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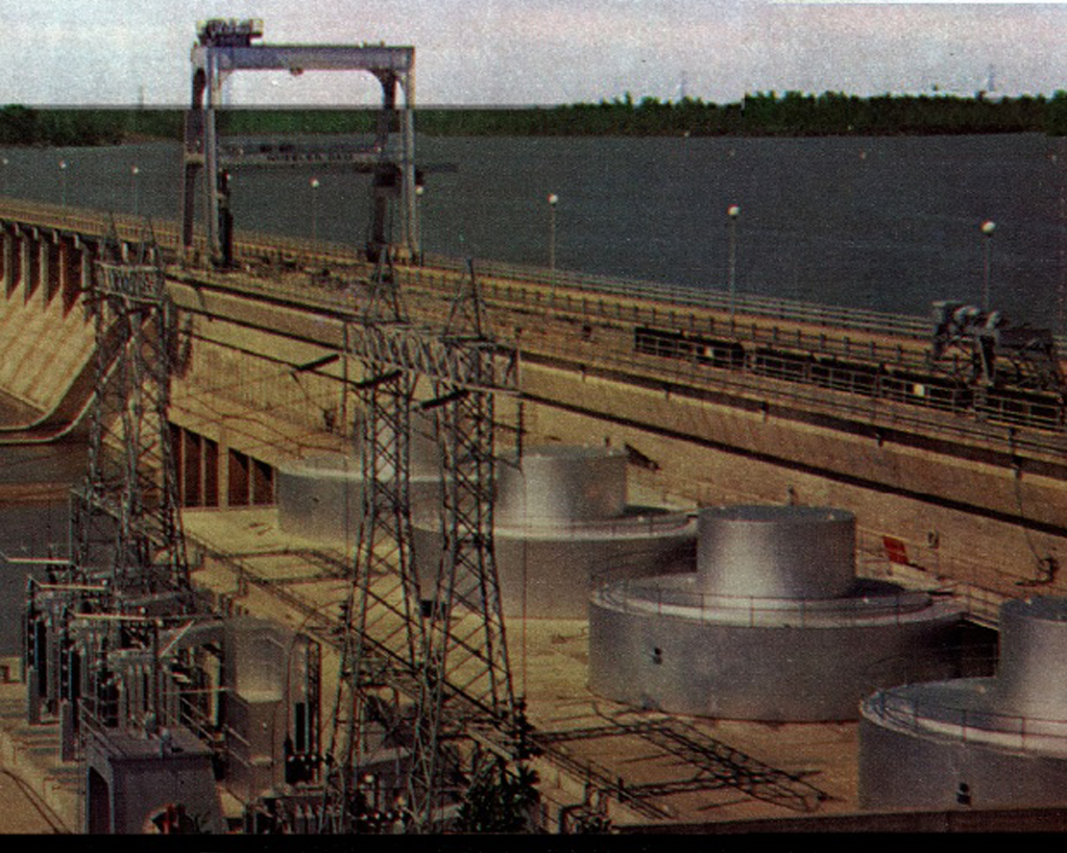

THE FIGHT GOES ON

BY FRANKLIN DELANO ROOSEVELT

"The Constitution Prevails"

Here is history—written by one of its makers: The President's own story of the fight for Supreme Court reform

THIS was the year of the famous Supreme Court fight—1937. This was the year which marked a definite turning point in the history of the United States. For this was the year which was to determine whether the kind of government which the people of the United States had voted for in 1932, 1934 and 1936 was to be permitted by the Supreme Court to function. If it had not been permitted to function as a democracy, it is my reasoned opinion that there would have been great danger that it might have been ultimately compelled to give way to some alien type of government—in the vain hope that the new form of government might be able to give the average men and women the protection and co-operative assistance which they had the right to expect.

For that reason I regard the effort initiated by the message on the Federal Judiciary of February 5, 1937, and the immediate results of it, as among the most important domestic achievements of my first two terms in office.

For two decades, the Supreme Court of the United States had been successfully thwarting the common will of the overwhelming majority of the American people; and had been diverting the functions and philosophy of government into channels which ran counter to the thought and objectives of progressive opinions throughout the modern civilized world.

