Charles Evans Hughes As Chief
Justice Of The United States
Supreme Court 1930 - 1940
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THESIS ABSTRACT

For

CHARLES EVANS HUGHES AS CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT, 1930-1940

By

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During his tenure as Chief Justice, Charles Evans Hughes was forced to lead his Court through one of the most critical periods of Court history. In this period, the Court judged state and national legislation which was passed to alleviate the unbalanced conditions resulting from a crucial depression. His decisions, whether liberal or conservative, were attacked by numerous Court critics.

The main purpose of this paper is to study the consistency of his philosophy and votes and his awareness of the economic and social conditions of the country. The decisions of the Court during his tenure fall into three major periods: the first from 1930 to 1935, the second from 1935 to 1937, and the third from 1937 to 1940. The Court, during the earliest period, seemed aware of national and state problems and it upheld price-fixing laws, mortgage moratorium laws, and the alteration of the gold content of the dollar. In general, both state and national emergency legislation was approved.

In the second period a reaction against the extensive controls placed on industry and agriculture seem evident, for

several major New Deal laws were declared unconstitutional. The third period was unanimously characterized by a liberal trend and all national legislation was upheld, including the controversial Wagner Act and the Social Security Laws.

From an examination of Hughes' early speeches and opinions, several major principles of his philosophy were evident. He believed in effective government, the right of government to regulate intrastate commerce when it directly affected interstate commerce, and the right of the states to experiment and regulate under the police power clause. He was deeply concerned about the rights of minorities and civil rights.

As an associate justice he had earned the title of a liberal "team work" judge, and the team-work tendency appears to be evident in his opinions as Chief Justice by his moderations and reason. During the first period he upheld social legislation on the emergency basis theory, and used the test of reasonableness and legitimate ends instead of the previous standard "affected with public interest" to uphold state regulations under the police power clause.

In the second period he led the Court in declaring unconstitutional the oil code provision of the National Recovery Act, which did not establish any standards by which the President could be guided. Congress had delegated its legislative function to the President, and a nearly unanimous Court held this act unconstitutional. The Court also unanimously declared the National Recovery Act invalid on the issue of undue delega-

tion of power to the President. Hughes stated further that the chicken business had such a remote effect on interstate commerce that it could not be regulated by the code authorities. The Chief Justice, concerned about the welfare of our country, made some decisions on the basis of the effect the laws would have United States citizens as a whole. The Gold Clause Cases are worthy examples of this action. The Chief Justice pointed out that "it would not require any acute analysis to disclose the dislocation of the economy if debtors were required to pay their debts at the rate of one dollar and sixty-nine cents and receive only a dollar value in taxes, rates, charges, and prices." The act was valid since the Constitution had given the government power over its monetary system. But being concerned about the precedents these decisions established, Hughes declared that the government's act of impairing its own obligation unconstitutional, but upheld the act on the fact that the plaintiffs could prove no loss. He joined the Court majority in declaring the Agricultural Adjustment Act unconstitutional; and although the principle that the government could tax for general welfare was maintained, the majority found the purchase of compliance "coercive."

The Court was divided in this period. In minority opinions Hughes maintained that industry must take care of its human wastage, that the federal government could extend bankruptcy relief to municipalities, and that the states had the right to protect its women from overreaching employers. The Court split three ways over the Guffey Coal Act. Hughes wrote

his moderate opinion holding that the tax on coal was a penalty and that a small group of employers and employees did not have the right to fix wages and hours for the entire industry, but he did maintain the right of the federal government to fix the price of coal at point of shipment under the interstate commerce clause. The conservative and liberal blocks in the Court wrote separate opinions and, since Hughes concurred in part with the conservatives, the bill was judged unconstitutional. The Court session closed with Hughes a little left of center in his views and opinions.

In the third period the Court was attacked by the administration. President Roosevelt proposed to pack the Court with as many as six new members. The plan was debated in Congress until after the close of the 1937 Court session and then the bill was defeated. The Court, by its decisions, supposedly responded to pressure and aided the bill's defeat.

The Chief Justice wrote few decisions in this period. Since the Court was unanimous in nine out of the fourteen cases presented, the opinions were assigned to other justices. However, two of the three controversial opinions were written by Hughes. By a divided vote the Court upheld the National Labor Relations Act, with the Chief Justice stating that Congress could regulate wide-spread manufacturing concerns since work stoppage within their plants would directly affect interstate commerce. The "affect and not the source" of injury determined federal power.

In the second case concerning the Washington Minimum Wage Law, his previous dissent established the ruling principle. Under their police powers Hughes decreed that the states were permitted to establish minimum wages for women. Finally, the Social Security Laws and old age pensions were upheld by Hughes. His votes in previous similar cases and his theory that "industry must care for its human wastage" foretold his vote in this instance.

From this time until Hughes' retirement nearly all federal regulation was upheld by the Court. The number of the conservative members was reduced by the resignation of Justice Van Devanter. The new appointee, Justice Black, voted consistently with the liberals.

The Chief Justice during his tenure was a true judicial statesman. His opinions in this period were consistent with his philosophy and the previous precedents established by him. He believed that changes and reforms should be carefully introduced and be the true remedies to eradicate the acknowledged evils. This belief, plus his principle that only good government was effective government, apparently guided his decisions. The development of his philosophy can be seen in the extension of the regulatory powers of the interstate commerce clause to industries completely within the state, and in the statement that the means employed by Congress in exercising power over interstate commerce may have the quality of police regulation.

Hughes believed in the stability of law and court decisions and his votes and opinions reflect a desire for progress without disrupting the country's stability or radically changing its form of government.

CHARLES EVANS HUGHES AS CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT, 1930-1940

By

PATRICIA BALTUTAT

A THESIS

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INTRODUCTION

"The man on the flying trapeze," "the corporation lawyer with a clouded view," "the radical governor," these and other titles more violent labeled Charles Evans Hughes as one of the most controversial figures on the Supreme Court bench for the last hundred years. Ever since he stepped into the limelight as counsel for the New York public utilities investigations in 1905, he had a constant influence on the American public. During the following thirty-five years he held a number of public offices.

As governor of New York he was considered a radical and as an associate justice on the Supreme Court he strengthened this opinion by voting with the other Court liberals. On the other hand, from 1924-1930 Hughes represented the large corporations before the Supreme Court and therefore was considered a conservative corporation lawyer. This fact, coupled with his appointment as Chief Justice by Herbert Hoover in 1930, caused the Senate to fear his influence upon the Court. When he was appointed, the Senate recorded twenty-six votes against his confirmation, and his liberalism as governor of New York and as an associate justice seemed to be forgotten. The opposition in the Senate considered only his last ten years as an apparent conservative.

The year 1930 was one of apprehension. Bankruptcy, widespread unemployment, and the beginnings of a general business

recession followed on the heels of the 1929 stock market crash. The recession deepened in the next few years into a depression of major size causing general indecision. The Supreme Court, composed of human beings rather than automatons, appeared to be sensitive to the changing economic and social conditions. The decisions in this period were for the most part liberal, allowing the government leeway to counteract the effects of recession. The Court was divided four against three after the appointments of Charles Evans Hughes and Owen J. Roberts. On the liberal side were Benjamin N. Cardozo, Louis D. Brandeis, and Harlan Fiske Stone. The conservatives were Willis Van Devanter, James Clark McReynolds, Pierce Butler, and George Sutherland. Hughes and Roberts were the middle-of-the-road justices with a number of both liberal and conservative votes for their record.

The opinions and votes of Chief Justice Hughes will be examined closely in this work to denote his position in the Court's reaction to the crises of the 'thirties, and to point out the development of his philosophy. He was fairly consistent in his votes and opinions, but as social and economic conditions changed his beliefs and philosophy did not remain static.

At first glance, three main periods of Hughes' tenure as Chief Justice are evident: the first from 1930 to 1935, the second from 1935 to 1937, and the third from 1937 to 1940. The Court, during the earliest period, seemed to be aware of the national and state problems. It upheld many of the laws which

fixed prices, established a moratorium on mortgages, and changed the gold content of the dollar. In general, both state and national emergency legislation was approved. In the second period a reaction against the extensive controls placed on industry and agriculture seemed evident, for several of the major New Deal laws were declared unconstitutional. The third period again was characterized by the liberal trend and the "green light" or "go-ahead sign" for the national government was seen in the upholding of the Wagner Act and social security legislation which were declared constitutional in divided decisions.

Under the exigencies of the time and the pressure of office, Chief Justice Hughes' interpretations tended to incorporate a more liberal philosophy. No longer bound in his decisions by precedent and tradition Hughes, as Chief Justice, often gave original opinions based on the exigencies of the time or the need of the people.

The consistency and the common-sense attitude of Chief Justice Hughes will be emphasized. The fact that he can neither be labeled "liberal" nor "conservative" should not be a criticism of him. He carefully and guardedly applied constitutional principles to the new and radical laws; some were acceptables or had to be changed and the remainder had to be barred from any future enforcement. According to Hughes growth is progress, but constitutional law demanded that change and form should be introduced gradually rather than abruptly.

ANNOTATED BIBLIOGRAPHY

The purpose of this paper was to examine Chief Justice Hughes' philosophy and the consistency of his votes and opinions. Three books were used for biographical background.

One was Our Eleven Chief Justices, by Kenneth Bernard Umbreit (New York: Harper and Brothers Publishers, 1938. pp. 451-500), a brief well-written account of Hughes' life, mentioning the major decisions in his judicial career.

Another was Charles E. Hughes, The Judicial Statesman, by William L. Ransom (New York: E. P. Dutton and Company, 1916. 353 pp.). Ransom analyzed the major opinions of Hughes as associate justice, stressing the relation between his previous experience as governor and the statements found in the opinions.

A great deal of material in the autobiography, Addresses and Papers of Charles Evans Hughes, 1906-1908 (With an Introduction by Jacob Gould Schurman, New York: G. P. Putnam's Sons, 1908. 289 pp.), was used in the paper to illustrate the Chief Justice's philosophy and attitude towards reforms and the interstate commerce clause. The book contained the major speeches made by Hughes as governor. The introduction by Schurman was a well-written evaluation of Hughes' life, philosophy, and policies by a contemporary and friend.

There are a number of books written on the Supreme Court which discuss the Hughes Court. Robert A. Carr's book, Democracy

and The Supreme Court (Norman, Okla.: University of Oklahoma Press, 1936. 142 pp.), was a thorough analysis of the 1935-1936 decisions. He criticised the inconsistent reasoning of the justices and analyzed the basic principles involved in each case.

The book, Lions Under the Throne, by Charles P. Curtis, Jr. (New York: Houghton Mifflin Company, 1947. 368 pp.), was a critical analysis of the Court's action. The book was of value to the writer as an example of the attitude and the reasoning of the Court critics.

Another highly critical book which censured the justices on the Hughes Court was The Nine Old Men, by Drew Pearson and Robert S. Allen (New York: Doubleday Doran and Company, 1937. 325 pp.). The chapter on Hughes recounted his background and interpreted his decisions as sweeping from liberalism to conservatism and back again as the President's pressure on the Court increased. The essential facts were accurate but the presentation was highly prejudiced.

Several books were written as an answer to the criticism of the Court. David Lawrence in his Nine Honest Men (New York: D. Appleton-Century Company, 1936. 164 pp.), and in his Supreme Court or Political Puppets? (New York: D. Appleton-Century Company, 1937. 60 pp.), writes a highly favorable account of the justices' lives, justifies their decisions, and criticises the President's action. His tendency is to oversimplify the difficult legal questions.

Since the paper was begun two major works on Charles Evans Hughes have been published. Samuel Hendel in his book, Charles Evans Hughes and the Supreme Court (New York: King's Crown Press, 1951. 337 pp.), presents a well-reasoned study of Hughes' opinions in both periods of his judicial career. He stresses the legal theory and analyzes Hughes' opinions and reasoning. His conclusion, unlike that of this paper, is that Hughes was simply swept along with the tide in the later years of his Chief Justiceship.

The second book was Charles E. Hughes, by Merlo J. Pusey (Two Volumes, I & II, New York: The Macmillan Company, 1951. 829 pp.). It is an extremely well-written biography including notes on interviews with the retired Chief Justice, and some of his private notes and letters. Pusey discusses some decisions at length and mentions others without comment. The book is chiefly biographical and discusses the Court decisions from that aspect.

CHAPTER I

THE EARLY ERA

When Charles Evans Hughes accepted his appointment as Chief Justice of the United States Supreme Court, he brought to the Court a wealth of rich and varied experience in the fields of administration and law. His background was humble but deeply influential in forming his character and philosophy. He was born in Glen Falls, New York, in 1862. His father was a Baptist minister and his mother was a former school teacher. Young Charles was a scholarly, precocious child and his early training by his parents served him in good stead in later years. He was admitted to Madison College at the age of fourteen, and two years later he transferred to Brown University. At nineteen he graduated after having been elected to Phi Beta Kappa. For financial reasons he was compelled to teach for a year before continuing his studies in law at Columbia Law School. He graduated with highest honors in 1884 and accepted a position with the law firm of Chamberlain, Carter, and Hornblower. A few years later he became a partner of the firm. From this time until 1905 Mr. Hughes lectured at both Cornell and New York Law School.

He became publicly prominent after he served as counsel for the Stevens Committee established to investigate gas and electric rates in the state of New York. His careful and thorough report, exposing the practices of the utilities of

basing their valuation on water stocks, caused a reduction of rates for private consumers from one dollar to eighty cents per thousand cubic feet, and saved New York City over $8,000 for city street lighting alone. His outstanding work in this investigation made him the natural choice for counsel for the Armstrong investigation of insurance rates. During the Stevens investigations he asserted that a public franchise was a public trust and that duties of reasonable, impartial, and adequate service are correlative to the privileges granted. In the Armstrong investigations he found nepotism, irregular accounting practices, and unusually high salaried officials. Upon completion of this investigation he asserted that: "No tendency in modern financial conditions has created more widespread apprehension than the tendency to vast combinations of capital and assets."[1] From examining insurance companies' practices of granting large bonuses and high commissions for overseas insurance policies, he was convinced that after companies attain a certain size a further increase results in inefficiency and unwarranted expense.

In his reports he advocated certain reforms which the New York legislature made effective in laws. He favored regulation of public utilities and monopolies but only after full, fair, and impartial investigations. A commission to conduct these investigations and to regulate and impose fair rates for

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[1]Charles E. Hughes, Addresses and Papers of Charles Evans Hughes, 1906-1908, (With an Introduction by Jacob Gould Schurman), New York: G. P. Putnams & Sons, 1916. p. 385.

public utilities was recommended by Hughes at this time.

Capitalizing on his popularity and his reputation as a reformer, the Republicans nominated him for governor of New York in 1906. As governor, he was both a reformer and a radical yet he maintained an honest, efficient, unbossed administration, ignoring party policy and pleas for patronage. He urged the legislature to pass a law regulating public utilities and establishing a public utility commission. A workingman's compensation law and a child labor law were also enacted under his direction.[2] His impartiality and his justice were shown when the legislature proceeded to pass a law regulating subway fares. He vetoed this bill, stating in the accompanying message that he believed in the principle of the law but felt that insufficient investigation had preceded its passage. Since a commission had been established to investigate and regulate fares, he felt that the commission should be allowed to act.[3]

Both Democrats and Republicans alike praised his appointment as associate justice to the Supreme Court in 1910. His thoroughness and impartiality were excellent qualities in a supreme arbitrator. Serving only five years, he acquired the name of a "team-work judge." He voted with the liberals fifty-one times and with the conservatives only ten.[4]

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[2]Charles E. Hughes, Addresses and Papers of Charles Evans Hughes, 1906-1908. Introduction, pp. vii-xxxviii.

[3]Ibid., p. 147.

[4]William L. Ransom, Charles E. Hughes, The Statesman, As Shown in the Opinions of the Jurist, New York: E. P. Dutton and Company, 1916. p. 10.

Several important principles were stated by him in his opinions from 1910-1915. He condemned a state statute which enforced voluntary servitude.[5] The law stated that if a person entered into a contract and received payment in advance for the work he committed, it was a criminal offense if he broke that contract. Justice Holmes maintained that the state had a right to legislate in this manner, but Hughes contended there was no more important concern than the freedom of labor to our "nation's well being." Liberty of contract, according to Hughes, was limited and governed by the test of reasonableness. The legislature might use wide discretion in promoting the health and the safety of laborers. It might even protect one party of a contract against himself when an inequality in employee-employer relationship exists. The governing principle was "where there is a reasonable relation to an object within the governmental authority, the exercise of legislative discretion is not subject to judicial review."

His liberality is well illustrated in his opinions in which he asserted that if the ends were legitimate and the means reasonably adapted to these ends, the laws would be upheld whatever their adverse effect might be on innocent behavior. He contended that the legislatures were entitled to their own judgment when the effects of the law were "debatable."[6]

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[5] Bailey v. Alabama, 219 U.S. 219 (1911).

[6] Price v. Illinois, 238 U.S. 44 (1915).

This liberal thought guided his opinions concerning state and federal legislation. He upheld the right of California to limit women's hours of work in certain establishments, stating that the legislature may classify and limit and apply restrictions where the need is greatest.[7]

Firmly believing in states' rights, he allowed the states a great deal of latitude under the police power clause, feeling that experimentation, regulation, and social legislation were appropriate subjects of the states' police power. He consistently voted to uphold the rights of labor and all minorities.[8]

When the question of the division of state and national power arose, Hughes generally acted upon the principle that local governments govern best. Still, he asserted that: "If .....the power of states are inadequate to deal with a subject hitherto retained in their keeping, and if the people as a whole demand the assumption of a power by the federal government, the people will provide the assumption of that power."[9]

He made this principle effective in two exceedingly important opinions in this period. When a conflict between state and national power arose, he maintained the supremacy of

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[7] Miller v. Wilson, 236 U.S. 373.

[8] Kenneth Umbreit, Our Eleven Chief Justices, New York: Harper and Brothers Publishers, 1938. pp. 451-500.

[9] Merlo J. Pusey, Charles E. Hughes, Two Volumes, I & II, New York: The Macmillan Company, 1951. Vol I, p. 215.

national power over state power on subject matter over which both held mutual jurisdiction.

In the Minnesota Rate Cases[10] he stated that the authority of Congress extends to every part of interstate commerce and to every instrumentality or agency by which it is carried on; the full control by Congress of subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. He denied the nation the right to deal with the internal concerns of the state as such, but maintained that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidently controls the latter. He stated that: "This conclusion necessarily results from the supremacy of the national power within its appointed sphere."

In the Shreveport Cases[11] the states challenged the dominance of federal power over state power. The state had established low rates on intrastate commerce, and on such a basis in relation to interstate rates as to inflict injury upon interstate commerce and in violation of the regulative rules declared by Congress as to interstate transportation. Hughes declared this action unconstitutional, stating:

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[10] 234 U. S. 342

[11] 234 U. S. 364

> "(Congress') authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hinderance. As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of interstate commerce shall not be used in such a manner as to cripple, retard, or destroy it."

Several of his statements in these decisions, as well as in his speeches before the New York Bar Association, were a forewarning of his attitude towards national power. He contended that regulations required in the exercise of the judgment committed to Congress for the protection of interstate commerce cannot be made nugatory by the mere comingling of interstate and intrastate transactions. Thus, from his opinions and speeches a belief in the necessity of extending national power in the future is evident.

Hughes closed his career as associate justice when he resigned to run for President as the Republican candidate in 1916. He lost the election and returned to private practice until President Harding appointed him Secretary of State. In 1925, he resigned when he was called upon to serve as a member of the Permanent Court of International Justice at The Hague. He was serving in this capacity when called upon to lead the highest Court in the United States through a most important and critical period.

CHAPTER II

THE OPINIONS OF CHIEF JUSTICE HUGHES BETWEEN 1930 AND 1935

"We may accomplish needed reforms by making our institutions work."

-- Charles Evans Hughes[1]

Charles Evans Hughes, the Chief Justice of the United States Supreme Court between the years 1930-1941, guided his Court through one of the most critical periods in constitutional history. He ascended to the Court bench following a barrage of criticism from the opposition group in the Senate, which lasted throughout two-thirds of his tenure.[2]

His appointment as Chief Justice in 1930 by President Hoover caused a protest movement in the Senate. Senator Norris, leader of the opposition to his nomination, stated that "no man in public life so exemplifies the influence of powerful combinations in the political and financial world as does Mr. Hughes.[3] Senator Borah questioned, "when in the past sixteen years has Mr. Hughes not appeared for organized wealth in conflict with the public and public interests?"[4] Hughes' "lack of sensibility in accepting a political nomination and leaving the Court bench" was criticized by Senator Glass.[5] The Supreme

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[1]Charles E. Hughes, Addresses and Papers of Charles Evans Hughes, 1906-1908. p. 62.

