men who served in the armed forces of the United States during the Spanish War period; to the Committee on Pensions.

4527. By Mr. GARBER of Oklahoma: Petition of Fresno Branch, San Joaquin Valley Retail Grocers' and Merchants' Association and Retail Grocers' Association of San Francisco, urging support of Kelly-Capper bill; to the Committee on Interstate and Foreign Commerce.

4528. Also, petition of Maston Harris, citizen of Enid, Okla., urging support of House bill 8976; to the Committee on Pensions.

4529. Also, petition of Oklahoma Pharmaceutical Association, urging retention permissive features prohibition act in Treasury Department; to the Committee on the Judiciary.

4530. By Mr. JAMES: Petition asking favorable action on Senate bill 476 and House bill 2562, providing for increased rates of pension to the men who served in the armed forces of the United States during the Spanish War; to the Committee on Pensions.

4531. By Mr. KVALE: Petition of citizens of the Upper Mississippi Valley, asking for early completion of the upper Mississippi system; to the Committee on Rivers and Harbors.

4532. Also, petition urging that a sufficiently high tariff be placed upon all foreign raw products from which food substitutes are made to adequately protect our dairy interests; to the Committee on Ways and Means.

4533. Also, petition of 74 residents of Canby, Minn., and vicinity, urging speedy consideration and passage of House bill 2562; to the Committee on Pensions.

4534. By Mrs. LANGLEY: Petition of George Ike Porter, Mr. J. J. Thomas, Mrs. Rhoda Thomas, and 64 other citizens of Floyd County, Ky., urging speedy consideration and passage of Senate bill 476 and House bill 2562, providing for increased rates of pension to the men who served in the armed forces of the United States during the Spanish War period; to the Committee on Pensions.

4535. By Mr. LETTS: Petition of Harry Pfabe and other constituents, urging the passage of legislation in behalf of the Spanish-American War veterans; to the Committee on Pensions.

4536. By Mr. MENGES: Petition submitted by C. A. Cromleigh and other citizens of York and York County, Pa., urging the enactment of an amendment to the present law to extend the date of service-connected disability allowance to January 1, 1930, to allow the benefits of compensation to disabled veterans of the World War who develop tuberculosis prior to the date of January 1, 1930; to the Committee on World War Veterans' Legislation.

4537. Also, petition submitted by George S. Fry, 627 Cleveland Avenue, York, Pa., and other citizens of York and York County, urging the enactment of Senate bill 476 and House bill 2562, providing for increased rates of pension for the men who served in the armed forces of the United States during the Spanish War period; to the Committee on Pensions.

4538. By Mr. MICHENER: Petition of sundry citizens of Tecumseh, Mich., favoring the passage of House bill 2562, providing for increased rates of pensions to Spanish-American War veterans; to the Committee on Pensions.

4539. By Mr. MOORE of Kentucky: Petition of citizens of Adairville, Logan County, Ky., urging passage of House bill 2562, providing for increased rates of pension to the men who served in the armed forces of the United States during the Spanish-American War; to the Committee on Pensions.

4540. By Mr. O'CONNELL of New York: Petition of Walter Waddelow and six other citizens of Mount Morris, Ill., favoring the passage of the Saturday half holiday bill (H. R. 167) for postal employees and the longevity bill (H. R. 162); to the Committee on the Post Office and Post Roads.

4541. By Mr. PEAVEY: Petition of citizens of Rusk County, Wis., in favor of the Robston educational bill; to the Committee on Education.

4542. By Mr. SHORT of Missouri: Petition of various citizens of Missouri, urging increased pensions for Spanish War veterans; to the Committee on Pensions.

4543. By Mr. SINCLAIR: Petition of 21 citizens of Mandan, N. Dak., in favor of a bill to increase pensions of veterans of the war with Spain; to the Committee on Pensions.

4544. Also, petition of 41 citizens of Ambrose, N. Dak., in favor of a bill to increase pensions of veterans of the war with Spain; to the Committee on Pensions.

4545. By Mr. WAINWRIGHT: Petition of 38 constituents, favoring the passage of House bill 2562, providing for increase of pension to Spanish-American War veterans; to the Committee on Pensions.

4546. Also, petition of 100 constituents requesting favorable consideration upon the Robsion-Capper bill to create a department of public education, and for other purposes; to the Committee on Education.

4547. Also, petition signed by 78 people, favoring the passage of House bill 2562, providing for increase of pension to Spanish-American War veterans; to the Committee on Pensions.

4548. By Mr. WINGO: Petition of citizens of Fort Smith, Ark., in favor of increased pensions for Spanish-American War veterans; to the Committee on Pensions.

4549. By Mr. WOODRUFF: Petition from citizens of Big Rapids, Mecosta County, Mich., favoring adoption of House bill 2562, granting increase of pensions to veterans of the Spanish War; to the Committee on Pensions.

4550. By Mr. WYANT: Petition of Fred G. Bowers, Belle Vernon, Pa.; A. W. Schroder, Avonmore, Pa.; and Patsy Costa, Mount Pleasant, Pa., members of Aspinwall Chapter, No. 20, the Disabled American Veterans of the World War, advocating passage of the Rankin bill, H. R. 7825; to the Committee on World War Veterans' Legislation.

4551. Also, petition of Triumph Council, No. 302, Order of Independence Americans, Sardis, Pa., protesting against Mexicans entering the United States as laborers; to the Committee on Immigration and Naturalization.

4552. By Mr. ZIHLMAN: Petition of citizens of Carroll County, Md., who urge early and favorable action on House bill 2562 and Senate bill 476, which provide for an increase in pension to Spanish War veterans; to the Committee on Pensions.

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## SENATE

THURSDAY, *February 13, 1930*

*(Legislative day of Monday, January 6, 1930)*

The Senate met at 11 o'clock a. m. in open executive session, on the expiration of the recess.

Mr. FESS. Mr. President, I suggest the absence of a quorum.

The VICE PRESIDENT. The clerk will call the roll.

The legislative clerk called the roll, and the following Senators answered to their names:

| | | | |
|---|---|---|---|
| Allen | Dill | Jones | Shortridge |
| Ashurst | Fess | Kean | Simmons |
| Baird | Fletcher | Kendrick | Smoot |
| Barkley | Frazier | Keyes | Steck |
| Bingham | George | La Follette | Steiwer |
| Black | Gillett | McCulloch | Stephens |
| Blaine | Glass | McKellar | Sullivan |
| Blease | Glenn | McMaster | Swanson |
| Borah | Goff | McNary | Thomas, Idaho |
| Bratton | Goldsborough | Metcalf | Thomas, Okla. |
| Brock | Gould | Norbeck | Townsend |
| Brookhart | Greene | Norris | Trammell |
| Broussard | Grundy | Nye | Tydings |
| Capper | Hale | Oddie | Vandenberg |
| Caraway | Harris | Overman | Wagner |
| Connally | Harrison | Patterson | Walcott |
| Copeland | Hastings | Phipps | Walsh, Mass. |
| Couzens | Hatfield | Pine | Walsh, Mont. |
| Cutting | Hawes | Ransdell | Waterman |
| Dale | Hebert | Schall | Watson |
| Deneen | Johnson | Sheppard | Wheeler |

Mr. SHEPPARD. I desire to announce that the junior Senator from Utah [Mr. KING] is necessarily detained from the Senate by illness. I will let this announcement stand for the day.

I also desire to announce the necessary absence of the Senator from Arkansas [Mr. ROBINSON] and the Senator from Pennsylvania [Mr. REED], who are delegates from the United States to the Naval Arms Conference meeting in London, England.

Mr. NORRIS. I desire to announce the unavoidable absence of my colleague [Mr. HOWELL]. I ask that this announcement may stand for the day.

The VICE PRESIDENT. Eighty-four Senators have answered to their names. A quorum is present.

### PETITIONS

As in legislative session,

Mr. KEAN presented petitions of sundry citizens of the State of New Jersey, praying for the passage of legislation granting increased pensions to Spanish War veterans, which were ordered to lie on the table.

Mr. BLAINE presented a petition of sundry citizens of the State of Wisconsin, praying for the passage of legislation granting increased pensions to Spanish War veterans, which was ordered to lie on the table.

Mr. TYDINGS presented petitions of sundry citizens of the State of Maryland, praying for the passage of legislation granting increased pensions to Spanish War veterans, which were ordered to lie on the table.

Mr. GOLDSBOROUGH presented a resolution adopted by the City Council of Baltimore, Md., favoring the passage of House Joint Resolution 167, directing the President of the United States to proclaim October 11 of each year as "General Pulaski's memorial day" for the observance and commemoration of the

death of Brig. Gen. Casimir Pulaski, which was referred to the Committee on the Library.

He also presented petitions of sundry citizens of Baltimore, Md., praying for the passage of legislation granting increased pensions to Spanish War veterans, which were ordered to lie on the table.

Mr. VANDENBERG presented a resolution adopted by the Detroit (Mich.) Federation of Labor, favoring the passage of the bill (S. 306) to amend certain laws relating to American seamen, and for other purposes, which was referred to the Committee on Commerce.

He also presented a letter in the nature of a petition from the South Side Boosters Club, of Saginaw, Mich., praying for the modification of the eighteenth amendment to the Constitution, and also the Volstead Act, pertaining to the manufacture, sale, etc., of intoxicating liquors, which was referred to the Committee on the Judiciary.

He also presented a resolution adopted by the national defense committee of the Detroit (Mich.) Board of Commerce, favoring the passage of the so-called reserve division bill, which was referred to the Committee on Military Affairs.

REPORTS OF COMMITTEES

As in legislative session,

Mr. KENDRICK, from the Committee on Indian Affairs, to which was referred the bill (H. R. 563) for the relief of Frank Yarlott, reported it without amendment and submitted a report (No. 181) thereon.

Mr. PINE, from the Committee on Indian Affairs, to which was referred the bill (H. R. 4604) to provide for the recording of the Indian sign language through the instrumentality of Maj. Gen. Hugh L. Scott, retired, reported it without amendment and submitted a report (No. 182) thereon.

Mr. FRAZIER, from the Committee on Indian Affairs, to which was referred the bill (H. R. 7964) to authorize the issuance of a fee patent for block 23 within the town of Lac du Flambeau, Wis., in favor of the local public-school authorities, reported it without amendment and submitted a report (No. 183) thereon.

Mr. TYDINGS, from the Committee on Commerce, to which was referred the bill (S. 3135) granting the consent of Congress to Helena S. Raskob to construct a dam across Robins Cove, a tributary of Chester River, Queen Annes County, Md., reported it with an amendment and submitted a report (No. 184) thereon.

REPORT OF POSTAL NOMINATIONS

As in open executive session,

Mr. PHIPPS, from the Committee on Post Offices and Post Roads, reported sundry post-office nominations.

BILLS INTRODUCED

As in legislative session,

Bills were introduced, read the first time, and, by unanimous consent, the second time, and referred as follows:

By Mr. WATSON:

A bill (S. 3545) granting an increase of pension to Emma G. Heffner (with accompanying papers); to the Committee on Pensions.

A bill (S. 3546) providing for reclassification of salaries of patent examiners; to the Committee on Patents.

By Mr. McCULLOCH:

A bill (S. 3547) to exempt certain persons from the payment of premiums on Government insurance; to the Committee on Finance.

A bill (S. 3548) relating to travel allowances of members of the volunteer forces of the United States authorized to be recruited under the act approved March 2, 1899 (with an accompanying paper); to the Committee on Military Affairs.

A bill (S. 3549) granting a pension to Sadie M. Waitman (with accompanying papers); and

A bill (S. 3550) granting an increase of pension to Eliza I. Duff (with accompanying papers); to the Committee on Pensions.

By Mr. OVERMAN:

A bill (S. 3551) for the relief of William J. Cocke; to the Committee on Claims.

By Mr. SWANSON:

A bill (S. 3552) to amend the Arlington Memorial Bridge act; to the Committee on Public Buildings and Grounds.

By Mr. THOMAS of Oklahoma:

A bill (S. 3553) for the relief of R. A. Ogee, sr.; to the Committee on Indian Affairs.

A bill (S. 3554) granting a pension to W. B. "Curly" Hicks (with accompanying papers); to the Committee on Pensions.

By Mr. McNARY:

A bill (S. 3555) authorizing the purchase, establishment, and maintenance of an experimental farm or orchard in Mobile County, State of Alabama, and authorizing an appropriation therefor; to the Committee on Agriculture and Forestry.

A bill (S. 3556) authorizing the sale of a certain tract of land in the State of Oregon, to the Klamath Irrigation District; and

A bill (S. 3557) to provide for the acquisition of certain timberlands and the sale thereof to the State of Oregon for recreational and scenic purposes; to the Committee on Public Lands and Surveys.

By Mr. CAPPER:

A bill (S. 3558) to amend section 8 of the act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June 30, 1914, and for other purposes, approved March 4, 1913; to the Committee on the District of Columbia.

By Mr. BLAINE:

A bill (S. 3559) granting an increase of pension to Frances E. O'Brien (with accompanying papers); and

A bill (S. 3560) granting an increase of pension to Leona O'Brien (with accompanying papers); to the Committee on Pensions.

A bill (S. 3561) to amend section 202 of the World War veterans' act, 1924, as amended; to the Committee on Finance.

By Mr. TYDINGS:

A bill (S. 3562) to authorize the appointment of Chief Machinist William C. Gray, United States Navy (retired), a lieutenant on the retired list of the Navy (with accompanying papers); to the Committee on Naval Affairs.

By Mr. SCHALL (for Mr. SHIPSTEAD):

A bill (S. 3563) granting a pension to John H. Lester; to the Committee on Pensions.

By Mr. FLETCHER:

A bill (S. 3564) to amend section 7 of the Federal reserve act, as amended; to the Committee on Banking and Currency.

A bill (S. 3565) for the relief of certain purchasers of lots in Harding Townsite, Fla.; to the Committee on Public Lands and Surveys.

SPANISH WAR PENSIONS

As in legislative session,

Mr. HARRIS submitted an amendment intended to be proposed by him to the bill (S. 476) granting pensions and increase of pensions to certain soldiers, sailors, and nurses of the war with Spain, the Philippine insurrection, or the China relief expedition, and for other purposes, which was ordered to lie on the table and to be printed.

MESSAGE FROM THE HOUSE

As in legislative session,

A message from the House of Representatives by Mr. Chaffee, one of its clerks, announced that the House had passed the following bills, in which it requested the concurrence of the Senate:

H. R. 318. An act for the relief of William S. McWilliams;
H. R. 321. An act for the relief of William J. McKenna;
H. R. 341. An act for the relief of Harvey H. Goyer;
H. R. 393. An act for the relief of William H. Wagoner;
H. R. 394. An act for the relief of Charles R. Stevens;
H. R. 395. An act for the relief of Alfred Chapleau;
H. R. 397. An act for the relief of Lowell G. Fuller;
H. R. 449. An act for the relief of Garrett M. Martin;
H. R. 453. An act for the relief of Michael Patrick Sullivan;
H. R. 462. An act for the relief of William Martin;
H. R. 464. An act for the relief of Dock Leach;
H. R. 477. An act for the relief of Harry Hamlin;
H. R. 507. An act for the relief of Richard A. Chavis;
H. R. 515. An act to extend the benefits of the employees' compensation act of September 7, 1916, to Jackson D. Wissman, a former employee of the Government Dairy Farm, Beltsville, Md.;
H. R. 516. An act for the relief of John Jakes;
H. R. 539. An act for the relief of William Earhart;
H. R. 542. An act for the relief of Chancy L. McIntyre;
H. R. 555. An act for the relief of Paul Jelna;
H. R. 562. An act for the relief of Edward McOmber;
H. R. 566. An act for the relief of Charles Smith;
H. R. 585. An act for the relief of Vanrenslear VanderCook, alias William Snyder;
H. R. 589. An act for the relief of Abram H. Johnson;
H. R. 591. An act for the relief of Howard C. Frink;
H. R. 651. An act for the relief of Henrietta Seymour, widow of Joseph H. Seymour, deceased;
H. R. 659. An act for the relief of Rosetta Laws;
H. R. 666. An act authorizing the Secretary of the Treasury to pay to Eva Broderick for the hire of an automobile by agents of the Indian Service;
H. R. 685. An act for the relief of Edward Gibbs;
H. R. 767. An act for the relief of John Costigan;
H. R. 772. An act for the relief of Joseph M. Black;