In 1932, a more or less do-nothing government was voted out of office. It had been unwilling or unable to use the enormous collective power and resources at its command to meet the economic and social disaster which had come from an unbalanced, maladjusted and unfair economy. The vast program of recovery and reform which had been begun by the new administration on March 4, 1933. had been overwhelmingly approved in the elections of 1934 and 1936.

The new Federal Government had substituted action for indecision and negation. It had extended comprehensive assistance to all sections and all groups of its citizens, instead of merely restricting its financial favors and economic advantages to the few at the top of the ladder, hoping that they might trickle down to the many at the bottom.

It had reached out its strong arm to help the farmers of the nation obtain

the farms and homes and shops of the nation.

Next, in a decision dealing with a registration statement which had been filed with the Securities and Exchange Commission and then withdrawn, the Court,[14] six to three, launched a bitter attack upon the Commission itself with what Mr. Justice Cardozo called "denunciatory fervor." Its effect was bound to hamper the work of the Commission, and to seek to discredit the motives and manner of operation of this agency set up to protect investors from fraud and dishonesty.

In May, 1936, came the next deathblow—this time to our efforts with respect to another great industry of the United States—bituminous coal. In an attempt to banish chaos from the industry—arising from overproduction, cut-throat competition, violent labor disorders and wastefulness—the Congress had passed a statute providing that prices were to be fixed as minima and maxima, and making provision for establishing minimum wages, maximum hours and collective bargaining. These standards were to be fixed by agreements reached among producers themselves, and between producers and employees. The Court, six to three, set aside the statute on the ground, among others, that the business of mining, and the labor relations therein involved, were all purely local questions, even though the coal went into interstate shipments after it was mined.[15]

The climax to this course of destruction was the five-to-four decision of the Court in June, 1936, nullifying the statute of New York setting up a minimum fair wage system for women in industry. Since the Court had already held that the Federal Government could not provide for such minimum wages, there seemed to be a complete "no man's land," in which no kind of government could protect laboring women from the oppressive sweatshop wage scales which had been traditionally forced upon them in the past. The language of the opinion was so broad and inclusive that it seemed hopeless for any state to try legislation of this kind in any form.[16]

By June, 1936, the congressional program, which had pulled the nation out of despair, had been fairly completely undermined. What was worse, the language and temper of the decisions indicated little hope for the future. Apparently Marshall's conception of our Constitution as a flexible instrument—adequate for all times, and therefore able to adjust itself as the new needs of new generations arose—had been repudiated. Apparently the physical conditions of 1787 in farming, labor, manufacturing, mining, industry and finance were still to be yardsticks of legal power for dealing with the wholly different world of one hundred and fifty years later. Those of us who had been taught by the great exponents of the Constitution that it contained enduring principles of wisdom and justice, which could be applied to any new set of conditions, had apparently been listening to false prophets.

But was it really the fault of our Constitution? Or was it the fault of the human beings who, in our generation, were torturing its meaning, twisting its pur-

poses, to make it conform to the mold of their own outmoded economic beliefs?

It did not take long for the answers to these questions to be found.