[2]Merlo J. Pusey, Charles E. Hughes. Vol I, p. 218.

[3]Congressional Record, Vol 72, 1930. p. 3372.

[4]Ibid., pp. 3372-73.

[5]Ibid., pp. 3448-51.

Court nominee was opposed because he had close relationship to "big money,"[6] because as Secretary of State he "failed to condemn the riot of corruption about him,"[7] and because "he agreed in the Harding Disarmament Conference to sink the greatest battleship fleet America ever had against the best interests of America."[8]

However, the measure of Hughes, the man, is not difficult to resolve for his career is marked by efficiency, integrity, and impartiality.[9] Hughes' liberalism or conservatism is merely a matter of degree, for his philosophy of government developed at the same time that industrialism evolved, and the subsequent events traced a pattern of national social philosophy in transition.[10]

The 1930-40 Court decided a number of vital cases in one of the most critical periods in the history of the Court and the country.[11] Many precedents established in these cases are comparable in importance only to those established by Chief Justice Marshall.[12]

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[6] Congressional Record, Vol 72, 1930. pp. 3564-81.

[7] Ibid., pp. 3588-89.

[8] Ibid., pp. 3589-90.

[9] Merlo J. Pusey, Charles E. Hughes. Vol I, p. 219.

[10] Samuel Hendel, Charles Evans Hughes and the Supreme Court, New York: King's Crown Press, 1951. p. 278.

[11] Kenneth Umbreit, Our Eleven Chief Justices. pp. 451-500.

[12] Ibid., Samuel Hendel. p. 280.

The Court was faced with judging popular laws which apparently had alleviated distressed conditions in the country. The period from 1930 to 1937 was one of economic, social, and constitutional crises. Three stages in the crises can be traced, which a student of history might term the liberal period, the reactionary period, and the period of enlightenment. The first stage was keynoted by the enlarging of the state and federal powers to meet the crucial needs of the depression. The subject-matter of the first of a series of major decisions was the power of the state and federal governments to tax. The Chief Justice directed the extension of the taxing power to new and heretofore untaxable fields.

The censured Missouri v. Gehner[13] tax decision placed the Chief Justice alone on the fulcrum between opposing economic philosophies. Voting with the majority but not concurring in their opinion, he simply allowed the established precedents to rule. The issue concerned the taxability of an entrepeneur's portfolio which included government bonds. The majority held that "neither ingenuity in calculation nor form of words in state enactments can deprive the owner of the tax exemption established for the benefit of the United States." The minority group, led by Justice Stone, expressed their belief that the majority opinion opened a "new and hitherto unsuspected field of operation for the immunity from taxation," to be enjoyed by

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[13] 281 U.S. 313.

the owners of state and federal securities. Both views deviated from the established precedent and apparently Hughes found the extremes in the opinions incompatible with his more moderate reasoning. This decision, later criticised as an illustration of Hughes' die-hard conservatism, was favorably received by many at this time.

Prosperity had recently ended and a financial crisis faced the country, with unemployment steadily mounting and production falling off sharply. Still the business leaders were not unduly apprehensive and firmly believed that the fundamental economic conditions were sound. The financial wizards and economic experts loudly and confidently stated that all the country needed was "optimism, courageous use of credit, and increased spending as the ingredients for a generous dose of common sense needed by victims of pessimistic whooping cough."[14] The leading bankers of the country were confident that the world was "passing through a natural and normal reaction.....the return of the next wave of prosperity is.....inevitable and certain.....Slowly but surely the forces that bring revival are at work.....Until the revival comes the wisest course for business men is to adjust their operations to current conditions and prepare to take advantage of future opportunities when they appear, in full confidence that they must

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[14]"Clubbing the Wolf from the Nation's Door," The Literary Digest, November 19th, 1930. p. 11.

appear in the not too distant future."[15]

The solution to the economic recession, according to professors and students of economics, was comparatively simple: encourage the entrepeneurs to stimulate the country's economy by increasing production, purchases, and investments. The business men were still the leaders of the country, and the country felt they held the key to the unending prosperity promised in Hoover's administration. In the incipient stages of depression the social and economic thought had undergone little revision. Big business, praised and eulogized during the administrations of Harding, Coolidge, and Hoover, advocated the Spencerian laissez-faire policy of government. To have continual prosperity the government must keep business free from governmental restraint. The tax decision by the majority in the Gehner Case was consistent with the economic philosophy which then dominated the country.

Slowly a transition in economic and social philosophy occurred as the optimistic forecasts of the early 'thirties were proven false. The revival of normal business conditions appeared to be far in the future to the public in the critical years of 1932 and 1933. Business, free from governmental restraint, failed to meet the crisis. The burden on state and local financial resources increased greatly as unemployment grew. Relief for the needy and unemployed drained local re-

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[15]"Bankers' Slant on Trade," The Literary Digest, October 4, 1931. p. 45.

sources and forced a number of cities to the verge of bankruptcy. Their customary source, the property tax, had dwindled and become almost non-existent. Thus state and local governments were forced to seek new taxable sources.

The states and even Congress began plugging tax loopholes. Since state and local governments had financed their own extensive improvement projects with bond issues, a tax on the profits of the sale of such bonds would provide a rich source of income. The bonds themselves were not taxable, but Congress decided that the income derived from the sale of these bonds should be taxable.

New precedents were established in the tax cases brought before the Hughes Supreme Court between 1931-1935. Hughes illustrated in his opinions that need and injustice could cause his own views to be altered. As governor of New York he opposed the Federal Income Tax Law. Being concerned about state governments, he reaffirmed his belief in Marshall's doctrine that the power to tax is the power to destroy. His chief objection to the income tax law lay in the broad and general wording of the law. As he construed it, the federal government could tax that state's instrumentalities.

The tax evasion practice which resulted from the wealthy purchasing a large number of bonds in local bond issues created an obvious inequality. The injustice was greatly increased by the volume of bonds issued and the rate of turnover at this time. These facts undoubtedly caused the Chief Justice to shift the emphasis from the power of borrowing to the power of

taxing. As author of many opinions increasing the scope of both state and federal taxing power, he asserted that "the power to tax (was) no less essential than the power to borrow money," and he maintained that, in preserving the power to borrow, "it is not necessary to cripple the former (taxing power) by extending the constitutional exemption from taxation to those subjects which fall within the general application of non-discriminatory laws, and where no direct burden is laid upon the government instrumentalities and there is only a remote, if any, influence upon the exercise of the functions of government....." The non-taxability of the bonds referred only to the interest received from the bonds and not to the profits received from the sale of the bonds. "The tax fell on the ownership," he maintained, "regardless of the use or disposition of the security."[16]

In 1932 the copyright immunity fell beneath the clear, logical reasoning of the Chief Justice. The principle that gains from copyrights were exempt from taxation had been declared by the Supreme Court in previous years. The copyright owners held that they were instrumentalities of the federal government, and therefore the profits gained from them were tax exempt. Directly over-ruling an established precedent which upheld the owners' contention,[17] Hughes asserted that the prin-

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[16] Willcuts v. Bunn, 282 U.S. 216.

[17] Long v. Rockwood, 277 U.S. 142.

ciple of immunity from state taxation has its inherent limitations. It was aimed at the "protection of the operations of government, and the immunity does not extend to anything lying outside or beyond governmental functions and their exertions."[18] The governing principle became, under Hughes' leadership, "the power to tax exists as soon as the ownership is changed." The Chief Justice reasoned that the owner exercised the copyright exclusively for his own profit and used it as a basis for extensive and profitable enterprises. The operations of the owner in multiplying copies are not operations of government, and thus "a tax upon the gains derived from such operation is not a tax upon the exertion of any governmental function."

Repeatedly using the principle that taxing power exists when the ownership changes, Hughes stripped the right to the use of the immunity provision from a number of individuals who were using it to evade taxation. In the Indian Territory Oil Case he maintained that Indian oil was tax exempt only as long as the Indians held title to it.[19] The state could levy a non-discriminatory ad valorem tax on the oil once it was owned by others and co-mingled with taxable oil. He continued to narrow the immunity clause by stating, "the immunity as a government instrumentality inheres in its operation as such, and being for the protection of the government in its function extends no

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[18] Fox Film Corporation v. Doyle, 286 U.S. 132 (1932).

[19] Indian Territory Oil Company v. Board of Equalization, 288 U.S. 325 (1933).

no farther than was necessary for that purpose."

The Helvering v. Powers decision established a precedent which impaired the taxation immunity enjoyed by state government employees.[20] Chief Justice Hughes maintained that the function the individual performs determines his liability to taxation. The question arose when the federal government taxed the salaries of state employees appointed to operate a railway company. The state had created a commission to operate a private railroad in order to insure service to its communities. Hughes contended that the state commissioners were performing a non-governmental function and their salaries were taxable even though they were received from the state. He states his thesis thus: "Their compensations, whether paid out of the returns from business or otherwise, can have no quality, so far as the federal taxing power is concerned, superior to that of the enterprise in which the compensated service is rendered."

Hughes continued his liberal trend by upholding the extension of state powers. The public was troubled by the growing giantism of the corporations, especially chain stores and banks.[21] Through their legislatures they protested by passing laws limiting the size and number of chains and placing a special tax on them. The chains' ability to purchase in large quantities at a discounted price placed them in an advantageous position

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[20] 293 U.S. 214 (1934).

[21] "See Chains Killing Independent Banks," New York Times, May 24, 1930. p. 20, II.

in respect to the small independent retail dealer. The chain store units totaled only ten percent of the retail stores but their sales amounted to twenty-two percent of the total sales,[22] and the chain store movement was then only in its infantcy.

Statutes taxing the chain stores were upheld by the Supreme Court with Hughes voting with the majority in 1930. The Chief Justice concurred in Justice Roberts' opinion wherein he asserted that the requirement of the power of taxation must not deny equal protection of the laws, does not compel adoption of ironclad rule of equal taxation, nor prevent differences or discretion in selection of subjects or classification.[23] Furthermore, Roberts reiterated a principle enunciated by Hughes innumerable times, namely that "the tax statute is not arbitrary if discrimination is founded upon reasonable distinction or if any state of facts can be conceived to sustain it." The test of reasonableness and the reluctance to invalidate state legislation of a regulatory nature is Hughes' mark of liberality. The state could use its discretion in selecting and classifying subjects which it desired to regulate or tax, according to the Court's liberal majority. This principle will be used to uphold a great many state statutes in the following sessions of the Hughes Court, the most noted case being the Washington

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[22]Ray Westerfield, "The Rise of the Chain Store," Current History, December, 1931. p. 359.

[23]State Board of Tax Commissioners v. Jackson, 283 U.S. 527.

Minimum Wage Law.

Liberal votes upholding state and federal legislation were the most prominent feature of Hughes' action during the 1930-1935 period. An important case, which could be considered a precedent for his future opinion and vote in the Wagner Act, was decided during this period. Depression and unemployment had caused much restiveness among the people; and even before the stock market crash of 1929, a series of strikes failed as unions tried to gain their place in industry. With starvation, layoffs, and unemployment increasing, the companies waged a successful war against the growing trend towards unionism. Many companies initiated company unions which they could control without interference.

In 1930 the Texas & New Orleans Case brought before the Court the problem of company unions.[24] A railway company sought to replace the Brotherhood of Railway and Steamship Clerks union with their own company union, forcing the Brotherhood local to disband. Chief Justice Hughes, author of the opinion, vetoed this action with these words: "such collective action would be mockery if representation were made futile by interference with freedom of choice." He further asserted that Congress had the right to enact the prohibition against company unions and to take cognizance of actual conditions. Hughes stated: "We entertain no doubt of the constitutional authority

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[24] Texas & New Orleans R.R. v. Brotherhood of Railway & Steamship Clerks, 281 U.S. 548 (1930).

of Congress to enact the prohibition. The power to regulate commerce is the power to enact all appropriate legislation for its protection and advancement, to adopt measures to promote its growth and its safety, to foster, protect, and control and restrain."

Again and again Hughes is found upholding the right of employees to join unions for collective action in order to safeguard their proper interests. After reading a number of opinions concerning labor and unions written by Hughes, the conviction that the Chief Justice believed that the right of collective action by laborers was an inalienable right grows and becomes an almost certainty. The fact that the individual laborer was at a disadvantage, generally, when bargaining with an employer disturbed Hughes greatly, and he approved of Congressional action for providing laws which legalized labor unions. The echo of the following statement can be found in the Washington Minimum Wage opinion, the New York Minimum Wage dissent, and in the opinion upholding the Wagner Act: "Congress (is) entitled to take cognizance of actual conditions and to address itself to practicable measures."

The Texas & New Orleans decision is notable for two reasons. First, it established a precedent for the extension of the commerce clause to regulate the conditions of work to those employees not working directly on the railroads; for, while the railway clerks were a necessary part of the railway business, a work stoppage would effect the railroad operation

only indirectly. Second, this opinion is a good illustration of the Chief Justice's feeling towards unionization, for this decision definitely established the rights of railroad workers under the Railway Labor Act of 1926.

Having upheld federal and state taxing powers and labor rights, Hughes next upheld the right of Ohio to liberalize her supreme court in 1930.[25] During the last decade the states had extended their power and had entered into many fields of enterprise originally considered to be primarily the fields of private interests. Besides owning and operating utilities and other enterprises, the states had passed a great deal of social legislation in this period. With increasing frequency the state courts were declaring state legislation invalid. Thus the state of Ohio, to protect its laws and social projects, passed a measure requiring that a statute be upheld unless more than one judge dissented. Hughes believed in allowing a state a great deal of leeway in its legislative policies, as is shown in his statement upholding the law: "It is not for this Court to intervene to protect the citizens of the state from the consequences of its policy if the state has not disregarded the requirements of the Federal Constitution."

The Chief Justice was liberal towards state police powers as is shown by his many opinions upholding state regulation, but he would not permit this regulation to infringe upon

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[25] Ohio ex. rel. Wadsworth v. Zangerle, 281 U.S. 74.

civil rights. Truly a champion of civil rights and minority groups, he pointedly expressed his beliefs in the Near v. Minnesota decision,[26] which was presented to the Court in 1934. Minnesota had passed a law which provided for "the abatement as a public nuisance of a malicious, scandalous, and defamatory newspaper, magazine, or other periodical." In a series of articles The Saturday Press criticised the public officials of Minneapolis. As a result, the state supreme court ordered the newspaper to cease publishing.

The case was brought before the Supreme Court. Precedent was against the newspaper, but principle upheld its right to continue printing. In a previous case Chief Justice Taft had stated that it was "assumed that the freedom of speech and press was protected by the First Amendment and the due-process clause of the Fourteenth Amendment," but the Taft Court upheld the state's right to abridge the freedom of the press.[27] Even with precedent against him, Hughes declared the law invalid. When writing his opinion he reiterated the arguments used by Taft that liberty of speech and press was not an absolute right and a state could punish its abuse; but a previous restraint on a publication, he contended, would be a step to a complete "system of censorship." "Preliminary freedom," he stated, "does not depend on the proof of truth."

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[26] 283 U.S. 697.

[27] Gitlow v. New York, 268 U.S. 652.

After stating the constitutional principles which apply, Hughes continued by describing the conditions of his time, illustrating a definite awareness of public problems and needs. "While reckless assaults on public men and efforts to bring obloquy upon those who are endeavoring faithfully to discharge official duties, exert a baleful influence and deserve the severest condemnation of public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape."

Hughes had been a governor and Harding's Secretary of State, and his administrative experience may have dictated this decision and the following comments which are found in the opinion which was that of a true statesman. He stressed the need for a vigilant press with these words: "The administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, and the danger of its protection by unfaithful officials and the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasises the primary need of a vigilant and courageous press, especially in great cities." He noted that "miscreant purveyors of scandal do abuse the liberty of the press, but this fact does not make any less necessary the immunity of the press from previous restraint in dealing with official misconduct."

Included in this opinion is a statement of the pressure of conditions. Hughes speaks of "crime (growing) to most serious proportions and unfaithful officials and criminal alliances and official neglect." Malfeasance and corruption of office was not an uncommon issue with the people. Just a few years before, the Harding scandals had been disclosed and the rule of the gangster in large cities was a known fact. The Wickersham Report had just been published and the investigators found the largest number of crimes and the largest criminal population in New York, Los Angeles, Kansas City, Minneapolis, and Denver. Hughes was impressed by the report, for he publicly praised Wickersham's work at a professional dinner.

Also, the year 1930 was marked by the expose of Tammany Hall criminal hook-ups, and current newspapers, filled with "The Beer Gang Murder," indignantly criticised local officials, accusing them of political hook-ups for the protection of beer.[28] The Literary Digest carried an article entitled "The Nation Aroused to Smash the Racketeer."[29] These are the facts that are reflected in the "gag" law opinion which held that "even more serious public evil would be caused by authority to prevent publication."[30]

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[28]"New Jersey's Beer Gang Murder," The Literary Digest, October 1, 1930. p. 11.

[29]December 6, 1930. p. 1.

[30]Near v. Minnesota, 283 U.S. 697.

Hughes continued to defend the civil rights of the people in the Stromberg Case,[31] wherein the constitutional issue was difficult and many-sided. Hughes' opinion was definitely liberal. Miss Stromberg, a schoolteacher in California, taught communistic principles to children at a camp where the Red Flag was displayed every morning. This act was a violation of the California Red Flag Law. During the 'twenties the people feared any change in the fundamental structure of government, and thus a number of state laws prohibiting any socialistic or communistic teachings had been passed. Anti-socialist action was expressed in New York in 1927 by barring several elected socialist representatives from their seats in the state legislature. By 1930, with the increase of unemployment, labor union activity, social legislation demands, and increased activity by the communists, the "red scare" again flamed into burning issue.[32]

The first of the state laws prohibiting communistic teachings was questioned in the Stromberg Case in 1931, and raised two vital questions concerning the rights of the states and also the citizens. Hughes examined the general and ambiguous Red Flag Law and asserted that the state did not have the right to pass legislation that defined terms and limits so

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[31] Stromberg v. California, 283 U.S. 359 (1931).

[32] "Whalen's Red Data Sought by Capital," New York Times, May 6, 1930. p. 1.

indefinitely. He then proceeded to uphold the right of a citizen to advocate the peaceful overthrow of the government. The Chief Justice maintained that the California law prohibiting the display of the red flag was invalid under the Fourteenth Amendment "because (it was) so vague and indefinite as to permit punishment for the fair use of this opportunity, is repugnant to the guarantee of liberty contained in the Fourteenth Amendment." He considered the state court construction of the clause broad enough to include peaceful and orderly opposition to government by legal means and within constitutional limitations. "The maintenance of opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means.....is a fundamental principle of our constitutional system," he asserted in the concluding paragraph of his opinion.

Again in the Macintosh Case,[33] against popular sentiment, the Chief Justice upheld the rights of the minority, but this time the Court repudiated his leadership. In the close five-four decision the Chief Justice sided with the minority. The anti-foreign feeling was at its height during this period with various groups urging the restriction of immigration and the deportation of aliens, especially those who entered illegally.

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[33] United States v. Macintosh, 283 U.S. 605.

Cartoons pictured aliens as criminals and undesirables who stole good American-born workers' jobs.[34] Under this cloud of public opinion the case of Macintosh was presented to the Court. The principle in question was the right of an alien to qualify the clause in which he must promise to bear arms. Macintosh, a Baptist minister and a citizen of Canada, taught theology at Yale University. He desired to become a citizen but he felt that he could not promise to bear arms unless he felt the war was morally justified. The majority of the Court decided that Macintosh could not become a citizen if he so qualified his oath. The Court made the "duty of citizens to bear arms whenever necessity arose" a fundamental principle of the Constitution.

Hughes dissented with the three liberal members of the Court, stating that the Act of Congress was sufficiently vague that it did not require such a promise that the oath could not be qualified by supreme allegiance to the will of God. "There is abundant room for enforcing the requisite authority of the law as it is enacted.....without demanding that either citizens or applicants for citizenship shall assume by oath an obligation to regard allegiance to God as subordinate to allegiance to civil promise." He pointed out that deplorable conflicts arise from forcing such promises, and Congress had previously

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[34]"Keep American Jobs Safe for Americans," The Literary Digest, December 13, 1930. p. 11.

legislated in such a manner as to prevent clashes in relation to the requirement to bear arms. At the same Court session the decision in the Bland Case[35] was also handed down. The issue here was similar to the Macintosh Case and the divided Court again cast a five-four vote. Hughes was adding to his remarkable record of opinions and votes upholding the rights of minorities.

