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The issue presented to the Nation by the President in his message on judicial reform demands clear thinking. Its significance is such that, whatever our positions may eventually be, we dare not rest them on catch words or mere phrases. We should know upon what we base our conclusions. We must know why we think as we do.

To begin with we must ask ourselves first what the problem really is. Only after we have answered that, can we then say what, if anything, should be done.

Realistic analysis of the problem is seriously clouded by two factors. The first is the assumption that the issue is a novel one in American life. The second factor that clouds the issue is the curious belief that seems to have grown up that the Supreme Court of the United States is somehow above criticism and immune to attack. Both these assumptions are false.

Conflict between the President and the Congress on the one hand and the Supreme Court on the other is intrinsic to American life. To realize how true this is, one need only remember that Lincoln was elected to the presidency largely because of his refusal to accede to the decision of the Supreme Court in the Dred Scott case. The very theory of the three branches of our government possessing coordinate powers implies that between those three branches there will frequently exist differences of opinion. Nor is Franklin Roosevelt the first president to take open issue with the Court. Jefferson, Jackson, Lincoln and Theodore Roosevelt did not hesitate to express themselves with directness and vigor.

Among lawyers criticism of the actions of the Court, entirely apart from the constitutional issues involved, is the grist of table gossip, of speeches, of argument. In the law schools criticism and disagreement has been the very life of the law. And so, I repeat that in approaching our problem we must first realize that criticism of the court is not new to our American tradition. In fact, it is the essence of the democratic process to be

bold to think, and free to talk about all the branches of government. It is in this spirit that we must move to our problem.

The real issue that we face today is not a new one. It is the old issue of the degree to which this nation shall be a government of laws or of men. Its roots go back to the Constitutional Convention of 1787.

It was in 1787 that that Convention gave birth to the Supreme Court. There, James Wilson, a delegate from Pennsylvania, twice proposed that the Supreme Court together with the President should have the power to revise laws passed by the Congress. He argued that this would afford protection against laws, that, to use his words, "may be unjust, may be unwise, may be dangerous, may be destructive, and yet may not be so unconstitutional as to justify the judges in refusing to give them effect."1/ This proposition would have made of the Supreme Court a supreme legislature. It would have given the members of the Court power to exercise their personal discretion with respect to the wisdom and justice of laws passed by Congress. The Convention twice rejected James Wilson's proposition and insisted that only judicial and not legislative power should be vested in the Supreme Court of the United States.2/

1/ *Madison's Journal of the Constitutional Convention, Hunt's* ed., vol. 2, p. 17.

2/ The final vote on the proposal was Massachusetts, Delaware, North Carolina and South Carolina voting no, Connecticut, Maryland and Virginia voting aye, Pennsylvania and Georgia divided, and New Jersey recorded as not present. Among the arguments that carried the day against the proposal were the following: "Mr. Ghorum did not see the advantage of employing the Judges in this way. As Judges they are not presumed to possess any peculiar knowledge of the mere policy of public measures." *Ibid.* p. 18. "Mr. L. Martin, considered the association of the Judges with the Executive as a dangerous innovation; as well as one which could not produce the particular advantage expected from it. A knowledge of Mankind, and of Legislative affairs cannot be presumed to belong in a higher degree to the Judges than to the Legislature. And as to the Constitutionality of laws, that point will come before the Judges in their proper official character. In this character they have a negative on the laws. Join them with the Executive in the Revision and they will have a double negative. It is necessary that the Supreme Judiciary should have the confidence of the people. This will soon be lost, if they are employed in the task of remonstrating against popular measures of the Legislature." *Ibid.* p. 21.

More than a hundred years later, in 1905, as though James Wilson himself had inspired it, the Supreme Court arrogated to itself the immense, super-legislative power that the Constitutional Convention had so deliberately denied it.