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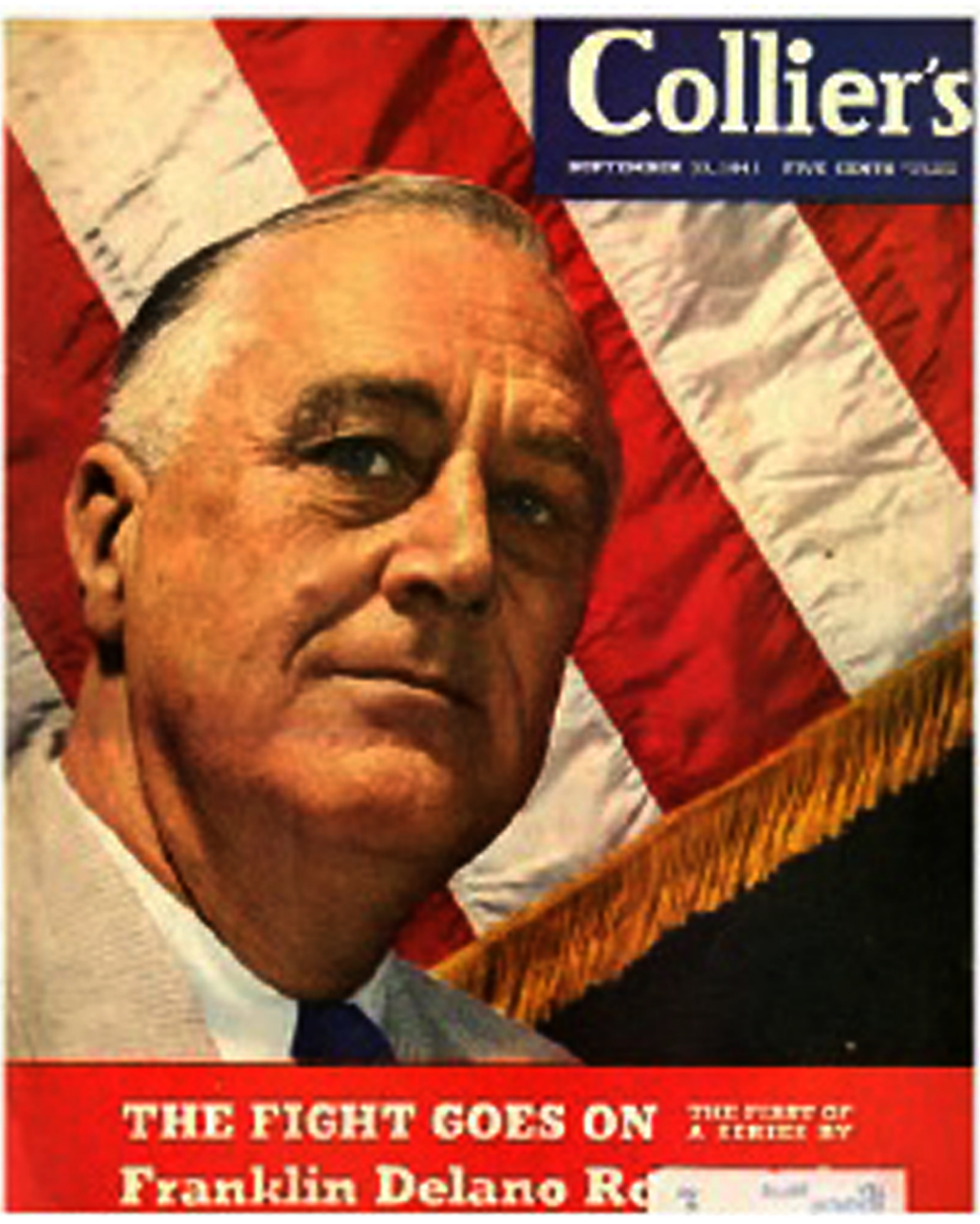
[12] United States vs Butler 297 U.S. 1.
[13] Ashwander vs T.V.A. 297 U.S. 288.
[14] Jones vs Securities and Exchange Commission 298 U.S. 1.
[15] Carter vs Carter Coal Co. 298 U.S. 238
[16] Morehead vs New York ex rel. Tipaldo 298 U.S. 587.

The President concludes his story of the Supreme Court fight next week

The NRA parade in New York in 1933: "The new Federal Government had substituted action for indecision. It had extended comprehensive assistance to all sections and all groups of its citizens instead of the few at the top of the ladder"



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"The Fight Goes On"

ACME

INTERNATIONAL

"For a dead hand was being laid on this whole program of progress - to stay it all. It was the hand of the Supreme Court of the United States." Pictured Above are former justices McReynolds, Van Devanter and Butler, whose judgements were constantly against the New Deal measures.

decent prices for their crops and a fair share of the national income; to save stituted action for indecision and negation. It had extended comprehensive assistance to all sections and all groups of its citizens, instead of merely restricting its financial favors and economic advantages to the few at the top of the ladder, hoping that they might trickle down to the many at the bottom.

It had reached out its strong arm to help the farmers of the nation obtain decent prices for their crops and a fair share of the national income; to save their homes and farms from foreclosure; to conserve their soil; to help them buy their own farms; to protect them from the ravages of flood and drought—in short, to increase their security and give them the purchasing power with which to buy the manufactured products of industry throughout the United States, and thus provide jobs for the

city and rural workers.

