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*The Return to the Constitution**

By HENRY WEIHOFEN†

In the August issue of DICTA,‡ Mr. Joseph C. Sampson of the Denver Bar, under the title, *The Lawyer's Oath,* issues a trumpet call to all lawyers to oppose the New Deal in the name of the Constitution. With the political philosophy therein expressed I do not here wish to quarrel, but the attempt to read that philosophy into the Constitution calls for refutation.

Mr. Sampson discusses a number of the most important constitutional cases decided during the last seven years, and disapproves of them all. Throughout the article, the "present members of the court" are repeatedly referred to as the main objects of reproof. But, surprisingly, almost all the cases condemned were decided before the first Roosevelt appointee went on the bench. When, therefore, Mr. Sampson permits himself in the heat of argument to refer to "judicial revolutionists," he must be taken to mean not Justices Black, Frankfurter, *et al.,* but Hughes, Roberts and Stone, with Hughes serving as Chief Revolutionist, he having written the opinions in six of the ten cases condemned.

The "judicial revolution," we are told, consists of nothing less than a discarding of *stare decisis* and the overruling of "150 years of precedent." But when we get down to cases, the new decisions complained of turn out to overrule specifically only three cases. These are *Collector v. Day,*[1] *Hammer v. Dagenhart* (the Child Labor case)[2] and *Adkins v. Children's Hospital* (the Minimum Wage case),[3] decided in 1871, 1918 and 1923 respectively. None of these was supported by previous decisions; all had been long and strenuously criticized as unjustified by the provisions of the Constitution. It could more justly be argued that it was the conservative judges who wrote the majority opinions in these cases, especially the child labor and the minimum wage

*The opinions expressed in this article are not necessarily those of the Denver or Colorado Bar Associations.

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‡(1941) 18 DICTA 202.

[1] 11 Wall. 113, 20 L. ed. 90 (1871).

[2] 247 U. S. 251, 38 S. Ct. 422, 62 L. ed. 939 (1918).

[3] 261 U. S. 525, 43 S. Ct. 394, 67 L. ed. 785 (1923).

cases, who were the "judicial revolutionists," distorting the language of the Constitution, and writing into it propositions never intended by the Framers or suspected by anyone else. The later court in overruling these decisions has not departed from the Constitution, but returned to it.

That the Constitution is what the Supreme Court says it is, is denounced as a "new and vicious doctrine." Most lawyers, surely, have heard this statement of Charles Evans Hughes[4] too often to find it new, and it would seem too inevitable a corrolary of our constitutional system to be deemed vicious. *Certainly* the Constitution is and always has been what the Supreme Court said. As construed by John Marshall, the Constitution took on strength which it had not had before, and which it would not have acquired if Spencer Roane of Virginia had been Chief Justice in Marshall's place (as he would have been if Ellsworth had held on to his position for one more month and Jefferson instead of Adams had had the appointment). Under Taney, social interests acquired recognition which Marshall was willing to give only to private rights. Under the leadership of Stephen Field, "due process," a modest clause requiring merely a fair hearing, took on a new and surprising meaning which made it the principal bulwark of private rights against social control, and thus effected a revolution in our constitutional law—a revolution which was checked only by the coming to the court of Holmes and Brandeis.

The meaning of the Constitution has fluctuated in response to the personal opinions of the judges, the influence of Presidents and the exigencies of events. The meaning of interstate commerce has had a meandering history. The Fourteenth Amendment, adopted to protect negroes against whites, has been metamorphosed into a provision protecting corporations against legislatures. Presidents have overcome adverse decisions by appointing judges who saw eye to eye with the administration. In emergencies, the court has upheld vast concentration of power in the hands of the executive. And all this happened long before 1933.

This process of development, of expansion and contraction, backing and filling, the growth of one constitutional doctrine and the decline of another—this process did not suddenly come to an end when we graduated from law school. It would be so much more neat, true enough, if law would stay put, if rules once learned could be counted on to remain true forever. But this wish for certainty is mere carry-over of the father-complex of the child mind.[5]

Mr. Sampson sagely states that the present court is attempting to adapt the law and the Constitution to what it conceives to be changing economic and social conditions. The implications are (1) that the court is now doing this for the first time, and (2) that it shouldn't be done.