H. R. 779. An act for the relief of George W. Gilmore;
H. R. 780. An act for the relief of George Selby;
H. R. 783. An act for the relief of Mary Neaf;
H. R. 786. An act for the relief of James Moffitt;
H. R. 827. An act for the relief of Homer C. Rayhill;
H. R. 843. An act for the relief of George A. Day;
H. R. 895. An act for the relief of William H. Estabrook;
H. R. 896. An act for the relief of Frank D. Peck;
H. R. 897. An act for the relief of Samuel Hooper Lane, alias Samuel Foot;
H. R. 898. An act to correct the records of the War Department to show that Guy Carlton Baker and Calton C. Baker or Carlton C. Baker is one and the same person;
H. R. 908. An act for the relief of Andrew Amsbaugher;
H. R. 942. An act for the relief of Squire J. Holly;
H. R. 1030. An act for the relief of William H. Fleming;
H. R. 1036. An act for the relief of Homer N. Horine;
H. R. 1042. An act for the relief of Albert D. Castleberry;
H. R. 1044. An act for the relief of Albert I. Riley;
H. R. 1074. An act for the relief of Curtis V. Milliman;
H. R. 1081. An act for the relief of Martin G. Schenck, alias Martin G. Schanck;
H. R. 1086. An act for the relief of George W. Posey;
H. R. 1301. An act for the relief of Julius Victor Keller;
H. R. 1485. An act for the relief of Arthur H. Thiel;
H. R. 1502. An act for the relief of Arthur Daniel Newman;
H. R. 1511. An act for the relief of Thomas Finley;
H. R. 1594. An act for the relief of John W. Leich, alias John Leach;
H. R. 1605. An act for the relief of Frank C. Russell;
H. R. 1606. An act for the relief of George A. Cole;
H. R. 1697. An act granting relief to the widow of Albert F. Smith;
H. R. 1706. An act for the relief of James E. Westcott;
H. R. 1803. An act for the relief of the Yosemite Lumber Co.;
H. R. 2331. An act for the relief of Leonard T. Newton;
H. R. 2808. An act for the relief of Robert J. Smith;
H. R. 2809. An act for the relief of Adelaide (Ada) J. Walker Robbins;
H. R. 3104. An act for the relief of Lieut. Edward F. Ney, Supply Corps, United States Navy;
H. R. 3105. An act for the relief of Lieut. Henry Guilmette, Supply Corps, United States Navy;
H. R. 3107. An act for the relief of Lieut. Edward Mixon, Supply Corps, United States Navy;
H. R. 3108. An act for the relief of Lieut. Archy W. Barnes, Supply Corps, United States Navy;
H. R. 3109. An act for the relief of Capt. William L. F. Simonpietri, Supply Corps, United States Navy;
H. R. 3110. An act for the relief of Capt. John H. Merriam, Supply Corps, United States Navy;
H. R. 3112. An act for the relief of Lieut. Commander Thomas Cochran, Supply Corps, United States Navy;
H. R. 3258. An act to correct the naval record of Peter Hansen;
H. R. 3288. An act for the relief of John Ralston;
H. R. 3289. An act for the relief of Charles W. Bendure;
H. R 3290. An act for the relief of Henry E. Thomas, alias Christopher Timmerman;
H. R. 3431. An act for the relief of Charles H. Young;
H. R. 3657. An act to quiet title and possession with respect to certain lands in Custer County, Nebr.;
H. R. 3948. An act for the relief of W. C. Moye;
H. R. 4055. An act to authorize a cash award to William P. Flood for beneficial suggestions resulting in improvement in naval material;
H. R. 6083. An act for the relief of Goldberg & Levkoff;
H. R. 6084. An act to ratify the action of a local board of sales control in respect to contracts between the United States and Goldberg & Levkoff;
H. R. 6290. An act authorizing the redemption by the United States Treasury of 20 war-savings stamps (series of 1918) now held by Dr. John Mach, of Omaha, Nebr.;
H. R. 8052. An act authorizing the heirs of Elijah D. Myers to purchase land in section 7, township 28 south, range 11 west, Willamette meridian, county of Coos, State of Oregon; and
H. R. 8699. An act for the relief of George S. Conway, jr.

ENROLLED JOINT RESOLUTION SIGNED

The message also announced that the Speaker had affixed his signature to the enrolled joint resolution (H. J. Res. 245) making an additional appropriation for personal services in the office of the Treasurer of the United States for the fiscal year ending June 30, 1930, and it was signed by the Vice President.

MESSAGE FROM THE PRESIDENT

A message in writing was communicated to the Senate from the President of the United States by Mr. Latta, one of his secretaries.

HOUSE BILLS REFERRED

As in legislative session,

The following bills were severally read twice by their titles and referred as indicated below:

H. R. 3657. An act to quiet title and possession with respect to certain lands in Custer County, Nebr.; and
H. R. 8052. An act authorizing the heirs of Elijah D. Myers to purchase land in section 7, township 28 south, range 11 west, Willamette meridian, county of Coos, State of Oregon; to the Committee on Public Lands and Surveys.
H. R. 2331. An act for the relief of Leonard T. Newton;
H. R. 3104. An act for the relief of Lieut. Edward F. Ney, Supply Corps, United States Navy;
H. R. 3105. An act for the relief of Lieut. Henry Guilmette, Supply Corps, United States Navy;
H. R. 3107. An act for the relief of Lieut. Edward Mixon, Supply Corps, United States Navy;
H. R. 3108. An act for the relief of Lieut. Archy W. Barnes, Supply Corps, United States Navy;
H. R. 3109. An act for the relief of Capt. William L. F. Simonpietri, Supply Corps, United States Navy;
H. R. 3110. An act for the relief of Capt. John H. Merriam, Supply Corps, United States Navy;
H. R. 3112. An act for the relief of Lieut. Commander Thomas Cochran, Supply Corps, United States Navy;
H. R. 3258. An act to correct the naval record of Peter Hansen; and
H. R. 4055. An act to authorize a cash award to William P. Flood for beneficial suggestions resulting in improvement in naval material; to the Committee on Naval Affairs.
H. R. 515. An act to extend the benefits of the employees' compensation act of September 7, 1916, to Jackson D. Wissman, a former employee of the Government Dairy Farm, Beltsville, Md.;
H. R. 666. An act authorizing the Secretary of the Treasury to pay to Eva Broderick for the hire of an automobile by agents of the Indian Service;
H. R. 1485. An act for the relief of Arthur H. Thiel;
H. R. 1803. An act for the relief of the Yosemite Lumber Co.;
H. R. 3431. An act for the relief of Charles H. Young;
H. R. 3948. An act for the relief of W. C. Moye;
H. R. 6083. An act for the relief of Goldberg & Levkoff;
H. R. 6084. An act to ratify the action of a local board of sales control in respect to contracts between the United States and Goldberg & Levkoff;
H. R. 6290. An act authorizing the redemption by the United States Treasury of 20 war-savings stamps (series of 1918) now held by Dr. John Mach, of Omaha, Nebr.; and
H. R. 8699. An act for the relief of George S. Conway, jr.; to the Committee on Claims.
H. R. 318. An act for the relief of William S. McWilliams;
H. R. 321. An act for the relief of William J. McKenna;
H. R. 341. An act for the relief of Harvey H. Goyer;
H. R. 393. An act for the relief of William H. Wagoner;
H. R. 394. An act for the relief of Charles R. Stevens;
H. R. 395. An act for the relief of Alfred Chapleau;
H. R. 397. An act for the relief of Lowell G. Fuller;
H. R. 449. An act for the relief of Garrett M. Martin;
H. R. 453. An act for the relief of Michael Patrick Sullivan;
H. R. 462. An act for the relief of William Martin;
H. R. 464. An act for the relief of Dock Leach;
H. R. 477. An act for the relief of Harry Hamlin;
H. R. 507. An act for the relief of Richard A. Chavis;
H. R. 516. An act for the relief of John Jakes;
H. R. 539. An act for the relief of William Earhart;
H. R. 542. An act for the relief of Chancy L. McIntyre;
H. R. 555. An act for the relief of Paul Jelna;
H. R. 562. An act for the relief of Edward McOmber;
H. R. 566. An act for the relief of Charles Smith;
H. R. 585. An act for the relief of Vanrenslear VanderCook, alias William Snyder;
H. R. 589. An act for the relief of Abram H. Johnson;
H. R. 591. An act for the relief of Howard C. Frink;
H. R. 651. An act for the relief of Henrietta Seymour, widow of Joseph H. Seymour, deceased;
H. R. 659. An act for the relief of Rosetta Laws;
H. R. 685. An act for the relief of Edward Gibbs;
H. R. 767. An act for the relief of John Costigan;
H. R. 772. An act for the relief of Joseph M. Black;
H. R. 779. An act for the relief of George W. Gilmore;

H. R. 780. An act for the relief of George Selby;
H. R. 783. An act for the relief of Mary Neaf;
H. R. 786. An act for the relief of James Moffitt;
H. R. 827. An act for the relief of Homer C. Rayhill;
H. R. 843. An act for the relief of George A. Day;
H. R. 895. An act for the relief of William H. Estabrook;
H. R. 896. An act for the relief of Frank D. Peck;
H. R. 897. An act for the relief of Samuel Hooper Lane, alias Samuel Foot;
H. R. 898. An act to correct the records of the War Department to show that Guy Carlton Baker and Calton C. Baker or Carlton C. Baker is one and the same person;
H. R. 908. An act for the relief of Andrew Amsbaugher;
H. R. 942. An act for the relief of Squire J. Holly;
H. R. 1030. An act for the relief of William H. Fleming;
H. R. 1036. An act for the relief of Homer N. Horine;
H. R. 1042. An act for the relief of Albert D. Castleberry;
H. R. 1044. An act for the relief of Albert I. Riley;
H. R. 1074. An act for the relief of Curtis V. Milliman;
H. R. 1081. An act for the relief of Martin G. Schenck, alias Martin G. Schanck;
H. R. 1086. An act for the relief of George W. Posey;
H. R. 1301. An act for the relief of Julius Victor Keller;
H. R. 1502. An act for the relief of Arthur Daniel Newman;
H. R. 1511. An act for the relief of Thomas Finley;
H. R. 1594. An act for the relief of John W. Leich, alias John Leach;
H. R. 1605. An act for the relief of Frank C. Russell;
H. R. 1606. An act for the relief of George A. Cole;
H. R. 1697. An act granting relief to the widow of Albert F. Smith;
H. R. 1706. An act for the relief of James E. Westcott;
H. R. 2808. An act for the relief of Robert J. Smith;
H. R. 2809. An act for the relief of Adelaide (Ada) J. Walker Robbins;
H. R. 3288. An act for the relief of John Ralston;
H. R. 3289. An act for the relief of Charles W. Bendure; and
H. R. 3290. An act for the relief of Henry E. Thomas, alias Christopher Timmerman; to the Committee on Military Affairs.

SALARY OF MINISTER RESIDENT AND CONSUL GENERAL TO LIBERIA (S. DOC. NO. 84)

As in executive session.

The VICE PRESIDENT laid before the Senate the following message from the President of the United States, which was read, and, with the accompanying papers, referred to the Committee on Foreign Relations and ordered to be printed:

*To the Congress of the United States:*

I transmit herewith a report by the Acting Secretary of State recommending legislation authorizing an increase in the salary of the minister resident and consul general of the United States to Liberia from $5,000 to $10,000 per annum.

I am in full accord with the reasons advanced by the Acting Secretary of State in support of the increase, and I strongly urge upon the Congress the enactment of legislation authorizing it.

HERBERT HOOVER.

THE WHITE HOUSE, *February 13, 1930.*

ADDRESS BY F. SCOTT M'BRIDE ON "THE ANTI-SALOON LEAGUE AND ELECTIONS"

As in legislative session,

Mr. SHEPPARD. Mr. President, I present for publication in the RECORD an address delivered by Rev. Francis Scott McBride on January 15, 1930, entitled "The Anti-Saloon League and Elections."

There being no objection, the address was ordered to be printed in the RECORD, as follows:

Prohibition became necessary because of the evils of the alcoholic liquor traffic. It came to answer the question, "How Solve the Alcoholic Liquor Problem?" It is therefore

AN ANSWER NOT A QUESTION

The Anti-Saloon League came in the early nineties to present prohibition as the best answer to the liquor question. Something had to be done. The traffic was growing by leaps and bounds. The halls of legislation were falling faint before the propelling political power of this evil and organized traffic. The brewers and the distillers who owned or controlled 177,000 saloons were the most potent and poignant political force of the day. The people galled under the heavy yoke and were moaning and groaning and crying out for help.

While a student in Muskingum, an Ohio college, in fellowship with other college students, one of whom was James A. White, I listened to an Ohio league man—probably Dr. Purley A. Baker—as he gave the plans and purposes of the Anti-Saloon League. These plans were new and different. After the meeting we discussed the proposed plans. We were convinced that the program suggested would solve the problem and do it in this generation. The foe was a formidable one, but this put the people, whose will is supreme, back of prohibition on election day. Dr. Howard Hyde Russell had outlined with one stroke of the pen the league's program for a century in the words, "Agitation, education, legislation, and law enforcement." Make prohibition sentiment and get it into action on election days. Former plans were theoretical, but the league plan was practical; others were impossible, this was possible.

LEAGUE METHODS

It is the purpose of the program committee in this convention to stress league methods. The committee has asked me to talk on The League and Elections." It is a far-reaching story. As I try to fully comprehend it I sympathize with the bright colored boy who appeared before the Civil Service Commission in Washington to be examined for the position of letter carrier. The first question was answered easily, but the second was, "How far is it from the earth to the moon?" "How fah am it from de earf to de moon?" echoed the astonished applicant. "Good gracious, boss, if yous gwine give me dat route, I don't want dis job." But I shall gladly endeavor to go as far and as faithfully as I can with this subject, even though I didn't ask for the job.

More than 90 per cent of Anti-Saloon League activities cluster about elections. Here is the heart of the Anti-Saloon League movement. The league's educational work, legal, and enforcement work all huddle up close to elections. Here the league must continue to function if prohibition is to be held and advanced. The league's program of elections are twofold:

First. Legislative or lawmaking.
Second. Executive or law functioning

LEGISLATIVE OR LAWMAKING

The first step toward the outlawry of the liquor traffic was the enactment of law. It was legislation. They were first laws for local option under which 90 per cent of the cities and villages were voted dry. Then it was legislation, granting township option under which 85 per cent of the townships of the country voted dry. Later on it was legislation granting county option, the securing of which made possible the voting dry of all but 505 of the 3,100 counties of the country. When the sentiment had grown and become better organized it was legislation for state-wide option, under which 26 States voted out the saloon. The liquor question had thus become a major issue in the election of members of State legislatures in every State. It was the league that gave the message of the records and attitude of the candidates for legislative offices to the people and the battle was fought out between the league and the liquorites. These contests centered in the primaries and regular elections. The league's part was to "wise up" the people so that they could make their choice as to candidates.

A NATIONAL ISSUE

In 1913 the Webb-Kenyon bill regulating the interstate shipment of liquor was passed by Congress and prohibition immediately became a national issue.

The Anti-Saloon League that same year held its famous Columbus convention, at which there was appointed a committee of 1,000 to go to the Capitol and present the case of the drys to the leaders in Congress. This committee grew from 1,000 to 2,800, 800 Women's Christian Temperance Union women joining in the procession as we marched down Pennsylvania Avenue and up to the east steps of the Capitol, where Senator SHEPPARD and Congressman Hobson, with fitting formalities, were handed the message.

Prohibition was henceforth a vital issue in every congressional election throughout the entire country. On the first roll call in Congress there was a majority vote for the amendment, but not the two-thirds required under the Constitution. But this support in Congress grew and grew until the 1st day of August, 1917, the United States Senate voted 65 to 20 for the prohibition resolution, and on the 17th day of December the House voted 282 for and 128 against, and the resolution was submitted.

The question of the ratification of the prohibition amendment became a dominant issue in the election of the members of the different State legislatures. Under the terms of the resolution there were seven years in which to accept or reject the amendment. It took one year and one month, lacking one day, to bring about ratification in the required three-fourths of the States. Forty-six of the 48 States ratified—all except Connecticut and Rhode Island. Ninety-three of the 96 legislative bodies of the country voted for ratification, and the total vote of the members of the legislatures of the country, including the House and Senate, was 5,092 for, and 1,272 against—more than 4 to 1.

The eighteenth amendment was submitted by more than the necessary two-thirds vote in Congress and was ratified by an 80 per cent majority in 46 State legislatures. Did these results just happen? Rather, they were the natural outcome of the campaigns conducted in primaries and elections. The league followed its practice of carrying the facts as to the records and attitudes of the candidates through the churches and

precinct organizations to the voters. The church vote was registered and recorded, and the people, organized and informed, got results.

REPEAL FIGHT BEGUN

Following the ratification in 1920 of the eighteenth amendment, the wets began their fight for repeal. They said that while the Congress of 1920 was dry, the one 1922 would be wet, but there were more drys elected in 1922 than in 1920. With an indescribable optimism they said that while "we failed in 1922 we will win in 1924." Likewise, two years later they said "We did not do it in 1924, but prohibition is now being fully discredited, and we will do it in 1926." But following the regular method as to elections the Anti-Saloon League carried the facts as to the records and attitudes of the candidates to the people and more drys were elected in 1926 than in 1924. In the 1928 election, the wets were better manned and better financed than ever before; with unlimited literature and means with which to organize they set out to prove prohibition a failure, that a wet was sure to be elected President and should have a wet Congress to back him. But the Congress that took its place in regular session, the first of last December, is the driest Congress that has ever walked up Capitol Hill.