The Federal Government, between 1933 and 1937, had also adopted a comprehensive program to protect the laboring man and woman from the exploitation of those who would, if they could, make them work at starvation wages for overlong hours; and to give to labor the dignity, and the standing and the fair share of the national income to which it was entitled. To carry out the program, legislation had been passed to guarantee to workers their right to bargain collectively with their employers; to safeguard their legal right of association, and to prevent discrimination against them because of any legitimate union activities; to prevent cutthroat labor competition by permitting agreements between employers in any industry to fix minimum wages and maximum hours for all their employees, and to abolish child labor in such industry; to provide machinery for the peaceful and equitable settlement of disputes so as to obviate, in some degree, the necessity of strikes and lockouts, to establish unemployment insurance for workers so that, during enforced unemployment, they might have some limited assurance of a bare living; to remove the specter of the poorhouse by furnishing subsistence in the form of old-age pensions and assistance.

To protect investors, legislation had been adopted requiring honesty, fair dealing, and public disclosure of facts, in the sale of securities and in the use of other people's money. A system of federal insurance of bank deposits had been established to protect the savings of the ordinary citizen.

For the benefit of certain hard-pressed industries of nationwide importance, such as oil and bituminous coal, the government had stepped in to bring about order and regularity where only chaos and cutthroat competition had previously prevailed. These industries were of national importance not only because of the vast amount of capital invested in them and the large number of workers employed, but also because they dealt with rich natural resources which were necessary to the daily lives of our people and to the military and naval defense of our country.

To save other great natural resources of the country from depletion, and to develop them for the use and betterment of all the people of the United States, the new government had proceeded, since 1933, to develop whole regions of the country like the Tennessee Valley; to turn water power into cheap electricity for the use of the people in their homes, shops and farms, by such structures as Grand Coulee and Bonneville on the Columbia River, and in many other places; to impound the water resources of the nation and use them for irrigation of dry land by such vast dams as Fort Peck, and by hundreds of smaller dams and reservoirs throughout the land; to preserve the forests; to conserve land; to preserve the forests; to conserve the soil; to prevent floods.

And for the protection and benefit of American citizens in general, legislation had been adopted between 1933 and 1937 to save homes from fore-

closures; to begin to provide decent housing for low-income families; to encourage, and financially to help, the construction and repair of private homes; to reduce unfair competition in business; to protect consumers of electric power from unfair prices and extortionate practices of utilities; to help outlaw child labor; and to fulfill the government's responsibility of furnishing food, clothing and shelter to the needy unemployed of the nation by providing work for those who could not find private work.

These and a myriad of other activities by the Federal Government constituted the new approach to the problems which a new industrial age had brought to the 130,000,000 people of the United States.

The People Made Their Choice

This was the New Deal in action. This was the kind of government which the people had voted for in 1932 and again in 1934.

The big choice before the American people in 1932 had been to determine whether they should continue the old type of administration or install a new one—definitely committed to the proposition that the Federal Government had not only the power, but the duty, to step in to meet with bold action the economic forces at play. The people had made their choice in 1932, and had emphasized it in 1934.

By the time of the election of 1936, however, it had become clear that this new concept of government and of its relation to economic and social problems was in danger of complete frustration. And the road ahead, for further, or even different, effective action to meet these problems, seemed to be completely blocked.

For a dead hand was being laid upon this whole program of progress—to stay it all. It was the hand of the Supreme Court of the United States.

The executive and legislative branches of the government had gone into action immediately in 1933. But they soon found that, athwart the path of progress along which they were moving, a majority of the Supreme Court of the United States was erecting a barrier which it was impossible to climb over, under or around. True, not everything had been destroyed by judicial fiat. But the whole question of the power of the Federal Government to handle these problems in an effective, decisive way had been placed not only in doubt, but in positive jeopardy.

It is a little difficult in 1941 to look back upon the days of 1933 and fully appreciate the danger which then faced the United States. The grave threat which today faces our democracy and our independent existence comes from an alien philosophy and an alien military machine, both of which have overrun the world about us. That threat is physical; it is imminent; it draws ever closer. It crowds out recollection of that other threat of destruction which faced us in 1933. Besides, the great recovery in business, in agriculture and in employment which has come since then—the

great increase in our security and physical well-being—have dimmed somewhat our memory of the hazards of those days.