In that year the Supreme Court had before it a law of the State of New York forbidding more than ten hours a day for workmen in bakeries. By a 5-4 decision it held the law unconstitutional.3/

Those first years of the twentieth century saw us as a nation struggling to cope with the new problems of industrialization. Those were the days of the beginning of concern with workmen's compensation, with safety appliance acts, with discrimination against unions, with child labor, with long working hours and low wages. This new society for industry and agriculture alike was insisting that its rights, its privileges, and its liberties needed reenforcement against the new pressures of a changing civilization.

It was in that bakery case that the Court took new powers to itself. The principle it laid down there came as a shock to the minority of its members, 4/ to constitutional lawyers, and to students of government. It takes no legal knowledge to understand that principle. It is simply this: If a law, says the court, seems to us "fair, reasonable and appropriate"5/ -

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3/ *Lochner v. New York*, 198 U.S. 45.

4/ Mr. Justice Harlan, who was joined by Justices White and Day, in dissenting took occasion to repeat the Court's own earlier words in *Atkin v. Kansas*, 191 U.S. 207,223: "The responsibility therefor rests upon legislators, not upon the courts. No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives".

5/ *Lochner v. New York*, 198 U.S. 56.

and I am using the words of the Court - it is constitutional; but if it seems to us "unreasonable, unnecessary and arbitrary" - and I am still using the words of the Court - despite the will of the people and the action of the legislature, we will hold it to be unconstitutional. The adoption of that principle made of the Court - made of five members of the Court - a supreme legislature with power to approve or disapprove the desires of the nation. It should be pointed out that this power was not given to the Court by the Congress, or by the people, but in fact, was twice denied it by the Convention which framed the Constitution. It was a power which the Court appropriated for itself and which has since repeatedly been used and stealthily expanded in subsequent decisions, until it now threatens to paralyze legislative action and popular will.

In the bakery case the dissenting judges pointedly told the majority that such a principle would permit the individual men who at any time might be a majority of the Court to write their own economic predilections and prejudices into the Constitution of the United States.6/ History has proven that the dissenting judges were right. That is exactly what the Court has done. Let me give you a few of the cases - all but one before 1933 - in which Congress or the states have been overruled by the Supreme Court through the use of the very power denied the Court by the Constitutional Convention.

6/ See Mr. Justice Holmes dissenting in *Lochner v. New York*, 198 U.S. 75: "This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law".

I have already mentioned the bakery case in 1905 in which, by a 5 to 4 vote, the Court vetoed the attempt of the New York legislature to restrict bakery employment to a ten-hour day. 7/

In 1915, by a 6-3 vote, the Court vetoed the attempt of the Kansas legislature to protect employees from discharge because of union affiliations. 8/

In 1918, by a 5-4 vote, the Court vetoed the efforts of Congress to regulate child labor. 9/

In 1922, by a 5-4 vote, the Court vetoed the efforts of the Arizona legislature to restrain the issuance of injunctions against peaceful picketing. 10/

In 1922, by a 5-3 vote, and again in 1925, 1927 and in 1936 by a 5-4 vote, the Court vetoed the efforts of first the Congress, then the Arizona legislature, then the Arkansas legislature, then the New York legislature to require industry to pay its women employees a living wage. 11/

7/ In 1917 in *Bunting v. Oregon*, 243 U.S.426, the Court by a 5-3 vote held constitutional an Oregon statute establishing a general 10 hour day. The majority never mentioned the earlier case of *Lochner v. New York*, but the bar generally believed that this was a political move to overrule that unfortunate decision. But in the first minimum wage case, Mr. Justice Sutherland resurrected *Lochner v. New York* to hold that act unconstitutional. Of this conduct, Chief Justice Taft said: "I have always supposed that the *Lochner Case* was thus overruled *sub silentio*." *Adkins v. Children's Hospital*, 261 U.S. 564. And Mr. Justice Holmes added that he "had supposed....that *Lochner v. New York* would be allowed a deserved repose." *Ibid.* 570.

8/ *Coppage v. Kansas*, 236 U.S. 1. Nine years earlier in *Adair v. United States*, 208 U.S. 161, the Court by a 6-2 vote vetoed an act of Congress of a similar character applicable to carriers engaged in interstate commerce and their employees.