The drys' lobbying is done back home in the districts, and when well done there little more is needed in Washington. The drys, with the great handicap of an unfriendly press in metropolitan centers, carried its case direct to the people. Being right economically, socially, and morally, with scarcely enough money to print their message, they trampled under foot every opposing fiend and foe and wrote the convicitions of the people into the legislative records of the States and into the Constitution of the United States.

The great wicked part the Anti-Saloon League played was to give to the people the facts as to the records and attitude on the prohibition question of those seeking legislative offices.

EXECUTIVE OR LAW FUNCTIONING

The eighteenth amendment is in the Constitution. It was placed there by the largest majority given to any portion of the great Magna Charta of our rights and liberties and should be the last repealed or nullified. It is for us to defend it and to see to it that this law, now enacted, functions, through orderly constitutional government. To do this there must be placed in authority executive officers who wish this law to succeed and will use the powers intrusted to them to make it succeed.

The league could abandon no field already entered. Much of its work requires now a more direct and more expensive program. No primary election or regular election as to legislative offices could be neglected, but the question of what kind of officers will execute the law and make it function had become also a very vital issue. This was particularly true in relation to the larger city. The city is the last stand of the liquor enemy and it now fights back and will continue to fight back the strongest and the longest.

The population of the United States is fast becoming urban. There are eight city centers or areas in which the population exceeds that of all the farms in all the States, namely, Boston, New York, Philadelphia, Detroit, Chicago, Denver, San Francisco, and Los Angeles. The prohibition law must eventually win in the city by having officers who will keep their oath of office.

PROHIBITION IN LARGE CITIES

Prohibition is proving itself even in the big cities. In Chicago there were 7,152 saloons and 12,000 speak-easies during the saloon régime. While prohibition has not corrected all the evils of liquor, it is now a new city under prohibition. The wets, who used the strength of the big cities against local option, are now using the wet strength of the cities for wet local option by electing every possible officer they can to defy this law. There is no short cut to victory. The city must be taken if the victory is to be complete. The injunction that comes to us is, "Go up to Nineveh." In the city are the centers of publicity. The political boss lives there; the press associations and news syndicates are located in the city. News travels out from the big cities. Millions of foreign born, unfamiliar with American ideals, have settled there. There are more Jews in New York than in Jerusalem, more Italians than in Naples, more colored folk than in New Orleans. The truth about alcohol and law must be carried to these people.

The Roman Empire collapsed when her rural districts drained into the city, but America can prove the worth of a democracy by taking the city for law and order. But this means registration and voting intelligently on primary and election days.

We have had a kindly welcome from these different agencies, including the mayor of this great city, to-night because of the fact that the better, patriotic citizens of Detroit took the trouble to register and vote in elections. Two times your city came dangerously near turning your government over to those who openly advocated nullification. May your election be an urge to all lax cities of the country. May it stand as a commemorative monument of what happened to John W. Smith and the other Smith lineage in 1928 and be a foretoken of what can and will happen to the whole Smith family if they again choose to run in 1932.

THE PRESIDENTIAL ELECTION

In 1928 the prohibition issue became a dominant one for the first time in a presidential election since the adoption of the eighteenth amendment. A presidential candidate raised the issue. Both leading party conventions adopted satisfactory enforcement planks in their platforms. The Republican convention followed by nominating Herbert Hoover, of California. The Democratic convention nominated Gov. Alfred E. Smith, of New York.

Between the convention at Kansas City and the convention at Houston the Anti-Saloon League gave out an official statement to the effect that it was satisfied with the platform and candidate at Kansas City and hoped that the Houston convention would give a similar platform and a candidate who would accept the platform. The league made it clear that in case this was done it would not support one candidate as against the other, thereby following strictly its nonpartisan policy.

Hoover said, in accepting the platform of his party, that he would stand for prohibition enforcement, and throughout the campaign he made it clear that he wished prohibition to succeed. Governor Smith, however, on the last day of the Houston convention, sent a telegram of acceptance in which he stated, in substance, that on the prohibition question he himself would be the platform.

CAMPAIGN LITERATURE

The issue was thus clearly defined in the election of the Chief Executive of the United States, who is, by virtue of his power, authority, and obligation, the chief law enforcement officer of the Nation. The Anti-Saloon League, invited by the wets into the field for the election of a President, followed the same methods fundamental with the league in the 35 years of successful history that preceded. It raised a special campaign fund of $100,000, which was used to carry the facts as to the attitude of the candidates to the voters. Twenty thousand dollars of this (or about one-fifth) was expended for printing in our own printing plant at Westerville, Ohio, and the rest was spent for postage, telephone and telegraph, other literature, meetings, and expenses of travel by workers in an effort to inform the people of the issues involved and to carry the message of the records and attitudes of the candidates to the voters.

We were not in any way to blame for what Smith's record was. He made it. We, however, would have been very derelict to duty had we failed to carry the facts of that record to the voters of the Nation as it touched the prohibition question. More than 5,000,000 of Smith's records were distributed. This printed statement gave page and date, facsimile copies of which we have filed in the safe in our Washington office. We widely distributed through press and pamphlet a leaflet on "The Next President and Prohibition." It set forth the need of a President favorable to prohibition enforcement, called attention to his great appointive powers, including the personnel of the Prohibition Department, the Attorney General, members of the Supreme Court, Federal judges, United States district attorneys, and United States marshals. Also that he appointed the Secretary of State, ambassadors to foreign countries, and made clear the fact that the President would be the leader of his party and by his veto power largely determines appropriations and legislation. It also outlined the attitude of both candidates and set forth the personnel, purpose, and character of the Smith campaign supporters, giving the facts as to why John J. Raskob and August A. Busch, both formerly Republicans, were among the chief supporters of Smith, the Democratic candidate.

The contents of this one leaflet were carried to the churches and other cooperating agencies, reaching, on a conservative estimate, 25,000,000 voters. It met clearly the issues of the campaign and gave the people a chance to intelligently decide as to their duty on election day. The people answered this challenge by giving Herbert Hoover the largest electoral vote in the country's entire history, the vote being 444 for Hoover and 87 for Smith, his wet opponent. Forty-three States elected dry governors, thereby establishing an executive cooperation between the States and the nations.

This election made the greatest leap forward in establishing official responsibility to the Constitution and the law. The wets said, "Let the Anti-Saloon League enforce this law." The election said, "The officers will do it and the Anti-Saloon League will back them up if they do their duty and back them out if they fail."

THE PRESIDENT AND PROHIBITION

The President elect bravely accepted his responsibility. In his inaugural address he said: "I have been selected to execute and enforce the laws of the country. I propose to do so to the extent of my ability." He placed his finger upon the text, "Where there is no vision the people cast off restraint, but he that keepeth the law, happy is he" (Prov. 29:18), and in less than 10 minutes of his address he said more about prohibition enforcement than had been said in any 10 years preceding by any Chief Executive in the United States or of any other country.

It is just as important to take care of the election of proper men to administrative offices as it is to elect the right kind of officers to

those having to do with the securing of legislation. By tying together the elections for legislation and elections for administration, prohibition is given its chance. Such legislation and appropriation as are necessary to effectively enforce the prohibition law should be provided, and officers who believe in the law should be placed in charge.

CONCLUSION

The Anti-Saloon League has enlisted for the duration of the war to solve the alcoholic-liquor problem. Its position has been unique in that no penny of patronage nor office of honor has been sought. The first 10 years of prohibition has been a struggle, but prohibition is coming through. Be of good cheer. As in the past the league has functioned in electing legislative officers, it will continue to carry on a militant, aggressive warfare until prohibition is in the hands of both legislative and executive officers who will give prohibition its rightful chance. We have long since learned that you can not win this fight with soft words and gentle gestures. It must be an aggressive, militant fight until country and city submits to law.

The league will continue to carry the records and attitudes of the candidates to the people until through their voice the lingering, lawless, and lying liquor traffic, now an outlaw, surrenders to the law and the Constitution.

The league was born of God. It has been led by Him and will fight on while He leads. And the one thing that stands forth in this progressive age is that those things that are in the way of the progress of the kingdom of God must get out of the way.

"Mine eyes have seen the glory of the coming of the Lord,
* * * * * * *
I have read his fiery gospel writ in rows of burnished steel.
* * * * * * *
Let the hero born of woman crush the monster with his heel.
Our God is marching on!

He has sounded forth His trumpet that shall never call retreat,
He is sifting out the hearts of men before His judgment seat;
O, be swift my soul to answer Him, be jubilant my feet.
Our God is marching on!

With a glory in His bosom that transfigures you and me
As He died to make men holy, let us live to make men free
While God is marching on."

CHARLES EVANS HUGHES

The Senate being in open executive session,

The VICE PRESIDENT. The question is, Shall the Senate advise and consent to the nomination of Charles Evans Hughes to be Chief Justice of the United States?

Mr. NYE obtained the floor.

Mr. GLASS. Mr. President, before we proceed to a further discussion of the Hughes nomination I ask leave to have read at the desk an editorial from to-day's Baltimore Sun touching this subject.

The VICE PRESIDENT. Does the Senator from North Dakota yield for that purpose?

Mr. NYE. Does the Senator from Virginia ask to have the editorial read?

The VICE PRESIDENT. He does.

Mr. NYE. I yield for that purpose.

The VICE PRESIDENT. The clerk will read, as requested.

The legislative clerk read as follows:

[From the Baltimore Sun, February 13, 1930]

THE FIGHT ON MR. HUGHES

To legions of good American citizens, trained upon the standard copybooks dealing with the Government of the United States, the attack in the Senate upon the confirmation of Charles Evans Hughes as Chief Justice of the United States Supreme Court must be totally incomprehensible. Here is a man, hailed by his most relentless opponents as one of the greatest lawyers the country has ever produced, being faced with a fierce attack upon his suitability as the head of the highest legal tribunal in the land. And the opposition contains the most diverse elements ranging all the way from Senator CARTER GLASS, of Virginia, a stanch Democratic conservative, to the progressive wing of the Republican Party.

How does this weird thing come about? How does it happen that there can be any doubt by honest men that a very great lawyer is fitted to head the greatest American legal tribunal? It comes about primarily because the United States Supreme Court has ceased to be merely a legal tribunal and has taken unto itself the deciding of great economic issues that are related in no certain way with the law.

To illustrate, when public-utility regulation, which has played an extensive part in the debate over the Hughes confirmation, was first undertaken in this country the United States Supreme Court kept hands off. It said that the fixing of public-utility rates was a legislative matter. Then it reversed its position and held that public-utility rates must yield a fair return upon a fair valuation of the property devoted to the public service, to avoid conflict with those provisions of the Federal Constitution that decree that there shall be no taking of private property without due process of law.

Once this step was taken, over the opposition of a minority of the Justices, who held that they were not equipped to decide the issues involved, the United States Supreme Court ceased to deal with any fixed principles of law in that field and became a body of economists. What is there in the Constitution, for example, that gives any guidance as to whether 5, 6, or 8 per cent is a fair return on public-utility property? Absolutely nothing. And what is there that sheds any light on the question of whether utilities should be valued for rate-making purposes at what they originally cost, or what it would cost to reproduce them at current prices? There is not a shadow of a clue. The issues involved must be settled by the application of highly controversial economic theories.

Since in this, among numerous instances, the United States Supreme Court has departed from anything related to a fixed body of law except by the most tenuous thread, and has become a body engaged in the practice of economics, it becomes highly relevant to know just what kind of economic theories the members of that court hold. If there be any doubt of that, it can be dispelled by studying the career of Justice Pierce Butler, of that body. For years, as a railroad attorney, he argued before the Interstate Commerce Commission for certain methods of railroad valuation. They were most highly controversial methods, on which the ablest lawyers were completely disagreed. Then he was elevated to the United States Supreme Court. Since then he has been making exactly the same arguments in public-utility cases, but now he is able to give them the force of his opinion as a member of the highest court in the land.

There are those who argue that the practice of the law is by its nature such that its devotees are merely expert pleaders, to make the best possible case for the side by which they are retained, and that they are so subtly geared that when elevated to the bench their past partisanship fades entirely out of their memory. That may be true, so far as the law is concerned, but the United States Supreme Court, by its own will, has moved its activities into the larger orbit of determining social and economic policies, and then imparting to them the force of law. It has, in other words, brought itself to the place where legal competence is only one—and perhaps not the most important—test of fitness for service on that court. This accounts for the strange phenomenon taking place in the Senate, where the fitness of an admittedly great lawyer for what the copybooks say is the greatest legal post in the Nation is being debated, and rightly, as an economic and social issue.

Mr. GLASS. Mr. President——

The VICE PRESIDENT. Does the Senator from North Dakota yield to the Senator from Virginia?

Mr. NYE. I yield.

Mr. GLASS. If I may say just one word for the benefit of Senators who may not have heard the editorial read; it sets forth the view in which many of us concur, that the Supreme Court in recent years has gone far afield from its original function and has constituted itself a court in economics and in the determination of social questions rather than in the interpretation of statutes passed with reference to the Constitution itself.

Mr. NYE. Mr. President, the editorial to which I have just listened with the greatest of interest speaks a language which I think is quite common in America to-day, and yet it is not language of recent origin, because history records our most eminent men down through history warning against the type of men, warning against the influences that may come to possess control over the Supreme Court of the United States. I have before me a quotation from Chief Justice Clark, of North Carolina, who said at that particular time:

At the present time the supreme power is not in the hands of the people, but in the power of the judges, who can set aside at will any expression of the people's will made through an act of Congress or a State legislature. These judges are not chosen by the people, nor subject to review by them. It is arbitrary power, and the corporations have taken possession of it simply by naming a majority of the judges.

That was the statement of Chief Justice Clark, of North Carolina. Then we find Justice Ford, of New York, using this language:

How do I become entitled to more respect as a judge than was accorded to me as a senator? There is absolutely no sound reason for it, and the only justification that can be urged for the custom of exalting judges above other public officials is that it has always been so. The sooner American citizens get rid of this idea that a judge is more honorable than a legislator and that a court is entitled to more respect than the legislator, the clearer will become our perception of the evils of judicial usurpation, the most threatening present-day danger to our democracy.

So, Mr. President, at first I thought I would try to prevail upon the Senate to send this nomination back where it prop-

erly belongs, namely, to the Committee on the Judiciary of the Senate. There have been points developed here in the two days of debate which at once awaken avenues of thought hitherto unconsidered by this body or its committee in connection with the nomination of Mr. Hughes to be Chief Justice of the Supreme Court of the United States; but, since it appears so evident that the Senate will be called upon to pass immediately upon the nomination of Mr. Hughes, and there is little likelihood of it being referred back to the committee for that further consideration which would wipe away many doubts now entertained, possibly even to the great advantage of Mr. Hughes, the nominee himself, I feel called upon to give voice to the purposes which will prompt my vote in this matter, being all the time aware that what I say will add nothing to the sum total of available information or intelligence and will influence, doubtless, no vote among my colleagues.

I think we are face to face, Mr. President, with as great a problem in this particular nomination as the Senate will be called upon to consider in a great many years. Under those circumstances I can not refrain from expressing the wish that it was as easy for the human race to say "no" as it is easy to say "yes." It is not easy to say "no" when there comes to us from the President of the United States a nomination which is not pleasing. I think there is not one among us who would not greatly prefer concurring in all nominations which are sent to the Senate. It would be far easier for me to vote to accept rather than to reject the nomination of Mr. Hughes, yet I can not be conscientious and fair with myself if I follow a course simply because that course offers the line of least resistance.

No man in this body has a right to expect, Mr. President, the choice made by another fully to measure up to his own choice, but since the Senate is charged with the duty of consenting to and concurring in this as in other nominations, and since the Senate is thus charged with a responsibility quite equal to that of the President of the United States himself, I am forced to declare that we did have a right to expect a more fortunate choice than the one before us in the form of the nomination of Mr. Hughes.

There is much of good that can be said and which has been said in support of the nomination. Mr. Hughes is by no means without right to consideration as a leading and brilliant American. As a lawyer he has few equals. There attaches to him no great scandal, and his record has not been one warranting criticism of a grave nature. Still he lacks to-day those qualifications which to my mind are so essential in one who is to occupy so great a post as that of Chief Justice of our court of last resort. These particular qualifications appear to me to be of double importance at this particular stage when on many hands challenges are being thrown in the face of the Government and of the masses of the people of this country by those predatory and favor-seeking interests which have become so strongly entrenched behind a wall marking all but absolute control of the money and credit of the Nation, which are the very heart of our economic life.

If we have not already reached it in America, we are fast approaching that parting of the ways which finds two forces seeking the first recognition at the hands of the Government through its legislative and administrative branches and through that last resort, as well, the judiciary. Those forces are none other than property rights on the one hand and the right to live, the rights of mankind, the interests of humanity, on the other.