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[4]ADDRESSES AND PAPERS (1st ed. 1908) pp. 139-140.
[5]See JEROME FRANK, LAW AND THE MODERN MIND (1931).

A reading of any good constitutional history will show that the court has not usually been so stupid as to ignore the economic and social conditions upon which the law must operate. Constitutional law is not a mere abstract, self-contained logic; it does not operate in a vacuum. There is no nice distinction between legal principles and those which are economic or sociological. You cannot determine the constitutionality of a state sales tax on a delivery of goods sent from another state, for example, except in the light of the economic effect upon such out-of-state buying. Constitutional law is not divorced from life.

A reexamination of the cases will show that, with the three exceptions mentioned, they do not purport to overrule prior cases, and that these three eminently deserved overruling.

THE MORATORIUM CASES

In 1934, in the Minnesota Moratorium case,[6] the Supreme Court, speaking through Chief Justice Hughes, upheld the Minnesota statute designed to meet the desperate situation arising from the depression and to minimize the losses accruing to both mortgagors and mortgagees from the flood of foreclosures. The statute provided for limited extensions of time for foreclosure, upon court order, during the emergency.

With this decision, says Mr. Sampson, "The court first sanctioned the doctrine of expediency in an alleged (!) economic emergency as an escape from constitutional limitation on legislative action."

This statement is sufficiently answered by pointing to a long line of cases upholding emergency legislation.[7]

More than a hundred years ago, Chancellor Kent denounced the Charles River Bridge decision[8] in language very similar to Mr. Sampson's. The decision, he wrote, "injures the moral sense of the community and destroys the stability of contracts * * * I have lost my confidence and

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[6]Home Building and Loan Assn. v. Blaisdell, 290 U. S. 398, 54 S. Ct. 231, 78 L. ed. 413.

[7]The Legal Tender cases, 12 Wall. 457, 20 L. ed. 287 (1871); Juilliard v. Greenman, 110 U. S. 421, 4 S. Ct. 122, 28 L. ed. 204 (1884); Wilson v. New, 243 U. S. 332, 37 S. Ct. 298, 61 L. ed. 755 (1917); Block v. Hirsh, 256 U. S. 135, 41 S. Ct. 458, 65 L. ed. 865 (1921).

"Emergency laws in time of peace are uncommon, but not unknown. Wholesale disaster, financial panic, the aftermath of war (Hamilton v. Kentucky Distilleries & W. Co., 251 U. S. 146, 161, 40 S. Ct. 106, 64 L. ed. 194), earthquake, pestilence, famine, and fire, a combination of men or the force of circumstances may, as the alternative of confusion or chaos, demand the enactment of laws that would be thought arbitrary under normal conditions (Bowditch v. Boston, 101 U. S. 16, 18, 19, 25 L. ed. 980; American Land Co. v. Zeiss, 219 U. S. 47, 31 S. Ct. 200, 55 L. ed. 82)." People ex rel. Durham Realty Corp. v. LaFetra, 230 N. Y. 429, 130 N. E. 601, 16 A. L. R. 152 (1921). For a full discussion see Clark, *Emergencies and the Law* (1934), 49 POL. SCI. Q. 268.

[8]Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. ed. 773 (1837).

hopes in the constitutional guardianship and protection of the Supreme Court."[9]

Today, no one doubts the correctness of that decision.

We live in a society of law, not an anarchy. "Pretty much all law," as Mr. Justice Holmes has said, "consists in forbidding men to do some things that they want to do, and contract is no more exempt from law than other acts."[10]

The Minnesota Moratorium case held the Minnesota statute a reasonable exercise of the state's police power. Neither creditor nor debtor was deprived of his property without due process. Both were protected. Mortgagee interests have largely acceded in this view. That the decision does not give the states *carte blanche* in postponing foreclosure was made sufficiently clear a year later when the court held a somewhat broader Arkansas statute unconstitutional.[11]

BUSINESS AFFECTED WITH A PUBLIC INTEREST

In 1934, in *Nebbia v. New York*,[12] the court, in an opinion by "revolutionist" Mr. Justice Roberts, upheld a New York law regulating the price of milk.