Liberalness keynoted most of the previous opinions Hughes had written with reference to the maladjusted conditions of the period. The next case, the Appalachian Coal Case,[36] illustrates Hughes' cognizance of the economic crisis as well. The coal industry was in serious difficulty in the 'thirties. Oil, gas, and electricity were becoming rivals to coal. The coal peak production year was in 1917 when 99 million tons had been produced. By 1929 the total had dropped to 74 million tons, and to 60 million tons in 1931. Coal employers were stating that they would have to close down operations unless they deflated the price of their commodity into line with other commodities. The reasons for this condition were explained thusly: The first serious clashes occurred with the decline of mining operations and an oversupply of labor when it was apparent that the coal industry was already over-developed. Thus some mines, from necessity, either had to close entirely or

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[35] United States v. Bland, 283 U.S. 359.

[36] Appalachian Coals, Inc. v. United States, 288 U.S. 344.

work for brief periods only. Then followed the economic depression and further development of the coal fields in Kentucky and West Virginia where low wages were paid to non-union workers, and thus other mine workers were unable to compete in the market.[37]

Besides these conditions of maladjustment, other inequalities began to enter the picture. The Literary Digest for June 22, 1932, carried an article describing the new situation thus: "The freight rate differential to Chicago was 40¢ in favor of southern Illinois mines against Kentucky. With reduction of $2.10 per day a base wage scale, coal men figure southern Illinois mines would sell large lump at $1.75 per ton. To meet this price in Chicago, Kentucky would have to offer its best coal at $1.35. Smaller sizes, lower grades, quoted at 80¢ to $1.00 at the Kentucky mines would have to take a similar 40¢ cut. Kentucky will lose its principal market, the midwest."[38]

These were the conditions against which the coal producers of Kentucky, Tennessee, Virginia, and West Virginia organized a sales agency as a defensive measure against the cut-throat competition that was developing in the northern areas. The price-fixing agreement was upheld in the lower courts, but when the Supreme Court reviewed the case Hughes, once again

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[37] "Markets, Not Wages, Will be the Real Issue at Coal Conference," Business Week, September 7, 1932. p. 7.

[38] "Coal Wage Settlement May Upset Important Market," The Literary Digest, June 22, 1932. p. 25.

the liberal, wrote the opinion stating: "When industry is grievously hurt, when the producing concerns fail, when unemployment mounts, and communities dependent on profitable production are prostrated, the wells of commerce go dry." He continued by contending that, as far as the decision of the lower courts was concerned, it was amply supported that the defendants were engaged in a fair and open endeavor to aid the industry in a measurable recovery from its present plight. "A co-operative enterprise, otherwise free from objection, which carries with it no monopolistic menace," he asserted, "is not to be condemned as an undue restraint merely because it may affect a change in market conditions, where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities."[39]

The principles that Hughes upheld in this decision were incorporated in the New Deal laws, and yet the Rooseveltian-inspired laws were deemed unconstitutional. This decision gives proof that Hughes was well aware of the need and plight of industry; and thus the invalidation of the New Deal statutes considering the Appalachian precedent may not have been a strictly conservative action.

Perhaps the best example of Hughes' so-called conservative tendency is the Benson Case.[40] Mixed with his liberal

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[39] Appalachian Coals, Inc. v. United States, 288 U.S. 344.

[40] Cromwell v. Benson, 285 U.S. 22.

opinions were a number of so-called conservative opinions and votes. The aforementioned liberal attitudes had not completely erased the picture of Hughes as a "corporation lawyer" from the minds of many. His action in the Benson Case explains partially the unpredictableness of votes and opinions in numerous cases. The award for injury under the Longshoremen's and Harbor Workers' Act was the immediate issue. Benson, the employer, contended that the defendant, Knudsen, was not in his employ at the time of the accident. He also contended that the compensation act was unconstitutional and violated the "due process" law of the Fifth Amendment.

The Chief Justice's opinion also maintained that Knudsen was not in Benson's employ at the time of the accident; thus the decision of the deputy commissioner was reversed and Knudsen did not receive the award. Hughes was criticised considerably for this opinion by the labor group. However, had they examined his past record they would have found that he, as governor of New York, had urged the passage of labor pension and compensation acts; and finally, as associate justice, he had denounced the invalidating of the Railroad Pension Act. Hughes was sympathetic towards labor, but his examination of the evidence in the Benson Case dictated the reversal of the award.

This case offers an interesting study of the Chief Justice's methods and the development of his philosophy of government. Under his direction and upon his recommendations the New York legislature created several administrative bodies to examine,

supervise, and establish rates for public utilities and insurance companies. The boards were to examine the facts and establish just rates without legislative action. Congress and other state legislatures found similar commissions invaluable, and in the following decade a large number of quasi-judicial and legislative boards were established. However, Hughes became concerned about this trend, believing that an unusual amount of authority was being delegated to these administrative boards; Congress and the state legislatures were permitting these boards to actually legislate, regulate, and judge. Fearing this trend, he issued his warning in the Benson Case.

In his opinion he upheld the right of the individual to appeal from the boards to the courts whenever a constitutional right is involved. He said: "In a case brought to enforce constitutional rights, federal judicial powers extend to independent determination of all questions necessary to enforce such rights." He refused to allow even a Congressional fact-finding tribunal to be supreme in all cases in the determination of facts. Hughes asserted that the argument that "the Congress constituted the deputy commissioner a fact-finding tribunal is unavailing as the contention makes the untenable assumption that the constitutional courts may be deprived in all cases of the determination of facts upon evidence even though a constitutional right may be involved."

This was a characteristic but futile gesture on the part of the Chief Justice. He attempted to protect the rights of

individuals from dictatorial boards, and in the same opinion issued a warning to Congress and the state legislatures of the latent dangers in their practices of delegating too much authority and power to semi-dependent boards. In following cases which treated with administrative boards, his opinion was quietly overruled. The reason for this action by the Court was apparently the number of cases which would be brought before the Supreme Court for review by dissatisfied litigants; the Court calendar would then be clogged, causing great delay and expense. The true remedy to the problem lay in the action of Congress, and the Court could not effectively solve it.

The second notable feature of this opinion was the questioning of the constitutional validity of the Longshoremen's Act. Benson had contended that the act was unconstitutional and violated the Fifth Amendment. Hughes side-stepped this issue by reiterating an often-used principle: "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is the cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

This principle was repeated numerous times in cases concerning state laws and especially in the T.V.A. Case. The Court employed it frequently but occasionally forgot to observe it in practice. The justice who employed this principle constantly was, by Hughes' own definition, a liberal. Chief Justice Hughes

reluctantly invalidated labor compensation and pension acts only if the law worked an obvious hardship on a certain group or was carelessly constructed.

Further evidence for the charge that Hughes was a "corporation lawyer" may be found in various Court cases after 1931. In United States v. Wells[41] the Chief Justice held that "the mere fact that death ensues shortly after a gift does not determine absolutely that it is contemplation of death within the statute taxing such transfers." He also stated that profit from minerals which were taken from leased state lands could not be taxed.[42] In the New State Ice Company v. Liebman decision[43] he voted with the majority in maintaining that the licensing of an ice business was unreasonable interference with private business.

These decisions, cited as examples, show Hughes' apparent tendency to guard property rights. As governor he proclaimed that the essence of democracy is that a man have opportunity for the exercising of his talent and should be secure in the results of his labor. His attitude towards property rights made the prediction of the vote in the Minnesota Moratorium Case uncertain.

Ever since the early 'twenties farm industry had been unstable. As foreign countries' economies began to collapse

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[41]282 U.S. 252.

[42]Burnet v. Coronado Oil & Gas Company, 285 U.S. 393.

[43]285 U.S. 262.

the agricultural market was flooded with products at low unprofitable prices. Russia, the United States' chief competitor, flooded the world market with wheat, apples, coal, and lumber, forcing the United States' products out of foreign markets and underselling them in their own home markets.[44]

The farmers had been entreated during World War I to expand production to aid the war effort. High profits and a ready market on the domestic and world fronts encouraged the purchasing of more land and farm equipment. Mortgages were placed on farms mainly for this purpose. The agricultural industry, an extremely competitive industry, was vulnerable to the slightest change in the country's economy; and by the time of the great depression farm prices had fallen sixty-three percent.[45]

Farm revolts and farm strikes filled the news as the number of foreclosures increased. Isolated bands of farmers forced the foreclosure sales to be held in the early morning, bid at ridiculously low figures for the property, and then deeded it back to the bankrupt farmer. One judge was hung by a group of angry farmers until he fainted because he forced foreclosure proceedings.[46] As the depression grew worse the

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[44]"Russia's Dumping War Challenge," The Literary Digest, October 11, 1930. p. 11.

[45]Samuel Hendel, Charles Evans Hughes. p. 172.

[46]"When the Farmers' Fury Explodes," The Literary Digest, January 21, 1933. p. 10.

farmers became increasingly more resentful.[47]

In April, 1933, Minnesota passed a mortgage moratorium which stated that an emergency existed and that the foreclosure of mortgages and execution sales might be postponed until May 1, 1935. The courts, when requested, could set a reasonable amount to be paid to cover interest, insurance, and taxes. Many states had already passed social legislation based on the emergency theory while the federal government sought to extend farm credit to the farmers. This attempt was called a "misfire" in a magazine article by Mark Rhea Byers.[48] The Farm Credit Administration designed a plan to take the worst of the mortgage load off the farmers' shoulders, but the banks refused to unload the mortgages at the scaled-down prices offered by the government commission. The farmers found this red tape too much, and in Wisconsin only four hundred committments were approved out of 2,800 applicants. The years of '33 and '34 could well be termed years of disaster even for the solvent farmers. Floods, drought, windstorms, and disease were the lot of all midwestern agriculturalists.

When the constitutionality of the Minnesota law was questioned before the Supreme Court it was held valid by a five-four vote, with Chief Justice Hughes joining the majority. The immediate question, it is true, was the Minnesota law, but

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[47]Samuel Hendel, Charles Evans Hughes and the Supreme Court. p. 162.

[48]Mark Rhea Byers, "Misfire," North American Review, Vol 236, 1933. p. 484.

a major underlying principle was the use of the "period of emergency" to justify passing the law. Recent state emergency legislation therefore was to be determined by this decision. Previously, the Court had asserted that emergency did not justify the passing of a wage and hours act for the Kansas railways.[49]

Hughes wrote the decision upholding the Minnesota law, stating that: "Emergency does not create power, nor does not increase granted power to diminish the restrictions imposed upon power granted or reserved."[50] He pointed out that the Constitution was adopted in a period of grave emergency and that its grants of power to the federal government and its limitations of the power of the states were determined in the light of emergency; "they were not altered by emergency." Having thus denied the right of use of emergency solely to increase the power of the state, Hughes saved the Minnesota law with this statement: "While emergency does not create power, emergency may furnish the occasion for the exercise of power....."

This viewpoint is also used in the N.R.A. decision one year later. Applying the theory that emergency may furnish the occasion for the exercise of power, Hughes upheld the Minnesota

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[49] Kansas Court of Industrial Relations v. Charles Wolff Packing Co., 262 U.S. 522.

[50] Home Building and Loan Association v. Blaisdell, 290 U.S. 398 (1934).

law. The theory, however, is not applicable to the federal law, and here the pressure of events, conditions, and public opinion is best demonstrated. Hughes continued examining states' power over contracts, maintaining that broad general clauses allowed the states to fill in the details; in his own words: "Where constitutional grants and limitations of power are set forth in general clauses which afford a broad outline, the process of construction is essential to fill in the details. This is true of the contract clause....."

Hughes also asserted that reasonableness controls the validity of the law. The states had the right to impair contract obligations if it for a temporary and appropriate end: "The question is not whether the legislative action affects contracts incidentally, or directly, or indirectly, but whether the legislation is addressed to a legitimate end, and the measures taken are reasonable and appropriate to that end....."

He mentioned the changing conditions which influence the decision and the necessity of a flexible Constitution. He pointed out that "it was manifest from this review of our decisions that there has been a growing appreciation of public needs, and the necessity of finding ground for a rational compromise between individual rights and public welfare." The Constitution must be interpreted in the light of changing conditions and the complexity of our growing society. Hughes expresses his social consciousness in this opinion to the extent conditions affect the Court's decisions, and may best be judged

by his own words: "The settlement of consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people, and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very basis of individual opportunity."

The Chief Justice felt that the pressure of a growing complex society justified the extension of state governmental power and the changed outlook. He stressed that where, in earlier days, it was thought that only "the concerns of individuals or of classes were involved, and that those of the state itself were touched only remotely, it has been found that the fundamental interests of the state are directly affected: and that the question is not merely that of one party of a contract as against another, but the use of reasonable means to safeguard the economic structure upon which all good depends."[51]

Hughes was aware of the economic situation and he felt it necessary to protect the very basis of individual opportunity. The small farm-owners were suffering most from foreclosure proceedings and the large insurance companies, banks, and wealthy individuals were the receivers of the foreclosed property. Hughes felt that every man should have the opportunity to exercise his talent, but the state must see that no one gets the

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[51] Ibid., 290 U.S. 398 (1934).

opportunity at the unjust expense of others. The Constitution was not to be interpreted in the light of its framers' actions in their own times and conditions, but with growing recognition of public needs and the relation of individual rights to public security. "Public security" was also a major factor at this time as the Court was forced to be cognizant of the farm revolts and the mob meetings of farmers to apply pressure on the legislators to pass the law. Hughes implied in his opinion that public security and the quelling of any movement towards anarchy was vastly more important than the effects of a temporary law. Here one of his favorite principles was apparently his guiding light: "We may accomplish needed reforms by making our institutions work and by effecting, in the light of the benefits thus secured, such changes as expediency may commend and deliberate judgment may approve."[52]

The Chief Justice placed major emphasis on the "temporary and conditional" nature of the law and upon the police power of the states to impair obligations of contract. The test of the law was its reasonableness. The states' police power and Hughes "reasonableness principle" was used in the Nebbia Milk Case,[53] which upheld state regulation of milk prices and was decided by the Court in a five-four vote with Hughes again

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[52]Charles E. Hughes, Addresses and Papers of Charles Evans Hughes, 1906-1908. p. 62.

[53]Nebbia v. New York, 291 U.S. 502 (1934).

joining the majority. "Police power," the "reasonableness of the law," and its "legitimate end" were the tests which justified the decision. Previously, "affected with public interest" governed the extent of state regulation. The criterion thus established by Hughes was accepted and applied in many cases.

These two decisions were extremely important to the nation as a whole since a large number of people felt that the New Deal laws would also be upheld on the "emergency" theory and under the test of "reasonableness." Nearly all magazine articles of a commentary or critical nature held the same general view as expressed in an article by Joseph Pollard: "When.....Chief Justice Hughes led the Court in upholding the validity of the Minnesota Mortgage Law, he paved the way for judicial approval of the entire national recovery program. He cleared away the many doubts existing about the constitutionality of emergency legislation."[54] Mr. Pollard alleged that the constitutional objections were similar in both cases, the chief objection being that private property and vested interests are free from governmental regulation. He reasoned that, if a constitutional provision protecting contract rights must yield to state regulation in the public good, then so too must a constitutional provision protecting individuals against deprivation of their property "without due process" of law yield to federal

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[54]John Percival Pollard, "An Unexpected Champion," The Literary Digest, Vol 237, April, 1934. p. 375.

regulation having a similar aim. He maintained that, from the combination of the two, the principles of the Shreveport Case and the Minnesota Mortgage Case, "the conclusion is inescapable that he will lead the present Supreme Court in giving judicial approval to the national recovery program."[55]

The entire nation appeared to overlook the stress placed on "temporary," "conditional," and "police power" of the states. The acceptance of the new doctrine of "reasonableness" made the outlook of the New Deal laws favorable in their eyes; and since many New Deal laws were to be decided within the next year, the administration and the people were now less apprehensive over the fate of these laws before the Court.

In retrospect, several broad principles may be discerned from Hughes' statements. First, the test for taxation of government instrumentalities shall be the governmental function which that instrument performs. Second, immunity from taxation shall be restricted to only the stated individuals and such articles may be taxed when the ownership changes. Third, the right of free speech and free press shall be upheld even under uncommon circumstances. Finally, laws created by the states must meet the test of reasonableness, legitimate ends, and the police power clause. The overall aspect of this period is Chief Justice Hughes' liberal attitude and largeness of spirit in response to the critical problems and needs which were

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[55]Joseph P. Pollard, "An Unexpected Champion," The Literary Digest, April, 1934. p. 375.

afflicting the country.

By 1935 the nation was entering a new era, one that foretold recovery and prosperity. Thus the cases decided in the first period would establish many precedents, and the tests for emergency laws prophetized the upholding of many of the New Deal laws. Hughes' votes and opinions in the first period had silenced a number of the critics of the "corporation lawyer." The opinion held by some that the sound drubbing and the bare-knuckled beating he received on the Senate floor by his critics were responsible for his liberal attitude, was apparent. Only a few times could they detect the note of the conservative in his opinions. Underestimating the Chief Justice, they assumed he believed that retreat was the better aspect of valor.[56]

As later studies of the Chief Justice appeared, the authors stressed that Hughes had reached the peak of his prominence and was revered both here and abroad before he accepted the position as Chief Justice.[57] Hughes disliked having his reputation besmirched by untruths and false statements, yet the vileness of the attack and the lack of truth in the charges would hardly be considered by the Chief Justice as sufficient cause for malfeasance of his duties on the highest Court of the country.

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[56]Drew Pearson and Robert S. Allen, The Nine Old Men, New York: Doubleday, Doran and Company, 1937. p. 88.

[57]"Hughes, Judicial Statesman," New Republic, Vol 104, June 9, 1941. p. 776.

Hughes' votes and opinions were liberal because he believed that the states had the right to experiment under the police power clause as long as it did not infringe on the individual's civil rights. It will be evident subsequently that he was more chary in allowing the federal government the same right. Federal laws affected the welfare of the entire country, and thus the division between what was federal and what was state had to be upheld.

CHAPTER III

HIGH TIDE OF JUDICIAL REVIEW

> "In attempting to provide remedies for the correction of known evils, let them be real remedies, not mere makeshifts which will bring the law and its administrators into contempt, but effective measures which in their just application will promote our tranquility and respect for law and order."
>
> -- Charles Evans Hughes[1]

The problems which faced Hughes from 1935-1937 were entirely different from the previous period of this Court tenure covering the problem of the post-war world and the descending phase of the depression. In this second period the Chief Justice attempted to lead his Court in a moderate semi-liberal path as the laws of Congress were adjudged in the light of their resultant precedents and their affects on the country in the future. Legislation which was poorly constructed and hastily passed now faced the scrutiny of the Court.

The 1935-1936 Court term was one of the most important in the history of our country. Nearly all of the major New Deal legislation which was passed at the critical point of the tragic depression was now reviewed by the Court. These laws had quickly converted our country into a highly centralized nationally-controlled economy from its former de-centralized state. The Chief Justice attempted to lead his Court in

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[1]Charles E. Hughes, Addresses and Papers of Charles Evans Hughes, 1906-1908. (A Speech Given Before the Utica Chamber of Commerce, April, 1907), p. 112.

moderate liberal opinions, but in a number of these cases his leadership was repudiated.

He believed in the flexibility of the Constitution and warned the justices against seeking the extremes of construction of the laws questioned before them. His own words best illustrate his beliefs that guided his votes and opinions in this period. In a speech in 1932 he stated that "We should be faithless to our supreme obligation if we interpreted the great generalities of our Constitution so as to forbid flexibility in making adaptions to meet new conditions, and to prevent the correction of new abuses incident to the complexity of our life, or as crystallizing our own personal notions of policy, our personal views of economics, and our theories of moral or social government."[2]

He seemed to foresee the crisis and the problems which were to face the Court in the future as he continued with this almost prophetic statement: "We would be faithless to our judicial obligation in failing to recognize these boundaries of power because of individual conceptions of the value of new social schemes resting upon coercion by a class, or upon unrestrained legislative will, as we would be in tightening conceptions to enforce particular economic views." This statement was made several years prior to the New Deal Court fight;

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[2]"Hughes Stresses Flexibility of Law," New York Times, June 19, 1932. p. 4.

it was not an attempted justification of the Court's decisions in this period. Could it be that Hughes foresaw the inevitable conflict between the Court and the administration, or did he conclude from experience that the new social legislation would be resisted by some of the members of the Court?

The following statements best illustrate Hughes' desire for moderation which was rejected numerous times by the other justices on the Court. He maintained that liberty of speech and press was only one of the essential conditions of liberty that the Constitution safeguarded, and stressed that it was a "highly difficult but not an impossible task to escape the errors of extreme constructions which would either nullify or extend beyond their fundamental purpose the great guarantees of individual liberties."[3] This philosophy explains Hughes' moderate opinions in a period when both the country and the Court experienced a reaction against socialization and centralization as it advanced under Roosevelt's administration.