No Limit But the Sky

Yet 1933 was, in a very real sense a period of war, too. The nation realized it. And in my first Inaugural Address I proclaimed it, when I said that I might have to "ask the Congress for the one remaining instrument to meet the crisis—broad executive power to wage a war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe."

From the original conception of the power of the Supreme Court as one to declare a law unconstitutional only when "its violation of the Constitution is proved beyond all reasonable doubt,"[1] it had been expanded by 1930 to a point where Mr. Justice Holmes exclaimed: "I see hardly any limit but the sky to the invalidating of those rights [the constitutional rights of the states] if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment [Fourteenth] was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions."[2] By June, 1936, Mr. Justice [now Chief Justice] Stone felt obliged to characterize the recent exercise of the power of the Court by the majority of the Court, as one based on the "personal economic predilections" of the justices.[3]

The history of the rise of that power, especially during the last half-century, indicated several unfortunate definite tendencies:—an unwarranted, restrictive construction of the legislative and executive powers of government, federal, state, and local; an unwillingness to tolerate legislative protection of ordinary men, women and children—laborers and others—from the control and domination of private economic forces; and a refusal to permit reasonable governmental curbs upon vast, monopolistic aggregations of concentrated industrial and financial power.

In the struggle between the political power of the people as expressed by their representatives and the economic power of private property, the Supreme Court, in the generation preceding the spring of 1937, seemed almost invariably to lean toward the latter.

And the judicial process was being more and more frequently exercised by the Court, to lay low the efforts of government to meet the pressing needs of the times in which it was functioning. In the first seventy years of our constitutional history, the Court invalidated only two acts of the Congress; in the next seventy years it nullified fifty-eight. Between 1920 and 1930 it declared nineteen federal statutes unconstitutional. To climax this growth, the Court in the three years beginning in October, 1933, set aside twelve statutes, five of which occurred in a single court year—the October, 1935, term.

When I came to office on March 4, 1933, I felt confident that the two elec-

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[1] Ogden vs Saunders (1827) 12 Wheat 212, 270.
[2] Baldwin vs Missouri 281 U.S. 586, 595.
[3] Morehead vs New York ex rel. Tipaldo 298 U.S. 587, 633.

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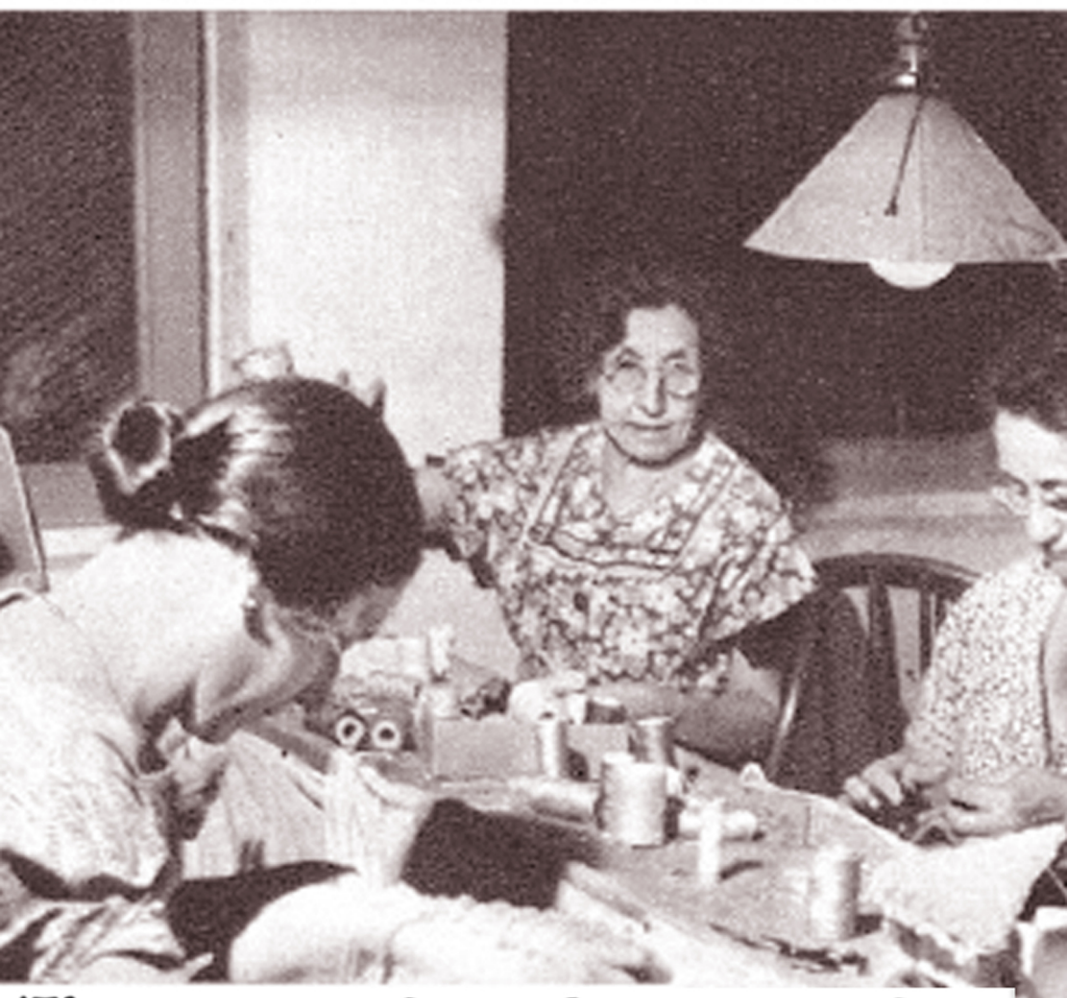

