Constitutional Aspects of the New Deal

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You have asked me to examine for you the present trend in legislation in the light of the Federal Constitution. Our first difficulty in making this study will be to orient ourselves. If we approach the task as partisans attacking or defending the program of the present national Administration, we shall be unable to see the truth. If we limit our examination to events of the last three years, we shall be looking through an inverted telescope. New deals have followed raw deals and these new deals have turned out to be misdeals in national, state and local affairs with disheartening regularity throughout our history. Because I am privileged to address this group of lawyers and their guests, who, I believe, are interested in an impartial and impersonal survey of current trends in government, I shall not yield to the temptation to break lances with the partisan politicians panting for public office who prattle pusillanimous piffle about Communists, Fascists and dictators in our national Government and other hobgoblins created to frighten the credulous. Our citizens who staggered out of the debris of the raw deal of the 20's, bewildered and doubting, are impatient with a leadership that can offer no more than carping criticism of those who took the wheel in 1933.

*Address of Hon. Floyd E. Thompson, of the Chicago Bar, formerly Justice of the Supreme Court of Illinois and President of the Illinois State Bar Association, at the Mid-Winter meeting of the Indiana State Bar Association, February 1, 1936.
when the old Ship of State was headed for destruction on the rocks of indifference, privilege and laissez-faireism. Let it be understood at the outset that I do not approach this examination as a critic or champion of the wisdom or necessity of specific measures recently adopted. The subject for discussion is not "Partisan Appraisal of the Roosevelt Administration" but "Constitutional Aspects of the New Deal." The task you have assigned me is not to inquire into the wisdom or necessity of the measures adopted, it is to apply to them the tests of the Constitution.

The Constitution of the United States is not a straight edge or a measuring cup. It is not some fixed standard which one can lay alongside a statute or into which one can pour an administrative regulation to test its conformity. It is a living, growing charter of government, ever constant in its purpose but ever changing in its application. It is a mere framework on which the government under which we live is built. It is in very few respects self-executing. It contemplates legislation to carry into execution the spirit and purpose which gave it being. It grants certain specific powers to the national government, specifically forbids the national government from exercising other powers which might have been implied from the powers granted, and reserves to the states and the people thereof all powers not granted or implied. That the preservation of this dual system of government is necessary to the maintenance of our liberties is declared by men of both historic parties, but it must be conceded by students of our political history that there has been from the beginning a constant withdrawal of power from the states. The Fourteenth Amendment took from the states the right to determine who should be citizens of the state and to legislate without Federal restraint with respect to the life, liberty and property of its citizens, the Fifteenth and Nineteenth Amendments limit the right of the states to determine who shall vote; and the Sixteenth Amendment extends to the national government the right to levy a direct tax on incomes of the citizens of all the states. These were fundamental changes in our scheme of government. Obviously, the New Deal did not have its genesis in the present national Administration.
Our national Constitution is the product of revolution. It was submitted and adopted in violation of the Articles of Confederation which forbade any change in such Articles except such as were proposed by Congress and confirmed by the legislatures of all the thirteen states. It has been the subject of debate and controversy from its adoption to this day. Being a framework of government designed for use under ever changing conditions, there will be a difference of opinion regarding its interpretation and application to new situations as long as this remains a government of free men. He is indeed a confident man who undertakes to state with finality the principles of our Constitution. Those principles do not change, but the opinions of men as to what those principles are and how they should be applied do change as conditions and circumstances change. The strength of our Constitution is its flexibility.

With the adoption of our Constitution there came into being a nation. There passed out of existence “the firm league of friendship” of states as political entities, each retaining “its sovereignty, freedom and independence” provided by the Articles of Confederation, and there was erected in its place a government of the people. There was instituted one great consolidated government of the people of all the states instead of a government by compact with the states as constituent parts. “We, the People of the United States, * * * ordain and establish this Constitution for the United States of America” was the proclamation of the founders. But the framers of the Constitution wisely recognized the existing divisions of the people by established state lines and preserved to the people of the several states the right to regulate their own local affairs according to their own judgment. In this dual system of government there was and is a balance of power which gives strength and stability to our system, but the difficulty which our fathers found in determining what were the affairs of the people of the several states and what were the affairs of the people of all the states has increased many times in our day. It is still my deepest political conviction that the people of the several states should order and control their own affairs without interference from the
national government and that the liberties of our citizens are imperilled when the votes of distant majorities, unfamiliar with local conditions and customs, dominate local governments. But I find myself more and more troubled when I try to determine just what are local affairs. What were the affairs of the people of a state yesterday may become national affairs tomorrow.