The emergency had passed; production and sales gradually increased to seventy percent of the 1929 high.[4] The nation began to relax; hope and optimism brightened the immediate future. Hotel and recreation centers, noting increased activity once more in their lines, optimistically prophesized that

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[3]Ibid., New York Times, June 19, 1932. p. 4.

[4]Business Indicator, Business Week, January 4, 1936.

the country was finally on the upward curve of the business cycle. With the promise of prosperity there came a definite reaction against the extensive controls placed on industry. The laissez-faire policy once more became the proper entrepeneurial dictum.[5]

Everywhere conflicts and criticisms were noted. Common complaints were that the Blue Eagle was being used to avenge private feuds, and that deputies authorized to obtain codes from great industries utilized their contacts with industrialists to feather their own nests for the future. The N.R.A. and the A.A.A. received the most criticism. David Lawrence, in his article on emergency laws, reiterated some comments on the A.A.A. found in the current magazine articles. He pointed out that the A.A.A. "(tax) device can be tried with respect to anything from farm to factory," and in this roundabout way the government "could acquire absolute control over production." He cited the actions of Hitler, Mussolini, and Stalin as an example, stressing that by dictatorial decree they usurped broad powers of regulation of business and control of production, and then he concluded with this comment: "The New Dealers in America appear to have tried it by legal adroitness."[6] The Republicans, farmers, and small businessmen were restive, and

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[5]Charles A. Beard, "Challenge to the New Deal," Current History, Vol 43, February, 1936. pp. 513-16.

[6]David Lawrence, "Emergency Laws," The Saturday Evening Post, Vol 206, June 23, 1934. pp. 5-7.

charges of dictatorship and regimentation were exceedingly common.

With Henry Ford, who controlled a large segment of the auto industry, refusing to enter into a code agreement, and with numerous reports that government was unable to enforce the labor provisions of the codes, the very workability of the N.R.A. was in serious doubt. Many of the objectives of the laws, however, were considered commendable by the public.[7] Still, the tone in some of the articles published was clearly that of an alert people facing stark reality. The tragedies of the depression convinced them that the economic system and laissez-faire philosophy were antiquated. A change was slowly taking place, but the objections were not to the change but to the method by which it was consummated. The administration was censured thus: "We are moving towards a blend of new circumstances with old principles of law, something that is not objectionable in theory as long as the principles are not subverted by.....devices."[8]

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[7]This statement is made after reading numerous articles on the New Deal laws published between 1933 and 1935. The re-election of President Roosevelt and the large number of votes cast for him would tend to illustrate that his policies and objectives were approved by large groups of the voting public. W. L. Chenery in a magazine article ("Battlelines of 1936," Colliers, February 17, 1934. p. 54) states: "obviously public opinion has approved the policies adopted by the administration."

[8]David Lawrence, "Emergency Laws," The Saturday Evening Post, Vol 206, June 23, 1934. pp. 5-7.

The Court's opinions were a definite surprise. Not only were the laws held unconstitutional, but also many of the principles stated in the opinions would forestall the passage of certain needed social legislation. The administration and Congress realized that the New Deal laws were passed in haste and subject to censure from the Court, but very few expected strict limits to be placed on the states' and federal government's power. Hughes did not oppose the New Deal in principle as much as he despaired at the hasty haphazard legislation passed in 1933 which placed nearly all industry under federal control with rules and codes formed by industrial competitors.

In former cases he had upheld price-fixing, the prohibition of child labor, limitations on hours of labor on railroads, and collective bargaining. These principles were now incorporated in the New Deal legislation. However, when dealing with the emergency laws, the Chief Justice was called upon to make effective a principle earlier stated by him as governor of New York: "In attempting to provide remedies for the correction of known evils, let them be real remedies, not mere makeshifts which will bring the law and its administrators into contempt, but effective measures which in their just application will promote our tranquility and respect for law and order."[9]

The Court was faced with a new problem. They realized

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[9]Charles E. Hughes, Addresses and Papers of Charles Evans Hughes, 1906-1908. p. 112.

that the emergency was passing and the national laws should not be upheld on the emergency thesis. In the previous period the Court was cognizant of the crucial conditions and hardships that were affecting the people and they upheld state relief legislation on the emergency basis. To extend this practice to federal legislation would establish a dangerous precedent, for reliance on emergency meant reliance upon an interpretation by the courts of contemporary conditions. The courts would thus be making decisions that would be political in nature. If the country decided to enter into an era of social and economic planning, the Court would only shackle real adjustments to the new order of economic conditions by upholding legislation on the emergency basis. The corollary attached to all emergency legislation is that it is temporary and, in normal times, the law would be unconstitutional.[10] It is obvious that, having already called for real remedies and effective measures, this weak, unstable principle would not appeal to the clear and logical mind of the Chief Justice.

The lower courts had held that the national emergency justified the grant and exercise of extreme powers. They stated that in such a situation for public benefit, necessity confers many rights and privileges which otherwise would not exist. All New Deal legislation passed in 1933 rested upon this weak stan-

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[10] Jane Perry Clark, "Emergencies and the Law," Political Science Quarterly, Vol 49, July, 1934. pp. 268-83.

dard. The National Recovery Act, the most comprehensive regulatory act ever passed, was upheld on this basis. The emergency argument became completely ineffectual after President Roosevelt's annual message to Congress in January, 1934. He "left no doubt that his emergency moves were no mere temporary steps, but part of a permanent edifice."[11]

Hughes' moderation is shown by his decision in the first New Deal case brought before the Court. The oil code in the National Recovery Act was declared unconstitutional.[12] The code was designed to alleviate over-production and cut-throat competition which characterized the oil industry in this period. The states had attempted to regulate the industry but, meeting with failure, they appealed for federal aid. Two sections of the National Recovery Act applied to the oil industry: the codes for fair competition which applied to the industry in general, and the particular provision which prescribed quotas for the various states. The specific provision, Section 9(c), authorized the President to prohibit the transportation in interstate and foreign commerce of petroleum produced or withdrawn from storage in excess of the amount permitted by any state law or regulation.

In July, 1933, President Roosevelt, by executive order,

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[11] "News and Comment from the Nation's Capital," The Literary Digest, January 20, 1934. p. 10.

[12] Panama Refining Company v. Ryan, 293 U.S. 388.

prohibited the transportation of oil in excess of amounts permitted by state action. A few days later he authorized the Secretary of the Interior to enforce the act. The plaintiffs, an owner of an oil refining plant and a producer of oil, attacked the validity of Section 9(c). They contended it was an unconstitutional delegation of legislative power to the President by Congress.

The Chief Justice bypassed the question of constitutional validity of the complete act, and examined only the oil code provisions.

> "Assuming without deciding," said Hughes, "Congress had the authority under the interstate commerce clause to forbid the transportation of the excess oil, the question of whether it should be prohibited is one of legislative policy. The Court would examine the statute only to determine whether Congress had declared a definite policy in regard to the statute and established a standard for the President's action; and whether Congress required any findings of the President in the exercise of this prohibition."

The Court findings were negative, and the Chief Justice led the Court in an eight-to-one decision judging the oil code section unconstitutional. Hughes stated that this section gave the President "an unlimited authority to determine the policy and lay down the prohibition, or not to lay it down, as he sees fit. And disobedience to his order is made a crime punishable by fine and imprisonment."

Hughes further criticized the law by pointing out that "Section 9(c) is brief and ambiguous." It did not, according to the Chief Justice, attempt to control the production of

petroleum within a state. He felt that Congress had not attempted to lay down rules for the guidance of the states and their legislatures. He found that the President's authority was unqualified by "reference to a basis, or extent, of the states' limitation of production. Section 9(c).....established no criterion to govern the President's course. It did not require any findings by the President as a condition of his action." Cardozo, the lone dissenter, took issue with the preceding statement citing numerous precedents to illustrate that Congress did not always demand that the President follow findings. The Chief Justice was without a single precedent to cite, but he did have the unanimous approval of the seven remaining judges.

It is not difficult to observe Hughes' own philosophy in the preceding quote. This decision is an excellent illustration of his belief that laws should be simple, broad, and concise. He stressed the legislators' mistakes and the vulnerable and invalid sections of the law, and in this way he advised as well as warned the lawmakers. Hughes felt that more closely defined objectives and more definite limits were needed in the law as to executive authority. Congress should have, he felt, defined unfair competition or declared that the transportation of "hot oil" was injurious to the industry. The fact that the President was not required to make any determination as to any facts or circumstances definitely disturbed Hughes' just and impartial nature.

A major principle of Hughesian philosophy was action, only after careful and thorough investigation. Never before in history had the delegation of unlimited power caused a law to be declared unconstitutional, but the chief issue in this decision was the delegation of power. Hughes states that the "effort by ingenuous and diligent construction to supply a criterion still permits such a breadth of authorized action as essentially to commit to the President the functions of a legislature rather than those of an executive or administrative officer executing a declared legislative policy....."[13]

The argument that oil needed regulation was met by the Chief Justice. He contended that even to meet recognizable evils, which Congress had not stated nor clearly defined, Congress could not "abdicate or transfer to others the essential legislative functions with which it was invested." According to Hughes' philosophy, Congress' action violated the principle of division of powers. He expected the executive's duty to be defined and the powers invested in the President to be kept within the limits of the definition. His objections, as stated, were frequently found in the written and spoken opinions of both Democrats and Republicans. "The point is not one of motives but of constitutional authority, for which the best of motives is not a substitute."

The Congressional Digest in 1933 carried several articles

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[13] Panama Refining Co. v. Ryan, 293 U.S. 388.

by eminent people on the New Deal measures. Extensive controls were not agreeable to many but all were troubled by the vast amount of power delegated to the President. Furthermore, in a comparatively short time this power might pass from President Roosevelt to another president or to numerous appointed subordinates. The fear of dictatorship resulting from the emergency laws and the precedents established by them is apparent, the chief contention being that Roosevelt could not exercise all this power personally but would delegate it to a large number of subordinates who would become dictators in their own little spheres. Other writers expressed fear that the recent laws might destroy constitutional government and substitute in its stead a communistic government with a sympathetic, humanitarian dictator in command.[14] Few people actually feared Roosevelt's use of the extensive power placed in his hands by Congress, but nearly all were apprehensive over the precedents established and his successors.

Some controversy developed concerning the Panama decision, but the general feeling was that "(the decision) did not menace the New Deal legislation as a whole," and that "the oil section offered an example of the way not to delegate authority to the President, and improved the opportunity to show New Dealers how to do it before they got in too deeply. This was

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[14]James M. Beck, "Are the Provisions of the National Industrial Recovery Act Constitutional?" Congressional Digest, 1933, p. 306.

the first important New Deal measure to be judged unconstitutional, and the entire nation waited expectantly for the Court's decision on other New Deal legislation.[15]

Early in the year of 1933, during the bank crisis, several emergency laws affecting currency were passed. One changed the value of the dollar to approximately fifty-nine cents, and another law placed all forms of currency on a parity and made it legal tender for all debts. By a joint resolution, Congress declared that all contracts for payment in gold were against public policy, and all obligations were made payable at face value in the new legal tender. This resolution was of vital importance to both debtors and creditors and to the government. Nearly all important contracts stipulated gold payment or the value thereof in legal tender. If these contracts were still held valid, all debtors would be required to pay one dollar and sixty-nine cents for every dollar in the contract; and the government's debt would be increased by over one half of its bonded debt.

Obviously, the devaluation law would work hardship on the people it was intended to aid; the businesses, the industries, the farmers with mortgages, and private individuals with large indebtedness as well as state governments and municipalities would all be penalized by an adverse decision. Business

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[15]"News and Comment from the Nation's Capital," The Literary Digest, January 20, 1934. p. 10.

was on the upswing and conditions were gradually returning to normal. Thus the decision, if adverse, could cause a panic or a crisis and send the country's economy tumbling again into a deep depression. President Roosevelt and Congress were apprehensive about the decision of the Court. Fearing an unfavorable decision, they prepared a bill that would nullify the effects of such a decision. Preparations were made to force it through Congress the day the decision was handed down. It was apparent to the country that the dollar would be in a state of ill balance with the rest of the economy.

Economists argued that the price level must be raised to the debt level, or the debt level should be lowered to the price level. "This is a matter of grim reality that cannot be cured by psychology, confidence, or government."[16] The price level could only be raised as the value of money declines or is lowered by law; therefore, the economy had readjusted itself on the lower money level and the structure would experience a terrific wrenching if the old standard was once again established. The immediate effect of an adverse decision was previewed by the stock market action a few days before the decision. Large purchases of gold payment and government bonds began while domestic corporation bonds, stocks, and commodities were heavily liquidated. The Attorney-General pointed out before the Court

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[16]G. F. Warren, "Deflation or Re-Flation?" Congressional Digest, February 3, 1933. pp. 3420-30.

that an adverse decision would reduce the balance of the Treasury by $3,500,000,000 and would increase both public and private debt. The federal mortgaged debt was $17,000,000,000.

The Chief Justice was concerned about the economic conditions as illustrated by this opinion. Immediately after summarizing the act, Hughes stated that the Court was not concerned with the wisdom of these provisions.[17] "The question before the Court," he maintained, "is one of power not policy." According to him, the question touched the validity of the measures only in the joint resolutions denying the effect to gold clauses in existing contracts. Hughes believed in protecting property rights, but in his opinion he stated that the resolutions must be considered "in their legislative setting and in the light of other measures in equal substance." The Court majority held that the gold contracts were not contracts for payment of gold as a commodity or in bullion but were "contracts for the payment of money."

Congress had the right to make Treasury notes legal tender in payment of debts whether contracted previously or subsequently to the law and that "authority may be exercised in course of war or in time of peace," according to the Court. Hughes maintained that the authority to impose requirements of uniformity and parity is an "essential feature of this control

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[17] Norman v. Baltimore & Ohio R.R., 294 U.S. 240.

of currency." Where, in state cases, the Constitution forbids the abrogation of contracts, the federal government's power to control currency supercedes this authority, and the Chief Justice asserted that no obligation of a contract can extend to the defeat of this authority.

Congressional laws take precedence over any private contract. As in the Minnesota Moratorium Case, the reasonableness of the action governed the case. Hughes, citing his previous McGuire Opinion,[18] maintained that "Contracts, however, in any expressive form cannot fetter the constitutional authority of Congress. Contracts may create rights of property, but when contracts deal with a subject matter that lies within the control of Congress, they have a congenital infirmity." He felt that Congress had the right to consider the volume of gold clauses and that their presence would constitute a substantial obstruction to Congressional policy. "If these premises were to be taken literally, they would be directly opposed to the policy of Congress, as they would be calculated to increase the demand for gold, to encourage hoarding, and to stimulate attempts at exportation of gold coin." He pointed out that it "did not require any acute analysis to disclose the dislocation of the domestic economy if debtors were required to pay their debts at the rate of one dollar and sixty-nine cents and receive only a dollar value in taxes, rates, charges, and prices." Once again

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[18] Chicago B. & Q. R.R. v. McGuire, 219 U.S. 549.

the awareness of economic conditions and sympathy for the underdog is evident, but Hughes was too learned a constitutional judge to allow the aforementioned conditions to decide the validity of a major statute.

Having mentioned that the economic conditions justify the passage of the law in accordance with Congress' stated policy, Hughes said that even the most serious consequences would not be an excuse for invasion of constitutional rights. The constitutional issue was one of the power of Congress over the monetary system of the country and its "attempted frustration." Congress had already established precedents for regulation of contracts by its interstate commerce clause and the tariff liability clauses. Congress held the power; the ends were legitimate and the means reasonable; on this basis the law was upheld. Here Hughes' refusal to allow the emergency theory to govern can be easily discerned.

Once again the Chief Justice's vote and opinion were determined by the "reasonable" and "legitimate end" precedents established by him as associate judge and more recently as Chief Justice. The Court was divided on this issue with the four staunch conservatives bitterly criticising the decision. Justice McReynolds denounced it with an icy outburst stating that "the policy of repudiation meant spoliation of citizens and legal and moral chaos." He was not only criticising this decision but a second one that concerned the gold clauses in government bonds. Hughes was author of the opinion which upheld the

government's right to abrogate its gold clauses on the fact that the bond holders could not prove personal loss. The Chief Justice censured the government for its act of bad faith feeling that, if the Supreme Court refused to recognize the binding character of these promises, it might have a serious effect on the public attitude towards government bonds in the future. Besides the adverse effect on the administration's future borrowing power, the Chief Justice, with the liberal majority concurring, stated definitely that the repudiation of the gold clause government bonds was unconstitutional.[19] The decision is typical of Chief Justice Hughes. He was unwilling to allow the people to become victims of financial chaos by an adverse decision, and still he would not compromise and declare the resolution a valid constitutional act.

The country's reaction was one of relief, the general opinion being that "There had been general fear and no little actual anticipation of a disruptive ruling; of one that would have called for drastic administrative action to prevent serious unsettlement of markets and business. Fifteen billion in gold payment promises might have been partially repudiated..... But that the government could be held liable for 169 percent of its own debt in terms of its own currency has been contemplated as a menacing possibility, even as suggestive of impending

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[19]Merlo J. Pusey, Charles Evans Hughes, Vol II. p. 737.

financial chaos."[20] The administration found the decisions agreeable, but the accompanying opinion angered them. Although the government was not required to pay the extra sixty-nine cents on a dollar, the Court had stated before the country that the Congressional resolution was unconstitutional. By an unconstitutional act, upheld on a technicality, Congress was relieved of its additional burden. The popular commentators censured the Court for upholding the law on a technicality.

In the midst of political and property rights' controversies, a new high point in civil rights was reached. Norris, a Negro, was indicted, tried, and sentenced to death by an all white jury.[21] When the Court reviewed the case they learned that Negroes had not been summoned for jury duty for over a generation, and that in the same period a large number of them could have qualified for such duty. The Chief Justice considered the summoning of an all white jury as discriminating against the defendant, in view of the facts presented. He stated that the indictment should have been quashed and that "while a colored citizen.....cannot claim, as a matter of right, that his race shall have representation on the jury.....it is a right to which he is entitled; and that in the selection of jurors to pass upon his life, liberty, or property, there shall

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[20] "The Gold Decision was Doubly Agreeable," The Literary Digest, March 2, 1935. pp. 36-7.

[21] Norris v. Alabama, 294 U.S. 587.

be no discrimination against him because of his color." Again, opposing tradition and custom of the South, Hughes firmly established the rights of Negroes in this Supreme Court ruling. Even the liberal Holmes did not have such a consistent record of votes upholding the civil rights of minorities.[22]

Following the Norris Decision, the Court was once again required to review an act of major political importance. There were two schools of thought regarding the constitutionality of the Railroad Retirement Act.[23] Justice Roberts, in the majority opinion, led the "arbitrary and unreasonable deprivation of property" school, while Hughes represented the other school of thought that asserted "industry must care for its human wastage." This law was poorly constructed and many of its provisions would cause hardship to railroads already dependent on government aid. The retirement act established a compulsory retirement and pension system for railway workers of an advanced age. Both the employer and the employees were compelled to contribute to the fund.

The decision here reveals a clear-cut difference of opinion between the justices of the Court. The constitutional issue was the deprivation of liberty and property without due process of law, and the extent of the interstate commerce clause was seriously questioned. The majority decided that the inter-

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[22]Merlo J. Pusey, Charles E. Hughes, Vol. I, p. 79.

[23]R.R. Retirement Board v. Alton R.R., 295 U.S. 330.

state commerce clause did not have the power to compel interstate carriers to retire their employees at a specific age. "Efficiency and safety would not be increased by the retirement of the older workers, and secondly, when deprivation seems unreasonable and arbitrary, it is without due process of law."