I listened only yesterday, Mr. President, to the argument that the question of property rights was quite mythical; that the expression really did not mean anything at all, but was simply molded to fall easily from the lips of thoughtless ones. "Property rights" became an American issue at our very inception as a Nation. Some there were then who would have limited representation in Government alone to those who had property, and even that representation only in proportion to the amount of property possessed. If the early spokesmen for Pennsylvania had carried the day, representation in this Government would have followed not the lines of population, not the question of numbers, not the rights of the States, but, instead, representation would have followed the rights of property alone. Property rights remain the issue to-day. Charles Evans Hughes himself has been party to appeals against "an invasion of the rights of property."

I think the Senate has not only the right but also has good reason, in the face of present-day demonstration of the insistence by property for still greater rights, to consider environment, training, and probable sympathies of great weight as qualifications of a Supreme Court Justice.

Of the probable sympathies of Mr. Hughes I shall say nothing because they have so often been suggested in the course of this debate. Of his environment and training I wish to quote another, yet one recognized on every hand as an authority in whom there is great and general confidence. The junior Senator from Illinois [Mr. GLENN] on yesterday declared that we ought to build our decision in the case of this appointment upon the record of Charles Evans Hughes and upon that record alone. The advice was good, and I am sure that without it I should have based my vote upon his record. To best ascertain that record, however, Mr. President, I turn to a volume written in 1912 by Gustavus Myers, an historian of renown, entitled "History of the Supreme Court." I announced in my place yesterday that I would speak on this subject for not more than half an hour. However, the force of a large part of a given chapter of this work compels me to take such additional time as will be necessary to run roughly through it here, and if for so doing I owe the Senate any apology I here offer it freely and gladly.

In this work, Mr. President, I find the record of Charles Evans Hughes recorded up to the year 1912. If the record is unfairly presented, I am sure there will be found here students who are ready to correct any wrong impression that a reading of it or any part of it may create.

Mr. WALSH of Massachusetts. Mr. President——

The VICE PRESIDENT. Does the Senator from North Dakota yield to the Senator from Massachusetts?

Mr. NYE. I yield.

Mr. WALSH of Massachusetts. Will the Senator state from what he is about to read?

Mr. NYE. I am about to read from a History of the Supreme Court by Gustavus Myers.

Mr. WALSH of Massachusetts. It contains a recital of the careers of the various Justices of the Supreme Court?

Mr. NYE. The Senator is correct. It sketches the careers of various Justices.

Mr. WALSH of Massachusetts. In what year was the book published?

Mr. NYE. It was published in 1912.

Mr. WALSH of Massachusetts. And it gives a history of the judges of the court up to 1912?

Mr. NYE. It does, and the chapter from which I am about to read is devoted to Mr. Hughes. I read from the work of Mr. Myers as follows:

After his admission to the bar, he became a clerk in the law office of Chamberlain, Carter & Hornblower, of New York City.

This was a notable corporation firm. Of Walter S. Carter, one of its members, a laudatory biographical account says, "Over one hundred distinguished lawyers have served in his office, such as William B. Hornblower, Lloyd W. Bowers, and Paul D. Cravath." Sherburne Blake Eaton, a member of the firm, became chief executive officer of the Edison Electric Light Co. in 1881, and its president and general counsel in 1884. Carter's great obsessing hobby was in encouraging a peculiar and ludicrous form of caste snobbery; he was a member of the "Settlers and Defenders of America," the "Founders and Patriots of America," the "Society of Mayflower Descendants," and the "Sons of the Revolution." As for Hornblower, he was, as early as 1880, counsel for the New York Life Insurance Co. He became one of the trustees of that company and head of the committee which approved the so-called "yellow dog" fund of the New York Life Insurance Co., which fund, ostensibly disbursed as "legal expenses," was used in reality to purchase favorable legislation and to defeat hostile bills. Hornblower was also counsel for the New York Central Railway Co., the Rome, Watertown & Ogdensburg Railroad Co., the New York Security & Trust Co., and many other corporations.

This was the same Hornblower who passed as a notable "reformer" in politics and who, as we have already related, had been nominated by President Cleveland an Associate Justice of the Supreme Court of the United States, which nomination had been rejected by the Senate in 1894 for personal political reasons.

So, Mr. President, if the Senate should take upon itself the responsibility of rejecting the nomination pending before us now, it will not by so doing by any means have established a precedent.

Such was the atmosphere of the office in which Hughes was a law clerk, and it may be added that Cravath was a fellow clerk at the same time.

Hughes's career now expanded. He was a precise, methodically minded man, extremely careful of the proprieties, never disposed to break conventions, studying the law and the law system as he found them; sticking to the letter and dismissing the spirit, for he saw that it was the letter that was applied. He perceived, too, that the most successful lawyers were those pleading for corporations; they waxed fat and great, and were high personages in the community. On the other hand, he could not help seeing that those who made a practice of defending the poor and helpless, the victims of the industrial system,

not only invited poverty but suffered a distinct stigma in the eyes of the influential and powerful.

Hughes had married Carter's daughter, and in 1888 the law firm of Carter, Hughes & Cravath was formed. Need it be explained who Paul D. Cravath was, the skillful and renowned Cravath? Later he became, and for nearly a quarter of a century remained, Thomas F. Ryan's most confidential legal aide, not as adroit as Elihu Root, but more constant, standing to Ryan as his shadow. Of Ryan's career we have already given sufficient glimpses; how from being a penniless young man, he became one of the most conspicuous multi-millionaires of the country, owning or controlling street-car systems, gas plants, railroads, trusts, and other properties, and we shall see how he acquired one of the great life-insurance companies. We can not enter here into the the immense mass of testimony before various legislative committees revealing the long trail of corruption and criminal transactions of corporations controlled by him. Whenever a franchise for Ryan's benefit was to be slid through legislature or board of aldermen, there Cravath was to be found with his particular arguments to persuade legislators that the grant should be made.

When Hughes was a candidate for Governor of New York, in 1906, he was quoted as denying that he had ever been a corporation lawyer except in the service of the State. Did the facts coincide with this statement? Let us see.

EFFORT TO PUT DEADLY WIRES UNDER GROUND

By the year 1875 New York City and other cities were filled with a network of deadly telegraph, electric light, and other wires, strung over the pavements on wooden poles. The introduction of heavy electric-light cables on poles brought a new element of danger to human life. A constant menace, these wires, as the courts later on stated, were improperly insulated. Their falling to the ground killed people constantly. In fighting fires, New York City's firemen were also often killed, and were prevented by the wires from overcoming fires as successfully as if the wires had been underground.

In the year 1875 the New York Legislature had already passed an act ordering that the wires should be placed underground. The electric light and other companies affected made resistance to this act, and had it declared unconstitutional. Year after year they lobbied in the State legislature to prevent the passage of other acts.

But deadly accidents kept increasing, and the public demand became stronger that the barbarous system of stringing wires overhead be abolished. The companies refused to make the change on the ground that it would entail much expense.

At this point high city officials suddenly began to support the public demand that the "poles must go." What was the motive of these Tammany officials? Was it one of public spirit? Scarcely. The sequel, years after, revealed that a band of shrewd politico-capitalists had seen how they could take advantage of this reform movement, and under cover of it get a comprehensive monopoly for themselves of the right of laying and operating underground conduits for the wires.

The New York Legislature, in 1884, enacted a law compelling companies in all cities of more than 500,000 population to put their wires underground before November 1, 1885. If they failed to do this the city government was empowered to tear the wires down and put them underground.

The companies raised the objection that the time allowed them was too brief. Moreover, they did not want to put the wires underground in any more cities than could be avoided. Lobbying at Albany produced an amendatory act making the law apply to cities exceeding a million population only. This, of course, meant that the operation of the act was restricted to New York City; no other city had a population of more than a million. The act of 1885 also created a board of electrical control. A supplementary act was passed in 1886. Still another law was enacted in 1887 giving New York City authority to remove the poles and wires 90 days after notice should be served.

These laws were contested by the companies. Finally, on May 12, 1889, Mayor Grant ordered the electric-light wires to be torn down. His ground was that they were imperfectly insulated and dangerous to human life.

HUGHES PLEADS FOR ELECTRIC-LIGHT COMPANIES

On November 11, 1889, James C. Carter, Joseph H. Choate, and Charles E. Hughes, representing the United States Illuminating Co. and the Mount Morris Electric Light Co., went to court. Pleading that the act of 1887 was "an invasion of the rights of property," they secured an injunction against the city.

The city appealed for the dissolving of the injunction. This appeal was argued in the general term of the supreme court in New York City, in December, 1889, before Judges Van Brunt, Barrett, and Brady. The companies were again represented by Carter, Choate, and Hughes.

The three judges concurred in deciding in favor of New York City. Their decision was of rather a caustic order, scoring the contentions of counsel for the companies. "* * * When," said this decision, "it is apparent, as in the case at bar, the condition of the wires is such that they are dangerous to human life, and that any passer-by, without negligence on his part, is liable to be struck dead in the street, can it be said for a moment that the public authorities have no power to abate this nuisance and protect the lives of its citizens? Indeed, it is one of their highest duties, and if they allowed such a condition of affairs to continue, might make the city liable for the damages sustained by reason of their negligence in not removing the common nuisance * * *."

Counsel for the companies, the court said, had contended that the board of electrical control had refused to allow repairs to be made. The decision disposed of this plea. The court said that it was established beyond question that the wires had become excessively dangerous. "Attention was called to this condition of affairs by the happening of accidents by which human life was sacrificed. * * *" This, the court stated, was a "shameful condition of affairs."

The companies, the court went on, had not made "the slightest effort to compel the board of electrical control, if they unjustly refused, to grant them permits to repair. * * *

"If these electrical companies had been actuated by the slightest desire to put their apparatus in a condition such as would not endanger human life, they could easily have found a way to remove the obstruction which they claim was placed in their path by the board of electrical control. It would seem that they were only too willing to shelter themselves behind the assumed unreasonableness of some of the regulations of the board, and to allow their apparatus to get into such a condition that it was dangerous to human life and become a public nuisance." The companies, the court said, were "guilty of the willful violation of a manifest duty in allowing the wires to become dangerous. They are without excuse, and when they claim that the destruction of these instruments of death * * * is an invasion of the rights of property, such claim seems to proceed upon the assumption that nothing has a right to exist except themselves."

I repeat that, Mr. President. In view of the argument that was presented here yesterday that "property rights" was only a mythical expression, I repeat this opinion of that New York court:

"They are without excuse, and when they claim that the destruction of these instruments of death * * * is an invasion of the rights of property, such claim seems to proceed upon the assumption that nothing has a right to exist except themselves." The court upheld the constitutionality of the law.

SCRAMBLE FOR UNDERGROUND FRANCHISES

While Hughes was thus acting for the electric-light companies, his partner, Cravath, was busy in other directions.

Realizing the great value of a monopoly of underground conduits, the Western Union Telegraph Co. (then controlled by Jay Gould and Russell Sage) and the Metropolitan Telephone Co. (now the New York Telephone Co.) had organized the Consolidated Telegraph & Electrical Subway Co., which secured a franchise to construct and operate conduits throughout the entire city. All other companies using wires were now confronted with the necessity of using those conduits and of being forced to pay a certain schedule of rentals.

The electric-light companies saw the situation in which they now were. On the one hand, the city was moving against them to force their wires underground; on the other, the only conduit franchise was owned by the Consolidated Telegraph & Electrical Co. While Hughes was one of the attorneys resisting the city's move, Partner Cravath was persuading the board of electrical control to give the electric-light companies franchises for underground conduits.

There was a lively scramble for franchises. On October 14, 1889, Wheeler H. Peckham appeared as counsel for the Standard Electrical Subway Co. This was, it is hardly necessary to say, the same Peckham whom Cleveland, in 1894, nominated as Associate Justice of the Supreme Court of the United States, and whose nomination was rejected by the Senate because of Senator Hill's personal opposition. Peckham pleaded with the board of electrical control that it give a conduit franchise to the Standard Electrical Subway Co. Elihu Root came forward, on February 17, 1890, to plead for the gift of a conduit franchise to the Manhattan Electric Light Co. and the Harlem Lighting Co. Root opposed Peckham's company, and argued against giving it a franchise.

On the same day on which Root appeared, Joseph H. Choate, Paul D. Cravath, and Caleb H. Jackson, representing the United States Illuminating Co. and the Safety Electric Light & Power Co., argued before the board of electrical control in favor of conduit franchises for those companies, and opposed the Consolidated Telegraph & Electrical Subway Co.

The upshot of this scramble was that all these companies succeeded in getting franchises in this way: A new company, called the Empire City Subway Co., was organized, and presented in 1891 with a comprehensive franchise to lay and operate underground conduits. The conduits of the one company were, it was stipulated, to be used for high-tension, and those of the other for low-tension, wires.

Business is growing good along about this time, it may be observed. Prosperity is breaking on every hand.

It may be said parenthetically at this point that Hughes and Cravath sundered partnership in about the year 1890.

MONOPOLY ESTABLISHED

Having fought the city and then one another, the companies now combined in a huge monopoly. From that day to this not a single telegraph, telephone, electric-light, or other company disapproved of by the combination has been able to get wires in the conduits. It was originally provided that all companies should have access, but this condition has been evaded by various pretexts.

With this monopoly of underground conduits secured, the various companies raised their rates to an extortionate scale.

The same, same old story, Mr. President.

The Metropolitan Telephone Co. increased its rates for unlimited service from $125 and $150 a year to $240 annually, and in some years its profits rose to 145 per cent on the actual cash capital, excluding from computation the capital added by dividends not distributed. The conduit monopoly has made enormous profits. Under the terms of the franchise all profits exceeding 10 per cent were to go to the city, but by a continuous process of juggling with the books—

"Juggling with the books," I repeat—

and the frequent issue of watered stock, the nominal profits (as reported to the city) have never equaled 10 per cent.

And to-day, Mr. President, we see men engaging in programs looking to that kind of juggling which will enable the owners and those who control the power resources of this country to evade the payment to the public or to the Government of a just share of profits which may accrue. Overcapitalization, watered stock, are practices being indulged in to-day, just as they were then.

All the electric-light companies were later merged into one monopoly, which in turn was controlled by the Consolidated Gas Co., which was controlled by the Standard Oil Co. In view of the decision of the Supreme Court of the United States in the 80-cent case (related in a previous chapter), which Justice Peckham, a brother of Wheeler H. Peckham, wrote; and, considering the facts here narrated, it is well to repeat the names of some of the great capitalist magnates controlling the Consolidated Gas Co. Among the directors were William Rockefeller, George F. Baker, James Stillman, William C. Whitney, Thomas F. Ryan, Anthony N. Brady, and sundry others.

Thus we see Hughes starting out as a young lawyer in the lucrative field of representing corporations. His clients, whether corporate or private, were all rich; poor men's cases do not seem to have been any part of Hughes's practice. That Hughes himself was in money matters personally and scrupulously honest was a fact. No doubt he gave conscientious, zealous service for the fees that he received.

But the question of personal honesty embraces so many aspects and demands so deep an analysis that it can not conclusively be said that a man was honest because he resorted to no illegal methods. There is an intellectual and class dishonesty which in its result far exceeds pecuniary dishonesty. The question might here be profitably entered into since it is the fact that an individual's views and conduct are largely determined by his interests, training, environment, and long-continued associations. The problem is to a great extent a social, not an individual, one; and when we consider why this or that man was selected for the Supreme Court bench it is necessary to know what his antecedent associations, influences, and interests were.

NEW YORK, WESTCHESTER & BOSTON PROJECT

The second illustration of Hughes's activities as a lawyer was his efficient work in getting a franchise for the New York, Westchester & Boston Railway.

For its entrance into New York City the New York, New Haven & Hartford Railroad had long had to use the New York Central's tracks from Woodlawn to the Grand Central Depot. (The New York Central controls the old New York & Harlem River Railroad, which owns the franchise to operate on Park Avenue.) This privilege cost it a certain tariff of 7 cents on every passenger, which tariff was recently increased to 12 cents. The New York, New Haven & Hartford Railroad was and is controlled by J. Pierpont Morgan; it now sought its own entrance into New York City. How was this to be obtained?

It happened that in the year 1872 a company called the New York, Westchester & Boston Railroad Co. had organized by filing articles of incorporation at Albany. In reality it was an abortive corporation; it had never completed the necessary legal formality of filing an affidavit as prescribed by section 2, railroad law of 1850. (See Minutes of the (New York) Board of Estimate and Apportionment, 1904, Vol. I, 471.)

The company, or what called itself the company, became insolvent in 1876, and a receiver was appointed on March 25 of that year. On March 22, 1881, the Supreme Court of New York directed the receiver to sell all its rights, title, interest, real estate, etc. These were sold to William F. Pelt for $5,500.

According to good legal authority, this sale operated to deprive the company of any located route except such as the legislature might subsequently grant. But the legislature did not act.

For years the paper franchise was hawked about for sale; nobody seemed to want it.