The spirit which gave birth to our Constitution was not ruthless individualism. That is the concept of the beast and the outlaw. The spirit of the American system of government is individual liberty founded on the concept of equal rights to all and special privileges to none. While liberty of the citizen is the cornerstone of our government, yet it must be recognized that the freedom of action of the citizen living in his cabin on the shore of Lake Michigan in 1835 was in the very nature of things less restrained than that of the citizen living in a skyscraper apartment in Chicago in 1935, of the citizen driving his team along the country road at four miles an hour than that of the citizen driving his automobile along Michigan Avenue at forty miles an hour; of the citizen farmer butchering a hog for his village neighbor than that of the citizen packer preparing meat for consumption by unknown thousands in many cities, and of the village blacksmith employing one helper than that of the manufacturing corporation employing thousands unknown even to the management. We must think in terms of today and tomorrow, not of yesterday. Quotations from George Washington and Thomas Jefferson and Abraham Lincoln, and others of revered memory, applying abstract principles to specific conditions in their day are neither helpful nor convincing when applied to wholly different conditions of this day. Affairs of the great body of our citizens 148 years ago when our Constitution was adopted, yes, sixty-nine years ago when the first radical change came by amendment, were largely confined to their respective neighborhoods. Few of them had social or business contacts beyond their county lines, much less their state lines. As we view it now, it was easy enough in the beginning to define the limits of the national and state governments, but all will agree it is becoming more and more difficult to make the separation.
Furthermore, in the beginning, the state boundaries were natural divisions of our people. The people of the United States were divided into distinct settlements, each having its local interests and problems. Today the state boundaries are altogether artificial. In no other human activity except government do we recognize them or know where they are. In everything except state government, the people of southern Illinois are more closely indentified with St. Louis than Chicago, and the people of northwestern Indiana with Chicago than Indianapolis. Chicago-land, embracing intimately parts of four states, and less intimately but definitely double that territory, is in nearly every respect, except that of government, a better defined and more natural division of people than any existing state. Northern California is as distinct from southern California in origin and traditions of its people, industrial activities and climatic conditions as Pennsylvania from Florida, and Colorado from Louisiana. Let these examples suffice to show that we must recast our states and set them up with boundaries that have some reason for their establishment or we must accept the alternative of delegating the regulation of many of our affairs to the general government because they are no longer the affairs of the people of any one state alone. The Constitution prohibits the forming of a state by the junction of two or more states or parts of states without the consent of the legislatures of the states concerned as well as the Congress, and, it being improbable that any state will voluntarily extinguish itself, it appears that we must continue to suffer the burden of the extravagance and inefficiency entailed by the continuance of some absurdly small political units called sovereign states. And I need only add without discussion that counties, townships and school districts as now set up are as outmoded as oxcarts, spinning wheels and bedwarmers. This matter of retaining small governmental units once necessary and convenient may be carried to absurd extremes.

If we were not such a restless lot, our problems of government would be less complicated and our burdens of government much lighter. If we had not invented the cotton gin, the steel plow and the reaper, built miles of railroad, discov-
ered electricity and put it to work in so many ways, invented the telegraph, the telephone and the radio, developed the gas engine and built more automobiles than all other peoples on earth, organized great industries and congregated people in great industrial centers, erected skyscrapers, invented fountain pens, typewriters and linotypes, found the processes by which iron, copper, lead, oil, rubber, and other things too numerous to mention have been made available to mankind in seemingly inexhaustible forms and quantities, and developed livestock breeding and plant life production to such high degrees, and discovered germs, glands and vitamins—in short, if we had stopped human progress, we could still be living the simple life of the plainsman and not be bothered with all these problems that are increasing more and more the burdens of government and demanding of our citizens closer attention to their responsibilities as sovereigns in a nation of free men.

These general observations are essential to a proper consideration of the constitutional aspects of the New Deal. Before we make specific application of constitutional limitations to any statute or program we must know what those limitations are and we cannot know what the limitations of our national Constitution are until we read its language in the light of experience and present-day necessities and conditions. Certainly the provision granting Congress power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States" includes more subjects today than it did in 1787 or even in 1917. And the power "to regulate commerce with foreign nations and among the several states" is necessarily broadening as such commerce increases. Furthermore, with this broadening of granted powers by the advancement of science and the new concepts of society, what broader construction can properly be given the power "to make all laws which shall be necessary and proper for carrying into execution * * * powers vested by this Constitution in the government of the United States or in any department or officer thereof?" It is for the President and the Congress to determine first what legislation, within the national field, is necessary for the general welfare, and their judgment is
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final unless the legislation is outside this broad and ever-broadening field or is in conflict with some constitutional limitation.

Let us examine some of this new legislation. The objections generally made are (1) that the Congress has delegated legislative powers to the President and others of the executive department, (2) that the national government has exceeded its granted authority and invaded the province of the states, (3) that the citizen is being deprived of his liberty and property without due process of law, and (4) that private property is being taken for public use without just compensation. Time will not permit mention of the 105 important acts and joint resolutions enacted from March 9, 1933, to August 26, 1935, and scores of others of similar import enacted since the turn of the century, nor detailed analysis of any of them. Many of these acts are amendments or extensions of existing legislation, fortunately some, but unfortunately too few, repeal existing laws, and others fall into that category of legislation to which we are accustomed and present no new constitutional problems. Most of the legislation which we should examine in this study can be grouped in more or less distinct classifications.

No class of legislation has done more to impair the principle essential to our dual system, that Federal power and state power are independent in their respective spheres, than the grant-in-aid legislation. The newcomer in this family is the Social Security Act of 1935, but it has many elder relatives. Through the years the grant-in-aid device has contributed to the establishment of colleges, the support of vocational rehabilitation and education, the advancement of agriculture, the building of railroads, the construction of highways, the fostering of maternity and infancy hygiene, and other projects which all will concede are worthy in themselves and of general public benefit. This sort of legislation has been in our statutes for more than a century. The grants made to the states under the Maternity Act of 1921 are most nearly like those of the Social Security Act. This form of legislation is essentially a device for the distribution of Federal funds and finds its support, if it has any in the Constitu-
tion, in the power of Congress to levy taxes to provide for the general welfare. The grant is made in order to encourage the states to pursue policies which the Congress desires to promote. These grants are made on the condition that the state also contribute and that the joint fund be used, as some bureau set up by Congress directs. Since the Sixteenth Amendment gave the Federal government a taxing power limited only by the incomes of the people, this 50-50 system of Federal aid has grown tremendously.