Writing the minority opinion, the Chief Justice vehemently criticized the majority opinion, pointing out that "The gravest aspect of the decision is that it does not rest simply upon a condemnation of the particular features of the Railroad Retirement Act, but denies to Congress the power to pass any compulsory pension act for the railroad employees." Had the majority limited their opinion to particularly objectionable provisions, Congress, he maintained, would be free to overcome the objections by a new statute, but "the majority finally raised a barrier against all legislative action of this nature by declaring that the subject matter itself lies beyond the reach of Congressional authority to regulate interstate commerce. Hughes asserted in his opinion that the conclusion which the majority had stated was a "departure from sound principles, and places an unwarranted limitation upon the commerce clause of the Constitution."[24]

The minority opinion was definitely in accordance with the Chief Justice's previous statements concerning the federal government's power under the commerce clause. The critics

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[24] Ibid., 295 U.S. 330.

found the following statement in Hughes' opinion impossible, contending that wisdom and the policy of the laws are barely separatable. But Hughes resorts to this principle whenever he is liberally inclined. He reiterates the principle used in the gold clause cases: "The power committed to Congress to govern .....does not require that.....government should be wise, much less that it should be perfect. The power implies broad discretion and thus permits a wide range of mistakes." He concluded his opinion by stating the human wastage theory which establishes a precedent for his votes on social security and the old age pension cases:

> "What sound distinction, from a constitutional viewpoint, is there between compelling reasonable compensation for those injured without fault of the employer and requiring a fair allowance for those who practically give their lives to the service and are incapacitated by the wear and tear of time, the attrition of the years? I perceive no constitutional ground upon the one can be upheld and the other condemned.....The fundamental consideration which supports this type of legislation is that industry should take care of its human wastage, whether due to accident or age."[25]

This decision by the Court made the administration apprehensive over the fate of the other laws which were pending before the Court. If the Court would limit the commerce power to the extent that it forbid compulsory retirement and pensions, just how would it react to the extensive controls placed on industry under the commerce clause? The Denver Press prophesized that "it not only junks their scheme for pensioning railroad employees

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[25] Ibid., 295 U.S. 330.

but it knocks the props out from under President Roosevelt's fantastic social security program and forecasts a judicial death-blow to the N.R.A."[26]

Other writers felt that the problem before Congress and the administration was how to "formulate legislation that will carry through the ideas referred to by the Chief Justice, but in a way that will satisfy the constitutional objections of the Court majority."[27] That was the problem; but it was only after several major laws were declared unconstitutional that Congress began to legislate in a careful and constitutional manner. The battle between the Court and the administration began just twenty-one days after the pension decision.

Thus the Court reviewed the most controversial and the most important law of New Deal legislation, the National Recovery Act. Stories of evasions and conflicts peppered the history of the law. Since the law specified the wages to be paid in the various industries and wages differed in the adjoining areas, complications and conflicts arose when an industry in one area sold in another area. According to the law the N.R.A. was to expire in 1935, just a few months after the Court decision. The Court could have allowed the law to expire and avoided, for the time being, the question of its validity,

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[26]"Current Opinion," The Literary Digest, May 18, 1935. p. 12.

[27]Ibid., The Detroit Free Press as quoted in "Current Opinion." p. 12.

but the President's statements and the new N.R.A. before Congress required judgment of the law. This was the opportune moment for the decision. Business conditions were nearing normality and the emergency theory was no longer justified; therefore, the Court was free to decide the constitutional validity of the National Recovery Act without being under extreme pressure.

Two events occurred almost simultaneously; the Court reviewed the law and Congress was contemplating renewing it or passing a new N.R.A. law. While the Court was hearing the arguments and writing the decision, a rebellion appeared in Congress. The extension of the old bill, or the revised edition of the new N.R.A., was subjected to censure and criticism and its passage was long delayed.[28] Roosevelt remained silent, strengthening the belief that he was not pleased with the effectiveness of the present recovery law.

The administrator of the law, General Hugh Johnson, in a speech defending the N.R.A., reiterates the charge leveled at the law and predicted "a distinct movement in Congress to repeal the N.R.A."[29] Admitting that there was a storm brewing, he charged that "it wouldn't be a forthright and open motion for appeal, but a flank attack by those who would return to the

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[28]Charles A. Beard, "Challenge to the New Deal," Current History, February, 1936. p. 519.

[29]New York Times, January 19, 1934. p. 1.

old order." He asserted that the charges that the N.R.A. oppressed small enterprises and promoted monopoly, or that it was partial to either capital or labor, were untrue. General Johnson frankly stated that a new economic order was to come into being through the N.R.A. "Those who accuse me of being a tyrant," the General said, "have nothing to offer except their own concept of laissez-faire, and I readily concede that I have nothing to offer except that the concept of economic planning would be substituted for the old thesis."[30]

While the General campaigned for the law, the other administrators, businessmen, and the Republican party was fighting it. A rise in profits and production caused an increased cry of "dictatorship" against the New Deal. The National Association of Manufacturers found eighty-two percent, of the 100,000 manufacturers polled, against the revival of the N.R.A. in any form. In another survey, three-fourths of the industries, establishments, and workers polled were against government regimentation.[31]

The most serious element of the opposition came from such administrators as Francis B. Biddle, chairman of the National Labor Relations Board. He called the provisions of Section 7A of the law "unenforcable" and "a sort of innocuous shibboleth." He urged that Section 7A be deleted from the codes since it gave labor only "paper rights" and employers had stiffened

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[30] New York Times, January 19, 1934. p. 1.

[31] Charles A. Beard, "Challenge to the New Deal," Current History, February, 1936. p. 519.

their resistance to compliance with Section 7A. He pointed out that from July 9, 1934, to March 2, 1935, the N.R.A. had tried 111 cases. In eighty-six the Board found the employer at fault, but only thirty-four cases were concluded in accordance with the Board's decision; no compliance was reached in fifty-two cases, and thirty of these were referred to the Department of Justice.[32]

The National Recovery Act provided for codes for industry that prescribed a forty hour week, a forty cent minimum wage, free collective bargaining, and provisions against unfair competition. When first contemplated, the codes were to be for a few major industries only, but by the time they were established they ranged high into the hundreds, and nearly every type of industry, trade, and profession had its own code. The codes were formulated by representatives of industry and labor with the provision that the President could make the final changes. The various companies entered into the code agreements voluntarily, but once having agreed to them could be punished for violating them. If the industry refused to comply, the wholesalers, retailers, and consumers were requested not to buy any goods that did not carry the N.R.A. labels. These labels were issued only to code-bound industries.

The purpose of the law was commendable, as it was designed to remove obstructions from the flow of interstate commerce caused by the disruption of employment, production, and

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[32]New York Times, March 14, 1935. p. 6.

transportation caused by the depression. The aspect of the law most feared by thoughtful people was that "the administration has been given enormous potential power.....and it could, by threatening to withhold its approval or to prescribe a code of its own, bring great pressure to bear upon industry and trade to include provisions which it favors.....The Act (did) not specify in any way the range of provisions which such a code or agreement could contain."[33]

The Schechter brothers were in the poultry business in New York. While the poultry they handled was shipped in from out of the state generally, they bought from a wholesaler and sold to individual customers. The Supreme Court reviewed the case[34] after they refused to abide by the codes and paid lower than minimum wages, besides allowing selection of the chickens. The company was before the Court for selling sick chickens, thus supposedly affecting the entire chicken industry. The defendants argued that Congress had improperly delegated legislative power to the President and other administrative officers; and, secondly, that Congress had exceeded its power to regulate interstate commerce and had invaded the realm of state power. They further contended that the N.R.A. law violated the Fifth Amendment and deprived people of property without "due process" of law.

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[33]Otto Nathan, "The N.R.A. and Stabilization," American Economic Review, Vol 25, 1935. p. 50.

[34]Schechter Poultry Corporation v. United States, 295 U.S. 495.

Chief Justice Hughes, speaking for a unanimous Court, stated that the business was not interstate commerce and the effect was so remote and indirect on interstate commerce that the law was invalid in this instance. The changed economic conditions of the country and the fact that President Roosevelt was requesting that the N.R.A. become permanent was reflected in the Chief Justice's opinion. One year before Hughes had maintained that the legislature could fill in certain details of the commerce clause, and interpreted this clause so broadly that the Minnesota Moratorium Law was upheld on the emergency basis. Now, in the N.R.A. case, he asserted that "Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power."

This reasoning is almost directly opposed to the Minnesota Moratorium Law Case,[35] and Samuel Hendel in his book on the Chief Justice states that "there is difficulty too in understanding just how this reasoning might be reconciled with that of the Chief Justice in the Minnesota Moratorium Law Case decided only one year earlier.....Might it not with equal validity have been held that the commerce clause belongs in the third category, requiring construction to fill in the details, and that the con-

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[35]See page 36.

stitutional validity of the N.R.A. should be judged in the light of emergency?"[36] This is the reasoning of a number of leading constitutional authorities. Professor Corwin makes a sweeping statement that "certainly, if extraordinary conditions may call for extraordinary remedies," and this fact has to be considered "when exercise of power is challenged," then to people unacquainted with legalistic jargon, or not disposed to be duly impressed thereby, it would seem that "extraordinary conditions do enlarge constitutional power."[37]

If Hughes' statements are examined purely from the legal aspect, then the constitutional authorities may be correct when criticising his reasoning. But the Chief Justice was more than a judge living in the rarified atmosphere of pure legal thought, he was a judge cognizant of the probable effects of the precedents he established. It would be difficult to imagine that he was not aware of the potential dangers which lay in the doctrine of emergency power. The Court did not wish to uphold the law on the emergency theory, therefore it examined the first contention of the defendants that the President was delegated unlimited legislative power.

The Chief Justice maintained that "Congress cannot delegate legislative power to the President to exercise an unfettered

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[36]Samuel Hendel, Charles Evans Hughes and the Supreme Court. p. 234.

[37]Ibid, Samuel Hendel. (Professor Edward S. Corwin quoted), p. 235.

discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry."[38] Hughes considered Article 3 of the Recovery Act "without precedent, for it applied no standards for any trade, industry, or activity; nor did it undertake to prescribe rules of conduct to be applied to particular states of facts determined by appropriate administrative procedures." Therefore, he felt that "in view of the scope of that broad declaration and of the nature of the few restrictions that are imposed, the discretion of the President in approving and prescribing the codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered."

Nearly every constitutional authority agreed with the Court's decision that Congress was too general and too vague in outlining the policy the President was to follow. In the general statement of policy in the preamble to the law, the President was directed to control production of oil for the general welfare of industry and the people. Professor Powell of Harvard Law School decalared that Congress "had expressed a hope of heaven but it had forgotten to specify anything that could be called a route."[39]

Hendel states that "whatever criticism may be justly leveled at the doctrine of non-delegatability of legislative

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[38] Schechter Poultry Corp. v. United States, 295 U.S. 495.

[39] Thomas Reed Powell, "Constitutional Overtones in 1936," Yale Review, September, 1936. p. 37.

power per se, and whatever the inconsistency or ambiguity in the earlier decisions of the Court, so long as the Court maintains its supervisory role and the doctrine retains a scintilla of value, this would appear to have been an appropriate occasion for its invocation."[40]

If Hughes had followed one of the major rules concerning decisions, the administration would not have been so critical and bitter. The Court generally limits itself by declaring only one point in the law unconstitutional.[41] Having found the laws unconstitutional on this issue, it normally refrained from commenting or examining further the other constitutional issues involved.[42] Not complying with this rule the Chief Justice turned, after declaring that unlimited delegation of power was unconstitutional, and found invalid the extension of federal power under the interstate commerce clause. The effect of wages and hours of workers in slaughtering and selling in purely local trade was considered too indirect on interstate commerce to allow the government control under the commerce clause.[43]

Hughes stressed that "if extension of this power were construed to reach all enterprises and transactions which could

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[40]Samuel Hendel, Charles Evans Hughes and the Supreme Court. p. 222.

[41]Justice Brandeis' dissent in Cromwell v. Benson, 285 U.S. 22.

[42]Ibid., Samuel Hendel. p. 222.

[43]Schechter Poultry Corp. v. United States, 295 U.S. 495.

be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would only exist by sufferance of the federal government." But he also maintained that each case would have to be examined individually in order to determine the effect of its operation on interstate commerce. It was the effect, and not the source of injury, which was the criterion of Congressional power. The use of the terms "direct" and "indirect" were criticised as purely legalistic jargon which did not establish standards by which Congress could be guided, and a mere subterfuge by which the Court could tie Congress' hands. This interpretation of the commerce clause, according to critics, limited the power of that clause as it had not been limited since the turn of the century. But Hughes did not intend that the government should be prohibited from regulating the trade of big industries who shipped across interstate lines, as assumed by numerous critics.[44]

The principles of the abolition of child labor in limiting the hours of work, minimum wages, and collective bargaining were championed by Hughes as governor, associate justice,

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[44]Thomas Reed Powell, "Commerce, Pensions, and Codes," Harvard Law Review, November, 1935. p. 224.

Samuel Hendel also presents a well reasoned argument upholding this view in his book, Charles Evans Hughes and the Supreme Court, pp. 236-39.

and in his dissents as Chief Justice. These principles were incorporated in the N.R.A. law, but the law had proved to be unworkable; the potential power in the President's hands was dangerous and the emergency was passing, as reflected by better business conditions.[45] Thus the Chief Justice and his eight colleagues decided that this haphazard, if noble, experiment should cease.

In the same Court session, two other New Deal acts were declared unconstitutional. One was a Congressional measure aiding the farm mortgagor; the other involved a Presidential dismissal of an appointed officer. The Frazier-Lemke Bankruptcy Act provided that a mortgagor might submit a plan of purchase of the property.[46] If the mortgagee refused, the bankruptcy court could stay all proceedings for the next five years. The mortgagor could retain possession of the property provided he pay a reasonable rental. At the end of the period, or during it, the mortgagor could pay the mortgagee the appraised value of the property through court proceedings. A unanimous Court declared such action unconstitutional. The obligation of contract clause applies only to state power and is inapplicable to federal legislation.

Justice Brandeis, the extreme liberal, as author of the opinion, stated that Congress, using its delegated bankruptcy

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[45]Otto Nathan, "The N.R.A. and Stabilization," American Economic Review, Vol 25, 1935. p. 50.

[46]Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555.

power, might discharge the debtors' personal obligations, but it could not take away specific property acquired prior to the passage of the relief statute. The Minnesota Moratorium Case[47] was distinguished from this case on the grounds that it applied to a limited emergency period and after that period was up, the mortgagee still retained rights to his property.

Here, as in the N.R.A. case, the justices could no longer justify the New Deal laws on the appeal of national emergency, for the emergency was gradually passing. Thus the constitutional questions had to be studied in the light of their implications, precedents, and repercussions.

The third case caused a great deal of comment since the decision apparently hedged, and indirectly overruled, the precedent established just a few years previously. Chief Justice Taft, in his opinion of Myers v. United States, asserted that the power to remove appointees was an implied power derived from the phrase that the President "shall take care that the laws are faithfully executed."[48] Also, he contended, that the power of removal extended not only to the immediate executive but also to members of the Congressional-created quasi-judicial commissions and boards. When this thesis was stated, McReynolds, Holmes, and Brandeis participated in the decision. All three dissented and were at variance with Taft's new principle.

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[47]See page 36.

[48]262 U.S. 390, (1926).

The presentation of a similar case before the Court at this time had a special significance. The Republicans were using the accusations of dictatorship as a prime campaign offensive and were seeking examples of it in Roosevelt's actions. Dictators and the threat of war in Europe intensified the fear of any arbitrary action. Coupled with this fear was the presence of several demagogues in the United States. People began to fear that the precedents established now by Roosevelt might be used in the not too distant future by those with much less commendable objectives. The Philadelphia Inquirer in 1935 carried these comments in its columns: "By translating into legislation the counsels of radical advisors, by expounding doctrines which, at least by implication, arrayed class against class, poor against rich, the shiftless against the thrifty, President Roosevelt himself all unconsciously prepared the way and opened the door to the prophets of come-easy go-easy."[49]

The President could cite Chief Justice Taft's thesis as precedent for his action in removing William E. Humphrey, Federal Trade Commissioner. But the removal of Humphrey was caused by differences in political viewpoints which might hinder Roosevelt in making effective his economic policy. Humphrey's appointment had been for seven years, and he had served only approximately three years when dismissed by Roosevelt. Humphrey refused to acquiesce to this dismissal and claimed mem-

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[49]"Current Opinion," The Literary Digest, May 18, 1935. p. 12.

bership on the Board. After his death his heirs started suit in the Court of Claims for the back salary due him from the time of his dismissal to his death.[50]

In the majority opinion, Justice Sutherland, the author, summarized the Court's decision with these words: "Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term, and precluding a removal except for cause, will depend on the character of office; the Myers Decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more causes named in applicable statutes." These three decisions, plus the Panama Oil Case and the opinion concerning federal gold clauses, made the Court appear as if it had suddenly shifted hard to the right. But in the Humphrey Decision, as in the other three decisions, the Court was nearly unanimous.

The Humphrey Decision is an excellent example to illustrate that the Court was not prejudiced against the New Deal and for that reason invalidated many of its laws. Justices Brandeis, Holmes, McReynolds, and Sutherland had participated in the Myers Decision under Chief Justice Taft. At that time the two major

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[50]Humphrey's Executor v. United States, 295 U.S. 602.

liberals, Brandeis and Holmes, and the conservative, McReynolds, wrote three dissenting opinions which attacked both the historical and constitutional arguments advanced by Taft.

Public opinion varied about these decisions. Immediately business felt a reaction and the stock market listings surged upwards. Business leaders planned increased production and employment with confidence and optimism.[51] The administration and Congress were disgruntled and disgusted. The decisions of the Supreme Court declaring the N.R.A. unconstitutional was a signal for a number of new bills and resolutions to curb the power of the Supreme Court. But not all people found fault with the Court. J. W. Hester, a Reconstruction Finance Corporation attorney, in his opinion of the Court, stated:

> "The Court has really been disposed to give the New Deal latitude in which to work out its program. In fact, no one can read the concurring opinion of Mr. Justice Cardozo in the Schechter Case without getting the feeling that he was writing under a feeling of resentment towards Congress for completely abdicating the legislative function, for he lashes out as if with a scorpion, the failure of legislative function. And no man, in fairness, can deny the social mindedness of Justice Cardozo, yet he and the rest of the Court in three opinions knocked the New Dealers 'groggy'."[52]

Hughes, Cardozo, and the rest of the Court were concerned about the failure of legislative function on the part of Congress, and the feeble plea of emergency could not justify the

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[51] "Business Votes with the Court," Business Week, June 8, 1935. p. 7.

[52] "How the Supreme Court Has Dealt with the New Deal," Congressional Digest, December, 1935. pp. 300-01.

validity of the act. Perhaps the feelings of the unemployed and the working class can best be expressed by Capper's comment: "N.R.A. was the first experiment of its kind, undertaken hastily in a period of desperate unemployment and business bankruptcy. Many mistakes were made, resulting in the whole experiment getting out of hand and bringing down upon itself vast disapproval and finally the veto of the Supreme Court....."[53]

Having invalidated a number of New Deal laws, the Court adjourned for the summer. Throughout that summer and into the winter business prospects were becoming increasingly good. The Court reconvened in October but did not review any major cases until January 6, 1936. On that day the Court held the Agriculture Adjustment Act invalid on the close vote of six to three.[54]

Charges of regimentation were commonly made against the A.A.A., but in general the farmers welcomed the new steady income that it provided for them. Another charge was that the corporation farmer was being favored over the small individual farmer. The only apparent validity of this charge, as shown by statistics, was in the southern Atlantic states, the number of small share-croppers decreased by approximately twenty thousand holdings in 1930-1935, while during this same period the number of farms increased, and the larger the farm the larger the in-

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[53] Ibid., Congressional Digest, December, 1935. pp. 300-01.

[54] United States v. Butler, 297 U.S. 167 (1936).

crease. Apparently the A.A.A. and the weather elements had created a shortage, causing rising prices, and it once more became profitable to engage in farming.[55]

The processors protested against the taxes which were placed on the processing of raw materials. The economists in their studies pointed out that the tax was not a true tax solely to provide revenue. They found that wheat sold at fifty-eight and seven-tenths cents a bushel and that the processing levy was thirty cents, or fifty-one percent of its value. Having observed these facts, it was pointed out that taxes were supposed to be revenue measures only, but "when they were made to serve the end of regulation, the purpose is usually that of limitation or destruction." The only sound conclusion the experts could draw was that the tax was primarily a regulating device which produced revenue. The administration, by levying the tax to aid the economic situation of the farmer, forced the consumer to bear the burden. Food prices increased by an amount somewhat greater than the net amount of revenue obtained from the taxes.[56]

The act was declared unconstitutional by the Court by a six-three vote, with the Chief Justice siding with the majority. Justice Roberts, the author of the opinion, found three points on which the act was invalid. First, it invaded the rights

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[55] Statistical Abstract of the United States, Washington, D.C.: United States Government Printing Office, 1936. p. 629.