HUGHES COMES FORWARD FOR THE PROJECT

In, however, either the year 1900 or 1901 some powerful interest suddenly took up the phantom, and on the strength of it tried to get a definite franchise from the board of aldermen. This body was at that time vested with the power of franchise granting. It was significant that the firm of Carter, Hughes, Rounds & Schurman (so the firm was now styled) appeared as the attorneys advocating the granting of the franchise. They seldom came forward except to represent some big interest. (From the New York Times, issue of January 19, 1908: "A noted corporation lawyer, speaking of Mr. Hughes, said that he was not a money maker and was one of the few lawyers who consulted their clients as to the size of his fees." The article further stated of Hughes that when he became a candidate for Governor of New York (in 1906) "it is doubtful whether he was worth more than $100,000.") Hughes was the member of the firm who was the active attorney in arguing for the passage of the franchise. (Minutes of the (New York) Board of Estimate and Apportionment, 1904, Vol. I, 1089, 1094, etc.)

Hughes solemnly denied that any large interest was behind the project; he asserted that the company was one absolutely independent of connection with any other corporation. The board of aldermen were skeptical.

At the same time another company, called the New York & Port Chester Railroad Co., projected itself upon the scene, applied for a franchise, and began opposing the New York, Westchester & Boston Co.

Report had it that both companies were owned by the New York, New Haven & Hartford Railroad, and interesting rumors declared that the show of opposition was only a trick to blind the people; that the object was to get a franchise for either company or both companies.

Later developments proved, as we shall see, that both companies were, in fact, owned by the New York, New Haven & Hartford Railroad, controlled by J. Pierpont Morgan and the Standard Oil group.

THE ALDERMANIC HOLD-UP

For three years the board of aldermen refused to grant the franchises. Nobody imputed any lofty motive to the honorable board. Meanwhile, what Lemuel Ely Quigg on another occasion called "accelerators of public opinion" carried on their deft work. "Taxpayers' organizations" were formed to support or oppose one side or the other, and the aldermen were bombarded with a series of approving or denunciatory resolutions. (These were duly published in the Minutes of the Board of Estimate and Apportionment, 1904, 471, etc.)

A significant episode now turned up, revealing that legislative bodies were merely registering committees for the great capitalists.

The board of aldermen had withheld granting both the Westchester franchise and the franchise for the Pennsylvania Railroad to enter New York City via the Hudson River tunnel. Somehow and from somewhere the announcement now came that unless the board of aldermen acted, a law would be passed by the legislature stripping it of all power of granting franchises. The threat was soon carried into execution. The legislature passed an act vesting franchise-granting power in the board of estimate and apportionment. This body was favorably inclined.

BOARD OF ESTIMATE GIVES LONG-SOUGHT FRANCHISE

The first point that this board decided to pass upon was the question whether or not the New York, Westchester & Boston Railroad Co. was or was not a defunct corporation.

On March 30, 1904, Corporation Counsel Delaney (elected by Tammany Hall) reported to the board of estimate and apportionment that the board had no jurisdiction to examine the legal capacity or incapacity of the company.

In the minutes of the board of estimate and apportionment Charles E. Hughes was described as the attorney of the projected railroad. These minutes give a long letter written and signed by Hughes from the office of Carter, Hughes, Rounds & Schurman, 96 Broadway and 6 Wall Street, to Corporation Counsel Delaney, proposing certain changes in the wording of the franchise contract. (Minutes of the (N. Y.) Board of Estimate and Apportionment, 1904, Vol. I, 1089.) Delaney wrote in part this reply to the board regarding Hughes's proposals: "Some of these I will not here discuss because I do not deem it expedient for the city's interests that they should be adopted, but there are several which should receive consideration." (Ibid, 1094.)

The New York, Westchester & Boston Railway Co. finally received its long-sought franchise on June 24, 1904. Although represented by Hughes as an absolutely independent company, which it may have been in name, it really was nothing more or less than an adjunct of the New York, New Haven & Hartford Railroad Co. Its franchise allowed it to operate more than 16 miles of 4-track line within New York City's limits, the main line crossing 120 streets and its branch line 74 streets. It secured practically all the available routes for entrance and exit to and from New York City by way of the Bronx. It is the only purely privately owned rapid-transit line in New York City. Its terminal, it

is true, is on the north side of the Harlem River, but it will probably be able to convey its passengers downtown by a new subway. Moreover, by means of the Pennsylvania Railroad Co.'s New York Connecting Railroad, which will traverse Randalls and Wards Island to and from Long Island, its trains will be able to run into the Pennsylvania Railroad's station on Seventh Avenue and thence under the Hudson River south and west, and the Pennsylvania Railroad can run its trains over the New York, New Haven & Hartford Railroad's tracks into New England.

The immense value of the franchise can, therefore, be seen at a glance. Its present value both as a railroad entrance and outlet and as a rapid-transit line is recognized as great enough, and its potential value—considering growth of population—is unquestionably even greater.

J. P. MORGAN AND ASSOCIATES IN CONTROL

That the New York, Westchester & Boston Railroad and the New York & Port Chester Railroad were both owned by Morgan's New York, New Haven & Hartford Railroad was shown by the formal incorporation of the Millbrook Co. on November 5, 1906. The Millbrook Co. was a holding company for the New York, New Haven & Hartford Railroad. It held the entire stock of the Port Chester Railroad, which in turn held the stock of the New York, Westchester & Boston Railroad.

The final proceedings occurred when Hughes was governor. An act was passed by the New York Legislature and signed by Governor Hughes on May 29, 1909 (ch. 579, Laws of 1909), authorizing the New York, Westchester & Boston Railroad and the New York & Port Chester Railroad to consolidate. The consolidation agreement provided for $45,000,000 capital in all, with possibilities of increase. There were $5,000,000 of stock, and $40,000,000 of mortgages, on which $15,100,000 of bonds had been issued by December 23, 1909. The remainder of the bonds to be issued under the mortgages were subject to the consent of the public service commission, second district. But this capitalization gives no adequate idea of the intrinsic value of the franchises, the value of which is estimated at much more than $100,000,000.

The consolidation agreement also showed that the directors of the new company were J. Pierpont Morgan, Lewis Cass Ledyard, William Rockefeller, Robert W. Taft, Charles S. Mellen (president of the New York, New Haven & Hartford Railroad), and other capitalists. Further, the agreement stated that the New York, New Haven & Hartford Railroad Co. owned 91,581 of the total issue of 91,590 shares of the New York & Port Chester Railroad (Consolidation Agreement, p. 15) and 105,384 shares of the entire issue of 105,397 shares of the New York, Westchester & Boston Railroad (Consolidation Agreement, p. 9).

HUGHES BECOMES PROMINENT

Up to this time Hughes was comparatively unknown to the general public. He first attained popular notice in his capacity as counsel for the (Stevens) legislative committee of New York, which was appointed to investigate the price of gas. The result of this committee's findings was the passage of a law providing that the charge for gas in New York City should be not more than 80 cents per thousand cubic feet. How this law was long contested, and how the Supreme Court of the United States, while upholding its constitutionality, adroitly used the case to intrench property interests to a remarkable degree—these facts have been related in clear detail in a previous chapter.

When, in 1905, a contest between competitive magnates in the Equitable Life Assurance Society led to the disclosure of a great scandal, a legislative committee was appointed to investigate the methods of the large life insurance companies. Hughes was chosen as the committee's counsel. There was a belief that this investigation was inspired or instigated by certain powerful magnates or groups of magnates with the ulterior purpose of ousting certain other magnates from control of the vast assets of the insurance companies. If this were true—and indications strongly pointed that way—there is no evidence for the suspicion that Hughes was in any way a conscious party to the proceeding, even though newspapers opposed to him politically later pointed out insinuatingly that at one stage of the contest for the control of the Equitable Life Assurance Society he had been counsel to James W. Alexander, president of that corporation, and that he had been counsel for the Mercantile Trust Co.—allied with the Equitable Life Assurance Society—in part of the litigation involved by the Shipbuilding Trust scandal.

HE EXPOSES INSURANCE INIQUITIES

As counsel to the committee, Hughes displayed uncommon skill and perseverance in unearthing certain parts of the vast system of insurance corruption through which the directors, brokers, promoters, syndicates of magnates and retainers, members of legislatures, lobbyists, and politicians enriched themselves at the expense of the policyholders. Point by point he patiently brought out the involved and concealed circumstances of the long-continued enormities of loot and corruption. Reputations, long acclaimed for their respectability, were blasted, others ruined, by these revelations. Of the great array of facts presented in the committee's report, we have already described some in a previous chapter.

Hughes's work called forth a newspaper demand that he be nominated for Governor of New York by the Republican Party that he might be able to put into law the insurance reforms that he had advocated. Meanwhile an event took place which the sophisticated might well have expected, but which surprised the innocent.

THE ODD, YET INEVITABLE, RESULT

It was soon observed that the only real result of the great investigation was to enable some magnates to oust others, and to concentrate the power of the dominating financial groups. Morgan tightened his hold on the New York Life Insurance Co. The Harriman-Standard Oil Co. interests obtained a completer control of the Mutual Life Insurance Co., and Hyde, Harriman's puppet in the Equitable Life Assurance Society, was put out, and none other than Thomas F. Ryan stepped into full control of the $470,000,000 assets of that company and retained it until December, 1909, when he sold his controlling stock to J. Pierpont Morgan.

It was currently reported that Cravath persuaded Ryan that Hughes would be a "safe man" as governor, but whether this report was true or not we can not say. One fact much commented upon was that in its investigation the legislative committee avoided any genuine inquisition into the methods of industrial insurance companies. These companies fattened on the poorest and most industrious part of the population, extracting hundreds of millions of dollars in profits from the working class. However, Hughes's record as exposer of insurance corruption was widely praised; he was acclaimed as a typical example of the "good man in politics."

Evidently the big financial magnates and capitalists had a deep appreciation of Hughes's devout qualities, for they came forward in large numbers to contribute to the campaign fund of the Republican gubernatorial campaign, when he was a candidate for governor in 1906. J. P. Morgan & Co. and Levi P. Morton each contributed $20,000. Andrew Carnegie, John D. Rockefeller, jr., H. B. Hollins, and E. M. Wells each contributed $5,000. Harvey Fisk & Son, Chauncey M. Depew, John W. Gates, J. & W. Seligman & Co., Kuhn, Loeb & Co., and sundry others each gave contributions of $2,500. Charles M. Schwab, Edwin Gould, Jacob Schiff, William H. Moore, Adolph Lewisohn, and many other millionaires or multimillionaires each contributed $1,000 or $2,000. The total sum contributed was $313,923.

This would indicate that so long ago as 30 years expenditures were being brought into play in an effort to influence campaigns in States as well as in the Nation.

Mr. NORRIS. Mr. President——

The VICE PRESIDENT. Does the Senator from North Dakota yield to the Senator from Nebraska?

Mr. NYE. I yield.

Mr. NORRIS. I did not quite hear some of the figures the Senator gave. Will he give again the total amount contributed by Wall Street people to the campaign of Mr. Hughes when he was running for the office of Governor of New York?

Mr. NYE. The showing by Mr. Myers was that J. P. Morgan & Co. and Levi P. Morton each contributed $20,000; Andrew Carnegie, John D. Rockefeller, jr., H. B. Hollins, and E. M. Wells each contributed $5,000. Harvey Fisk & Son, Chauncey M. Depew, John W. Gates, J. and W. Seligman & Co., Kuhn, Loeb & Co., and sundry others each gave contributions of $2,500. Charles M. Schwab, Edwin Gould, Jacob Schiff, William H. Moore, Adolph Lewisohn, and many other millionaires or multimillionaires each contributed $1,000 or $2,000. The total sum contributed was $313,923.

I continue reading:

Inasmuch as all of the aforesaid contributors were reputed to be extremely sagacious, practical men, it is quite clear that they were under no illusions as to the measure of Mr. Hughes.

HUGHES ELECTED GOVERNOR

After Hughes's election as Governor of New York in 1906, certain pretentious laws of a "reform" nature were passed. Some were good in their way, but it was a negligible good. Laws were enacted to prevent the corrupt use of insurance funds, yet of what real avail are such laws as these in a fabric erected on corruption and sustained by it? The statute books were already encumbered by laws prohibiting corruption. They were always evaded and never enforced. Moreover, even if corruption by the insurance companies were stopped, the saving of the millions formerly spent in corruption all the more enriched the magnates in control and gave them larger funds to manipulate. The policyholders were no better situated; their premiums were as high as ever, and the conditions more or less as hard as before, although some slight relief was given in the abolition of the "deferred dividend" plan.

In fact, the great magnates continued to use the insurance money in their fraudulent trust and railroad operations. Harriman, by the end of 1907, had obtained from the Mutual Life Insurance Co. not less than $10,000,000 loans on stocks largely watered, and the same company had invested $46,223,500 in securities of corporations controlled by Harriman.

At that point, Mr. President, I am given to ponder and to wonder just how extensively the funds of these same insurance companies are being brought into play to-day in support and in behalf and in furtherance of the chain-banking program and the chain-store program, the chain this and the chain that, which seek to fasten upon America a monopoly that will have absolute control in every sector of the land.

The surplus of the Equitable Life Assurance Society was put at Ryan's disposal, in violation of one of the very laws Hughes had advocated and caused to be enacted. By the close of the year 1907 fully $27,048,517 of bonds and stocks of corporations controlled by Ryan had been sold to the Equitable. As for the New York Life Insurance Co. it held, by the close of 1907, the enormous sum of $112,391,000 in securities issued by corporations controlled by Morgan. Inasmuch as it was contrary to the new insurance law for insurance companies to invest in stocks, the insurance companies explained that these enormous holdings of stocks were "left overs" of a time before the passage of the law. So far as the industrial insurance companies were concerned, Governor Hughes did not make a single move to remedy the evils bearing so heavily upon the working class.

Although the insurance investigation had disclosed that a large number of officials or capitalists controlling the companies had been guilty of perjury, fraud, mismanagement, corruption, and theft, it was a subject of general comment that District Attorney Jerome, of New York City, who had been so signally active in sending petty offenders to prison, failed to bring about conviction and imprisonment of any high insurance official. Another scandal, too, was the immunity from serious prosecution of Ryan and his associates of the Metropolitan Street Railway Co., who were specifically charged with having looted that company of at least $90,000,000 by duplication of construction charges, manipulation of accounts, and other involved series of thefts and frauds. This was the estimate made by Colonel Amory in his Truth About Metropolitan, published in 1906.

When a candidate for district attorney in 1901, Jerome had publicly and repeatedly announced that he would "follow the trail of corruption to the end, even if it lead to the offices of the Metropolitan Street Railway Co." But after his election and reelection no results came.

CHARGES AGAINST DISTRICT ATTORNEY JEROME

On September 8, 1907, a voluminous petition was sent by New York business men and others to Governor Hughes making a scathing criticism of District Attorney Jerome for having failed to prosecute the traction looters, and demanding that the attorney general of New York State be directed to prosecute. This petition recited in detail the enormous frauds and thefts committed.

Evidence was submitted on December 11, 1907, to the grand jury in general sessions showing that Ryan and associates had bought in 1902 from Anthony N. Brady for $250,000 the franchise of a company called the Wall & Cortland Street Ferries Railroad Co., a corporation having a dormant franchise for a road never built. Then they had sold this franchise to a dummy corporation, called the Metropolitan Securities Co., for $965,607.19.

It might be pointed out here that the recent history with relation to the Continental Trading Co. and like efforts to loot stockholders and to loot business in behalf of a few favored individuals is not new by any means. It long has been practiced in New York.

Part of this went to the syndicate's brokers; the exact amount of loot divided among Ryan, Widener, Dolan, and the estates of William C. Whitney and William L. Elkins was $692,292.82. (These facts were testified by Brady on October 8, 1907, in an inquiry conducted by Chairman Wilcox, of the public service commission.) The surviving members of this syndicate practically confessed their guilt by making restitution of this sum after the facts had been made public and after charges had been made against Jerome. On the very day that Ryan and associates had bought the nonexistent Wall & Cortland Street Ferries Railroad they had also bought, for $1,600,000, the People's Traction Co. and the New York, Westchester & Connecticut Traction Co., the franchises of both of which had lapsed. In this transaction there was, it was charged, another grand division of loot.

ASSORTMENT OF THEFTS AND CORRUPTIONS

These transactions, however, were insignificant compared to the theft of $16,000,000 from the treasury of the Third Avenue Railway (so Receiver Whitridge of that company stated; and see Colonel Amory's remarks, June 29, 1910, Third Avenue Co.—Plan of Reorganization, public service commission, stenographic minutes, p. 2417), and vaster plunderings in other directions, totaling, as we have said, approximately $90,000,000.

The fact was brought out in the investigation by the public service commission that all the books of the Metropolitan Street Railway Co. in which its transactions from 1891 to 1902 were recorded were sold to a purchaser who promised to destroy them. Street-car lines bought for a few hundred thousand dollars were fraudulently capitalized at ten or twenty times that sum, and then vast amounts were fraudulently charged in duplication of construction accounts.