"Never before," we are told, "had the court permitted governmental regulation of prices except in the case of public utilities, which because of their monopolistic character, were 'affected with a public interest.' "

This is incorrect. Various businesses not public utilities and not monopolistic in character had been subjected to price control.[13] The

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[9]Quoted in WARREN, CONGRESS, THE CONSTITUTION AND THE SUPREME COURT, 269.

[10]Dissenting in Adkins v. Children's Hospital, 261 U. S. 525, 568, 43 S. Ct. 394, 67 L. ed. 785 (1923), citing numerous cases. That contract rights may be restricted by reasonable exercise of the police power is established by a host of cases: Northwestern Fertilizer Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036 (1878); Stone v. Mississippi, 101 U. S. 814, 25 L. ed. 1079 (1880); Butchers Union Slaughter House v. Crescent City Co., 111 U. S. 746, 4 S. Ct. 652, 28 L. ed. 585 (1884); McLean v. Arkansas, 211 U. S. 539, 29 S. Ct. 206, 53 L. ed. 315 (1908); Holden v. Hardy, 169 U. S. 366, 18 S. Ct. 383, 42 L. ed. 780 (1898); Muller v. Oregon, 208 U. S. 412, 28 S. Ct. 424, 52 L. ed. 551 (1908), Bunting v. Oregon, 243 U. S. 426, 37 S. Ct. 435, 61 L. ed. 830 (1917); Knoxville Iron Co. v. Harbison, 183 U. S. 13, 22 S. Ct. 1, 46 L. ed. 55 (1901)—to name only a few.

[11]W. B. Worthen Co. v. Kavanaugh, 295 U. S. 56, 55 S. Ct. 555, 79 L. ed. 1298 (1935). See also Treigle v. Acme Homestead Assn., 297 U. S. 189, 56 S. Ct. 408, 80 L. ed. 575 (1936), holding invalid a Louisiana law, undertaking to alter the contracts of building and loan associations.

[12]291 U. S. 502, 54 S. Ct. 505, 78 L. ed. 940 (1933).

[13]Brass v. North Dakota, 153 U. S. 391, 14 S. Ct. 857, 38 L. ed. 757 (1894) (fixing charges of grain elevators where there was no monopoly); German Alliance Insurance Co. v. Lewis, 233 U. S. 389, 34 S. Ct. 612, 58 L. ed. 1011 (1914) (fixing fire insurance rates); Block v. Hirsh, 256 U. S. 135, 41 S. Ct. 458, 65 L. ed. 865 (1921) (fixing rents); Highland v. Russell Car & Snow Plow Co., 279 U. S. 253, 49 S. Ct. 314, 73 L. ed. 688 (1929) (fixing price of coal during war time); Stephenson v. Binford, 287 U. S. 251, 53 S. Ct. 181, 77 L. ed. 288 (1932) (fixing rates for contract haulers as well as common carriers).

court had, however, in previous cases, attempted to employ the concept of a business "affected with a public interest," and to hold that only such businesses could be subjected to price control. The term "business affected with a public interest" had come into the law quite by accident in 1877.[14] It had no meaning then and in half a century of heroic effort the court had not succeeded in giving it a workable definition. *Nebbia v. New York* discarded the impractical phrase. Its passing gives no cause for grief.