[56] M. Slade Kendrick, "Processing Tax on Wheat," American Economic Review, 1936. pp. 621-36.

reserved to the states; second, the farmers' power of choice was illusory; and, third, the tax was not a true tax but merely a regulatory device. Roberts contended that the federal government had no power to regulate agriculture, and its attempts to do so were invading states' rights.[57]

Chief Justice Hughes was silent in this opinion, simply voting against the law; but in his private papers he expressed satisfaction with the results of the debates in the Court chambers.[58] In Roberts' opinion, for the first time, the breadth of the welfare clause is expounded. From Hughes' notation, it appears that the interpretation is due to his influence and persuasion. Hughes considered the broadening of the general welfare clause beyond the scope of its enumerated powers the most important and most significant ruling in the Butler Case. Alexander Hamilton, and later Justice Story had argued that the Constitution gave Congress the power to tax for general welfare beyond the scope of the enumerated powers. The Supreme Courts of previous years would not interpret the welfare clause so broadly, declaring that such a tax would be beyond the power of Congress. Now, for the first time, Hamilton's thesis was accepted and circulated by the Court.

Roberts declared that "the powers of Congress to authorize expenditures of public monies for public purposes is not to

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[57]United States v. Butler, 297 U.S. 167.

[58]Merlo J. Pusey, Charles E. Hughes. Vol II, p. 743.

be limited by direct grants of legislative power found in the Constitution." But the power of taxation and appropriation "extend only to matters of national, as distinguished from local, welfare." This interpretation was vital to the country because projects like the Tennessee Valley Authority, the pension, and social security laws could be upheld under it.

With this new interpretation of the welfare clause, the processing tax could be upheld, but the majority found another issue upon which it was adamant. The A.A.A. controlled farm production. Previously, in the child labor case, taxes for the single purpose of regulation were declared unconstitutional, and the Court found an exact parallel in the farm processing taxes. Obviously, the government was not free to levy taxes for this purpose without relating its action to any federal regulatory power. Chief Justice Taft, in previous cases, had pointed out that the commerce clause would probably be the best vehicle for regulatory measures,[59] but this Congress attempted to control local activities "irrespective of any relation to interstate commerce," according to Justice Roberts. The majority of the six judges found the acreage controls to be coercive, but Stone and Cardozo held the purchase of compliance not to be coercive, and dissented.

The Chief Justice's votes holding the three major New Deal laws unconstitutional may be easily attributed to the care-

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[59]Merlo J. Pusey, Charles E. Hughes. Vol II, p. 744.

less and haphazard method of legislating. Congress had recklessly passed laws that were improperly constructed, but a number of the New Deal laws were upheld by the Court at this time: the Trading with the Enemy Act[60], the National Bankruptcy Act,[61] and the Silver Purchase Act[62] were only a few to be mentioned. These laws were strictly within the power of Congress, and the Constitution had made express provision for action by the Congress. But the Ashurst-Sumner Act,[63] which prohibited the shipment of prison-made goods in interstate commerce, and the Chaco Embargo Act[64] were borderline cases. However, the Court upheld these acts also.

The T.V.A. Case[65] produced an interesting example of Hughes' methods and opinions. The doctrine of implied power was extended to its limits in the Tennessee Valley Case. The issue which confronted the Court was extremely difficult to judge. The Court apparently could not make up its mind and delayed reading its decision for several months. The right of the government to supply electricity to private individuals from federal owned dams was questioned by the litigants.

The government had built a dam in 1916 to provide elec-

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[60]292 U.S. 449.

[61]Kuehner v. Irving Trust Company, 299 U.S. 445.

[62]United States v. Hudson, 299 U.S. 498.

[63]Kentucky Whip & Collar Co. v. Illinois Central R.R., 299 U.S. 334.

[64]United States v. Curtiss-Wright Export Co., 299 U.S. 304.

[65]Ashwander v. T.V.A., 297 U.S. 288.

trical facilities for its munitions plants and to promote flood control in the Tennessee valley. The surplus electricity generated by the dam was sold to the Alabama Power Company who retailed at a profit. During the depression, the Roosevelt administration, desiring to aid the masses, decided to furnish electricity through government lines, and built several dams in the valley to promote flood control and reclamation projects. The Alabama Power Company sold the government transmission lines, substations, and auxiliary properties for one million dollars. The stockholders objected, contending that the company entered into a contract injurious to the stockholders' interests. They entered suit against the company to have the contract annulled, but the company refused to comply. When the case was brought before the lower courts, the litigants sought to restrain not only their own company's action, but also the whole T.V.A. project from being extended.

The power interests were definitely opposed to the extension of the T.V.A., for the government service rates were to be used as a measuring stick for the private company's charges. The price predictions caused the stocks of the large utility companies to decline drastically.[66] Following the goverment's lead, the municipalities began demanding public work funds to purchase and establish city-owned utilities.[67] The trend was

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[66]"A.A.A., P.W.A. Lose; T.V.A. Wins," Business Week, July 20, 1935. p. 6.

[67]Ibid., Business Week, July 20, 1935. p. 6.

apparently towards socialization of electricity. To combat this trend, the private utility companies launched numerous expansion programs, particularly in the West.

The country was well aware of the dilemma which faced the Court as shown by an article in one of the business journals at this time: "The sooner a case affecting the new T.V.A. projects can be brought before the Court, the stronger the likelihood of winning a decision against state socialism. For any court is naturally reluctant to judge a governmental enterprise after it has attained such a size that the fortunes of large populations are involved with it."[68]

Perhaps this is the reason for allowing the case to be judged a valid suit against established precedents to the contrary. If the government's power was to be questioned, it should be accomplished before the fortunes of a large number of people were involved. The Court held a divided opinion on the question of a valid suit. Since the stockholders were suing their own company, the minority of the judges felt that the suit should be dismissed. The administration hoped for a judgment that would delay the question of the validity until later. If the liberal minority had been joined by Hughes, the administration would have won a temporary victory; but the Chief Justice, leading the conservative judges, voted to entertain the suit.

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[68]"For a Real T.V.A. Test," Business Week, February 22, 1936. p. 48.

Hughes limited the question to the validity of the construction of Wilson Dam and the right of the government to dispose of its own electricity in its own way. The circuit court had already decided that the construction of the dam and the right of the government to sell electricity through its own facilities was constitutional. The Chief Justice limited his opinion to include only those issues contained in the lower court opinion, instead of accepting Justice McReynold's contention that the constitutional validity of the whole T.V.A. project be considered. By limiting the opinion in this way, the Court allowed a true suit on broad constitutional issues to be brought before the Court at a later time. Magazines and newspapers proclaimed that the decision was an apparent victory for the administration, but that it actually gave the public utility interests an opportunity to present a real test in the near future.[69] The Court had given the administration the yellow light to proceed with "caution."

Hughes read the majority opinion upholding the government's right to sell its electricity to private individuals, but refused to consider the question of the validity of the T.V.A. The issue was the contract between the power company and the government which involved only the Wilson Dam. The construction of the dam was constitutional because it was con-

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[69]Charles A. Beard, "The T.V.A. Decision," Current History, April, 1936. p. 69.

structed under war powers and for the purpose of national defense and the improvement of navigation. Hughes simply reiterated the principles already laid down by the circuit court in the earlier decision, yet the method by which he does it is an interesting study. The "implied power" thesis had been extended throughout the years, but the Chief Justice broadens it even further in this decision. He reasoned that, from the express power to regulate interstate commerce, might be implied the power to promote navigation upon the nation's rivers. Since promoting navigation involves the construction of a dam, then from the implied power to promote navigation, may be gained the implied power of generating electricity, as this is a normal byproduct of the functioning of the dam; and, furthermore, since the byproduct is electricity and is the property of the United States, the Constitution allows the government the right to dispose of its own property.

Hughes contended that the government was entitled to all available energy it can possibly obtain by letting water generate electricity. He then invoked the rule of common sense: "The government is entitled to exercise discretion in selecting the specific method it would employ in disposing of its property. The Constitution would not forbid the right to government to seek a wider market. Therefore, from the express power to regulate commerce through the implied power to generate electricity, and the right of the government to dispose of its property, the government receives the implied power to purchase

transmission lines over which surplus electricity may be disposed.

If this decision established a precedent, nearly any and all laws could be upheld by the extension of implied powers from express powers. This decision well illustrates the Chief Justice's common sense decisions and the technical language and arguments he uses to justify them.

The plaintiff argued that Congress might allow itself to use its discretionary power in wider and wider fields of private business, but the Chief Justice found that that argument was irrelevant to the issue here. Hughes was criticised by the authorities as being inconsistent for that statement. In his N.R.A. decision he had stated that Congress had to be stopped or it would extend its control to regulate every local business through the recovery law. Now, in the T.V.A. decision, he stated, in effect, that there was plenty of time to restrain government when it attempts to extend its power, but it was improbable that it would.

The Chief Justice appears to be justified in the conflicting opinions, the constitutional authorities excepted. The attitude towards public utilities had been for some time that it was a field for government control and ownership. Besides this, the government was required to hold the Muscle Shoals dam inactive for ten years because the public utility companies were not sufficiently large enough to buy or operate it. The argument does stand that there were offers to buy the electricity,

and the utilities were planning extension of their service. The T.V.A., on the whole, was an experiment; and the expense of the experiment alone could be prohibitive of large-scale extension.

The N.R.A., on the other hand, was also an experiment; but it was out of control almost immediately, extending into the field of intrastate commerce. Constitutional principles may conflict in the two statements, but common sense appears to rule. Rarely would a Chief Justice lay down a prohibitive ruling against an action that might occur sometime in the future, without regard to the changed philosophy and conditions that might then be a cause for action. The danger of the extension of the N.R.A. over every important field of business could be classified an immediate factor, past experience illustrating the ease with which it was done. Other plans, similar to the T.V.A., were yet in the minds of the visionaries.

Following the T.V.A., a series of adverse decisions were handed down by the Court. Hughes' leadership was repudiated in these cases. Forever the team-work judge, he attempted to concilliate the opposing views in moderate opinions, but the other justices refused to adhere to his reasoning.

The Bituminous Coal Conservation Act was designed to replace the N.R.A. codes in the coal industry. Two sections were featured in the act to control the production of coal and alleviate the tragic conditions which prevailed in the industry. A tax was added to the price of coal at the mine. This tax was a ninety percent rebate provision for the producers who complied

with the codes that fixed prices. The second section established minimum wages and maximum hours of labor. The labor board, composed of coal producers and employees, would meet and establish the wage and hours codes.

Labor and trade conditions were deplorable in the soft coal industry, which was characterized by cut-throat competition and low living standards for the miners. The states declared their inability to handle the situation and thus nationalization, or national control, was advocated for the industry. The argument advanced to defend the act was that, if the states were unable to remedy the evil, then the right of Congress to legislate for general welfare took clear precedence over states' rights.[70]

The law was declared unconstitutional by the Court in a five-four vote.[71] Three opinions were written for this decision, and both the majority and the minority refused to follow Hughes' lead. The majority held that the tax was not a revenue measure, but a penalty to obtain compliance with the regulatory provisions. They also contended that Congress may regulate commerce, but not production, and that the government possessed no inherent powers. The provision allowing a certain group of employers and employees to establish wages and hours to be im-

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[70] "Back to Choas in Coal," New Republic, May 27, 1936. pp. 59-61.

[71] Carter v. Carter Coal Company, 298 U.S. 238.

posed upon other workmen and producers was, they held, and unconstitutional delegation of power.

The Chief Justice, in his separate opinion, agreed that there had been an undue delegation of power to the labor board, and held that section invalid. Congress specified in the law that, if one section of this law was invalid, and the other section valid, then the valid section should remain in effect to the fullest extent possible. Hughes, declaring that the law be separated and at least one of its sections be effective, upheld the price-fixing provision. Since the cessation of coal production would immediately affect interstate commerce and the countries industries, schools, and homes, Hughes felt that the tax was within the power of the interstate commerce clause. His reasoning in this case was similar to that in his decision in the Appalachian Case[72] in which the majority upheld the fixing of prices by a group of producers in the industry to alleviate conditions of hardship. The effect, not the source, of the injury to interstate commerce determined the extent of regulation by Congress under the interstate commerce clause. This criterion is also used in later cases concerning the Wagner Act.

A marked contrast between the views of the conservative block in the Court and the Chief Justice is shown in this case. The conservatives asserted that the evils of the Guffey Act were designed to correct "all local evils over which the federal

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[72]Appalachian Coals, Inc. v. United States, 288 U.S. 344.

government has no legislative power." Hughes held the coal shipments to be within the control of Congress.

In the following Ashton Case[73] Hughes became more liberal and wished to extend the Federal Backruptcy Act to aid the municipalities. Certain major principles of his philosophy should be presented in correlation with his vote in this case. The state and national governments, according to his firm belief, had distinct and separate powers, and both governments should remain within the limits of those powers. But he also believed that the best government was an effective government, and laws which vitalized and effectuated it should be upheld.

The municipal governments were in debt and were being forced to the verge of bankruptcy. One of two lines of action was open to these cities, either repudiation of their debts or near cession of government. While the first recourse was distasteful to the people and the Court, the second recourse might mean virtual chaos in the highly urban society of the country.

The Municipal Bankruptcy Act was declared invalid by the Court in a five-four vote. Once more the Chief Justice sided with the minority. The law was passed by Congress to relieve local governments that were nearing bankruptcy. The creditors holding the municipal bonds could file a petition requesting that the debt be scaled down. Two-thirds of the creditors and the state had to approve the petition before there could be any

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[73]Ashton v. Cameron Co. Water District, 298 U.S. 513.

court action.

The majority of the Court contended that the federal government could not extend its bankruptcy provisions to the localities because the act would invade the rights of the states. The states could not, by their approval of the proceedings, relinquish their jurisdiction; and since the states did not have the right to impair contracts, they could not give their approval to allow the central government to do it.

The minority opinion, in which Hughes concurred, stated that it was within the power of Congress to allow localities to reduce their debt with the state's approval. They asserted that the bankruptcy provisions were gradually being extended through Court decisions, and that relief for local units was in the stage of evolutionary process. They reiterated a statement Hughes had used many times previously, namely: that to overcome an act of Congress, the invalidity of the act must be proved beyond reasonable doubt. The opinion included a great deal of statistical data concerning the economic status of localities in the forty-eight states. These facts influenced the decision. Cardozo, in the minority opinion, asserted that to redeem the debts the localities would have to tax and tax, but "the command to tax would be futile when tax values are exhausted."

The third decision in which the Chief Justice dissented was the Morehead Case.[74] This case was of unusual interest

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[74] Morehead v. New York ex. rel. Tipaldo, 298 U.S. 587.

because several states had passed minimum wage laws that had been declared unconstitutional by the Supreme Court. The previous Adkins Case[75] established determining precedent. Since the Adkins Decision states had examined the opinion and had attempted to legislate in the manner considered acceptable to the judges. The Morehead Case questioned the New York Minimum Wage Law. The vote against the law was five to four by the Court in the Morehead Case, with Hughes voting with the minority for the third consecutive time. The majority opinion held that the Adkins and Morehead Cases were indistinguishable and therefore the Adkins precedent ruled.

Hughes was always concerned about minority groups and was inclined to allow the states leeway in legislating to protect these groups. In his dissent, he stated that the federal Constitution did not deny the states the right to protect women from being exploited by overreaching employers who refused to pay a decent wage. After examining the statute he disagreed with the majority's contention that terms "living wage" and "oppressive" and "unreasonable wage" are not clearly defined. He found the objectives of the law and the terms defined clearly and fairly. The law included a statement that the prescribed fair wage was to correspond to a reasonable value for the service which the employees perform, and that, according to the Chief Justice, was the essential feature of the law and as such

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[75]Adkins v. Children's Hospital, 261 U.S. 525.

distinguished it from the Adkins precedent.

Hughes argued for the reconsideration of the Adkins precedent and the New York Law with these words: "Such divisions (equal or nearly equal divisions of the Court on certain cases) are at times unavoidable, but they point to the desirability of fresh consideration when the are material differences in the cases presented."[76] This statement does a great deal to explain his action in following cases. He also stated that the validity of the New York act must be considered in the light of the conditions to which the exercise of the protective power of the state was addressed. The state submitted a brief which showed the increase of women workers and their low wages. It also stressed that the wages were unfair in that they were insufficient for the women to support themselves. The Emergency Relief Bureau of New York City was forced to accept these women as relief petitioners.

Hughes asserted the right of the states to use police power to protect women from exploitation, and stated that the liberty of contract had its inherent limitations. He felt that liberty of contract must be protected from arbitrary and capricious interference, but also that it was necessary to prevent its abuse. Otherwise, it could be used "to override all public interests and thus, in the end, destroy the very freedom of opportunity which it is designed to safeguard." Hughes maintained that "liberty of contract is a qualified, not an absolute right."

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[76] Ibid., 298 U.S. 587.

"Liberty" implies the absence of arbitrary restraint, not immunity from reasonable resolutions and prohibitions imposed in the interests of the community. These same statements of Hughes can be found in his McGuire Opinion[77] as well as in the gold clauses[78] and the Nebbia Milk Case.[79] He stressed that precedent had already been established by limiting hours of work in mines and smelters, and hours of employment in specified manufacturing establishments.

He argued that women were in a distinctive class due to their particular relation to social welfare, and he pointed out that several laws were upheld that limited hours of work for women and put women in a special class by themselves. He reasoned that, if liberty of contract were viewed from the standpoint of absolute right, there would be as much said against fixing wages. Once again he asserted that principle dear to his logic: "the test of reasonableness," and added "in the circumstances disclosed." He found the end legitimate and the means appropriate, and felt that the act should have been upheld. The three liberals, Brandeis, Cardozo, and Stone joined in this opinion.

Nation-wide protest appeared against this decision by the Court majority, for the Court had said in effect that, since liberty of contract could not be impaired, no government, either federal or state, could regulate the wages of women. Thus there

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[77] Chicago B. & Q. R.R. v. McGuire, 219 U.S. 549.

[78] Norman v. B. & O. R.R., 294 U.S. 240.

[79] Nebbia v. New York, 291 U.S. 502.

existed a vacuum of power which only the employers could fill. This view was definitely not in accord with the developing social philosophy of the nation.

This decision was the last one to be judged adversely by the Court. Criticism, adverse commentary, and proposals to change the Court filled the air. Strangely enough, President Roosevelt made no definite statements or criticisms. Many people felt that, if the Democratic party so wished, it could carry the campaign issue on the Supreme Court decisions.

The 1935-1936 session of the Court was one which condemned the major New Deal policies and state social legislation. The Court was very conservative in appearance. By examining the record, the Chief Justice is found voting with the unanimous Court on three major decisions, and voting with the majority on a split vote on the unconstitutionality of only one law. He sided with the so-called liberal minority in two instances, and partially upheld and partially destroyed another federal law. The unanimous vote may not be judged either liberal or conservative since the complete Court found the law definitely invalid.

The two liberal dissents and the conservative vote balanced with the half-and-half decision in the coal case and placed Hughes a little left of center. His dissents provide the best sources for predicting his actions and votes in following sessions. The Chief Justice, therefore, entered the most crucial period of recent Court history with a remarkable record of impartiality and freedom of opinion.

CHAPTER IV

THE NEW DEAL UPHELD

> "The people.....have reached the conclusion that there should be no limit to the exercise of federal power in connection with interstate commerce short of absolutely securing the people in the freedom of commerce, and of putting an end to the discrimination and unlawful preferences which have afflicted interstate commerce in the past.
> -- Charles Evans Hughes[1]

Chief Justice Hughes reached his pinnacle as the teamwork judge in 1937. He led his Court in upholding fourteen major laws while the Court was under attack by the administration. By conciliation and moderation Hughes was able to command a majority of five justices in the most controversial cases before the Court; the Washington Minimum Wage Law, the Wagner Act, and the Social Security Acts.

The Court was faced with a crisis which threatened to disrupt and alter the entire judicial system and establish a dangerous precedent. The President had proposed to pack the Supreme Court with additional judges up to six new members. The party leaders, Congress, and the people protested against the passage of such a bill, and a long debate and bitter fight continued from January until July, ending with the bill's defeat which was caused, in some part, by the Court's decisions.

The protests against the Court became only an undertone

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[1]Merlo J. Pusey, Charles E. Hughes. p. 215 (Vol I).

during the presidential campaign of 1936. The President shattered this silence in his second inaugural speech when he urged the Supreme Court "to make effective the instruments, the conceded powers, and those legitimately applied for the public good." Hughes realized that this Court session was to be the most critical one of his tenure as Chief Justice. Already the national press, the administration and Congress, and the people were censuring the Court for its decisions in previous sessions and were advocating a change in its justices.

By 1937 the long-term problems of the country were evident and the legislation directed at obliterating the conditions causing the maladjustments was to be reviewed by the Court. The Chief Justice recognised that these laws were directed at alleviating permanent, not emergency, distress conditions. The philosophy which apparently guided his votes in this period was that "if the powers of the states are inadequate to deal with a subject heretofore retained in their keeping, and the interests of the people as a whole imperatively demand the assumption of power by the federal government, the people will provide for that assumption of power."[2] When this statement was made Hughes was thinking of a constitutional amendment, not of a forced liberal interpretation by the Supreme Court, but his philosophy cannot be considered invalid even in light of the Court fight.