Lemuel Ely Quigg (who had been for six years a Member of Congress) admitted that in the four years preceding 1907 he had received $217,000 from the company. This was charged to a construction fund, part of which was another sum of $798,000 corruptly paid to persons whose names were concealed. Also by means of hired agents, Quigg caused the organization of numerous citizens' associations whose influence was used at Albany for or against pending measures in which his employers were interested.

O Mr. President, what an opportunity there was in New York in the days of those scandals for the governor, for one who was desiring to serve his State as chief executive; what an opportunity there was for a man to have made a record in behalf of and in the interest of honest and conscientious government. But let me follow on in the story and see just what advantage was taken of this opportunity.

Previous to the merger of the Ryan and Belmont interests, which merger was accompanied by an addition of $108,000,000 of watered stock, Quigg created "citizens' associations" to oppose Belmont's designs; subsequently he served the combination. His expenses, he said, ranged from $50,000 for manufacturing a great petition from the tenement-house district to $500 paid to individuals for "agitation." Among those whom he employed directly or indirectly to make arguments at Albany were two men who had recently become justices of the Supreme Court of New York State. Quigg also admitted that he employed detectives to watch Col. W. N. Amory, who was persistently exposing and denouncing the traction looters and corruptionists and demanding that they be prosecuted criminally. As a matter of fact, Amory was not only watched but hounded and persecuted. (Investigation of Interborough-Metropolitan Co., etc., public service commission, 1907, pp. 1395–1559.)

The investigation by the legislative "graft" committee in 1910 supplied certain missing links and disclosed who had received part of the corruption funds. The books of a Wall Street brokerage house, used as an intermediary, showed that State Senator Goodsell, Assemblyman Louis Bedell, and other active members of the New York Legislature had received large sums during the sessions of 1900–1904 from officers of the Metropolitan Street Railway Co.

But no criminal proceedings were brought against Ryan. In a statement published on May 26, 1909, Colonel Amory charged that when a grand jury was called in 1907 to investigate the criminal practices of Ryan and associates of the Metropolitan Street Railway Co. the foreman of the grand jury was a director in Ryan's Equitable Life Assurance Society.

Colonel Amory also charged that in April, 1903, Daniel Mason, Jerome's former law partner, and William H. Page, jr., another of the Metropolitan's lawyers, had attempted to bribe him (Amory) while a State's witness, with $200,000, to withdraw the charges that Amory had filed with Jerome against the Metropolitan Street Railway Co.

The particular grand jury investigating the matter of the $692,292.82 paid for the paper franchise of the Cortland and Wall Street Ferries Railroad Co. stated in its presentment:

"That one of the questions that the grand jury was investigating was whether the said Thomas F. Ryan and others in connection with the sale of the said railway company had stolen the sum of $111,652.78." Of the particular item of $692,292.82 looted the amount mentioned, $111,652.78, was supposed to be Ryan's share.

Paul D. Cravath, Governor Hughes's former law partner, was in court zealously looking out for Ryan's interests. Cravath had refused to answer certain vital interrogations, and the question came up whether he should be punished for contempt of court. He was not. During this time District Attorney Jerome, as he admitted at a hearing on May 7, 1908, on the charges against him, "dined with Allan Ryan [one of Thomas F. Ryan's sons] and his wife at Sherry's and Martin's." Jerome said he was not a friend of the Ryan family, "but I think young Ryan is a fine chap, but can't claim anything more than a pleasant acquaintance."

On January 27, 1908, Judge Rosalsky, in the court of general sessions, New York City, severely arraigned District Attorney Jerome, declaring that Jerome had so conducted the examination of Thomas F. Ryan before the grand jury as probably to invalidate any indictments which that body might have found against Ryan.

Governor Hughes appointed a commissioner to hear the evidence upon which the charges against Jerome were made. Jerome admitted that when Ryan, Brady, and Vreeland were before the grand jury he had asked leading questions of them. He further testified that he had not asked the grand jury to indict Ryan in the matter of the Wall Street and Cortland Street Ferries Railway transaction. "No," he said, "I will never advise that an indictment be found in that case." But an inspection of the minutes of the grand jury of November, 1907, disclosed that Jerome had told Brady that he (Brady) "and Ryan and Whitney and this outfit were in cahoots and in some way got $700,000

of the Metropolitan Securities' money. You are, practically every one of you, under suspicion and accused of being thieves. * * *"

At the hearing Jerome was asked as to a certain contribution made to his political campaign by Samuel Untermeyer, counsel for Hyde, of the Equitable Life Assurance Society, but he denied that any ulterior purposes were behind it. Ryan had admitted on the witness stand that he (Ryan) had contributed $500,000 to the national Democratic Party in 1900.

HUGHES EXONERATES JEROME

The commissioner's report "whitewashed" Jerome, and Governor Hughes dismissed the charges, saying: "Nothing has been presented which furnishes any just ground for impeaching the good faith of the district attorney in connection with any of the transactions set forth, nor has anything been shown which would justify his removal from office." (Colonel Amory did not think that Jerome had been corrupted by means of money. "When the day of retribution comes * * *," wrote Colonel Amory, on March 18, 1906, "* * * it will then be disclosed that there are other than money bribes. I believe Mr. Jerome incapable of doing a corrupt act for money."—Truth About Metropolitan, page 2. In the same pamphlet Colonel Amory stated that Jerome knew specifically of the vast plunderings as early as 1903, and that he had then encouraged Amory to believe that the looters would be prosecuted.)

In 1910 came the disclosures before a legislative committee revealing the consecutive briberies and corruptions carried on in the New York Legislature by the Metropolitan Street Railway's officials, by fire insurance companies, and by other corporations. Ten of the principal legislators implicated were the very same who for years had ruled senate and assembly committees.

I ask, Mr. President, that the five following paragraphs may be incorporated in the RECORD at this point without reading.

The VICE PRESIDENT. Without objection, it is so ordered.

The paragraphs referred to are as follows:

THE OBLIGING JUDGE LACOMBE

In the meantime, learning that Attorney General Jackson, of New York State, contemplated throwing the looted railway system into the hands of receivers, Ryan and associates hurried to apply for the appointment of Adrian Joline and Douglas Robinson as receivers. Joline was an old attorney of the Metropolitan Street Railway Co., and Robinson was President Roosevelt's brother-in-law. Lacombe granted the application, thus forestalling the attempt of Attorney General Jackson to put in receivers hostile to Ryan and associates. Judge Lacombe was a protégé of William C. Whitney and had been placed on the circuit court by Whitney's efforts.

In the course of his remarks before the public service commission in November, 1910, Colonel Amory unsparingly denounced Judge Lacombe. "There is a judge on the bench," he said, "who has protected these criminals. He is the creature of William C. Whitney and the tool of Thomas F. Ryan. * * *

"There has been a plan successfully put on foot to keep the traction thieves from prison and from disgorging the millions they have made away with.

"Ryan still controls the street railways of this city. Back of these receivers who defy the public service commission and treat it with contempt and ignore the laws of the State is Judge Lacombe * * * and back of Lacombe stands Ryan." (Reorganization Plan, public service commission hearing, stenographic minutes, pp. 2407–2409.) When Judge Lacombe was challenged to make a categorical reply he refused.

Some time ago the statute of limitation intervened to prevent any possible prosecution of the traction looters, which was precisely the point that they were fighting for so desperately. They are now immune. Ryan's fortune is estimated to be more than $225,000,000. His great African concessions of domain, with incalculably rich resources, which he secured in association with the late King Leopold of Belgium and others, may signify that his private fortune is, perhaps, double that sum.

Mr. NYE. Mr. President, I quote further from the History of the Supreme Court as follows:

"RULE OF REASON" SPEECH

When occupying the office of Governor of New York State (in which he served two terms, having been reelected in 1908), Hughes did nothing at basis to antagonize and much to win the favor of great corporate interests. Quite true, his church-bred opposition to vulgar gambling asserted itself in his causing to be enacted a statute forbidding the operation of race-track gambling, for which deed he was much praised by pious people. These good folk, however, were not at all concerned about stock-market gambling, and neither was Governor Hughes. "Reforms" of the race-track sort did not touch the fundamentals of society, and were, therefore, "safe and sane." At the same time Governor Hughes opposed or vetoed certain measures affecting large corporate interests. He found objections to the constitutional amendment providing for an income tax. He vetoed the 2-cent railroad fare bill, the 5-cent Coney Island fare bill, and other measures. And when President Taft appointed him to the Supreme Court of the United States, no opposition was manifested by any prominent capitalist interest. Indeed, William J. Bryan, three times Democratic candidate for President of the United States, openly charged Taft with packing the Supreme Court with protrust men. In a statement published on October 12, 1911 (published originally in Bryan's periodical The Commoner, and republished in the newspapers), Bryan asserted:

"In its 1908 platform the Republican Party promised to amend the Sherman antitrust law. During the campaign of 1908 Governor Hughes, of New York, interpreted that promise to mean that 'the rule of human reason' must be accepted.

"Later Taft appointed Governor Hughes, as well as other men of his mold of thought, to the United States Supreme Court.

"George W. Perkins, associated with J. P. Morgan in trust control, delivered a speech recently in which he complained that Republican Congressmen had not tried to redeem their platform promise, but that it had been redeemed by the Supreme Court in the recent trust decision wherein Governor Hughes's 'rule of reason' was applied.

"Here we have it. Governor Hughes was put forward to represent the Republican Party; he assured the trusts that 'the rule of reason' for which they had been waiting for more than 10 years would be adopted. Congress refused to keep the promise, so Governor Hughes was put on the Supreme Bench and helped to amend the law in accordance with the Republican promise, and now President Taft, in whose interest the promise was made and who appointed Governor Hughes, says that the antitrust law as amended by the court must not be disturbed.

"Here is a chain of circumstantial evidence sufficient to convict in a criminal court."

In another statement, published on October 20, 1911, in the form of an open letter to President Taft, Bryan accused Taft of having appointed protrust men to the Supreme Court. "You appointed to the Chief Justiceship of the Supreme Court Justice White, who 13 years ago took the trusts' side of the trust question. You appointed him over the head of Justice Harlan, who had served longer and with more distinction and who had taken the people's side on trust questions. * * * You appointed Governor Hughes to the Supreme Court bench after he had interpreted your platform to suit the trusts and proceeded to join Chief Justice White and carry out your platform promise to amend the antitrust law by weakening it * * *." Bryan asked Taft to make public the recommendations, written and verbal, upon which he had made these and other appointments "and let the people know the influences that dictate your appointments."

President Taft replied weakly and evasively, saying that he considered the questions "an insult" to the Supreme Court of the United States.

Had President Taft been bold enough to have expressed the facts as clearly as he knew and adapted them, he would have said that Bryan's charge was a compliment, not an insult. The trusts were the dominant economic factor of the day; being so, why should they not have their representatives on the Supreme Court bench as well as in other departments of Government? The processes of the capitalist system, for which Government is merely a registering machine, made this inevitable.

Moreover, as we have previously pointed out, the trusts were a necessary outcome of the capitalist struggle, and represented a higher form of industrial organization than the abandoned competitive stage, which Bryan, the mouthpiece of his fading class, has the blindness and folly to which to see restored. For the ends of progress it was, indeed, salutary that Taft should have appointed protrust judges. Finally, it was not Taft that essentially decided affairs, but the great force of magnates owning the resources and industries not only of the United States but of other parts of the world.

Mr. President, from this history, from this description may be derived a picture of the background, the environment, and the training and the practice of Charles Evans Hughes during all of those years. Upon that record I am basing in part my opposition to the confirmation of the nomination of Mr. Hughes. I think men do not rise very much above or beyond that which is instilled by environment and training. These contributors to the building up of minds eventually become quite the masters of men. What, then, must we think of the record of Mr. Hughes since he retired from the Supreme Court in 1916 to become a candidate for high political office?

We find him retiring from the court to become a candidate for President. His candidacy failed and Mr. Hughes becomes again a private citizen. He gave up his place on the court, I assume, because he preferred the Presidency to it. To his retirement from the court to seek the Presidency I think there can be no valid objection, and of that action there can be no real criticism, but I believe, Mr. President, that there is grave and general ground for objection to his return to that court as a member after he has once shown politics to be really a dominating factor in the charting of his own course. Perhaps we have great reason to believe that Mr. Hughes has no further aspirations to gain the Presidency, and that he would, therefore, take with him in his work and in his duties as Chief Justice

of the Court no ambition or hope for further political rewards than he has already won; but this same man who from 1912 to 1916 was declaring he would not take the Presidency because of an ethical obligation he felt as a member of the Supreme Court, an obligation he certainly would not compromise. But he did compromise it; he did abandon this thought once held; he did resign from the court to become a candidate for political office. Would he do it again, Mr. President? Who can say? Who will venture to speak on that point?

Mr. President, in its issue of June 19, 1912, the New York Times contained this very interesting story:

When seen by a representative of the Associated Press, Justice Hughes confirmed a report from New York that he had to-day telephoned to friends in New York and telegraphed others at Chicago that he would not under any circumstances permit his name to be used, and he asked that all mention of him as a compromise candidate for President be stopped.

Justice Hughes stated that his decision was final. All use of his name, he said, was absolutely without authority, and he had positively forbidden it. He would not permit the Supreme Court of the United States to be brought into politics, he said, and he declared that he would not accept the nomination if it were offered him.

So we see Justice Hughes himself at one time declaring that to retire from the court in order to seek the Presidency would constitute a compromise of his position and that he declined to be a party to bringing the greatest judicial body of the land into politics. But three years later, having succeeded in staving off the nomination to the Presidency in 1912, if I may express it in that way, the urge came in 1916 to Justice Hughes to become a candidate for President. In a letter of Justice Hughes to ex-Gov. Edward C. Stokes, of New Jersey, dated May 20, 1915, he declared as follows:

It seems to me to be very clear that as a member of the Supreme Court I have no right to be a candidate, either openly or tacitly. I can not do my work here and hold an equivocal position before the country. I must therefore ask that no steps be taken to bring my name before the country.

Then, in June, 1912, again we find a very interesting report relative to Mr. Hughes's attitude toward politics and high judicial position. I read it because I want to ask the Senate how the Senate feels his attitude at that time compares with his readiness and his willingness to accept appointment to the court to-day?

Rabbi Stephen S. Wise, after a personal interview with Justice Hughes at Lake Placid, N. Y., is quoted in the New York Tribune of June 21, 1912, as follows:

I deem it important to set forth the reasons which have led him (Justice Hughes) to refuse to permit his name to be considered at the convention of the Republican Party in Chicago.

These reasons prove his position to be unassailable. He seems to have asked and to his own satisfaction to have answered one question:

"Is it right that I should permit my name to be used?" His answer has been "No." This "no" is the reasoned and unalterable decision of an unbending conscience.

The decision is not to be recalled if extraordinary circumstances arise or unforeseen contingencies come to pass. But it will be reaffirmed as final and irrevocable. He would decline the nomination if tendered him. Why? The Supreme Court must not be dragged into politics. A judge of the Supreme Court should not be available, though he be nominally eligible for elective office. The moment he assumes the judicial office he ceases to be a partisan and knows, or should know, no partisan obligation. The moment he accepts a party nomination one or more things happen and happen explicably.

First, a political party may undertake to capitalize the judicial decisions of its candidate, than which nothing could be more deeply violative of the spirit of the judicial institution. His decisions would become subject to partisan and passionate review of partisan strife. Worst of all, it is not inconceivable that if men are to step from the bench to elective office, decisions may ultimately be rendered with a view to the contingency of such public and necessarily partisan review.

Such a situation would be certain to lessen the independence of the judiciary, as it would inevitably impair the Nation's confidence in the unswerving integrity of the courts. Of what real and permanent value were the decisions of a judge to-day, who on the morrow may choose or be chosen to sue for the favor and suffrage of the electorate?

As we parted, I asked the final question: "Do you not conceive that an extraordinary crisis might make it your duty to accept the nomination for President in order to render a great public service?"

Unhesitatingly and unequivocal was the answer: "I hope that, as a Justice of the Supreme Court, I am rendering public service and may continue to do so for some years, but the Supreme Court must not be dragged into politics, and no man is as essential to his country's well-being as is the unstained integrity of the courts."

I think we can assume that that speaks pretty well the language of that day of Charles Evans Hughes.

Mr. President, in view of these circumstances, I feel that we establish an exceedingly bad precedent when we return to the Supreme Court men who have once retired from the court to seek or to accept political preference; and particularly bad is that precedent after the principal involved has won and has exercised a great practice before that body largely as a result of his former connection with that court. Here, it seems to me, arises a very, very grave question of ethics.