THE GOLD CLAUSE CASES

The Gold Clause Cases[15] are indeed subject to criticism, but not because they go too far; rather, because they do not go far enough. In holding that the government may nullify the gold clauses of *private* obligations, the court pointed out that the power of Congress to fix the value of the dollar and control the currency necessarily includes power to prevent obstruction to the free flow of that currency, and that no private contract may be permitted to prevent the exercise of that power. For the court to have ruled otherwise would have been to nullify the plainly expressed power. No cases can be cited which these cases overrule; on the contrary, the precedents are all in accord with the result reached.[16]

As to government obligations, however, the court in the gold cases refused to follow this reasoning, though it would seem to be as valid here as in the railroad case. If the gold obligations obstructed the free flow of the new currency, Congress by a non-discriminatory measure should have been allowed to include government obligations with all others in providing for payment in the new currency. The court, however, held the opposite, with the result that while all other obligations were now payable in the new currency, government bonds were payable in the old. The staggering burden this would saddle upon the government apparently gave the majority of the court pause, and they held that though the government had breached the contract, the bondholder could not recover because he had not proved damages. The government was branded a defaulter for failing to pay its just debts, and in the next breath

[14]The term was first presented to the court in argument of counsel in Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77 (1877), and casually taken over by the court. It was supposedly based on a fragmentary statement of Lord Hale's. For the interesting story of how this phrase was transferred from Hale's forgotten little book to the Fourteenth Amendment of the U. S. Constitution, see Walton Hamilton, *Affectation With a Public Interest,* 39 YALE L. J. 1089.

[15]Norman v. Baltimore & Ohio Railroad Co., 294 U. S. 240, 55 S. Ct. 407, 79 L. ed. 885 (1935); Perry v. United States, 294 U. S. 330, 55 S. Ct. 432, 79 L. ed. 912 (1935).

[16]The Legal Tender Cases, 12 Wall. 457, 20 L. ed. 287 (1871): Juilliard v. Greenman, 110 U. S. 421, 4 S. Ct. 122, 28 L. ed. 204 (1884); Veazie Bank v. Fenno, 8 Wall. 533, 19 L. ed. 482 (1869).

the bondholder, seeking to collect this just debt, was charged with seeking "unjust enrichment"!

This has been criticized,[17] but not from Mr. Sampson's point of view. Indeed, it is not clear what his point is. He speaks darkly of the moral laxity and even moral chaos which the decision supposedly caused, about which I happily know nothing. Be that as it may, we are not here discussing theology or morals, but constitutional law. Constitutionally, there is no basis in precedent or in principle for denying to Congress the power to abrogate gold clauses.

TVA

It is no doubt true that TVA represents a tremendous expansion of government ownership and operation of industry—socialism, if you will. Whether this is a good thing or a bad thing is debatable and debated. But it is a question upon which we must make up our own minds; the Framers did not settle it for us. Americans have a weakness for assuming that any strong beliefs they may hold, whether on legal, political, economic or even religious questions, are certainly embodied in the Constitution, and that the opposing view is "unconstitutional." Socialism is a Bad Thing; *ergo*, it is unconstitutional. The fact that all the decisions of the Supreme Court are to the contrary[18] is apparently immaterial.

Shocking as it may seem to the Mark Hanna school of politics, the Framers did not write any particular economic philosophy into the Constitution—least of all *laissez faire* individualism, which was still *in ovo*, and did not come into its own until, say, 1830,[19] and which found no support in the United States Supreme Court until the 1890's.

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[17]See, for example, Dickinson, *The Gold Decisions*, 83 U. OF PA. L. REV. 715.

[18]Ashwander v. TVA, 297 U. S. 288, 56 S. Ct. 466, 80 L. ed. 688 (1936); Jones v. City of Portland, 245 U. S. 217, 38 S. Ct. 112, 62 L. ed. 252 (1917); Green v. Frazier, 253 U. S. 233, 40 S. Ct. 499, 64 L. ed. 878 (1920) (upholding North Dakota legislation providing for such enterprises as a state bank, state warehouse, elevator, flour mill system and state home-building project); Madera Water Works v. Madera, 228 U. S. 454, 33 S. Ct. 571, 57 L. ed. 915 (1913); Standard Oil Co. v. Lincoln, 275 U. S. 504, 48 S. Ct. 155, 72 L. ed. 395 (1926).