Federal aid is a tempting bait and many time-proven fundamental rights have been bartered for a paltry helping from the Federal pork barrel. Our people do not seem to realize that all government “gifts” must come out of their pockets. In my opinion, this whole system of Federal subsidies to the states is morally, if not legally, wrong. Twenty years ago these subsidies amounted to less than $6,500,000 a year; in 1925 they aggregated more than $110,000,000, and today it is impossible to determine the total, but it exceeds a billion dollars a year. Vicious as the system is for the extravagance it breeds, its worst feature is the invasion by the Federal government into matters local in character. Wholly apart from the question of power, the only way to assure proper accountability for the expenditure of public money and to maintain virility in state and local governments is for each unit to provide its own revenues for its own purposes. It is humiliating to any self-respecting citizen to see our governors and mayors going to Washington to beg for their handouts.

The purpose of the Social Security Act, as stated in its title, is “to provide for the general welfare by establishing a system of Federal old age benefits and by enabling the several states to make more adequate provision for aged persons, blind persons, dependent and crippled children, maternal and child welfare, public health, and the administration of their unemployment compensation laws.” Few persons will quarrel with these worthy objectives, but many will question the power and wisdom of the Federal government undertaking them. Some of these purposes are the subjects of statutes passed under former administrations, but this is the first attempt of the Federal government to establish a comprehensive
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social security program. There are eight kinds of new grants-in-aid provided in the Social Security Act. In five instances grants are conditioned upon the co-operating state appropriating to a joint fund and submitting to Federal dictation in spending its own money. These five include grants-in-aid of state expenditures for promotion of maternal and infancy hygiene and for assistance to the aged, the blind, the dependent child and the crippled child. In two cases, public health services and child welfare services in rural areas, the grant is conditioned only on the states spending the funds for these purposes. The eighth grant is designed to finance the entire cost of administration of unemployment compensation in states which provide plans approved by a new Federal commission set up by the Act.

For the first one hundred years of government under our Federal Constitution, social security was considered a matter of local concern. Strange as it may seem, there was a time when most of us were considered capable of looking after ourselves. We should not now accept the theory that whenever something is conceived to be of advantage to the people, that is of itself a reason why the national government should do it. Only those provisions for the general welfare of the people which in their nature cannot be made as well by the several states should be made by the Federal government and then it alone should make the provisions and not in partnership with the states. There is no sanction in our plan of government for these 50-50 arrangements.

Tempting as it is to discuss the social and economic aspects of this form of legislation, our inquiry is as to its constitutionality. In this field our first problem is, Who may raise the question? Our Supreme Court has already held that the Commonwealth of Massachusetts could not question the constitutionality of the Maternity Act because it was not directly affected by it, and that a taxpayer could not because she had suffered no direct injury as a result of its enforcement, but suffered, if at all, merely in some indefinite way in common with taxpayers generally. Assuming some way may be devised to present the issue, What attack can be made on the grant-in-aid provided by the Social Security Act? Since all
grant-in-aid statutes are mere devices for the distribution of Federal funds, the first question is, Do the funds come from taxes collected or from other sources? If from taxes, for what purposes can the Federal government impose taxes? If for the general welfare, then what are the limitations? May the courts inquire into the purpose of the expenditure? If so, and the Congress has determined the purpose is public and national in character, can the courts review that determination? Can the expenditure be traced to the source from which the fund was raised? Is the collection of the tax from one class and its expenditure for the benefit of another a taking of private property without due process or for a public use without just compensation? In the Maternity Act case, which involved the same Federal-state relation as most of the provisions of the Social Security Act, the Supreme Court said the question of whether such legislation infringed on state sovereignty was a political question which does not admit of judicial review. Obviously, the collection plus the disbursement of Federal funds results in Federal regulation of non-Federal subjects, and the whole scheme involves a stretching of the Federal Constitution to the breaking point if it is to be sustained.

The limits of this discussion will permit only an outline of the constitutional questions. Where the grant-in-aid amounts to a mere distribution of Federal funds it seems to have the support of established decisions. Where a special tax is levied, as in the case of old age annuities and unemployment insurance, difficult problems are presented. The sums involved are staggering in amount but this goes only to the wisdom of the legislation, a non-judicial question. Whether the fact that as many people who earn their living by daily labor are excluded from the provisions of these titles as are included denies to these titles the cloak of the general welfare clause presents an interesting question. The old age annuity venture is a Federal rather than a Federal-state venture and so it will undoubtedly be argued that the tax on the employer to support the fund is an excise tax on the act of employing workers and the tax on the employee is an income tax. The tax on the employer is similar in principle to a tax on manufacturing and selling, on making gifts, on dealing on an
exchange, and on transferring property, all of which have been sustained. A tax on income received for personal services has also been sustained as an excise tax. To date the Supreme Court has not declared a Federal tax measure invalid because of unreasonable classification. It seems that the old age annuity title would be fairly secure, if it stood alone. Its weakness is that it is a part of a regulatory measure. The unemployment insurance title does involve a Federal-state relation which renders its validity very uncertain. In fact, it is difficult to see how it can be sustained in view of the decision invalidating the Agricultural Adjustment Administration Act, and the earlier decisions invalidating the Child Labor Tax Act and the Grain Exchange Tax Act. In each of these cases the Act reviewed was held to be a pretended exercise of the unquestioned authority in Congress to levy an excise tax with the object of accomplishing a regulatory end not properly within the powers conferred upon Congress by the Constitution. It may well be argued upon sound authority that the unemployment insurance title reveals on its face that it is enacted for the express purpose of forcing the states to enact unemployment insurance laws of a character demanded by the bureaucrats at Washington and not for the purpose of raising revenue, and that it is an unwarranted invasion of the reserved rights of the states in violation of section 10 of the Bill of Rights. The required conditions for the approval of the state statute by the Social Security Board can leave no doubt of the regulatory character of the title. Among other things the Act standardizes the methods of payment of benefits and of handling reserve funds and the types and conditions of work which the plan adopted may not force the employee to accept on pain of losing his benefit. The laudable purpose of directing public effort toward the prevention of destitution rather than the mere assistance of needy persons is manifest in this legislation, but the citizens of this nation have not yet delegated to the Congress the authority to regiment all the people for the benefit of the few who need the benefactions of a paternalistic government.

