if we may judge by the best thought in the United States, because there are upon the Supreme Court, justices who perhaps do not have the right viewpoint as to the constitution they should make. During a few prior administrations not enough care was given to the selection of justices for the Supreme Court. Of course, there is no guarantee that any better care of this matter will be taken in the future. If some scheme of further safeguarding the appointment of justices of the United States could be evolved, that would be desirable. Some method of nomination of a list of candidates from which the President might be required to nominate might be as good a scheme as could be proposed. However, this scheme to be constitutional would probably require an amendment to the constitution and even if the constitution was amended to permit it, it is questionable whether the scheme would be perfectly successful.

There remains, therefore, as the only method for obtaining a

96. The Eleventh Amendment was also the result of a Supreme Court Decision.

better constitution than we have been obtaining, the Supreme Court itself as it has been constituted, as it is not constituted, or as it may ever be constituted. Perhaps the only thing that the people of the United States can do is to trust the Supreme Court. There is a possibility that the Supreme Court itself may, in the course of time, correctly think through all of our governmental and economic questions and finally come to a correct result. In the give and take of discussion and argument, there is a possibility that those members of the Supreme Court who have been maintaining the right position may gradually convince their opponents that they are correct and in this way the truth may finally evolve.⁹⁷ If this result does not come to pass with the court as now constituted it may gradually come to pass with changes in the personnel of the bench.

97. Corwin, *Commerce Power versus State Rights* (1936) 265; Willis, *Constitutional Law of the United States* (1936) 114, 925.