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[2]Merlo J. Pusey, Charles E. Hughes. Vol I, p. 215.

Even as early as 1907 he asserted that "The.....people have reached the conclusion that there should be no limit to the exercise of federal power in connection with interstate commerce short of absolutely securing the people in the freedom of commerce, and of putting an end to the discrimination and unlawful preferences which have afflicted interstate commerce in the past."[3] A few years later he actually extended the commerce clause to intrastate commerce. In the Minnesota Rate Cases[4] and in the Shreveport Case[5] he maintained that Congress was free to regulate local operations "having such close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance."[6]

Since Hughes was sensitive to the people's will, he did not find it difficult to read their wishes as evidenced by their actions. Congress, the people's representative, had passed numerous laws increasing and extending federal power. The President had suggested and advocated the passage of these laws, and the people had recently voted his re-election, giving him an

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[3] Ibid., Merlo J. Pusey. p. 215 (Vol I).

[4] 230 U.S. 352.

[5] 234 U.S. 342.

[6] Ibid., 234 U.S. 342.

overwhelming vote of confidence. Thus the people apparently wanted federal power extended to alleviate conditions that were beyond the control of the separate states.

The Court appeared to respond to these wishes when it upheld the social legislation presented to it. The liberal minority became the majority when Justice Roberts once again voted with Hughes, Brandeis, Cardozo, and Stone.' Legislation, previously held unconstitutional, was again reviewed by the Court in revised laws. Several of the laws embodied the principles of the National Recovery Act, but each principle was carefully incorporated in a separate and distinct law. Pieces of social legislation reviewed by the Court for the first time were the Social Security Acts and the Old Age Pension Act. The Court judged all of these laws constitutional, but this did not silence the Court critics. Now they charged that the Court was responding to the pressure placed upon it by the administration. Some of them claimed that Roosevelt had been victorious; while others leveled even more criticism at the Chief Justice for being influenced by the Court fight, ignoring the fact that Roberts, not Hughes, was responsible for the changed majority.

What had caused this new attitude of the Court? And what, primarily, had influenced Justice Roberts to vote with the majority block rather than remain firm with the views of the conservatives? These questions will never be answered to the satisfaction of everyone. Each individual, after examining this period, will entertain his own opinion, but Chief Justice Hughes'

actions are more easily attributed to his philosophy and his awareness of a transition in social and economic thought. Emergency conditions were no longer influential, as business conditions were improving and production was near its pre-depression level. But the business and the economy as a whole were faced with two major problems, namely: prevention of another depression, and the effective use of the country's surplus labor force.

The depression had forced businesses to seek more efficient and economical methods of production, resulting in the installing of many labor-saving devices. Machines and more efficient organization cut the demand for laborers in the factory drastically. Statistics show that, even at the 1929 levels of production, a large number of workers would still be unemployed. In the present 1937 boom period eight to twelve million people were still unemployed.[7]

Coupled with this unemployment situation was warning of an impending recession sometime in the future. Popular commentators and economists warned that the current boom might become inflationary and end in a crash. Even Roosevelt is quoted as stating that another crisis like 1929 was again becoming possible, "not this week or month, perhaps, but within a year or

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[7] J. George Frederick, "Not by Leaving It to Industry Alone," Forum, March, 1937. pp. 148-50.

or two."[8] The Chief Justice was well aware of these conditions and problems. Labor surplusses meant workers placed in a disadvantageous position in relation to the employer, and the threat of another depression would mean more starvation, tragedy, and burdens on the state and local units. The new social philosophy found such conditions out of harmony with its objectives of equality and security for the worker and farmer.

Disguising his major purpose, Roosevelt proposed a bill which purported to make the court system more efficient and effective by allowing judges to be appointed or transferred from one district to another to relieve the congested court dockets. The important feature of the bill gave the President power to appoint an additional judge for every judge on the Supreme Court bench over seventy who had not retired. According to Roosevelt's thesis, any judge over seventy automatically became slower and less capable of clear thinking. The appointment of new judges for justices over seventy would allow Roosevelt to pack the Court with as many as six new members. These would be Roosevelt men and the favored projects of the New Deal were more likely to be approved. This bill, drawn up by the Attorney-General, was referred to the two committees on the judiciary immediately. During the first week the country was stunned and little opposition arose. The solid Democratic Congress was

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[8]Walter Lippman, The Supreme Court, Independent or Controlled? New York: Harpers and Brothers, 1937. p. 47.

expected to pass the bill immediately.

However, when the bill was examined more closely and its true purpose exposed, a violent reaction against the bill set in throughout the country. The people, the national press, and the political leaders, both Democrat and Republican, protested against the bill; and Congress was flooded with letters from constituents opposing its passage. The Supreme Court was begged to stand firm against the plan and not to resign their positions. Each day the opposition increased but still Roosevelt would not compromise. He appeared to be confident of the bill's passing and yet, being an astute politician, he knew that the party which altered the Supreme Court structure was committing political suicide.[9] During the period when the bill was in the committee's hands he did nothing to hasten its passage. His chief objective was to have a liberal Court and, if this could be accomplished through pressure rather than the bill, he would be satisfied.

The administration and the people waited for the Supreme Court decisions. The Summers-McCarren Bill, which allowed justices to retire with full pay at seventy, was passed at this time. Many Congressmen favored the retirement of several Supreme Court justices so that younger and more virile judges could be appointed. The Senate was split on the Court packing issue; with Wheeler, Borah, and Brown leading the opposition.

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[9]Merlo J. Pusey, Charles E. Hughes. Vol II, p. 754.

Senator Ashurst wanted the controversy to last until July for he felt that, if the bill came to vote then, the chances of its passage would be much greater.[10] Roosevelt, in radio speeches on March 4th and 10th, attacked the Supreme Court and appealed directly to the people in urging the passage of the bill. The probability of a favorable report on the bill by the Senate Judiciary Committee was very doubtful. A revolt had begun in the Senate.

Two minor decisions were handed down by the Court before any major New Deal laws were decided. The first one, the Gold Ban Case,[11] was a victory for the New Deal. The majority upheld the Congressional emergency joint resolution that abrogated payments in gold. Previously, the Court had held that the gold clauses in bonds could be abrogated under the power of Congress. Now they held that the power even covered rental contracts based on settlement in gold bullion. The second decision[12] was a victory for the conservatives. Hughes joined them in exempting municipal employees from income tax.

The controversy over the Court packing plan continued in Congress, but the interest of the people regarding it gradually decreased, and the press reported only briefly on the bill's progress. The people, according to a New York Times editorial,

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[10] New York Times, March 9, 1937. p. 15

[11] Holyoke Water & Power Co. v. American Writing Paper Co., 304 U.S. 574 (1937).

[12] New York ex. rel. Rogers v. Graves, 299 U.S. 401 (1937).

did not regard the plan with favor: "Rightly or wrongly, the people of the United States have interpreted the Presidential proposal as an attack on the integrity of the Supreme Court. This is hardly less true of his supporters than of his opponents."[13]

The opponents of the plan sought Hughes' support. He wrote a letter in which he stated that the Court was abreast of its work and that the present proposal would be unconstitutional. He pointed out that increasing the Court justices would not ease its burden but increase it, as all the justices are required to read the briefs and vote on the cases, and the Constitution did not provide that there shall be two Supreme Courts. Hughes' letter destroyed all arguments for the bill that Roosevelt had advanced, and only one argument remained; Roosevelt would be able to appoint young justices raised on social and economic theory similar to his own.

The second blow dealt to the Court packing plan was the Court's upholding of the Washington Minimum Wage Law, the Frazier-Lamke Farm Mortgage Moratorium Law, and the Railroad Labor Act. This was an apparent triumph for Roosevelt as he had forced the Court to liberalize itself. The outlook for the National Labor Relations Act was increasingly favorable, according to the press.

To the outsider, Roosevelt's assumption that he had for-

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[13] New York Times, March 21, 1937. (Editorial by Jerome D. Greene), p. 8.

ced the Court to become liberal would appear to be valid, but Hughes' private notes disprove his assumption.[14] Just before Christmas in 1936 the Court had voted four to four to uphold the minimum wage law and to overrule the precedent established in the Tipaldo Case,[15] which invalidated the New York Minimum Wage Law. Roberts had abandoned his former stand and had joined the liberals. Justice Stone was ill, and Hughes decided to wait for his vote to overrule the Adkins and Tipaldo precedents.[16] Stone returned just after the Court plan was presented to Congress. The Court decided to delay announcing its decision until later so as not to appear as being influenced by the Court fight. By March 30th the pressure had lessened, and the Court handed down its decision upholding the law.

Hughes, firmly believing in minimum wages for women, was very pleased when Justice Roberts changed his views, for a divided Court with five-four votes disturbed the Chief Justice as much as it did the country as a whole. Court decisions, he felt, should be consistent, and he occasionally resorted to devious reasoning in his own opinions rather than directly overrule an established precedent. However, he felt that the precedents established in split decisions should be re-examined when a similar case was presented before the Court. "A dissent

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[14] Merlo J. Pusey, Charles E. Hughes. p. 757 (Vol II).

[15] Morehead v. New York ex. rel. Tipaldo, 298 U.S. 587.

[16] Adkins v. Children's Hospital, 261 U.S. 525.

in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."[17] For this reason, when the Washington Minimum Wage Law was reviewed, he gladly accepted the responsibility of writing the challenging decision.[18] If Roberts were to concur with the majority and vote to uphold the law, a valid distinction would be needed to differentiate this law from the New York Minimum Wage Law. If this were not done, it was unlikely that Roberts would subject himself to criticism over the reversal of his vote.

The Chief Justice stressed that the petitioner's question in the New York case did not warrant the re-examination of the constitutional principle. The New York state court had not found any material difference between the Washington, D.C., statute which established the no-minimum-wage-for-women precedent and the New York law. The Supreme Court was requested to ascertain whether the two laws were distinguishable. The Court majority held that the "meaning of the statute," as stated by the state courts, "must be accepted here if the meaning had been specifically expressed in the enactment."

Hughes considered the question presented in the Parrish Case (Washington Minimum Wage Law) decidedly different. The

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[17] C. Herman Pritchitt, The Roosevelt Court, New York: The Macmillan Company, 1948. (Hughes quoted), p. 52.

[18] West Coast Hotel v. Parrish, 300 U.S. 379.

supreme court of Washington had upheld the wage law, stating that the law was a reasonable exercise of the police powers of the state. It refused to regard the Washington, D.C. (Adkins Case)[19], law as determinative, citing both precedents previously established to the Adkins decision and the Court's attitude then and since as justifying the wage decision. The Chief Justice considered that the state court's action demanded the re-examination of the Adkins precedents. Refusing to allow that emergency argument and crucial conditions could automatically validate national legislation, he still considered current conditions a vital aspect in the decisions. He constantly brought forward the conditions that influenced judgment, and in this case he felt that "the importance of the question, in which many states having similar laws are concerned, the close division by which the decision of the Adkins Case was reached, and the economic conditions which have supervened, and in the light of which the reasonableness of the exercise of the protective power of the state must be considered, make imperative that in deciding the present case the subject should have fresh consideration."

Since the minimum wage law was held unconstitutional under the due process clause of the Fourteenth Amendment, the Court was forced to re-examine the arguments against the law. Minimum wage was attacked as a deprivation of freedom of con-

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[19] Ibid., 261 U.S. 525.

tract. Hughes, when writing the majority opinion, stressed that the Constitution did not guarantee freedom of contract, but liberty; and liberty, through interpretation of the courts, is a limited concept. He pointed out that "liberty safeguarded" was the "liberty of a social organization which required the protection of law against the evils which menace the health, safety, morals, and welfare of the people." Thus liberty under the Constitution is "necessarily subject to restraints of due process and regulation which is reasonable in relation to its subject and is adopted in the interests of the community." This line of argument refuted the opinion written in the Adkins Case and destroyed the first principle upon which the invalidity of the minimum wage laws rested.

Having stated that liberty was of a limited nature, Hughes reinforced his argument by citing precedents eastablished in the gold clause and moratorium cases. "Freedom of contract is a qualified and not an absolute right." This statement was reiterated and illustrated by a battery of cases in which regulation and limitation of working hours had already been upheld. The examples he cited were the right of the state to limit the hours of work, its right to prohibit contracts limiting liability for injuries to employees, and forbidding the payment of seamen's wages in advance. Quoting from other decisions, he stressed the principle of reasonableness and the fact that the Court should not judge the wisdom of the act and invalidate it unless it was "palpably in excess of legislative power."

The state had a special interest in protecting women against employment contracts which, through poor working conditions, long hours, or scant wages, would leave them inadequately supported and undermine their health because, according to Hughes, "the health of women is related to the vigor of our nation." He continued that "women are especially liable to being overreached and exploited by unscupulous employers and, if this condition exists, the community is forced to accept the full burden of their complete or partial support." He further strengthened his argument by stressing the recent economic conditions and the problems which faced the country at that time. His words were:

> "The exploitation of a class of workers who are in an unequal position with respect to bargaining power, and are thus relatively defenseless against the denial of a living wage, is not only detrimental to their health and well-being but casts a direct burden for their support upon the community. What these workers lose in wages, the taxpayer is called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression, and still continue to an alarming extent despite the degree of economic achievement which has been achieved.....While in the instant case no factual brief has been presented, there is no reason to doubt that the state of Washington has encountered the same social problem that is present elsewhere."[20]

This opinion, coupled with the Minnesota Opinion,[21] is the best illustration of Hughes' philosophy that "needed reforms

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[20] West Coast Hotel v. Parrish, 300 U.S. 379.

[21] Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398.

may be accomplished by making our institutions work, and by effecting in the light of the benefits secured, such changes as experience may command and deliberate judgment approve."[22] Economic conditions and the number of state laws enacted demonstrated the need for a more liberal interpretation. Generally liberal in the face of state police powers, the Chief Justice easily found such a law within the limits of the police power clause.

The conservative block of the Court, in a ringing dissent, denounced the majority opinion. Justice Sutherland wrote the opinion, stating that a judge must resolve for himself the validity of a statute. "The oath which he takes as a judge is not a composite oath, but an individual one. And on passing on the validity of the statute he discharges a duty imposed on him which cannot be consummated justly by an automatic acceptance of the views of others, which have neither convinced nor created a reasonable doubt in his mind." These words create a moot question; was Justice Sutherland referring to his own inability to vote with the majority for the good of the Court, or was he referring to the changed attitude of Justice Roberts?

Sutherland continued by stating that "the meaning of the Constitution does not change with the ebb and flow of economic conditions." It was not the judicial function to amend the Constitution under the guise of interpretation, according to

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[22]Charles E. Hughes, Addresses and Papers of Charles Evans Hughes, 1906-1908. p. 74.

Sutherland. "While it was true that freedom of contract was subject to restraints, the exception to rule and restraint was justified only by exceptional circumstances. A limitation upon freedom of contract for adult women legally capable of contracting for themselves to assure a minimum wage was not such a circumstance."[23] This was the Spencerian laissez-faire theory held by the conservatives in opposition to the realities and tragedies of the depression. The Chief Justice had denounced these views in the previous Morehead Case dissent.[24] Throughout his service as governor, associate justice, and Chief Justice, Hughes' record shows that he did believe in limitation of freedom of contract and improving the lot of the workingman.

Three other decisions were handed down by the Court that same day. The amended Railway Labor Act was upheld in the Virginia Railway Company Case.[25] Justice Stone wrote the opinion in which the whole Court concurred. This decision specifically extended Congress' power over interstate commerce to the activities of "back shop" employees engaged on heavy repairs on locomotives and cars. The Railway Labor Act extended to this group and company unions were forbidden. The railroad had to treat with the authorized representatives of its employees for the purpose of negotiating a labor dispute. Railroading was inter-

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[23] West Coast Hotel v. Parrish, 300 U.S. 379.

[24] Morehead v. New York ex. rel. Tipaldo, 298 U.S. 587.

[25] Virginia Railway v. Federation, 300 U.S. 515.

state commerce, but "back shop" activities could not be so considered. However, these activities would injure interstate commerce directly if a work stoppage ensued; therefore, the interstate commerce clause was extended to protect them. Here is an inkling of a changing attitude towards the effect on interstate commerce by people indirectly connected with it.

The second case reviewed by the Court dealt with the revised Frazier-Lemke Act, with Justice Brandeis reading the opinion.[26] The Court upheld the act by a unanimous vote. Brandeis stressed the new feature which now made the law constitutional. The law allowed the farmer-debtor a three year stay of foreclosure. This stay was not to be an absolute one for the court could terminate it earlier and order the sale of the property. Furthermore, the conditions of sale hinged on whether the farmer could rehabilitate himself financially within the three year period, or if the emergency had ceased to exist which had given rise to the legislation. The legislators, having amended that feature which the Court had stressed as unconstitutional, revised two other objectionable sections. Brandeis pointed out that the act now was not unconstitutional as applied to the mortgagee because the possession of the property during the stay of foreclosure was in the hands of the debtor. subject to obligations imposed by the act and under the supervision and control of the court, rather than in

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[26] Wright v. Vinton, 300 U.S. 440 (1937).

a receiver or trustee.

The third case passing Court review was the National Firearms Act[27] and was also upheld by a unanimous vote. The law provided that every dealer in firearms had to have a license, and that the sales of certain firearms were to be taxed. The Court stated that the law was valid because it was a true revenue measure. A tax may have regulatory effects and may burden, restrict, or suppress the thing taxed and still be within the taxing power. The Court reiterated a principle used a number of times when it wished to uphold a certain law, namely: that the courts may not inquire into the motives of Congress in exercising its measures.

The decisions in all three of these cases may be specifically pointed out as the reasonable attitude of the Court which allowed Congress to legislate and extend its control to subjects properly within its jurisdiction. The lawyers had examined the Constitution and carefully formulated their bills under the appropriate clauses. The revised Frazier-Lemke Law now read like the Minnesota Moratorium Law.

The country waited breathlessly for the N.L.R.B. Decision. With the Court fight losing momentum this decision might be the deciding factor, and the friends of the Court prayed for a favorable decision. On April 12th the Court convened. Chief Justice Hughes opened the session by reading the anxiously

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[27] Sonzinsky v. United States, 300 U.S. 506.

awaited N.L.R.B. Decision.[28] The main incident of the case was the discharge of ten employees from the Jones and Laughlin Steel Company. The union alleged that the employees were discharged because of their union activities within the plant. N.L.R.B. ordered the rehiring of the men and a full payment of wages lost during the period of discharge. The Jones and Laughlin Company refused to obey the order, contending that production was not commerce and thus the Labor Board's power did not extend to interstate commerce, citing the Schechter Case[29] as precedent.

The N.L.R.B. opinion is worthy of note as Chief Justice Hughes interpreted the commerce clause so broadly that no law since challenged under the commerce law has been held invalid to date. Many authorities feel that this decision overrules the precedent established in the Schechter Case, while others maintain that Hughes simply returned to the original broad interpretation that he first stated in the Shreveport Case,[30] namely: that when intrastate commerce directly affects interstate commerce the national government has the right to control and regulate both for the good of interstate commerce.

Hughes answered the defendant's contention by stating that the Jones and Laughlin Company was engaged in interstate

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[28] N.L.R.B. v. Jones and Laughlin, 301 U.S. 1.

[29] Schechter Poultry Corp. v. United States, 295 U.S. 495.

[30] Shreveport Case, 294 U.S. 342.

commerce. He clearly, and with much detail, recounted the business activities of the company which extended throughout the country. After stating these facts, he asserted that previous precedents had established such activity as being interstate commerce. The interesting point to note is his statement that "the distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system," but he continued by asserting that "the cardinal principle of statutory construction is to save and not to destroy." He further stated that "we have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act." He pointed out that the act was designed to apply only to those cases which directly burden or obstruct interstate commerce. The law was valid but its application had to be determined in each individual case.

Hughes had maintained, in the Schechter Case, the principle of determining the effects in each individual case, but this statement was bypassed and people generally considered that the government was not allowed to regulate intrastate activities. Hughes held that employee organization was a fundamental right which was necessary to place the employees on some sort of an equality with the employer. He returned again to the question of whether manufacturing is commerce. After stating several stream of commerce principles, he said that even

these analogies were unnecessary for "although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstruction, Congress cannot be denied power to exercise that control." The question of affecting and obstructing was necessarily one of degree.