Taxes may be laid for "any purpose in which the state may engage and this covers almost any private business if the Legislature thinks the state's engagement in it will help the general public * * *." Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 43 S. Ct. 630, 67 L. ed. 1103 (1923).

"It is settled by unanimous decisions of this court that the due process clause does not prevent a state or city from engaging in the business of supplying its inhabitants with articles in general use, when it is believed that they cannot be secured at reasonable prices from the private dealers." Brandeis, J., dissenting in New State Ice Co. v. Liebmann, 285 U. S. 262, 52 S. Ct. 371, 76 L. ed. 747 (1932).

The Framers apparently felt that the Constitution gave the national government power even "to establish mercantile monopolies." BRANT, STORM OVER THE CONSTITUTION, 133. That the federal government build dams at Muscle Shoals to control the Tennessee River was urged more than a hundred years ago by John C. Calhoun.

[19]The year of the repeal of the Corn Laws, as good an arbitrary date as any to mark the acceptance of *laissez faire* economics in England.

In the words of the Mississippi Supreme Court: "The due process provisions of our constitutions do not enact Adam Smith's concept of the negative state, one of the main junctions of which would be to stand aloof from intervention in the social and econmoic life of its citizens. This concept of the state was probably acted upon in the early history of this country but has long since been discarded * * *."[20]

The assumption that the TVA program is not really a defense measure, to create power and manufacture nitrates, but is purely a plan to socialize the domestic electric power business, should certainly be silenced today, when TVA's contributions to national defense and to navigation are indisputable. True, the generation and distribution of electric power is also a large aspect of the program, but the very nature of the task calls for a combination of these functions; they cannot be separated.

That the sale of the electric power generated by the dams involves competition with privately owned utility companies raises no constitutional issue. In spite of much wishful thinking, there is no constitutional protection to a business against competition. On the contrary, business men themselves do much talking in favor of a competitive system. That the competition comes from a government-owned business is immaterial. Government may compete with private industry, and may make full use of its sovereign powers (*e. g.*, taxation) to undersell and ruin the private industry. The Constitution does not prevent it.[21]

Whether government should use this power to ruin private industry is a question of policy to be determined at the polls. If opponents of such government operations cannot win the electorate to their viewpoint, they must not scold the courts for refusing to interfere. The Constitution does not empower the courts to do so.

REGULATION OF WAGES

"Until the advent of the present *(sic)* 'liberal court,' " we are told, "wage-fixing by government boards, commissions and bureaus had always been held unconstitutional."

Always? Well, to be exact, from 1923 to 1937. In 1923, in *Adkins v. Children's Hospital*,[22] the court by a 5-3 decision (practically 5-4) held unconstitutional a District of Columbia act providing for minimum wages for women. There was no precedent for such a decision. Chief Justice Taft, conservative as he was, dissented, saying, "It is not the function of this court to hold congressional acts invalid simply

[20]Albritton v. City of Winona (Miss.) 178 So. 799 (1938).

[21]Puget Sound Power & Light Co. v. Seattle, 291 U. S. 619, 54 S. Ct. 542, 78 L. ed. 1025 (1934).

[22]Adkins v. Children's Hospital, 261 U. S. 525, 43 S. Ct. 394, 67 L. ed. 785 (1923).

because they are passed to carry out economic views which the court believes to be unwise and unsound."

The easy assumption that Mr. Justice Sutherland, speaking for the majority, spoke with the voice of the Fathers, can in this instance be specifically disproved. The Fathers had no objection to price fixing. Most of the original thirteen states passed laws fixing the prices of various commodities.[23] Indeed, "due process" to the Fathers involved no substantive restrictions at all, but meant merely "process,"—procedure.[24]

Mr. Justice Sutherland's reasoning in the *Adkins* case was brilliantly and mercilessly demolished by Thomas Reed Powell. I quote only one sentence from his conclusion: "As a flagrant instance of insufficient reasons and of a judgment widely regarded as an indefensible judgment, the minimum wage decision has few, if any, rivals."[25] This was essentially the verdict of other commentators on the decision, including Edward S. Corwin, Edwin Borchard, C. G. Haines, and F. B. Sayre.[26]

When the "present liberal court" (meaning the not-so-liberal court of 1937) overruled this judicial misfit,[27] it was not violating the Constitution, but was healing a violation done to it by Mr. Justice Sutherland and his conservative associates.