"There seemed to be a complete no man's land in which no kind of government could protect laboring women from the oppressive sweatshop wage scales which had been traditionally forced upon them'

tive branches of the Government—the executive and legislative—were united in their determination to meet, by bold action and experimentation, the new crisis which had developed in our national life. I, of course, did not know what the attitude of the third branch—the judiciary—would be. Its members were appointive and not elective. A majority of the Supreme Court had previously indicated an attitude toward social and economic questions which

was somewhat inconsistent with New Deal philosophy. They had been more or less inclined to a *laissez-faire* doctrine of economics and politics, which had already proved its inability to cope with the catastrophe which had come to the United States and to the rest of the world. The old economic order had been replaced in 1933 in the Congress and in the White House; but the old order, by reason of the life tenure of the justices, seemed grimly to be holding its place on the supreme bench of the land.

By the time of the elections of 1936, what had the Supreme Court done to our program of recovery and reform? And even more important, what had the majority of the justices said or refused to say in their opinions, by which we could formulate future action to take the place of what they had nullified? Was there any hope held out by the Court, in their opinions, that they might change their general views under other conditions, or that some different type of legislation might be passed and escape judicial destruction?

Recapitulation will show how hopeless it looked, by the time I started the so-called Supreme Court fight on February 5, 1937, that any really effective legislative program could withstand the assaults being made by the judicial branch of the government.

The first major blow had come in January, 1935. Our efforts to remove chaos from the third largest industry in the country—petroleum—were struck down. The oil-producing states had been unable individually to meet the problems which came from overproduction of oil, wasteful competition, and consequent bankruptcy prices. Only the national government could save the industry. It proceeded to try to do it. Pursuant to congressional statute, it prescribed quotas of oil for each oil-producing state, and permitted each state to prescribe fair quotas for each well within its boundaries. It then prohibited any interstate shipments of "hot oil," that is, oil produced in excess of these quotas. The states alone could themselves never have prevented these interstate shipments. The decision of the Court, however, was that the statute was unconstitutional as a delegation of legislative power to the President.[4]

This was the first time that a federal statute had ever been nullified on such a ground. But, unfortunately, it was not to be the last. This new doctrine—nowhere specifically mentioned in the Constitution—added much doubt and perplexity to framing all future legislation. Some delegation is, of course, necessary if government is to function at all. But neither from the words of the Constitution, nor from the mouth of the Court, came any standards to fix the amount of delegation permissible.