Another device long used by the Federal government to extend its power into private and local affairs is the proprietary corporation. The Bank of the United States is the
first outstanding example of stock ownership in such a corporation by the national government, and its character and its activities, many of them corrupt, furnished a subject of bitter political controversy from the Washington through the Jackson administrations. More recent examples are the Reconstruction Finance, Federal Deposit Insurance, Federal Farm Mortgage, Federal Housing and Subsistence Homestead Corporations. The use of this device has grown in the past twenty years to such an extent that few know how many such corporations there are or what powers they exercise. They function like private corporations. Naturally their managers do not feel the accountability to the public that elected public officials should and usually do. These corporations ignore the distinction between public and private business. A conspicuous example is the R. F. C., one of the alphabet family which had cast off its swaddling cloth and was going strong when the present Administration was in the embryonic stage. Through such corporations the government engages in local and private activities which it could not enter otherwise. This device of indirect government is growing with possibilities of abuses and dangers to our institutions which few, if any, realize.

Here, again, there is the difficulty of presenting the issue of constitutional authority for these governmental agencies. The Bank of the United States Act was sustained more than a century ago under the implied powers of Congress on the ground that it was "a convenient, a useful and an essential instrument in the prosecution of the government's fiscal operations." And so it appears in the light of established decisions that these strange and dangerous instruments of expediency are safe from successful attack in the courts. They rest on the spending power of Congress which has been a subject of debate from the beginning. Prior to the A. A. A. decision last month the Supreme Court had not chosen between the Alexander Hamilton view that the government may spend its funds for any object even though it cannot legislate on that object, and the James Madison view that the spending power is inseparably connected with the power to legislate. The present national Administration, like its predecessor, seems
to take the Hamiltonian view. Dictum in the A. A. A. decision countenances it. This is an opening wedge for the complete subjugation of the states. Add to the power of Congress to confiscate all income of the people the power to spend the public funds for any purpose it deems for the general welfare and our priceless heritage of a separation of powers of government will be a mockery. The demagogue now buys his election to Congress with generous distribution of public funds. With the bars down, his taxing and spending will know no bounds.

With the extended use of the device of the proprietary corporation many constitutional questions will arise in the administration of these agencies of government. Conspicuous among those likely to present new questions is the Tennessee Valley Authority. This Federally owned corporation must stand, not on any peculiar rule arising from the fact that it is a corporation, but on some constitutional power in the Federal government, such as the express power to collect and spend Federal funds to provide for the common defense and the general welfare, or the express power to regulate commerce among the states, or the implied power to provide the means necessary to these ends. As I read my Constitution and its history, I find no authority in the Federal government to engage in the business of generating, transmitting and distributing electric energy or in any other business as such. These administrative corporations are governmental agencies and under no theory consistent with the Constitution can they be operated for profit. They are not subject to state regulation as foreign corporations, cannot be taxed by the state or local municipalities, and are otherwise free from the jurisdiction of the states in which they operate. If such corporations can engage in business in competition with private capital and persons, then private business cannot survive in such fields.

The economic soundness of government-owned corporations entering the field of industry is not within the scope of our study. We are concerned now only with the power of the Federal government to engage in business. There are no decisions of our Supreme Court sanctioning such a course.
Absence of approving decisions is strong evidence that thus far in American history it has not been considered lawful for the Federal government to engage in undertakings of a proprietary character in competition with its citizens. Because it has been held that states and local municipalities may engage in the utility business, it does not follow that the Federal government may do so. Nor is there constitutional authority for the "yardstick" concept or the "birch rod" philosophy which adorn the bedtime stories used to lull our citizens into acceptance of these new fields of government activity. The Federal government being one of granted powers must find its authority in some particular grant. Surely, the ownership of power sites deliberately acquired by the Federal government on navigable streams (and some of these navigable only by canoes operated by skilled hands) over which the Federal government has power of regulation does not give it authority to engage in business. When the Federal government builds a dam under the guise of aiding navigation, preventing soil erosion, controlling floods, fostering irrigation and supplying materials necessary for the common defense, some of these extensions of the granted powers to doubtful objects, will the courts shut their eyes to the obvious intent to engage in the hydroelectric business?