Was it right for Mr. Hughes to practice before the Supreme Court after his retirement as a member of it? Was it right for him to return and plead the cases of client corporations before a body of men with whom he had become intimately associated during his membership upon the court? Here arises a question upon which I suspect lawyers would differ widely; but to me the case is one dictating that it would have been far more ethical, would have been far better, for Mr. Hughes, ex-Justice, to have declined any practice before the court of which he had been a member. It seems to me that Mr. Justice Taft himself established such a standard and such a rule and precedent in ethics when, upon his retirement from the Presidency, he announced that he would not practice his profession before the Supreme Court, because he had appointed several of the members of that body.

Perhaps the cases are not at all alike. Perhaps lawyers can demonstrate that there is no similarity whatever between the cases of Taft and Hughes; but still the question will linger, Mr. President. Surely America is not so bankrupt of men possessed of those qualifications which fit them for appointment to the Supreme Court that Mr. Hughes is the only one to-day available.

Though I dislike very much the necessity of doing so, Mr. President, I should be quite dishonest with myself and with my constituency if I were to do anything other than vote against the confirmation of this appointment. True, an appointment much less choice to our way of thinking than is this one might be made; but that does not remove the consciousness of a responsibility on the part of the Senate as great as that which rests with the President who makes the appointment. With an eye to the terrific struggle for supremacy taking place in America to-day, with the record of Mr. Hughes clearly before us, I think the Senate can do and ought to do but one thing here, namely, deny confirmation.

Mr. BRATTON. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. FESS in the chair). The clerk will call the roll.

The legislative clerk called the roll, and the following Senators answered to their names:

| | | | |
|---|---|---|---|
| Allen | Dill | Jones | Shortridge |
| Ashurst | Fess | Kean | Simmons |
| Baird | Fletcher | Kendrick | Smoot |
| Barkley | Frazier | Keyes | Steck |
| Bingham | George | La Follette | Steiwer |
| Black | Gillett | McCulloch | Stephens |
| Blaine | Glass | McKellar | Sullivan |
| Blease | Glenn | McMaster | Swanson |
| Borah | Goff | McNary | Thomas, Idaho |
| Bratton | Goldsborough | Metcalf | Thomas, Okla. |
| Brock | Gould | Norbeck | Townsend |
| Brookhart | Greene | Norris | Trammell |
| Broussard | Grundy | Nye | Tydings |
| Capper | Hale | Oddie | Vandenberg |
| Caraway | Harris | Overman | Wagner |
| Connally | Harrison | Patterson | Walcott |
| Copeland | Hastings | Phipps | Walsh, Mass. |
| Couzens | Hatfield | Pine | Walsh, Mont. |
| Cutting | Hawes | Ransdell | Waterman |
| Dale | Hebert | Schall | Watson |
| Deneen | Johnson | Sheppard | Wheeler |

The PRESIDING OFFICER. Eighty-four Senators have answered to their names. A quorum is present.

Mr. DILL. Mr. President, I have here an editorial from the Baltimore Evening Sun of February 12, entitled "The Nose of Mr. Hughes," which I should like to have the clerk read at the desk.

The PRESIDING OFFICER. The Chair will ask the Senator from Washington whether the editorial has not been read already.

Mr. DILL. No; I understand that the one read and placed in the RECORD this morning was an editorial from the morning issue.

Mr. SMOOT. Will not the Senator allow it to go into the RECORD without reading?

Mr. DILL. No; I should like to have it read.

The PRESIDING OFFICER. Without objection, the editorial will be read.

The legislative clerk read as follows:

[From the Baltimore Evening Sun of February 12, 1930]

THE NOSE OF MR. HUGHES

Monday a representative of the world of business gave his opinion of Charles E. Hughes in no very flattering terms. Henry L. Doherty,

opposing confirmation of Mr. Hughes as Chief Justice of the United States Supreme Court, asserted that there is danger in his "self-conceit" and his obstinacy.

Yesterday two Senators expressed their opinions in terms hardly more flattering, although carefully considered. BORAH, of Idaho, asserted, in effect, that Mr. Hughes is thoroughly committed to the defense of property rights as more sacred than human rights. Senator GLASS, of Virginia, asserted that he could not vote for Mr. Hughes for two reasons. One is the singularly blunted sense of the proprieties which permits a Justice of the Supreme Court to abandon the bench to run for office, then to resume practice before the court of which he was once a member, and, finally, seek to become chief of the court. The second reason is Mr. Hughes's bland disregard of the Federal nature of this Government.

Several other Senators signified their desire to speak, so the discussion will be continued to-day. Therefore, it is possible that some one will bring into the debate another peculiarity of Mr. Hughes, not mentioned by Mr. Doherty or either of the Senators. This is the fact that he seems to be suffering from atrophy of the olfactory nerve.

For three years Charles E. Hughes sat in the Harding Cabinet, in intimate association with Harry M. Daugherty, Albert E. Fall, and Edwin Denby. That administration, as all the world knows now, generated more evil odors than any other since the administration of Grant. Mr. Hughes was squarely in the midst of it, yet he gave no indication whatever that he smelled anything.

So bad a nose is poor equipment for a Chief Justice of the United States.

Mr. LA FOLLETTE. Mr. President, I address myself to the underlying issues which are involved in the nomination now pending before the Senate because I believe the responsibility rests squarely upon each Member of this body to weigh those issues, and to come to a conclusion in the light of the facts. As I view it, the issues at stake transcend the question of the personal character and ability of the nominee, which are conceded.

Mr. President, the pending nomination raises an issue which at various times in the history of this Republic has been of crucial importance. It raises the question of usurpation of power by the courts.

It is, perhaps, futile to discuss that problem, and to argue it in this connection, but some of the highest authorities this country has produced have challenged the right of the judiciary to declare acts of Congress unconstitutional.

I quote briefly from one of them, Thomas Jefferson. He said:

> It has long been my opinion, and I have never shrunk from its expression, that the germ of dissolution of our Federal Government is in the judiciary—the irresponsible body working like gravity, by day and by night, gaining a little to-day and gaining a little to-morrow, and advancing its noiseless step like a thief over the field of jurisdiction until all shall be usurped.

I realize that it may be said the power of the court to declare acts of Congress unconstitutional has now become a moot question. Nevertheless, a study of the history of the encroachment of power on the part of the judiciary reveals that said usurpation, like every usurpation of power in history, has grown by what it fed on.

The Supreme Court of the United States first formally enunciated the doctrine that it had power to declare acts of Congress unconstitutional in the famous case of Marbury against Madison, although it was not necessary to the decision of the case. And it should be remembered by Senators that even in the case of Marbury against Madison, while the Supreme Court declared that it had the power to nullify acts of Congress, it recognized the principle that only legislation which was clearly repugnant to the Constitution could be declared void.

Mr. President, I now wish to read a few quotations from outstanding opinions rendered by members of the Supreme Court, cited by Gilbert E. Roe, in his constructive study, Our Judicial Oligarchy. Of the author of this work my father said:

> He has always looked upon the profession of the law as one that involves a high degree of responsibility to the public and it would be difficult to find a successful practitioner who combines with his legal skill a keener sense of duty to the public good.

Before the court ever entered the perilous field of judicial declaration that acts of Congress might be nullified on the ground that they were repugnant to the Constitution, Mr. Justice Chase in 1796 had said:

> If the court have such power, I am free to declare that I will never exercise it but in a very clear case.

In 1870 Mr. Justice Strong, in a decision in the legal tender cases, declared:

> It is incumbent, therefore, upon those who affirm the unconstitutionality of an act of Congress to show clearly that it is in violation of the provisions of the Constitution.

In 1879 Mr. Justice Miller, in a powerful opinion, declared:

> When this court is called on in the course of the administration of the law to consider whether an act of Congress, or any other department of the Government, is within the constitutional authority of that department, a due respect for the coordinate branch of the Government requires that we shall decide that it has transcended its powers only when that is so plain that we can not avoid the duty.

Mr. Justice Story, one of the ablest jurists who ever sat upon the Supreme Bench, declared in 1838:

> A presumption never ought to be indulged that Congress meant to exercise or usurp any unconstitutional authority unless that conclusion is forced upon the court by language altogether unambiguous.

In 1878, in the famous Sinking Fund cases, Mr. Justice Waite said:

> Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the Government can not encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.

Mr. President, as late as 1905 Mr. Justice Harlan, one of the ablest and most profound students of the law ever to sit upon the Supreme Court, declared, in support of the right of the Legislature of New York to limit the hours of labor in bakeries:

> If there be *doubt* as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation.

While this is the language of a dissenting opinion, it nevertheless states an invincible truth.

By the year 1905 the Supreme Court of the United States had gone much further in declaring acts of Congress unconstitutional. The court not only declared acts unconstitutional when it found them repugnant to some clause in the Constitution but also when, in the opinion of a majority of the judges, the social or economic end which Congress sought to achieve was contrary to their beliefs.

Mr. President, I am led to briefly review the history of this usurpation of power by the Supreme Court of the United States, because yesterday the right of individual Senators to challenge the acknowledged and confirmed opinions of a nominee to that court was questioned. If it has become necessary for the Senate of the United States, in the solemn discharge of its responsibility in the confirmation of judges, to weigh their opinions upon the pressing economic and social questions of the day, the responsibility for that necessity rests upon the Supreme Court itself.

Because the Supreme Court of the United States, under the guise of declaring acts of Congress unconstitutional, has gone to the extent of declaring acts of Congress unconstitutional because a majority of the members of the court do not agree with the legislative objective, the social ends, and the economic theories involved in such legislation.

If anything further need be said to demonstrate the truth of this statement, I desire to quote from Mr. Justice Holmes in the case to which I have just referred, the case of Lochner against New York. Mr. Justice Holmes in a dissenting opinion said:

> I regret sincerely that I am unable to agree with the judgment in this case, and I think it my duty to express my dissent. This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agree with that theory (limiting the consecutive hours of labor in bakeries which may be required of an employee), I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.

No other construction can be drawn from the language of the eminent jurist than that he was specifically charging the majority of the court with having declared this law unconstitutional because the majority of the court did not believe in the social end of that legislation.

In the same opinion Mr. Justice Holmes said:

> Some of these laws embody convictions or prejudices which judges are likely to share. Some may not, but a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen of the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

Mr. President, I desire to quote from the employers' liability cases, Two hundred and seventh United States Reports, page 463, upon this point. Mr. Justice Moody in his dissenting opinion said:

I am unable to agree to the judgment of the court. Under ordinary circumstances, where the judgment rests exclusively, as it does here, upon a mere interpretation of the words of a law, which may be readily changed by the lawmaking branches of the Government, if they be so minded, a difference of opinion may well be left without expression. But where the judgment is a judicial condemnation of an act of a coordinate branch of our Government it is so grave a step that no member of the court can escape his own responsibility, or be justified in suppressing his own views, if unhappily they have not found expression in those of his associates. Moved by this consideration, and solicitous to maintain what seem to me the lawful powers of the Nation, I have no doubt of my duty to disclose fully the opinions which to my regret differ in some respects from those of some of my brethren.

Mr. President, so often these cases are decided by a divided court. When able jurists differ concerning the constitutionality of a statute, when they divide upon whether a great piece of social legislation enacted for the benefit of the people of the country is constitutional or not, then the decision of the majority becomes a judicial veto of legislation enacted by the Congress. Perhaps there never was a more frank admission of this fact than in the opinion rendered in the well-known income-tax cases.

It should be remembered that at the time of the argument of the income-tax case in the Supreme Court, which occurred in March, 1895, Mr. Justice Jackson was indisposed and could not participate in the case. The remainder of the court consisting of eight members were equally divided upon all questions involved in the case. The lower court having sustained the constitutionality of the income tax act, this division of opinion upon the part of the court resulted in sustaining the law. However, Mr. Justice Jackson recovered and a reargument was had upon the case in the Supreme Court.

One of the judges, who had upon the previous occasion voted to sustain the constitutionality of the law, for an unexplained reason changed his vote. The result was that, upon the final decision in the case, the court divided 5 to 4 and the law was declared unconstitutional. The frank declaration of Mr. Justice Field in his opinion for the majority of the court is very significant. I quote from it.

The present assault upon capital is but the beginning.

Said the majority of the court:

It will be but the stepping-stone to others, larger and more sweeping, until our political contests will become a war of the poor against the rich; a war constantly growing in intensity and bitterness. If the purely arbitrary limitation of $4,000 in the present law can be sustained, none having less than that amount of income being assessed or taxed for the support of the Government, the limitation of future Congresses may be fixed at a much larger sum, at five or ten or twenty thousand dollars, parties possessing an income of that amount alone being bound to bear the burdens of Government; or the limitation may be designated at such an amount as a board of walking delegates may deem necessary.

Mr. President, in answer to the question as to whether or not this income tax law was declared unconstitutional because the majority of the court regarded the act as repugnant to some clause in the Constitution or whether they regarded it as an assault upon capital, I desire to read briefly from the dissenting opinion of Mr. Justice Jackson. Said this learned jurist:

The decision [of the majority of the court] disregards the well-established canon of construction to which I have referred, that an act passed by a coordinate branch of the Government has every presumption in its favor and should never be declared invalid by the court unless its repugnancy to the Constitution is clear beyond all reasonable doubt. * * * I can not see, in view of the past, how this case can be said to be free of doubt. Again, the decision not only takes from Congress its rightful power of fixing the rate of taxation, but substitutes a rule incapable of application without producing the most monstrous inequality and injustice between citizens residing in different sections of their common country, such as the framers of the Constitution never could have contemplated, such as no free and enlightened people can ever possibly sanction or approve.

The practical operation of the decision is not only to disregard the great principles of equality in taxation but the further principle that in the imposition of taxes for the benefit of the Government the burdens thereof should be imposed upon those having most ability to bear them. This decision in effect works out a directly opposite result in relieving the citizens having the greater ability, while the burdens of taxation are made to fall most heavily and oppressively upon those having the least ability. * * * Considered in all its bearings, this decision is, in my judgment, the most disastrous blow ever struck at the constitutional power of Congress.

Here was an economic issue. I submit that a careful reading of these opinions will not justify any man in the assertion that the real, the sincere, the honest grounds of the court in declaring that law unconstitutional was that it was repugnant to some clause in the Constitution. The very language which the court employs in its decision is an admission that it challenged the constitutionality of the act and declared it null and void because, forsooth, a majority of the members of the court did not believe in income taxation.

Mr. Justice Brown said:

While I have no doubt that Congress will find some means of surmounting the present crisis, my fear is that in some moment of national peril, this decision will rise up to frustrate its will and paralyze its arm. I hope it may not prove the first step toward the despotism of wealth. As I can not escape the conviction that the decision of the court in this great case is fraught with immeasurable danger to the future of the country, and that it approaches the proportions of a national calamity, I feel it a duty to enter my protest against it.

Mr. Justice Harlan said:

It nevertheless results that those parts of the Wilson Act that survive the new theory of the Constitution evolved by these cases, are those imposing burdens upon the great body of the American people who derive no rents from real estate and who are not so fortunate as to own invested personal property, such as the bonds and stocks of corporations, that hold within their control almost the entire business of the country. Such a result is one to be deeply deplored. It can not be regarded otherwise than as a disaster to the country. The decree now passed dislocates—principally, for reasons of an economic nature—

Mr. Justice Harlan did not mince words. Said that great jurist, in speaking of the majority of his colleagues in this case, and I repeat it for emphasis:

The decree now passed dislocates—principally for reasons of an economic nature—a sovereign power expressly granted to the General Government and long recognized and fully established by judicial decisions and legislative actions. It so interprets constitutional provisions, originally designed to protect the slave property against oppressive taxation, as to give privileges and immunities never contemplated by the founders of the Government. * * * The serious aspect of the present decision is that by a new interpretation of the Constitution, it so ties the hands of the legislative branch of the Government that without an amendment of that instrument, or unless this court at some future time should return to the old theory of the Constitution, Congress can not subject to taxation—however great the needs or pressing the necessities of the Government—either the invested personal property of the country, bonds, stocks, and investments of all kinds, or the income arising from the renting of real estate, or from the yield of personal property, except by a grossly unequal and unjust rule of apportionment among the States.

Thus, undue and disproportioned burdens—

Continues this able dissenting opinion—

are placed upon the many, while the few * * * are permitted to evade responsibilities for the support of the Government ordained for the protection of the rights of all. I can not assent to an interpretation of the Constitution that impairs and cripples the just powers of the National Government in the essential matter of taxation and at the same time discriminates against the greater part of the people of our country.

In commenting upon these cases, the late Walter Clark, chief justice of the Supreme Court of North Carolina, a very able jurist, in my judgment one of the ablest produced by that State, declared:

One man nullified the action of Congress and the President and 75,000,000 of living people, and in 13 years since has taxed the property and labor of the country by his sole vote, $1,003,000,000, which Congress, in compliance with the public will, and relying upon previous decisions of the court, had decreed should be paid out of the excessive incomes of the rich.

Mr. President, I have briefly recited some of these cases because they make it imperative for every Member of this body to study and weigh the economic and social views of Mr. Hughes before voting to confirm him to the high office of Chief Justice of the Supreme Court.