9/ *Hammer v. Dagenhart*, 247 U.S. 251. A subsequent effort by Congress to prohibit child labor through the use of the taxing power was held unconstitutional in 1922 in the *Child Labor Tax Case*, 259 U.S. 20.

10/ *Truax v. Corrigan*, 257 U.S. 312.

11/ *Adkins v. Children's Hospital*, 261 U.S. 525; *Murphy v. Sardell*, 269 U.S. 530; *Donham v. West-Nelson Mfg. Co.*, 273 U.S. 657; *Morehead v. N. Y. ex rel. Tipaldo*, 298 U.S. 587.

All but one of these cases, and there are many more of the same type, 12/ occurred prior to 1933. These vetoes were possible only because the Court had arrogated to itself the power denied it by the Constitutional Convention of 1787. And these vetoes, made possible through a balance usually of only one judge, set the Court athwart this century's great thrust for social progress.

These vetoes still stand. They cover the action not only of those states, those Congresses, but all states and all Congresses. They strip organized democratic government of the power to achieve objectives of long standing. In 1933, when a vision of new national aims was born, we hoped that some recognition of these aims would be entertained by the Court. Instead, as the world knows, the Court has encroached even further upon the desires of a nation and of its states.

This, then, is the fundamental problem which we face today - whether or not we shall permit the Court to continue in its role of a self-constituted super-legislature in disregard of the Constitution and in disregard of the function of a judiciary in our national life. Our problem today is whether the Court shall be a court of law holding itself to the interpretation of law, or whether it shall be a court of men judging the legislative wisdom or unwisdom of their countrymen.

12/ See e.g. *Tyson v. Banton*, 273 U.S. 418 (holding unconstitutional by a 5-4 vote a New York statute aimed at controlling ticket-scalpers by limiting the re-sale profit on theatre tickets to fifty cents a ticket); *Weaver v. Palmer Bros. Co.*, 270 U.S. 402 (holding unconstitutional by a 6-3 vote a Pennsylvania statute seeking to protect the public from unsanitary conditions in the bedding industry); *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504 (holding unconstitutional by a 7-2 vote a Nebraska statute which sought to prevent deception in the sale of bread by requiring standard weights for loaves of bread); *Adams v. Tanner*, 244 U.S. 590 (holding unconstitutional by a 5-4 vote a Washington statute forbidding private employment agencies from charging placement fees of employees); *Ribnik v. McBride*, 277 U.S. 350 (holding unconstitutional by a 6-3 vote a New Jersey statute prohibiting employment agencies from charging more than reasonable fees for their services).

A court which is a court of men by this very fact spreads uncertainty throughout the whole body of law. The fact that the Court assumes to pass upon the reasonableness or unreasonableness of legislation - a test that, as the Chief Justice himself has recognized, can frequently be the same as the wisdom or unwisdom of the legislation 13/ - makes constitutional law more a matter of guess work than of science. The plain truth known to many lawyers but to few laymen is that the modern constitutional lawyer is obliged to study not only the law, but also the individual prejudices and predilections of the members of the Court. This makes as uncertain as human nature itself the validity of the mass of social legislation whose necessity and desirability has now on three occasions been definitely attested to by the overwhelming votes of the Nation. This uncertainty throws doubt upon laws already passed or now in contemplation, irrespective of careful and conscientious draftsmanship, dealing with such matters as old age pensions, social security, collective bargaining, control of crop surpluses, crop insurance, soil conservation, coordinated river basin control, government aid for better housing - to catalogue only a few of the measures that bespeak the aims of our generation.

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13. "When the Court is dealing with the question whether a legislative act is arbitrary, and transcends the limits of reason which are deemed to be embraced in the fundamental conception of due process of law or of equal protection of the laws, it may be difficult to draw the line between what is regarded as wholly unreasonable and what is deemed to be unwise. It is doubtless true that men holding strong convictions as to the unwisdom of legislation may easily pass to the position that it is wholly unreasonable." *Hughes, The Supreme Court of the United States*, p. 37.