The Tennessee Valley Authority Act states expressly that the corporation was created "for the purpose of maintaining and operating the properties now owned by the United States in the vicinity of Muscle Shoals, Alabama, in the interest of national defense, and for agricultural and industrial development and to improve navigation in the Tennessee River and to control the destructive flood waters in the Tennessee and Mississippi Valley basins." Only the most liberal construction of the Constitution gives the Congress power to do what the title says is the purpose of this gigantic undertaking. But our courts will be blind not to see that these declared purposes are only the window dressing to conceal what is generally known—that the real purpose of the sponsors of this project is to put the United States in the business of generating, transmitting and distributing to the consumer electrical energy in direct competition with privately owned utilities. The build-
ing of dams in mountain streams which have only a remote connection with navigation and the direct acquisition by the Federal government of privately owned utilities and the financing of local municipalities in the acquisition of such properties or in the construction of competing plants to provide an outlet for the product of these projects, show beyond question that those executing this program consider that the Federal government has the power to engage directly in the hydroelectric business. The state through which the navigable stream flows owns the bed of the stream and there is sound basis for contention that it owns the power generated by the use of the water of that stream. But assuming the right of the Federal government to sell at wholesale the excess electricity generated at a dam which was in fact built for a national public purpose, this right is no warrant for exceeding the granted powers by reversing the process and making the by-product the first object of the project. If the Federal government has the power to engage in the business of furnishing to the public electricity, gas and water, it has a like power to engage in the clothing business and the food business and, in short, in every business, because all are necessary to the common defense and the general welfare of the United States. Our whole constitutional background is at variance with the notion that the Federal government has power to invade the domain of private business in the several states.

We come now to the attempt to regulate and destroy public utility holding companies. Inasmuch as I do not now have and have never had any other relations with such companies than paying my monthly gas and light bills, what I have to say on this subject is at least free from the bias of a hired propagandist. As I read the 700-word first section of this Act, which sets forth the alleged need for this legislation, I am reminded of the sweet young maid who received a twenty-page letter from her lover. Her mother exclaimed, "A twenty-page letter from the boy friend! what does he say?" and the daughter demurely replied, "He says he loves me." And so I sum up this preamble: It says we hate public utility holding companies. This is the most extraordinary piece of
legislation I have ever read. It holds the record for violating more provisions of the Constitution at once than any prior act. It seeks to control business which has no connection with commerce among the states, to deprive public utility holding companies of the use of the mails in negotiating or performing service, sales or construction contracts for any public utility or holding company, and in offering for sale or exchange securities of its own or subsidiaries or affiliates or any other public utility or in acquiring such securities, without regard to whether the thing sent through the mails is itself harmful or dangerous, to set up arbitrary and capricious rules for keeping records of the companies and their subsidiaries and affiliates, and otherwise regulate the internal affairs of such companies, to compel such companies to divest themselves of their ownership of properties; and to delegate legislative powers to the executive department. This legislation is obviously the executioner that is to eliminate competition from the business field which the Federal government is to enter through its power projects already established on the Tennessee River, the Colorado River and the Columbia River, and others to be established on the St. Lawrence River, the Missouri River and elsewhere.

All will concede that public utility holding companies have engaged in practices harmful to the public interests as have other gigantic business combines, but it does not follow that the states are impotent to correct these evils or that the Federal government must be projected into private business with its attendant inefficiency, extravagance and despotism. Never in peace time has any political movement been supported by such a flood of propaganda emanating from officialdom. There are evils crying out for adequate remedies but the extravagant publicity given these evils has put the average citizen in the position of the New Jersey farmer who agreed to furnish a New York restaurant with 1,000 frog saddles a week. Some days later he wandered into the restaurant haggard and worn and besmeared with swamp mud and tendered three frogs. The restaurateur asked, "Where are the others you promised to furnish?" and the poor farmer replied, "This is all there were. I was fooled by the noise they made."
Eighty per cent. of the transmission of electrical energy and substantially all of the generation and distribution are purely intrastate in character. Properly organized and managed, holding companies perform highly useful and necessary functions with reference to financing, management and coordinating the service of underlying operating companies, and common sense argues against, if the Constitution does not forbid, the destruction of this private business directly by legislative process or indirectly by the regulatory or taxing power of the Federal government. All necessary regulation can be provided by the states and there is no justification for adding this problem to an over-stuffed Federal government now suffering from a surfeit of local problems. The supine submission of the states to this and kindred Federal aggression and the neglect of the state authorities to provide the necessary protection for the public mean the end of the dual system which has characterized our governmental structure and which has stood as a bulwark against invasion of individual liberty.

The National Industrial Recovery Act has already been declared unconstitutional because in its administration there was an attempt to regiment all business, to fix wages and prices in local industries, to regulate and control commerce wholly intrastate in character, and to transfer to the executive department the power to make and interpret laws as well as to execute them. The Agricultural Adjustment Administration Act suffered the same fate for similar reasons and the additional reason that by this legislation the Congress undertook to exercise powers specifically reserved to the states and the people thereof. The National Labor Relations Act is equally vulnerable to these constitutional objections.

