



5-1-1937

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Recommended Citation

Thomas F. Konop, *Reorganization of the Federal Judiciary*, 12 Notre Dame L. Rev. 347 (1937).

Available at: <http://scholarship.law.nd.edu/ndlr/vol12/iss4/1>

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NOTRE DAME LAWYER

A Quarterly Law Review

VOL. XII

MAY, 1937

NO. 4

REORGANIZATION OF THE FEDERAL JUDICIARY*

MR. Chairman and Gentlemen of the Committee: There has been so much discussion of the President's proposal, that nearly every possible phase of the question has been presented and very little can be added to the discussions.

What is the problem and how did it arise? Was it suddenly thrust upon us by the President's proposal? I think the problem is a moral one, basic and fundamental, and involves more than a mere change in the number of Justices of the Supreme Court. Gentlemen, behind this simple proposition is a basic problem, a problem that must be solved at present if American institutions, American industry, and American government are to survive.

Fundamentally, the problem is a moral one. It involves questions of right and wrong. It involves Justice and a Square Deal to men, women, and children, who, after all, make up the country, its institutions and its government. It is hard to give a specific definition to this problem. In Christianity it is defined in its precept "Love thy neighbor as thyself" and the ever present quære, "Am I my brother's keeper?"

*Statement concerning the proposed reorganization of the federal judiciary made by Dean Thomas F. Konop before the Senate Committee on the Judiciary, March 18, 1937.

Let me quote to you from a letter of the Great Emancipator, Abraham Lincoln, to Mr. Jesse Harper:

“Yes we may all congratulate ourselves that this cruel war is nearing to a close. It has cost a vast amount of treasure and blood. The best blood of the flower of American youth has been freely offered upon our country’s altar that the nation might live. It has been indeed a trying hour for the republic, but I see *in the near future a crisis approaching that unnerves me and causes me to tremble for the safety of my country.* As a result of the war, corporations have been enthroned and an era of corruption in high places will follow, and the money power of the country will endeavor to prolong its reign by working upon the prejudice of the people, until all the wealth is aggregated in a few hands and the republic is destroyed. I feel at this moment more anxiety for the safety of my country than ever before, even in the midst of war. God grant that my suspicions may prove groundless.” (Italics are mine.)

Is this prophecy of Lincoln to come true? One of the main causes of our present economic trouble has been a soulless and a conscienceless person created by *law* and called the corporation. It has been the use and abuse of this device in business and manufacturing that has been responsible for piling capital upon capital; factory building upon factory building; and plunging the American people into a maelstrom of overcapitalization and overproduction which culminated in a collapse in 1929. This soulless entity, instead of being a servant of the people for their good and their material prosperity, has become a monster of their destruction.

When the United States Supreme Court held that corporations were “persons” within the provisions of the 14th Amendment, it practically destroyed all powers of the states to regulate and control the corporations, the very “persons” that the states created. This was the beginning of the oppression of the people by organized and soulless corporate greed.

Now, why the controversy about courts? Within the past few years, trial as well as appellate courts have declared unconstitutional several acts of Congress. These laws were enacted during a serious economic depression. When these acts were passed, large masses of our people were in des-

perate circumstances. They were losing all hope. Local governments were unable to help them. It was then, that the Federal Government stepped in to save the American people. Laws were enacted by Congress, and are being enacted now, to save our financial, economic, and industrial structure and to promote the welfare of the people, and to provide against a recurrence of similar catastrophes.

Then came the decisions of the Supreme Court striking social and beneficial laws from the statute books. By these decisions, the Court in effect told the American people that because of the Constitution their representatives could not pass these laws. That was quite a jolt to the people of America. They had been taught that the Constitution was the Charter of a Great Democracy. They had been taught that it was a Charter of their liberties; they had been taught to love it, fight for it, and if need be, die for it. And during the Depression, when the people needed the Constitution to save them and to save their Democracy, the Supreme Court decides, that because of previous decisions, under the rule of *stare decisis*, nothing can be done.

Ought we to be surprised that there is some discontent among our people? That there are sit-down strikes and disorders, that there is disrespect for law and order, and that a crime wave still persists? Ought we to be alarmed that Communists are finding here and there in America a fertile field for the preaching of their destructive doctrines?

As now construed by the Supreme Court, the people look upon the Constitution as a bar to help them in times of distress and as a barrier to progress and social justice. Reasonably and liberally construed, the Constitution will adapt itself to our progress. It can and must be so construed if we are to save ourselves and the Supreme Court.

The Declaration of Independence and the Preamble to the Constitution together constitute the *spirit* of the Constitution. The Constitution is the plan. It provides the *form* of

government. Its letter tells us how the governmental processes are to be carried out by the three branches. The people, speaking through the Congress, the President and the Supreme Court, make up the Government. The Constitution provides the *form*, but it also breathes the spirit of the God-given rights of man as defined in the Declaration of Independence and general welfare as defined in the Preamble. In the case of *Gulf, C. & S. F. R. Co. v. Ellis*¹ the Supreme Court of the United States said:

“. . . the latter [meaning Federal Constitution] is but the body and the letter of which the former [meaning the Declaration of Independence] is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence.”

Today's construction of the Constitution by some Justices indicates that they forget the real spirit of the Constitution and obscure its substance and spirit by emphasis on mere “form.”