From January until March strikes, walkouts, and lockouts had filled the news. An epidemic of strikes had become a state problem in Michigan and threatened nearly all the business and industrial activity in the state. The companies refused to allow unionization, and employed armed guards to protect their interests and property. The union members had discovered an effective remedy for the importation of scab labor: the sit-down strike, where the workers simply sat down at their jobs.[31] Thus they had control of their machines and the employer's property. This method of striking resulted in many injuries, some deaths, and much property damage. Furthermore, the strikers' tactics were illegal and police were required to evict them from the premises.

Again in this case[32] Hughes, in his opinion, illustrated his awareness of current conditions and the probable effects of this decision. He maintained that the stoppage of manufacturing

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[31] New York Times, January 1st to March 30, 1937.

[32] N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1.

operations by industrial strife would have a most serious effect on interstate commerce; "in view of the respondent's far-flung activities, it is idle to say that it would be indirect or remote, for it is obvious that it would be immediate and might be catastrophic." He continued, explaining why the Schechter Decison was not applicable here:

> "Because there may be but indirect and remote effects on interstate commerce in connection with a host of local enterprises throughout the country, it does not follow that other industrial activities do not have such a close and intimate relation to interstate commerce as to make the presence of industrial strife a matter of most urgent national concern. When industries organize themselves on a national scale, making their relation to interstate commerce a dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?"[33]

The industrial strife of the present period was an excellent reference for his following statements: "Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace." He stressed that one of the most prolific causes for strife has been the employers' refusal to confer and negotiate with these representatives. According to Hughes:

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[33] Ibid., 301 U.S. 1.

> "The Court is asked to shut its eyes to the plainest facts of our national life.....to deal.....in an intellectual vacuum. Interstate commerce must be appraised by a judgment that does not ignore actual experience. Refusal by employers to confer and negotiate has been one of the most prolific causes of strife. The steel industry is basic; its strikes have had far reaching consequences. It falls properly within the preview of Congress. The Wagner Act has been criticised as one-sided; but the Court is dealing with the power of Congress, not its policy, and a cautious advance, step by step, is perhaps not undesirable and perhaps better than trying to obliterate all evils in one sweep. The Labor Board acted within its competency and the act is valid as here applied."[34]

From this statement it would seem that the Wagner Act had Hughes' full approval.

Hughes concluded with a statement which gives Congress control over wide-spread manufacturing concerns. This statement was extremely important because the interpretation of the commerce clause was broadened and re-interpreted as it had been before the 1900's. At that time Congress was given a great deal of power under the commerce clause to regulate industries.[35]

It is not difficult to discern the Chief Justice's philosophy of judicial action in this N.L.R.B. decision. Characteristic of his judicial thought is his statement that "a cautious advance, is not undesirable and perhaps better than trying to obliterate all evils in one sweep." As governor of New York he warned against haphazard and spasmodic legislation. He felt

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[34] N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1

[35] Charles E. Hughes, Addresses and Papers of Charles Evans Hughes, 1906-1908. p. 210.

that society could not be stable unless it was progressive, but progress demanded patience and reason. He asserted that:

> "Reason implies patience. This is a hard lesson for democracy to learn. It does not mean that unnecessary delays should be tolerated, or that obstacles should not be surmounted by determined effort. It simply means the desire to bring about good order by orderly processes. It means recognition of our mutual dependence, of our complex relations in society, and of the necessity that our efforts in social progress should not be haphazard nor spasmodic, but steady, sober, and persistent."[36]

The Chief Justice was inclined towards liberalism if the need and the will of the people were evident and the procedure correct, while the conservatives were not so inclined. The laws were better constructed than in the previous period since now, at least, five of the nine justices held valid the new laws which had principles of the invalid ones incorporated in them. But the four conservatives held fast to their belief that these principles were beyond the shadow of constitutionality.

Three other cases concerning the National Labor Relations Act were reviewed by the Court at this time. Hughes wrote all three decisions. Having established the constitutional validity of the law, he examined each case to see if the law was applicable and the regulation of the specific industry warranted. The Fruehauf Company had manufacturing plant branches in a number of states and two-thirds of its products were produced for

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[36] Ibid., Charles E. Hughes. (Speech at Chautauqua, N.Y., August 24, 1907), p. 210.

sale in other states. These facts, the majority considered, warranted the extension of the N.L.R.B. to the trailer concern, as the stoppage of work would directly effect interstate commerce.[37] The effect, and not the source, determined the applicability of the law.

In another case the buying and selling of goods caused a clothing company to be placed under the N.L.R.B.[38] The fact that the goods were transformed from yard goods into finished products was incidental to the Court decision.

The Jones-Laughlin Case, the Fruehauf Case, and the Amalgamated Clothing Company Case were all very similar in principle. Each company was basically a manufacturing company which produced finished goods from raw materials and had plants in various states. The products of these plants were manufactured and sold to the country at large and were, in fact, part of interstate commerce.

While the aforementioned decisions were acceptable to the majority of the people, the critics of the Court commented adversely on the extension of the N.L.R.B. to the Associated Press Case.[39] Here Chief Justice Hughes stated that "interstate communication of a business nature, whatever the means, was interstate commerce subject to regulation by Congress."

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[37] N.L.R.B. v. Fruehauf Trailer Co., 301 U.S. 49 (1937).

[38] N.L.R.B. v. Friedman-Harry Marks Clothing Co., 301 U.S. 58.

[39] N.L.R.B. v. Associated Press, 301 U.S. 103.

Even a non-profit company, which did not operate or sell its news, was held to engage in interstate commerce. The act applied to those employees working on editorials as well as those engaged in the actual transmission of the news. This decision was censured as extending the commerce clause too far.

The National Labor Relations Board decisions were a major blow to Roosevelt's Court packing plan, and the plan lay in the committee's hands gasping its dying breath. However, the President considered himself the victor since he had achieved his objective, a liberal Court.[40] Still, two other laws were yet to be reviewed by the Court, the Social Security Act and the Old Age Pension; and the Court might still veto these laws.

Praise and criticism were the Court's lot, and the most common criticism was that the Court had become liberal only under Presidential pressure. Various writers purported to examine Hughes' opinions and find them inconsistent. Hughes, "the man on the flying trapeze," was persuading the Court to loop-the-loop with him in order to save it from destruction.[41] These were only a few of the comments directed at the Chief Justice. Apparently few realized that Justice Roberts, and not Hughes, was responsible for the liberal majority.[42] The tone of

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[40]Merlo J. Pusey, Charles E. Hughes. p. 759 (Vol II).

[41]Drew Pearson and Robert S. Allen, Nine Old Men. pp. 74-97.

[42]Ibid., Merlo J. Pusey. p. 757 (Vol II).

a number of articles was highly critical and censured the Court heavily for its liberal interpretation.

While the Court itself appeared to have removed the necessity for the Court packing plan, President Roosevelt still desired to appoint several new justices to the Supreme Court bench. The fight over the bill in the committee continued as the Court decisions became even more favorable.

Several other interesting cases were reviewed by the Court before the Social Security decisions were announced to the country. One was the Anniston Manufacturing Company Case.[43] It sued the United States for a refund of the taxes collected under the invalidated A.A.A. law of 1933. The Chief Justice upheld the right of the government to establish a Board of Review to examine the complaints and claims of appellees. This reviewing board could compel the appellees to show that they had not shifted the burden of the taxes on the consumer. Hughes reiterated a primary principle of his own philosophy when he stated that, when two constructions of the law are possible, the Court should adopt the one that will save it, not destroy it. The government, through this provision, was not required to refund the taxes duly proven to the near impossibility of establishing the actual extent of the shifting of the tax burdens. Justices Stone and Cardozo concurred in this

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[43] Anniston Manufacturing Co. v. Davis, 301 U.S. 337.

opinion, but with a reservation. They would not vote on the constitutional or the statutory rights of the taxpayer in the extent it should be impossible to ascertain whether there had been a shifting of the tax. Justice McReynolds dissented. The New Deal laws were being upheld, but the Court was still divided, and the important judgments were decided by a five-four vote. The conservatives would not allow for changed conditions, economically or socially, when interpreting the Constitution.

While the conservatives were adamant in their position against the extension of federal control to subjects they considered properly within the states' jurisdiction, they consistently upheld the rights of the federal government as a sovereign ruling body. An illustration of their action and their philosophy is clearly seen in the Chaco Case.[44] This decision, which allowed Congress the right to pass a resolution permitting the President to place an embargo on arms and ammunition sent to warring countries, was very important since it stated the conservative's viewpoint concerning government powers. The Court decided that Congress had the right to act as a sovereign nation in foreign relations. Justice Sutherland, writing for the majority of eight, stated what he considered the limiting factor on Congress: "The primary purpose of the Con-

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[44]United States v. Curtiss-Wright Export Company, 299 U.S. 304 (1937).

stitution was to carve from the general mass of legislative powers then possessed by the states such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states..... That this applied only to the powers which the states had, is self-evident."[45]

Another case decided at this time is a very good illustration of Hughes' liberal philosophy. The Kentucky Whip and Collar Company Case[46] was in accord with his previous decisions upholding the right of the government to limit the hours of work for railroad men, the establishment of federal employers' liability legislation, and the enforcing of grade crossing statutes; all of these laws were, in fact, safety measures. But in the Kentucky Whip Case the Chief Justice clearly states that "in exercise of its (federal) control over interstate commerce, the means employed by the Congress may have the quality of police regulation....." Originally, only the states held police powers and could legislate for the safety, good, and general welfare of the state. Now, in this decision, the Court allows Congress the "quality of police regulation."

Then, on May 24th, the Court delivered its decision on the Social Security Cases. This was final victory for the Court

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[45] Ibid., 299 U.S. 304 (1937).

[46] Kentucky Whip & Collar Co. v. Illinois Central R.R. Co., 299 U.S. 334.

over the administration in a certain sense, as this decision dealt a death blow to the Court packing plan even though Roosevelt's request that the Court liberalize itself was fulfilled. The Court vote on the social security legislation was a divided five-four decision. Justice Cardozo, author of the opinion, interpreted the general welfare clause so broadly that for the first time in history a direct tax could be held on the country at large and used for a certain program. The Charles Steward Machine Shop petitioned the Court for a refund of the social security unemployment tax, contending that there was a conflict between the law and the Constitution because the latter forbid a direct tax on the country as a whole.[47]

Justice Cardozo stated that the tax was an excise tax and that recent events, like the depression and the resultant unemployment, justified the tax. This line of reasoning was in accord with the interpretation of the welfare clause in the Butler Case (A.A.A.).[48]

Following this case, litigation concerning Alabama's unemployment act was begun, ending in the Court's five-four vote upholding the state's right to participate in the benefits available under the Federal Social Security Act.[49] The act was valid in that the taxes were excises and for a public

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[47]Steward Machine Co. v. Davis, 301 U.S. 548.

[48]United States v. Butler, 297 U.S. 167 (1936).

[49]Carmichael, Attorney-General of Alabama, et. al. v. Southern Coal & Coke Co., 301 U.S. 554.

purpose, and the Court stated that the state had not abdicated its function nor was there any coercion.

The second part of the Social Security Law was the old age pension provision.[50] Justices Cardozo, Brandeis, Stone, and Roberts desired that the case be dismissed because they felt that an injunction against payment of the tax was not a correct remedy. But the majority contended that the issue and the extraordinary features of the bill were important and vital enough to justify the decision. Cardozo, the author of the opinion, wrote the decision on the principle that social and economic wastage was important to general welfare. Therefore, the Helvering v. Davis Case established the right to aid the aged under the general welfare clause.

These were the major social security laws that Roosevelt desired to have validated to such an extent that he would alter the entire Court structure to see this end accomplished. The Court liberally upheld all of his measures as well as other laws concerning police powers. In all, the Court decided fourteen major cases in this session.

The session closed with the social security decisions and Justice Van Devanter's resignation. At last Roosevelt was free to select a Supreme Court judge. He had promised the appointment to Senator Robinson as a reward for pushing the

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[50] Helvering v. Davis, 301 U.S. 619.

Court packing bill through the Senate, but Robinson died a few days after Van Devanter's resignation. Therefore, Justice Black was appointed and took his seat on the bench in the next session. Justice Van Devanter's resignation reduced the Court's solid conservative block to three members.

With Justice Black's appointment, the invalidation of Roosevelt-inspired laws ceased. The controversy was over, and nearly all of the laws were upheld by the newly constituted Court. However, were the charges of the writers and commentators true that the Court packing plan had forced liberal interpretations of federal and state powers in 1937? This question is partially answered by an examination of the staunch conservative votes in the Court. Justice Van Devanter, an arch-conservative, voted to uphold these laws nine times and voted against them three times. Just as the Court was unanimous in the 1935-36 session in declaring the haphazard and poorly constructed New Deal laws invalid, it now was unanimous in upholding three-fourths of the legislation presented to it in 1937.

The three cases upon which the Court split were the Washington Minimum Wage Law, the National Labor Relations Act, and the Social Security Law with the old age pension provisions. It is obvious, therefore, that they were against the minority's philosophy and interpretation of the Constitution. The other laws, revised and written without haste, were upheld by a unanimous Court as being within the powers of the state and

federal governments. If the Court were to respond to the administration's pressure, the two major laws, the N.L.R.B. and the Social Security Laws, would be strategical laws calling for a unanimous, or near unanimous vote. Yet, the conservatives dissented vigorously in these cases and denounced the majority opinions in bitter and vehement attacks.

However, now the Court crisis was over, and the President had won an apparent victory and suffered a minor defeat. The rumbling of war machines in the distance and severe business recession drew the spotlight away from the Supreme Court. Abruptly the Court crisis ceased and the Supreme Court slipped quietly back into its dignified and revered position. Few books or articles found its forthcoming decisions of any outstanding interest. The question of federal regulation and control had been settled by a great wrenching and twisting in the construction of the Constitution, according to the Court critics. A new social philosophy was accepted; a philosophy which maintained that the masses, the working classes of the country, should have the right of a decent wage and some security, and the government should tax for general welfare. The laborer was now rising in importance and was contending with business for its crown.

Chief Justice Hughes must have been grateful for the obscurity and peace which once again descended on his judicial house. He always maintained that decisions should be made without pressure and undue influences on the judges, as the

judges always worked best in an atmosphere of peace and quiet. Indeed, this atmosphere is most conducive to serious thought and the just evaluation of a man's character and actions. Justice Roberts, in the Agricultural Adjustment Act opinion, asserted that the judges were to lay the laws beside the Constitution and judge the disparity thereby. Unfortunately, the decisions that the Court makes are not as simple as that. Chief Justice Hughes stated the problems that faced the Court very well when he said: "How amazing it is that, in the midst of controversies on every conceivable subject, one should expect unanimity of opinion on difficult legal questions. In the highest ranges of thought, in theology, philosophy, and science we find differences of view on the part of the most distinguished experts....."[51]

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[51]Paul A. Freund, On Understanding the Supreme Court, Boston: Little Brown and Company, 1950. p. 117.

CHAPTER V

CONCLUSION

The Court controversy diminished in importance with the close of the 1937 session, and the "Court packing" provision of the Federal Court Reorganization Bill was defeated before Congress adjourned. The "reconstructed" Court continued to uphold all federal legislation including the far reaching regulatory laws. Numerous cases questioned the extent of the interstate commerce power over intrastate commerce in this period. The right of the government to regulate intrastate commerce when it directly affected interstate commerce was upheld consistently, since the principle of the "affect and not the source of injury" on interstate commerce had broadened the concept of the regulatory powers of the government considerably.

The Chief Justice had led his Court ably through a most difficult period. His leadership was highlighted by a reasonable attitude and a willingness to give or find a rational basis upon which a majority of the Court could agree. He was considered a "team work" judge during his early service as associate justice, and this "team work" tendency is also observable in his later opinions.

He sought a rational basis to uphold the laws questioned before him. The test of "reasonableness" and "legitimate ends" became the standard of measurement. But Hughes could not judge

alone and, therefore, had to conciliate the widely divergent views of the other justices. Moderation and reason guided his actions as he led the Court forward removing old abuses in the tax laws, upholding civil liberties, the rights of the minorities, and any reasonable state regulation. He, as well as the Court, experienced a reaction against the careless legislating of the New Dealers. A unanimous Court barred from further enactment the broad regulatory laws of the National Recovery Act. The broad delegation of power to the President was judged unconstitutional and Congress was advised to state more clearly and explicitly its aims and purposes. Hughes also maintained in this decision the limits of the interstate commerce clause. Intrastate commerce, which affected indirectly and remotely interstate commerce, could not be regulated by the National Recovery Act authorities. The other decisions which declared New Deal legislation unconstitutional stressed the sections which should be revised or amended.

But the period was not simply one of negation. The Chief Justice led the majority in upholding the government's right to impair contracts under the monetary clause in the Constitution. In minority opinions he stated several principles which were accepted as the rule in later cases. He maintained the right of the state to establish a minimum wage for women, the right of Congress to establish a railroad pension system, and its right to extend bankruptcy relief to municipalities. He also held that the interstate commerce

power extended to the shipments of coal across state lines. The prices of interstate coal could be fixed at the mouth of the mine before shipment.

Many new precedents were established and several precedents overruled in the third, and most important, period of Hughes' service. The Court was unanimous in judging constitutional nine of the fourteen laws presented in 1937. Several of these laws had been revised after having been declared unconstitutional in the previous session. The Court upheld by a divided vote the extension of the interstate commerce power to manufacturing industries, minimum wages for women, and the right of government to tax for general welfare and enact social security laws. Hughes was the author of two of the three controversial opinions. These opinions were consistent with his philosophy and in accord with precedents previously established by him. His dissent in the New York minimum wage case became the rule in the later Washington minimum wage case. The Minnesota Rate cases, the Shreveport case, and the Texas and New Orleans Railway decision established precedents which helped to validate the National Labor Relations Act.

The Chief Justice is often pictured as a man torn between two conflicting philosophies. He supposedly resisted change until he was caught in it and swept along with the tide. A more accurate explanation would be that he was conscious of the increasing complexity of society and a transition in social and economic philosophy. He realized that "no man can go it alone"

and judged the laws on that basis and in the light of their affects on the future of the country.[1]

The reflection of the man is often found in the qualities and attributes praised by him in another individual. This is especially true in Hughes' eulogy of Chief Justice Taft on the occasion of his retirement from the bench. Included in his tribute were these statements:

> "To Chief Justice Taft, the administration of justice was never an abstract conception, to be extolled in vain praises and with but slight regard to changes in social conditions and to existing deficiencies. While holding in contempt the fanciful schemes with which the administration of justice in this country is threatened from time to time, he was ever pointing out its shortcomings and laboring for its improvement by practical remedies.....He realized profoundly that the chief defects in the administration of justice lie in the men rather than in the method. A good judge, using the means at the command of an alert and informed mind, will find but rarely that he cannot force his way through to effective action. .....The Chief Justice had an open mind with respect to the necessary adaption of the authority of government, especially in relation to the broadening requirements of interstate commerce under modern conditions....."[2]

These statements are typical of Hughes and his beliefs. He did not consider the administration of justice an abstract concept, and he continually cited conditions and trends which should be recognized by the justices. He believed that the Constitution should be flexible but he regarded with suspicion

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[1]Merlo J. Pusey, Charles E. Hughes. p. 733 (Vol II).

[2]United States Report, Washington, D.C.: United States Government Printing Office, Vol 285, 1930. p. 30.

extremely radical, ill-considered changes and dangerous trends. Hughes' liberality was tempered with caution. William Ransom draws an apt analogy of Hughes' manner and spirit in regard to public questions. This analogy is valid in Hughes' tenure as Chief Justice as it was during his service as associate justice. The mastery of law and its development and application is likened to a great heap of dirt that needs to be cleared away:

> "The foolish man says: 'It is impossible that I should be able to remove this immense heap. I will not attempt anything so impossible. I will ignore it, pass it by and say there is no such obstacle.' But the wise man says: 'I see it. It is there. It has to be dealt with. I will remove a little today, some more tomorrow, and more the day after, and thus in time I shall remove it all; and the fathers will be glad.'"[3]

The three philosophies which dominated the Court might be found in this adaptation. The conservatives felt that it was impossible to remove the constitutional barriers even if the need was evident. They would not attempt anything so impossible. The liberals ignored the barriers, passed them by, and said there is no such obstacle. But Hughes' action was that of the wise man. The increasing complexity of our society demands a flexible Constitution. Hughes said: "I see the barriers. They are there. They have to be dealt with. I will remove a few today, some more tomorrow, and more the day after, and thus in time I shall remove them all." This

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[3]William Ransom, Charles E. Hughes, New York: E. P. Dutton and Company, 1916. p. 14.

analogy characterizes Hughes' method and his desire for progress and yet stability in constitutional theory.

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