Once more let me state our problem. It arises out of the disregard of constitutional limitations by a majority of the members of the Supreme Court who insist upon writing their own individual economic prejudices and predilections into the fabric of constitutional law. 14/ It means that the constitutionality of past, present and future legislation dealing with social and economic progress and with the power of the nation as a nation, to cope with its national problems, is subject not to the wisdom of an electorate, not to the wisdom of a congress, not to the wisdom of an elected president, but must also run the gamut of a judgment based not on law but upon purely economic and social considerations by a majority of the Supreme Court. It means today an attitude toward constitutional law which incites to litigation, incites to defiance of government, and too frequently leads to the paralysis of a program before it even has a chance of initiation.

This is our problem, and it seems to me that there are four attitudes which can be taken toward it. The first is to do nothing. That way would be sponsored by those who are against the program for economic and social progress that has now been building for more than a quarter of a century. These men, who not only have a basic distrust of democratic government but hate the very march of modern industrial and agrarian humanitarianism, will,

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14/ If this statement be regarded as severe, compare the following: Chief Justice Taft criticizing the action of the majority in holding invalid the minimum wage law said: "But it is not the function of this Court to hold congressional acts invalid simply because they are passed to carry out economic views which the Court believes to be unwise or unsound." 261 U.S. 562. Mr. Justice Holmes said of the majority in the *Lochner Case:* "This case is decided upon an economic theory which a large part of the country does not entertain." 198 U.S. 75. Mr. Justice Brandeis in the Nebraska bread case characterized the decision of the majority as "an exercise of the powers of a super-Legislature - not the performance of the constitutional function of judicial review." 264 U.S. 517.

of course, oppose it. But they will be too wise to oppose it on those grounds. Instead they will hide themselves as they have hid before behind epithets and phrases, such as "regimentation", "socialization", "individualism", "un-Americanism", "dictatorship", or the like. Under faded banners such as these will they try to lead the electorate. These men of course will say "do nothing" and from their point of view they are right in saying "do nothing". To them the President can make no appeal. But others must be on their guard not to swell their legions.

A second attitude is again to do nothing - a course urged by men who recognize the existence of the problem and are sincerely grieved by it. Their hope is that time itself will cure the problem. New men on our courts with new ideas, who have lived actively through the adversity of the last few years, known and seen at first hand its tragedies, and are alive to the possibilities of a better ordering of our national life, these new men, they hope, will take the places of the old. And their ideas they hope will restore the Court and the Federal judiciary to the function which its founders intended it to assume. To them, perhaps one can say that a nation, now almost desperate in its needs and desires, will not, as it did not in 1932, continue to wait patiently for a prosperity that was assumed somehow to be just around the corner. "Do-nothingism" was repudiated four years ago. It has been repudiated with increasing intensity twice since then.

The third course of action that is possible is the suggestion of action by way of constitutional amendment. No particular amendment has as yet, so far as I know, received the support of more than a handful of men in or out of the Congress. Various types have been suggested. Among them is the device, suggested by the Senator from Montana, still lacking in details, which would permit the Congress by a two-thirds vote to override particular decisions of the Supreme Court holding acts of Congress invalid.

This proposition has many weaknesses. The most obvious of these is that it would offer no solution to the problems of the various states whose legislative programs have been so often upset by the Court. Such an amendment does not make it possible for states to pass minimum wage acts, for states to provide for social security, for states to encourage collective bargaining. The relief it offers is illusory.

But, more than this, such an amendment would give the Congress the right to override the specific guarantees of the Constitution. The Senator from Montana has recognized this by already suggesting that the Bill of Rights should be omitted from its application. But there are other specific guarantees in the Constitution equally vital, equally dear to the liberties of the citizen. Are these to be so cavalierly overridden? In other words, such an amendment would completely and finally obliterate the constitutional amendment machinery and give the Congress the arbitrary power to make all amendments without regard to the Constitution itself, without any reference to the states.