The next decisions were on the question of the government's power to abrogate gold clauses in private and public contracts. These decisions, therefore, involved the entire control by the Congress of the currency of the United States, and the whole gold and silver policy of the duly elected government. This policy was, to a great extent, the basis of the recovery program—the

means used to bring order out of chaos in foreign exchange and domestic currency, and to remake the unfair debt structure then in existence. It can well be said that, in these decisions, the Court was passing on the validity of the whole American economy, which had been accepted by the business and financial world almost universally since the enactment of the statute a year and a half earlier, and which was then in process of adaptation to the changing world economy.

Recovery Upheld by One Vote

The congressional action was sustained as to private contracts—but only by a five to four vote.[6] It was held invalid as to public obligations; but by technical legalistic reasoning, the disastrous results of such a holding were avoided by a conclusion that no actual damage had been proved. Even as to this conclusion, four of the nine justices disagreed.[6]

By the slim margin of one human being, this very foundation of our recovery had been upheld. What a slim thread on which to hang the fate of a nation!

Shortly thereafter came the next shock. The Court declared unconstitutional the Railroad Retirement Act which provided a means of paying pensions to retired railroad employees. The Court, five to four, not only invalidated this particular statute, but condemned all attempts by the Congress to pass any compulsory pension act for railroad employees, as not being related to the business of interstate transportation.[7]

Then came, all in one day, May 27, 1935, a unanimous decision that the Frazier-Lemke Act, designed to help farm mortgagors, was unconstitutional;[8] a unanimous decision that the President could not remove a Federal Trade Commissioner,[9] although in an earlier case, in 1926, the Court had stated that the Executive could remove any officer he could appoint, even one with quasi-judicial powers;[10] and a unanimous decision that the National Industrial Recovery Act was unconstitutional.[11]

This last decision was the most far-reaching. It again invoked the shadowy doctrine of unlawful delegation of powers to the Executive. If the Court had stopped here, its job would have been done, and the damage would not have been wholly irreparable. But it went farther, and held that the statute and the code-making power under it were not a valid exercise of the power of the Congress to regulate interstate commerce. This broad, sweeping assertion immediately cast a long shadow of doubt over everything which we had been doing, and were expecting to do, for the benefit of the citizens of the United States through the federal control of interstate commerce.

This shadow of doubt became more definite and certain when the Court, on January 6, 1936 by a vote of six to three, invalidated the agricultural adjustment program.[12] The statute thus set aside had been enacted in 1933, and had been absolutely essential to the survival of agriculture in the panic of that year.

The states alone were powerless by themselves to cope with the reduced farm income, with the prevailing bankruptcy prices for farm products, with the burdensome surpluses and overproduction of farm commodities. If one state tried by itself, the adjoining state could nullify its efforts. Only the Federal Government could help—and in 1933 it did, almost immediately. The widespread, beneficial results of our farm program enacted to meet the agricultural crisis of 1933 are well-known now. Its benefits extended not alone to the farmer; they spread to all sections and to all groups throughout the land, by furnishing the farmers with purchasing power with which they could buy industrial products and manufactures of all kinds.

But all this effort was destroyed. The basis on which it was destroyed was even more disastrous in its implications than the immediate decision itself. It was apparently set aside on the chief ground, among others, that overproduction of farm commodities and all the dire results of such overproduction were not matters of general welfare but purely a local condition, of purely local concern to the respective states. To remedy this condition, it was held, the Congress could not pay farmers for voluntary crop limitation, under the general welfare clause of the Constitution—which by its terms would seem clearly to give the Congress power to tax and spend for the general welfare. The three dissenting justices characterized the majority opinion as a "tortured construction of the Constitution," and indicated how far-reaching would be the effects of this kind of decision—a decision which was not based upon legal reasoning at all, but upon political and economic bias.

Doubt Hamstrung the Government

In a case decided in February, 1936,[13] the Supreme Court held that the United States could develop water power into electric energy and sell it; but the decision was expressly limited to one dam in the Tennessee Valley, which had been constructed as a war measure. By thus limiting the decision to the strict confines of the record before it, and not deciding the broader question of whether the Government had the same power with respect to all dams, the matter remained in doubt. This lack of assurance as to the future of all our power projects then being constructed in several other parts of the country was bound to hamstring the government in its every attempt to carry out its policy of development of cheap electricity for the farms and homes and shops of the nation.

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[13] Schechter Poultry Corp. v. U.S., 295 U.S. 495.