Let me cite a few decisions which are hard to reconcile in the spirit: The Court says that neither Congress nor legislatures can through their commissions fix rates for public utilities that would deny a reasonable return (about 7%) to the stockholders. This is all right because it protects and guarantees profits. But the Court also says that neither Congress nor the legislatures can pass laws to fix minimum wages.²

Again, the Supreme Court in effect says: You can't levy an income tax.³ Later it said: Yes, you can levy an income tax on salaries, dividends and money income, but under the Income-Tax Amendment, which took 20 years of agitation to adopt, you can't levy an income tax on stock dividends.⁴

¹ 165 U. S. 150, 160 (1897).

² *Adkins v. Children's Hospital*, 261 U. S. 525, 43 Sup. Ct. 394, 67 L. Ed. 785, 27 A. L. R. 1238 (1923); *Morehead v. New York*, 298 U. S. 587, 56 Sup. Ct. 918, 80 L. Ed. 1347, 103 A. L. R. 1238 (1936). Both of these cases were overruled in *West Coast Hotel Co. v. Parrish*, 81 L. Ed. 456 (1937); and now Congress and the state legislatures may fix minimum wages for women.

³ *Pollock v. Farmers' Loan & Trust Co.*, 158 U. S. 601, 15 Sup. Ct. 912, 39 L. Ed. 1108 (1895).

⁴ *Eisner v. Macomber*, 252 U. S. 189, 40 Sup. Ct. 189, 64 L. Ed. 521 (1920).

Again, the Court says in effect: You can by law take property from one railroad company that hath and give it to a railroad company that hath not.⁵ But you can't by law levy a processing tax on the processors and provide for its distribution to farmers.⁶

I suppose from now on teachers of Constitutional Law will be trying to reconcile *Hammer v. Dagenhart* (the Child Labor Case)⁷ with *Kentucky Whip & Collar Co. v. Illinois Cent. R. Co.*⁸ case which sustained the constitutionality of the *Ashurst Summers Act*. Other cases could be cited.

Gentlemen: The cry is that the President is usurping the power of the Supreme Court; that he is a Dictator and an Autocrat; that he wants to destroy our liberties, our free speech and press, freedom of religion, trial by jury, etc. A few minutes ago I quoted Lincoln:

"The money power of the country will endeavor to prolong its reign by working on the prejudices of the people until the wealth is segregated in a few hands and the republic is destroyed." (Italics are mine.)

WHO is usurping? It is the Supreme Court that is usurping the power of Congress and the President. It is the Supreme Court that has been destroying laws passed by Congress for a better life, more liberty and equality; social justice, and pursuit of happiness of one hundred thirty million people.

Who is the Dictator? *ONE MAN*, not elected by the people, but appointed for life. The *FIFTH JUSTICE* of the Supreme Court is the Dictator!

What about five-to-four decisions of the Supreme Court of the United States? What about the power of *ONE MAN*, the *FIFTH JUSTICE*, to thwart the will of the people as expressed through their representatives? May there not be dictatorship in that?

⁵ Dayton-Goose Creek R. Co. v. United States, 263 U. S. 456, 44 Sup. Ct. 169, 68 L. Ed. 388 (1924).

⁶ United States v. Butler, 297 U. S. 1, 56 Sup. Ct. 312 (1936).

⁷ 247 U. S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101 (1918).

⁸ 81 L. Ed. 183, 57 Sup. Ct. 277 (1937).

Gentlemen: Is there no such thing as leadership in our American political life? When a president submits his record of four years to his people and they approve it by the greatest majority on record, he is not the people's Dictator. He is their leader to carry out their mandate. Finance, Industry, Labor, all have their leaders. May not the people of America have one?

Gentlemen: The American people have been patient in enduring injustices under our industrial system. The amendment process is too slow to give relief. The people do not envy nor hate the rich. They believe in individual rights, individual liberty, and individual ownership. It is not individualism that the people object to, *but they do object to an over-organized and syndicated capital* that refuses to give them a square deal.

The American wants a job in private industry. He wants wages that will keep up his home and give him an American standard of living. If our capitalistic industrial system does not give these to him, then someone else must and will. Let us settle the basic problem now. The problem will not be settled until it is settled right.

Now as to the method. Let us not quarrel about method. While Lord North, Pitt, Burke and Chatham were debating method in London, Thomas Jefferson was writing the Declaration of Independence in Virginia.

Seventy years of quarreling over methods of dealing with the slavery question plunged us into a Civil War.

What is the President's proposal? As a judge or justice seventy years of age or over cannot be compelled to retire, the President recommends to the Congress, legislation for the appointment of an additional judge or justice when a judge or justice who has reached the age of seventy does not retire. Under the present situation this would increase the number of justices on the Supreme Court to fifteen.

Under the Constitution, the President has the power to make recommendation,⁹ and the Congress has always exercised the power to increase, or to decrease for that matter, the number of justices. None of the checks and balances are impaired. The President appoints—the Senate confirms—and the appointment is for life.

Unless the President's attempt to get into the Supreme Court an interpretation and construction of the Constitution in the "substance and spirit" as I have pointed out, then the American people, outraged at the inability of Congress and the President to protect them and their resources, will, by amendment, sweep the Supreme Court out of the constitutional picture. We will then have an amendment which will deny the power of the Supreme Court to sit in judgment upon congressional legislation and probably state legislation as well. This kind of an amendment would tend to destroy the Bill of Rights.

I think the President's proposal is a safety-valve to save the Supreme Court and its jurisdiction. I favor the President's proposal because it is simple, expeditious and constitutional, and it will permit Congress and the President to carry out the people's mandate.

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⁹ U. S. CONST. Art. II, § 3.