It is not surprising that the tendency toward the Hamiltonian theory that the national government has power to do all things considered necessary to the common good, which has been growing since the Civil War period, should culminate, in times like those in which we have been living since the economic collapse of 1929, in measures which many believe destructive of free institutions and which, if continued, must inevitably effect a complete change in our plan of government.
At a time of experimentation to relieve economic and social distress and to promote recovery therefrom, measures are sure to be adopted without considering carefully their constitutional validity. This is not the time for partisanship. Those who would like to have us believe that the New Deal was inaugurated March 4, 1933, would have us forget history and accept partisan mythology. Both of the major political parties must bear responsibility for present tendencies. Both will share the credit for the preservation of our institutions if they are preserved. Their preservation must not be permitted to become a partisan issue. Patriotic men and women must make common cause to preserve our priceless heritage. We need not question, and I certainly do not question, the patriotic purpose of those in this and the preceding Administration who adopted extraordinary measures to meet extraordinary conditions. The times have not been favorable to considerate reflection upon constitutional limits of legislative and executive authority. Where a power was assumed from patriotic motives, the assumption found ready justification in patriotic hearts. Many who doubted yielded their doubts, but those who believe measures have been adopted which attack our system of government at the heart and who believe we cannot justify, under pressure of an emergency, the tearing down of time-proven safeguards of individual liberty cannot longer remain silent lest these temporary measures become permanent. Complacency often comes dangerously near complicity. We cannot yield to the dangerous delusion that in some way or somehow our plan of government will bring wisdom and justice in public service. It is as true to day as it was when first uttered that "eternal vigilance is the price of liberty." Liberty is not the natural state of man but is a right which only organized government established and conducted by an enlightened and vigilant citizenry can provide and preserve.

My consideration of constitutional limitations has thus far been confined to the written Constitution. But there is an unwritten constitution which is just as important to our scheme of government as the document drafted by the Convention of 1787 and the amendment thereto. This unwritten consti-
stitution is the aggregate of American institutions, traditions and customs. It embraces the fundamental truths embedded in American hearts. That government derives all its just powers from the consent of the governed, that this is a government of free men instituted to preserve the blessings of liberty to themselves and their posterity; that the best governed people are the least governed people, that the Federal government should be confined to those relations which are essentially national and international in character, that all other powers of government should be reserved to the sovereign people acting through their state and local municipal governments, that the citizen should have complete freedom of thought; that his freedom of expression and action should be limited only insofar as unrestrained freedom would interfere with the rights of others, and that individual effort, initiative, industry and ability should not be hindered by governmental regulations tending to establish a moribund mediocrity.

Large segments of these American institutions and traditions are not rendered immune from legislative change by the written Constitution, nor even by the doctrines of constitutional law established by the written decisions of our courts. We have seen that the device of grant-in-aid statutes and the proprietary corporation have given the Federal government control over local affairs, individual action and private business which has palsied the individual responsibility which has marked the American with a resourcefulness hitherto unknown among men. We have also seen that the Federal government has assumed powers incident to its powers to collect taxes, expend public funds, provide for the common defense and regulate commerce among the states which violate American institutions and traditions by so weakening the state and local municipal governments that they lack initiative and courage to discharge the functions committed to them. Perhaps the courts cannot apply this unwritten constitution in testing Federal legislation but the Congress can and should in enacting it. When a proposed statute is opposed to American traditions and customs and will effect a fundamental change in basic American institutions, it should be resisted in the
Congress until it has been shown clearly that conditions call for a change in these basic institutions. The courts cannot protect us from departure from our traditional course except as some governmental act invades the field of individual liberty preserved by the Constitution. This negative judicial remedy is too tardy, hazardous, expensive and cumbersome to be of practical benefit to the great body of our citizens. Our first line of defense is traditionally the people's representatives in Congress and there we must look for preservation of many of our most precious constitutional rights.

It is seldom that the constitutional validity of a statute can be judged from an examination of the words of the written Constitution alone. It is not likely that anyone who can read the plain language of the Constitution would doubt the invalidity of a statute which would require every citizen to embrace the Mohammedan religion or which would lay a duty on corn shipped from Illinois to any other state or foreign nation. But who can say what is the full scope of the power "to regulate commerce with foreign nations and among the several states"? What laws are regulations? What activities are commerce? What commerce is "commerce with foreign nations and among the several states"? Here we must go beyond the words of the Constitution and seek light from the unwritten constitution found in the traditions and customs of the American people and from the decisions of our courts. And this process which controls interpretation changes as the social, economic and political philosophies of our people and our judges change. Within certain limits our judges must go outside the clustered precincts of application of fixed limitations and act as statesmen by creating wise constitutional law through interpretation and construction. In his capacity of statesman the judge may err in interpretation or he may usurp authority which should be conceded to the written document. Regard for the public welfare under conditions of today,—conditions vastly different from those of 1787 and 1867, yes, of 1927,—may well prove an irresistible temptation to surreptitious amendment of the written document.

There is yet another field of constitutional law which is beyond the words of the document or the construction of its words. As it has been construed, the provision which declares
that "no person shall be deprived of life, liberty and property without due process of law" authorizes the courts to declare unconstitutional any statute which they deem arbitrary, capricious or unreasonable. In pronouncing these decisions the judges act as statesmen and not as interpreters. Many doctrines of constitutional law embody tests of such a nature that the doctrine does little more than direct the court to decide the case before it as it thinks best for public interests.

There is evidence of a growing tendency through the years of a feeling on the part of most judges that no human being can achieve ultimate wisdom and they are more and more unwilling to substitute their judgment for that of Congress and to veto changes deemed by the Congress to be necessary for the public welfare. Study of American constitutional law cannot leave other than a conviction that our body of constitutional law depends as much upon the patriotism and statesmanship of the judges of our Supreme Court as upon the wording of the document. This judicial process is merely further evidence that many of our traditional beliefs in the government-citizen relation can be preserved only by the people's representatives in the Congress, which in the end means by the character and learning of the men the people send to Congress.