SALARY TAX CASES

In 1939, the court held that a state may collect income tax on the salary of a federal employe[28]—overruling *Collector v. Day*.[29] The reasoning of the court was that such a tax is not a burden on the federal government. The same reasoning applies to federal taxation of state employes. The decision is denounced, on the ground that it "nonchalantly overrules a constitutional principle firmly established by former decisions for a century and a half." The reply can be brief:

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[23]As late as 1841, the city of Mobile had an ordinance fixing the price of bread. This was held valid. Mobile v. Yuille, 3 Ala. 137, 36 Am. Dec. 441 (1841). It is interesting to note that this case was quoted with approval in Munn v. Illinois, *supra*, note 14. The court in the Munn case pointed out that "it has been customary in England since time immemorial, and in this country from its colonization, to regulate ferries, common carriers, hackmen, bakers, millers, warfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for the services rendered, accommodations furnished, and articles sold."

[24]For references to some of the immense literature on this change of meaning of "due process," see Commager, *Constitutional History and the Higher Law*, in THE CONSTITUTION RECONSIDERED, 225 at 231.

[25]Powell, *The Judiciality of Minimum Wage Legislation* (1924) 37 HARV. L. REV. 545.

[26]Articles by these and other writers are collected in a booklet entitled THE SUPREME COURT AND MINIMUM WAGE LEGISLATION (1925) compiled by the National Consumers League.

[27]West Hotel Co. v. Parrish, 300 U. S. 379, 57 S. Ct. 578, 81 L. ed. 703 (1937).

[28]Graves v. New York *ex rel. O'Keefe*, 306 U. S. 466, 59 S. Ct. 595, 83 L. ed. 927, 120 A. L. R. 1466 (1939).

[29]11 Wall. 113, 20 L. ed. 122 (1871).

1. This seems to carry the reverence for precedent to the ultimate —good or bad, a precedent must never be overruled.

2. That the court adopted the new rule "nonchalantly" is belied by the cautious progress of the decisions.[30]

3. The "century and a half" of precedent dates from 1871. There was no basis for *Collector v. Day* in prior decisions.

Collector v. Day rested on the ground that an income tax on the salary of a government employe is a tax on that government. The *O'Keefe* case, overruling this, holds that the likelihood of the burden of such a tax being passed on to the employer-government is too remote. As a state employe, I can ruefully testify to the correctness of the newer rule. My federal income tax comes out of my pocket; I have not found a way to load the burden on the State of Colorado. The present rule is all too correct. I know.

THE SALES AND USE TAX CASES

Very important cases in this field have been decided in the last few years.[31] They involve economic and legal considerations too complex to discuss in this cursory article. In general, the justification for permitting states in some instance to tax sales of goods brought in from other states is to prevent discrimination against local sales. It is not yet clear how far the states may go in applying such taxes. The court in the *Berwind-White* case felt that it was not overruling prior cases, though admitting that prior dicta were *contra*. I am inclined to agree with Mr. Sampson; it is difficult to reconcile the case with some prior decisions.

But this does not mean the case is wrong. The court had already held that a compensating use tax could be applied to such sales.[32] To deny that the same objective can be accomplished by a sales tax would involve a mere technicality of draftsmanship, rather than any great constitutional principle.

The applicability of modern sales taxes to interstate sales involves new and complex problems. It is naive to assume that the answers can

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[30]The evolution of the new rule can be traced through James v. Dravo Construction Co., 302 U. S. 134, 58 S. Ct. 208, 82 L. ed. 155 (1937); Silas Mason Co. v. State Tax Commission, 302 U. S. 186, 58 S. Ct. 233, 82 L. ed. 287 (1937); Helvering v. Bankline Oil Co., 303 U. S. 362, 58 S. Ct. 616, 82 L. ed. 897 (1938); Helvering v. Gerhardt, 304 U. S. 405, 58 S. Ct. 969, 82 L. ed. 1427 (1938).