The Senator from Montana publicly said that the Democratic platform last year called for amendment of the Constitution, - that it called for curing the problems created by unconstitutional judicial interpretation by clarifying amendment. He has not quoted the platform correctly. What the platform said was that if every other means within the Constitution failed, then the Administration would seek a clarifying amendment. The President is trying the other means today - within the Constitution.

But the objections that I see to attacking this problem through constitutional amendment strike far deeper than this. First there is the time lag of constitutional amendment. Years of agitation preceded the passage and ratification of such amendments as those granting woman suffrage, granting

the power to the national government to lay an income tax, proscribing the manufacture, sale and transportation of intoxicating liquors and, in turn, the amendment that repealed that. Twenty years have now elapsed since the Supreme Court first denied the national government the power to deal with child labor. Despite the fact that the Congress on three separate occasions by overwhelming majorities endorsed the principle of child labor regulation, thirteen years have now passed and the requisite number of states is still lacking. Shall we say to the woman worker in industry, to the farmer, to the consumer, to the employee -- wait these many more years before we can restore to you the liberties and the rights to the pursuit of your happiness of which the Court has deprived you.

But for other reasons also, the dictates of wise statesmanship urge attack upon this problem otherwise than through constitutional amendment. It is not difficult to see ahead that serious problems confront the Nation in the next few years. There is the threat of war abroad; there is the threat to industrial peace at home. There are all the manifold and difficult problems of harnessing this new recovery so that it will not destroy us, of fashioning it to be our servant and not our master. These problems must in the next few years engage the attention and energy of the Nation. One might well ask whether it is wise statesmanship to divert our concern from these impending and mighty concrete issues, in order to plunge the Nation over a period of at least four years, into the throes of a bitter and heated constitutional debate. One might well ask whether it is wise statesmanship to prolong for another four or six, or eight years, the partisan bickerings, the charges and countercharges of last June to November. It is the essence of the survival of democratic government that it must be able to handle its problems expeditiously and definitively. And democratic government, we all agree, must survive.

Wise statesmanship, it seems to me, suggests termination of the issue after a reasonable period of time for debate upon the problem and a conclusion after that time either to find a solution or to decide that there shall be no solution. We dare not repeat the mistake of Buchanan - to let the Nation, as he did, after the Dred Scott decision, falter and fumble too long for its destiny. We must, if we can, find a way to do otherwise.

The President suggests the way to do otherwise. His proposal recognizes that the issue is not one of the Constitution, but an issue of men whose interpretations of that document make it a straightjacket upon our national life.

The proposal cannot be attacked upon the ground that it is not within the powers conferred on the Congress and the President by the Constitution. It cannot be attacked upon the ground that it breaks faith with the Democratic platform. It is however attacked upon the ground that the proposal seeks to subvert the independence of the judiciary. That attack is equally false.

What the proposal seeks to do is to restore the originally intended balance between the legislative, the executive and the judiciary - the balance that has been subtly and increasingly upset within the last thirty-five years as a majority of the Court assumed more and more the right to pass upon the wisdom of legislation. 15/ The Constitution specifically gave the President and the Congress the means to restore that balance, a means which in no way

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15/ Compare the statement of Mr. Justice Stone in the Agricultural Adjustment Case: "Courts are not the only agency of government that must be assumed to have capacity to govern. Congress and the courts both unhappily may falter or be mistaken in the performance of their constitutional duty. But interpretation of our great charter of government which proceeds on any assumption that the responsibility for the preservation of our institutions is the exclusive concern of any one of the three branches of government, or that it alone can save them from destruction is far more likely, in the long run, 'to obliterate the constituent members' of 'an indestructible union of indestructible states' than the frank recognition that language, even of a constitution, may mean what it says: that the power to tax and spend includes the power to relieve a nationwide economic maladjustment by conditional gifts of money."

makes judges subservient to their will or to the will of any individual, but a means to recreate a court conscious of its function and of its part in our national life. The fathers of the Constitution granted this means; with their great foresight they envisaged that there might be a need for its exercise. That need is now here.