Significant facts to bear in mind in considering the constitutional aspects of any body of legislation having to do with the Federal-state relation or the government-citizen relation are that the Supreme Court, with few exceptions, has sustained legislation extending Federal regulation and control, that when once it has upheld an extension of Federal control over matters theretofore in the exclusive control of the states, it has never retraced its step, and that when once it has upheld an extension of governmental regulation of personal liberty and personal property rights, it has never overruled that holding. This much seems to be settled. Decisions limiting or denying Federal power are likely under changed conditions to be overruled, but decisions upholding extensions of Federal power are not.

Many of the statutes which comprise the New Deal legislation delegate extensive administrative power to the President and others. The most conspicuous example is the N. I. R. A.
and the Supreme Court has said that the powers delegated were legislative and the delegation extra-constitutional. This is the first time in the 148 years of our Supreme Court that this constitutional objection has been sustained. The document does not in express terms forbid Congress to delegate its powers. The judges have deduced from the provision which says, "All legislative powers herein granted shall be vested in Congress", by construction and interpretation, that legislative power is non-delegable. No one questions that the system of government outlined in our Constitution divides the agencies of government into three coordinate departments,—the legislative, the judicial and the executive,—and it is generally recognized by students of government that this is our greatest contribution to the science of government. Notwithstanding this agreement on the form of our government, the problems of construction often presented throughout our history, when a statute has been challenged on the ground that it violated that theory underlying the Constitution which prohibits the exercise by one department of powers limited to another, have given rise to litigation which has had distinguished champions on both sides and has resulted frequently in division of our Supreme Court. Manifestly, the Congress is not permitted to abdicate or to transfer to others legislative functions with which it alone is vested and all good citizens deplore the tendency on the part of the Congress to become subservient to the will of the executive.

There is a middle course which should be followed. Legislation must often be adapted to complex conditions involving a host of details with which the Congress cannot deal directly, and the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicability which will enable it to perform its function of laying down policies and establishing standards while leaving to selected instrumentalities the making of rules and regulations within prescribed limits and the determination of facts to which the policy as declared by the Congress is to apply. For instance, the Supreme Court has sustained the authority given by the Congress to the Secretary of War to determine whether a particular bridge constitutes an unreasonable ob-
construction to navigation and to remove such obstruction, the authority of the Interstate Commerce Commission in the exercise of the declared policy of the Congress in enforcing reasonable rates, in preventing undue preferences and unjust discrimination and in requiring suitable facilities for transportation, the authority of the Radio Commission to determine the public convenience, interest and necessity in assigning frequencies and wave lengths to different stations, the authority of the President to determine when conditions of production at home and abroad warrant a revision of the tariff up or down on some particular commodity; and scores of similar delegations of administrative powers.

Emergency does not give a power which the Constitution prohibits but emergency does justify an exercise of power in a way that will get immediate results. In the complex life of today and in an emergency, government could not function efficiently without the delegation, in greater or less degree as conditions require, of the power to adapt the rule or the policy fixed by the Congress to the swiftly changing facts. From 1784, when Congress authorized President Washington to lay an embargo upon ships of the United States and of any foreign nation under such regulations as the circumstances required and to continue or revoke the same whenever he thought proper, down to this Administration, there have been numerous instances of delegation of broad administrative powers to the executive department. We need not fear that our nation will drift from its ancient moorings as a result alone of delegation of power by Congress to President Roosevelt in this emergency. When he took the helm millions of good citizens were out of employment and our whole economic and business structure was threatened with collapse. Something had to be done and done quickly. While we may question the wisdom of some of the measures adopted to meet the emergency, we must admire the vigor and courage with which President Roosevelt tackled the job. But notwithstanding our admiration of the strength of the Executive, we cannot ignore the fact established by past and current experiences in government that the tendency of the legislative department to shift its responsibility to the executive department is charged with
great danger. When the power to make, the power to interpret, and the power to enforce the law are vested in an individual or a selected group, tyranny is likely to follow. A study of the science of government will disclose that as these natural functions have been separated, so has free government advanced.

The number and importance of the acts of Congress now being challenged and the regularity with which these challenges are being sustained has brought to the fore again the bewhiskered question of whether the Constitution grants to the Supreme Court the right to void a statute which it decides contravenes the limitations set by the Constitution or whether that power was usurped by the Supreme Court in the formative period of our government under the Constitution. The document does not in express terms grant this power, but it does vest in the Supreme Court, and inferior courts to be established, the judicial power of the United States. This power necessarily embraces the power to determine controversies and the second section of the judiciary article specifically states that the judicial power shall extend to all cases arising under the Constitution and statutes of the United States. The Congress has only such powers of legislation as are granted by the Constitution and to prevent an assumption of power in certain fields the power to legislate in these fields was either specifically denied to Congress or greatly limited. While the president and the members of Congress take an oath to support the Constitution and it is intended they will observe that oath there is no provision of the document which even suggests that the judgment of the executive or the legislative department with respect to such observance shall be final. It is certain that the people in adopting a written constitution to protect themselves from the excesses of government, intended that some agency of that government should have the authority to enforce compliance with the limitations they fixed in the document. If the limits set by the people in the fundamental law may be transgressed by those intended to be restrained, to what purpose is their power limited and for what reason is that limitation committed to writing? It is a proposition too plain to be disputed
that if the legislative department is to pass any legislation it
pleases, without regard to conformity to the letter and spirit
of the Constitution, then written constitutions are absurd
attempts on the part of the citizens to limit a power which is
itself illimitable. To deny to the Supreme Court the power
by majority decision to determine constitutional questions is
to change our system of government.