[31]Henneford v. Silas Mason Co., 300 U. S. 577, 57 S. Ct. 524, 81 L. ed. 814 (1937); McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 60 S. Ct. 388, 84 L. ed. 565 (1940); Nelson v. Sears, Roebuck & Co., 312 U. S. 359, 61 S. Ct. 586, 85 L. ed. 622 (1941) and others. Of the many articles discussing the subject, see, among the latest: McNamara, *Jurisdictional and Interstate Commerce Problems in the Imposition of Excises on Sales* (1941) 8 LAW AND CONTEMPORARY PROBLEMS 482; Vaske, *Are You Selling in Foreign States?* (Aug., 1941) 19 TAXES 467.

[32]Henneford v. Silas Mason Co., *supra*, note 31.

be found by merely reading the Constitution. The answers must be worked out with only the broadest constitutional principles to guide the court. Probably any solution can be supported by appeal to precedents —and criticised by appeal to other precedents.

NLRB CASES

The line of cases involving the Labor Relations Act has, undoubtedly, extended the concept of interstate commerce further than had previously been conceived. But to say that these cases ignore well established precedents, and that by holding the plants of the Jones and Laughlin Steel Corporation to be in the stream of interstate commerce[33] the court "completely upset a long line of precedents, firmly established," is error. Erroneous also is the further statement that "prior to the National Labor Relations Board cases, the court had not permitted the federal government to intrude at all in commerce conducted wholly within state borders." Any law student could challenge these statements by pointing to the famous Shreveport rate case,[34] which permitted federal regulation of rates of a railroad line lying wholly within the State of Texas, on the ground that that line competed with an interstate line and regulation of the intrastate line was necessary for effective regulation of the interstate. The board of trade and stockyard cases[35] had permitted federal regulation of activities no less local than the steel industry on the ground that they were part of the "stream of commerce."

These concepts are not new. Perhaps the most important single purpose leading to the adoption of the Constitution was the creation of a federal government with power to control interstate commerce and prevent state barriers. True, the Framers did not think of the village blacksmith as being engaged in interstate commerce, but they emphatically did intend to give Congress control of "that commerce that concerns more states than one,"[36] and if the steel industry today is not a merely local activity conducted under the spreading chestnut tree, but is

[33]NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615, 81 L. ed. 893 (1937).

[34]234 U. S. 342, 34 S. Ct. 833, 58 L. ed. 1341 (1913). In accord: Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co., 257 U. S. 563, 48 S. Ct. 232, 66 L. ed. 371 (1922); Dayton-Goose Creek R. Co. v. United States, 263 U. S. 456, 44. S. Ct. 169, 68 L. ed. 388 (1924).

[35]Stafford v. Wallace, 258 U. S. 495, 42 S. Ct. 397, 66 L. ed. 735 (1922); Tagg Bros. & Moorhead v. United States, 280 U. S. 420, 50 S. Ct. 220, 74 L. ed. 524 (1930); Chicago Board of Trade v. Olson, 262 U. S. 1, 43 S. Ct. 470, 67 L. ed. 829 (1923).

[36]"The words *'among the several states'* distinguish between the commerce which concerns more states than one and that commerce which is confined within one state and does not affect other states." Hughes, J., in the Minnesota Rate Cases, 230 U. S. 352, 398, 33 S. Ct. 729, 57 L. ed. 1511 (1913) (italics added). The italicized phrase was first used by Marshall, C. J., in Gibbons v. Ogden, 9 Wheat. 1, 194-5, 6 L. ed. 23 (1824).

a great giant extending its ramifications beyond state lines, it is subject to federal regulation within the clear intent of the Constitution.

"We must bear in mind," said Alexander Hamilton, "that we are not to confine our view to the present period, but to look forward to remote futurity * * * Nothing, therefore, can be more fallacious, than to infer the extent of any power proper to be lodged in the national government, from an estimate of its immediate necessities. There ought to be a capacity to provide for future contingencies, as they may happen; and as these are illimitable in their nature, so it is impossible to limit that capacity."[37]

The prophetic words of Madison are also in point here: "If," he said, "the people should in future become more partial to the federal than to the state governments, the change can only result from such manifest and irresistible proofs of a better administration, as will overcome all their antecedent propensities. And in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due."[38]

THE AAA

The court in *Mulford v. Smith*[39] upheld the second AAA (1938), in fixing marketing quotas for tobacco. Mr. Sampson indicates his disapproval of the case, but his objections are addressed solely to the wisdom of the act. Constitutionally, no reason is pointed out why the court ought to have stricken the act down.

Careful analysis of the case would have revealed an argument, however. The result of the case is impossible to square with *Hammer v. Dagenhart*,[40] the famous child labor decision of 1918. There the court held that Congress could not prevent the interstate shipment of child-made goods, on the novel ground that the power to control interstate commerce did not give Congress power to prevent interstate transportation in order to reach evils occurring before the transportation (although it could do so to prevent evils occurring after transportation, as in the Mann Act). The AAA of 1938 prevented the interstate marketing of tobacco grown in excess of quota—a prior evil. The court upheld the AAA and gave *Hammer v. Dagenhart* the silent treatment. This indicated to students of constitutional law that *Hammer v. Dagenhart* was

[37]THE FEDERALIST, No. XXXIV.
[38]THE FEDERALIST, No. XLVI.
[39]307 U. S. 38, 59 S. Ct. 648, 83 L. ed. 1092 (1939).
[40]247 U. S. 251, 38 S. Ct. 529, 62 L. ed. 1101 (1918).

on the way out, and they were not surprised when, in 1941, in sustaining the Wage and Hour law, the court overruled *Hammer v. Dagenhart* expressly.[41]

Why Mr. Sampson neglects the Wage and Hour decision—one of the few important cases in which the present court has actually overruled an important precedent—I don't know.[42] We can take it that he disapproves. But *Hammer v. Dagenhart* was certainly wrong,[43] and the present court in overruling it was right.

CONCLUSION

Some of the cases criticized in the August DICTA involve no new law, overrule no prior cases, *e. g.*, the TVA and Gold Clause cases. In those the objection seems to be, not that the court has overthrown precedent, but that it has not. When the new decision is disliked, the court is scolded for overruling precedent, but when the old law is disliked, the court is criticized for following precedent.

Other decisions criticized involve the perpetual process of extension or redefinition of constitutional doctrine. They do not involve the overthrow of precedent, but merely illustrate that the interpretation of the broad language of the Constitution must be "adjusted to the various crises of human affairs." The cases specifically overruled consist mainly of two decisions of the ultra-conservative court of the previous generation, decisions wholly impossible to justify under the language of the Constitution. The court in recent years has restored in large measure the separation of the powers of the legislative, executive and judicial branches which the court during the preceding half century had gradually been usurping unto itself. It was the trend of decisions from 1890 to 1937 which did violence to the Constitution. In reversing that trend, the court has not deserted the Constitution but has returned to it.

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[41]United States v. Darby Lumber Co., 312 U. S. 100, 61 S. Ct. 451, 85 L. ed. 395 (1941).

[42]Also neglected, for some reason, is Erie Railroad v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. ed. 1188 (1937), overruling the hundred-year-old case of Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865 (1842). In Swift v. Tyson the court had usurped for the federal courts the power to declare their own common law, "a power not conferred by the Constitution, and in so doing (had) invaded rights reserved by the Constitution to the several states." JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY, 273.

[43]For criticisms of the case see Gordon, *The Child Labor Law Case* (1918) 32 HARV. L. REV. 45; Powell, *The Child Labor Law, the Tenth Amendment, and the Commerce Clause* (1918) 3 SO. L. Q. (now TULANE L. REV.) 175.