In considering the constitutional aspects of the New Deal,
let us look for a moment at the conditions which brought forth
some of this legislation. There can be no question that the
money-grubbers and some of the over-lords of business and
banking, who are protesting loudest against the New Deal,
have brought upon themselves and their fellow-citizens the
excesses of government regulation. Their misuse of the
power of wealth and position and their seeking after and
securing special privilege at the hands of the government
brought on conditions which impoverished millions of our
citizens and created a situation in this land of plenty that no
self-respecting citizen can defend. There are those who still
adhere to the Hamiltonian theory that the masses fare well
when the wealth of the country is centered in the few or that
prosperity trickles down from the top. My whole being rebels
against this theory. There are others who believe with
Jefferson that every man should have an equal opportunity
under the law and that prosperity and happiness are with us
when the abundance of our country is available to all. With
this I am in full accord.

Under the privilege tariff policy which first protected strug-
gling industries essential to our well-being and later secured
industrial monstrosities in their entrenched positions which
they maintained by "campaign" contributions to their puppets,
this government was projected into partnership with business.
This policy, which favored one part of our people over an-
other, was contrary to the American theory of "equal rights
to all and special privileges to none." As I view it, the only
defensible protective tariff policy is one that equalizes the
cost of production here and abroad. Such a policy protects
in the interests of all the people of the United States and does
not favor a part of our people at the expense of the rest.
Though the privilege tariff system was more subtle than the dole system, it was nevertheless a handout from the government. Under it the government was placed in the position of supporting a scheme which took money from the pockets of the many and put it in the pockets of the few. Those who adhere to this theory that the power to levy and collect imposts carries with it the power to subsidize specially selected business should have been enthusiastic supporters of the Agricultural Adjustment Administration Act. The farmers are right in their contention that the privilege tariff policy which has been "sauce" for the industrialists has been "apple sauce" for them. I consider all forms of government subsidy of private business wrong in principle and unconstitutional in the broad sense. Our experience has shown that when any business is supported to any degree by government bounty, the beneficiary is never satisfied but is constantly clamoring for more help. Its partiality and artificiality necessarily result in creating a dependent attitude with its attendant weaknesses.

It will take a major operation to correct the evils of the era of the survival of the fittest, the law of the jungle, and no one ever came through a major operation, however successfully, without a great deal of pain and some damage. When and only when the powers of the government, including the power to lay and collect taxes and to spend public funds, are exercised in the interests of the whole people and not in the interests of any favored part, will true happiness and prosperity return to our people. Then only will our government be administered in the spirit of American traditions and the written Constitution.

Summing up, I regard the principles I have applied in testing the constitutionality of current legislation fundamental American principles of government. They cannot be ignored without changing the plan of government outlined in our Federal Constitution. They were not new when our Constitution was adopted. All, except the principle which separated the powers granted the Federal government from the powers reserved to the people of the several states, had been written into the constitutions of the Colonies and had been established as fundamental American doctrines for a century and
a half before the Colonies declared their independence. In view of my known activities as a member of the Democratic Party, I trust you will pardon the personal reference if I remind you that I am reannouncing in this discussion the principles of government to which I have long adhered. I stated them as chairman of the Democratic Illinois State Convention in 1924 and as the candidate of the Democratic Party for Governor in 1928, and as a delegate to the Democratic National Convention in 1932 I voted for a platform which announced them. Given the opportunity, I shall again support those principles in 1936. I am not yet convinced that these fundamental principles of government are unsound. Under a government founded on these principles this nation has attained first rank among the nations of the world and our people have enjoyed a greater measure of happiness and prosperity than any other people. In no other country has it been possible for so many individuals of obscure and humble origin to rise to positions of wealth and influence. Our form of government is our most precious inheritance and our most sacred obligation is to preserve it for posterity.

In this study we have seen that the New Deal is not new and that it has not presented new constitutional questions. As the last stick of cordwood causes the overload which breaks the wagon, so have the latest additions to our paternalistic Federal laws shown the extent to which this mania for attending to other people's business may go and has brought home to our citizens once more the danger of centralizing their government in Washington. The New Deal has rendered a distinct public service in awakening our citizens to a reexamination of our foundation stones. We have learned in this study that we cannot find security in the form of our government alone and that frequent recurrence to fundamental principles is essential to the maintenance of free institutions.

Whether this government shall remain a representative republic or degenerate into a bureaucratic empire depends upon the wisdom and loyalty of the citizens. If the majority of our people regard the national government as a representative republic of limited powers, it will remain so, but if our
people conceive it to be a unitary, paternalistic state, it will become so notwithstanding the written Constitution to the contrary. Our government gives much to the individual citizen and expects much of him in return. The real danger which confronts us is that too many of our citizens are more concerned with their privileges and immunities than with their duties and responsibilities. There are too many slackers who refuse to interest themselves in public affairs, too many men who are so interested in their private affairs that they refuse to give thought to the political problems which must be solved. Without government there can be no private business and the time is coming when this government of free men will be transformed if the good citizen will not take time to attend to his public duty.

Our country's great need is that those blessed with positions of leadership take an attitude and cultivate a spirit, not of resignation to the seeming inevitable, but of aggressive hostility to every corrupting influence. Our scheme of government cannot long endure without individual initiative, individual responsibility and individual sacrifice. By no form of special pleading or specious argument can the lawyers escape their responsibility. We must step forward as individuals and take our stand for a government under our Constitution which will secure to all our people the blessings of liberty, a fair share of our abundance, and the protection of the fruits of their industry. May a divine Providence open our eyes and our hearts, give us light to see the right and the courage and wisdom to do it.