We are confronted here, as I see it, with one of the gravest and most pressing problems that to-day face the American people. The Supreme Court by the gradual usurpation of power has entered, if I may be so bold as to say so, upon the field of judicial legislation. Will any fair-minded lawyer come to any

other conclusion when he studies the antitrust cases and the writing by the court into that statute of the word "unreasonable"? I have not the time, Mr. President, to review the legal history of the notorious antitrust decisions.

Suffice it to say, a careful, consistent study of the record of the court during the last 40 years will demonstrate that the United States Supreme Court in case after case, involving great problems of economic and social significance to the rank and file of the people of the country, has declared laws unconstitutional because the court, or a majority of it, did not agree with the legislative purpose and the objectives sought by Congress. In other words, to put it plainly, the Supreme Court of the United States, through the usurpation of this power, has now placed itself in the position where it defeats the popular will as expressed in legislation enacted by Congress.

In the income-tax cases, to which I have referred, it required a long political struggle to enact an amendment to the Constitution so that Congress could overcome the effect of the unexplained action of one judge upon the Supreme Court of the United States.

Mr. President, in view of this situation, how can Senators challenge the right of representatives of the people in this Chamber to examine the economic and social views of candidates for a position upon the Supreme Court? We are put upon notice by the action of the Supreme Court itself that in passing upon the nominations of members of that court we are filling the jury box which ultimately will decide whether there is to be effective regulation and control of the great organizations of capital in the United States. If that be the situation, as I said before, the court itself is responsible for it.

Let anyone read the recent dissenting opinions of Justice Brandeis, Justice Holmes, and Justice Stone on public-utility valuation, which involve the most pressing economic problems confronting the American people to-day. The ultimate decision of the valuation issue will determine whether or not the rank and file of the people shall endure economic slavery.

The struggle to regulate the railroads of this country dates back to the granger movement in the seventies. Iowa, Minnesota, and Wisconsin rebelled against the tyranny of the railroads. They demanded, inasmuch as the railroads were common carriers, that they should render adequate service at reasonable rates. Chief Justice Ryan, of the Wisconsin Supreme Court, one of the ablest jurists ever to sit upon that bench, played an important part in the legal battle which arose in connection with the effort to regulate common carriers and to compel them to give adequate service at reasonable rates.

In a notable address delivered to the graduating class of the University of Wisconsin Law School, in referring to this great economic struggle, Chief Justice Ryan, in 1873, uttered these prophetic words:

> There is looming up a new and dark power. I can not dwell upon the signs and shocking omens of its advent. The accumulation of individual wealth seems to be greater than it ever has been since the downfall of the Roman Empire. And the enterprises of the country are aggregating vast corporate combinations of unexampled capital, boldly marching, not for economic conquests only, but for political power. We see their colors, we hear their trumphets, we distinguish the sound of preparation in their camps. For the first time really in our politics, money is taking the field as an organized power. It is unscrupulous, arrogant, and overbearing. Already, here at home, one great corporation has trifled with the sovereign power and insulted the State. There is great fear that it and its great rival have confederated to make partition of the State and share it as spoils.

Said this great jurist:

> Wealth has its rights. Industrious wealth has its honors. These it is the duty of the law to assert and protect, though wealth has great power of self-protection and influence beyond the limits of integrity. But money as a political influence is essentially corrupt; it is one of the most dangerous to free institutions; by far the most dangerous to the free and just administration of the law. It is entitled to fear, if not to respect. The question will arise, and arise in your day, though perhaps not fully in mine: Which shall rule—wealth or men; which shall lead—money or intellect; who shall fill public stations—educated and patriotic freemen or the feudal serfs of corporate capital?

Mr. President, my father as a young man listened to that memorable address of Chief Justice Ryan. The granger movement resulted in the establishment of the right of the people, through commissions, to regulate these common carriers, the railroads, and to force them to give adequate service at reasonable rates. My father contended that the logical step in securing reasonable rates was a physical valuation of the property of these common carriers upon which to base the rates charged. Under his leadership as Governor of the State of Wisconsin there was enacted the physical valuation law, and the physical value of the roads within the confines of Wisconsin was determined. Upon that honest physical valuation rates were adjusted by the Railroad Commission of the State of Wisconsin.

When my father came to the United States Senate in 1906, he initiated legislation to provide for the physical valuation of the railway properties of the United States, in order that there might be a just basis upon which the Interstate Commerce Commission could fix reasonable rates, so that the railroads would be insured a fair return upon honest capital, honestly invested, and the rights of the people protected. When he first presented that proposition in the Senate, it was met by sneers and jeers. Senators left the Chamber in an effort to haze him. But, Mr. President, he continued his persistent fight for that legislation until it was finally enacted into law.

Then the Interstate Commerce Commission began its tremendous task of valuing the railroads of this country. That task was finally completed upon a small railroad, the St. Louis & O'Fallon, and the case went up to the Supreme Court of the United States. By a divided opinion, the Supreme Court of the United States decided that the Interstate Commerce Commission had not given sufficient weight to the reproduction theory of valuation, and remanded the case to the Interstate Commerce Commission.

Since that time the court has rendered important decisions affecting the valuation of public utilities. In Maryland Public Service Commission against United Railways & Electric Co. of Baltimore, a majority of the court declared:

> It is the settled rule of the court that the rate base is the present value.

Mr. President, what does that mean to the people who must obtain and pay for the services rendered by these great public-service corporations? It means that the public will be called upon, not to pay a rate fixed upon an adequate return for honest capital, honestly invested, but what it would cost to reproduce those utilities; in other words, as the court declared, their present value.

Mr. President, they were not satisfied with that statement. The majority of the court said further:

> It is not certain that rates securing a return of 7½ per cent or even 8 per cent on the value of the property would not be necessary to avoid confiscation.

Thus the majority of the court has taken unto itself the right to declare what shall be an adequate return upon the present value of these properties; and the court says that it is not certain that rates of 7½ or even 8 per cent will be sufficient to avoid confiscation. If a majority of the court by its opinion may say that 7½ or 8 per cent is not a sufficient return to prevent confiscation, what, in God's name, is to prevent the court from saying that 10 or 15 or 20 per cent is not sufficient to prevent confiscation?

Mr. DILL. Mr. President——

The VICE PRESIDENT. Does the Senator from Wisconsin yield to the Senator from Washington?

Mr. LA FOLLETTE. I yield to the Senator.

Mr. DILL. In that connection, I desire to call the Senator's attention to the fact that some years ago, before the Interstate Commerce Commission was given power actually to make rates but simply had the power to compel reasonable rates, the court repeatedly held that when rates yielded even less than 5 per cent under the commission's order they should not be held confiscatory; and that this is a great advance on the part of the court in the matter of economic return on the capital invested in railroads, which bears out the very idea the Senator has just expressed.

Mr. LA FOLLETTE. I thank the Senator for his suggestion. When the court gets into the realm of deciding what is and what is not an adequate return to prevent confiscation, and when it moves up, as the Senator from Washington has shown, from less than 5 per cent to 7 or 8 per cent, are we not confronted with the proposition that the court, by a majority decision, may declare that 10 or 12 or 15 per cent is not an adequate return upon the present value of these utilities? Mr. President, unchecked and uncontrolled, that power may chain future generations in links of economic bondage to these great aggregations of wealth engaged in the public-utility business as effectively as if they were the chains of slavery.

Electricity, transportation, communication, and the other vast economic fields now enjoyed by these private organizations of capital have become prime necessities of life. They are almost as essential as food itself; and they become more so with every new invention and every new step toward the further industrialization of this great country. Can it, then, be said that we are exceeding our constitutional responsibility when we ask that a nominee for the Supreme Court of the United States shall be

examined to ascertain what his views are upon this most pressing economic problem? Especially is that examination justified when we are confronted by the constant increase in power usurped by the courts.

Carried to its logical conclusion, the decision in the case of the Railroad Commission of Maryland against Baltimore Street Railway Co. means the destruction of all regulatory power by a State, and even by the national commissions, of these public-service corporations. That is true because as you increase the rate of return which these corporations may enjoy you finally reach a point where they are entitled by judicial sanction to charge rates which are all that the traffic will bear. We are, through the action of the court, driven back to the position which we occupied when this fight for regulation of these public-service corporations first began in this country. We are put back where these great aggregations of capital may say once more, "The public be damned!"

Mr. President, this state of affairs has not been brought about, may I say, through political activity on the part of these great public-service corporations in securing majorities in the House and in the Senate. The situation is created by the action of the Supreme Court of the United States.

It is not my purpose to review the position which Mr. Hughes has taken upon many of these great problems. That has been ably presented by other Senators in this debate. In summing up, however, I should like to submit to Senators that in passing upon this nomination their responsibility is not to the President of the United States. Their responsibility is not to Mr. Hughes. Their responsibility is to the rank and file of the citizens of their respective States, who have sent them here to protect the interests of the great mass of the people of this country. It is to them that Senators must answer for their votes upon this nomination.

It is not sufficient for Senators to say that Mr. Hughes is an estimable gentleman; that he is an able lawyer; that his character is beyond reproach. That is not the issue involved. As stated succinctly by the able junior Senator from Texas [Mr. CONNALLY] yesterday, the struggle is on in this country to ascertain whether the Government of the United States shall regulate and control these vast aggregations of capital, or whether they, through the Supreme Court of the United States, are to control and run the Government of this country.

The people have a right to know, in view of the record made by the Supreme Court on this great, pressing economic problem, where Mr. Hughes stands.

I submit to any disinterested person that to vote for the confirmation of the nomination of Mr. Hughes is to ratify the decisions of the Supreme Court in the cases which I have cited, and in these great valuation cases. It is to declare that a majority of the Senate of the United States sanctions the Supreme Court's usurpation of power, and approves decisions that carried to their logical conclusion will strip the governments of the States and the Government of the Nation of all power to regulate these utilities and public-service corporations.

A vote for Mr. Hughes, as was stated by the Senator from Washington [Mr. DILL] on yesterday, is a vote in favor of giving to the great Radio Corporation of America the vested right in perpetuity to these channels of communication through the air.

To vote for Mr. Hughes is to approve his contention in the Newberry case, that the Congress of the United States is impotent to protect the purity of nominations which lead to elections of candidates to this body and to the one at the other end of the Capitol.

To vote for Mr. Hughes is to approve of his decision in the Shreveport case, which deprives State commissions of the power to regulate railroad rates.

I have little patience with Senators who try to distinguish between the attitude of the advocate and the attitude of the jurist. These cases were not cases between one individual and another; they went to the heart of great problems of national importance.

To contend that Mr. Hughes appealed in the Supreme Court of the United States to his former associates to take a position upon great constitutional questions affecting the rights of the people of this country when he did not himself believe in it is to make an accusation against his intellectual integrity.

Mr. President, it is to me a very significant thing that this discussion, which we must agree has been for the most part upon a high plane, should have taken place in the Senate of the United States, and that the usurpation of power of the courts, their decisions upon these great economic and social questions should have been under fire in the Senate of the United States. It is significant because, as we look back over the history of this country, we find that some of the greatest economic and political struggles have been caused by decisions of the courts.

The junior Senator from Illinois [Mr. GLENN] on yesterday said that the time had gone by when the people of the United States were longer agitated by great mergers and combinations. He burned incense to the idol of great wealth. I do not question his right to do so, but I venture to disagree with his conclusion that the time has gone by when the rank and file of the people of this country are interested in the encroachments of great organizations of capital upon the rights of citizens. These gigantic monopolies—the chain stores, the chain banks, other great combinations—are destructive of our democratic institutions.

Mr. President, the struggle to prevent the Supreme Court from thwarting the will of the people as expressed by Congress has been revived in the Senate during the past two days. I, for one, take my place in the ranks of those who are fighting to maintain in this country the integrity of our Government for and by the people.

I shall vote against the confirmation of Charles Evans Hughes.

Mr. DILL. Mr. President, I make the point of no quorum.

The VICE PRESIDENT. The Secretary will call the roll.

The legislative clerk called the roll, and the following Senators answered to their names:

| | | | |
|---|---|---|---|
| Allen | Dill | Jones | Shortridge |
| Ashurst | Fess | Kean | Simmons |
| Baird | Fletcher | Kendrick | Smoot |
| Barkley | Frazier | Keyes | Steck |
| Bingham | George | La Follette | Steiwer |
| Black | Gillett | McCulloch | Stephens |
| Blaine | Glass | McKellar | Sullivan |
| Blease | Glenn | McMaster | Swanson |
| Borah | Goff | McNary | Thomas, Idaho |
| Bratton | Goldsborough | Metcalf | Thomas, Okla. |
| Brock | Gould | Norbeck | Townsend |
| Brookhart | Greene | Norris | Trammell |
| Broussard | Grundy | Nye | Tydings |
| Capper | Hale | Oddie | Vandenberg |
| Caraway | Harris | Overman | Wagner |
| Connally | Harrison | Patterson | Walcott |
| Copeland | Hastings | Phipps | Walsh, Mass. |
| Couzens | Hatfield | Pine | Walsh, Mont. |
| Cutting | Hawes | Ransdell | Waterman |
| Dale | Hebert | Schall | Watson |
| Deneen | Johnson | Sheppard | Wheeler |

The VICE PRESIDENT. Eighty-four Senators have answered to their names. A quorum is present.

Mr. NORRIS. Mr. President, before the Senate votes upon the main question I expect to make a motion to recommit this nomination to the Committee on the Judiciary. I understand that there are some Senators who want to be heard on that motion, although they could proceed now if they so desired. I give this notice so that Senators may take their choice.

I wish to congratulate the Senate upon the high order of the debate which has taken place upon the important question now pending before the Senate. I want to concede very frankly and freely the good intentions, the patriotism, and the conscientiousness of those who are opposed to the position I take on this confirmation. I very frankly admit that they are moved by motives which to them are perhaps as sacred and are just as high-minded as those which in my judgment are moving me. I believe that we are all anxious that we should preserve the honor and integrity of our Supreme Court. We are equally anxious that no step be taken, either in the Senate or elsewhere, that will in any way detract from the high position which that great tribunal occupies in the civilized world.

So I am conceding to my brethren who do not agree with me the highest of honest purposes and motives. We look upon this matter from different viewpoints. I presume we all agree that one of the most important functions that come to this body as a part of the legislative branch of our Government is to pass upon nominations such as this. The importance of this office is second only to that of President of the United States and in some respects is of greater power for the good or the evil of the civilized world in general and of our people in particular. I think it is a matter of great gratification that in the two or three days the matter has been discussed there has been no rancor, no ill will, no charge of bad faith, but that everything has been considered upon a high patriotic plane.

To my mind the Senate is soon going to vote upon a matter that has more to do in the end with the upbuilding of the human race, with the advancement of civilization, with the happiness and contentment of our people, than any question that has been presented to it for years. There are two schools of thought and there are, of course, dishonest men in both schools. I think they are in the minority in both schools, but for the purposes of my discussion I want to speak of both of them in the highest terms. I want to speak to those in the two classes of thought who are honest and who are conscientious and who are patriotic and who are not moved by any selfish or ulterior motives.

Some of us think that in the progress of the world we have reached the time when some of our sacred fundamental insti-

tutions of government are sadly in need of relief, that there is danger ahead, that there are danger signs now along the Government pathway, and unless we heed them our children and the generations who follow will greatly suffer for the mistakes we make here. We are fearful of the encroachment of organized wealth upon our civilization. We are fearful of combinations and monopolies and mergers which have almost taken possession of the entire world. It is going on in all human activities. We believe that it will lead us to danger, that our institutions of liberty and freedom are liable to suffer. There are those who do not agree with us. There are those who feel that there is no danger in combinations, in aggregations of wealth. They make a plausible argument along that line. Mr. President, it is conceded by all of us, I believe, that Mr. Hughes belongs to the latter class. There is practically no dispute about the facts before us. I want to concede to him, as I concede to those Senators who do not agree with me, that he is just as honest in the position he takes as I am in the position I take, and that he is just as conscientious. I think he is wrong. I think those who hold his views are wrong, and that, carried to its logical conclusion, as I am going to attempt to show, it will bring distress ultimately, perhaps ruin, to governments such as ours.

I listened to the greater part of the very able address of the Senator from Illinois [Mr. GLENN]. He made practically the only defense which, in my judgment, was really logical of Mr. Hughes and Mr. Hughes's attitude that thus far has been made. From his standpoint it seems to me he said all that could be said, and he said it fairly and eloquently. But, Mr. President, we all know that the Senator from Illinois, starting out to defend Mr. Hughes, before he finished was engaged in a defense of monopoly, of trusts, of combinations—and that is logical, perfectly logical. That is where it leads. That is the point to which, in my judgment, those who think that such men as Mr. Hughes ought to be appointed to the Supreme Court will and must come.

The Senator from Illinois said there was a time when we heard much about trust busting, when we heard much against combinations and mergers, but he said we hear no more of it now. To a great extent, what the Senator from Illinois said is true. I think that it is a matter of regret that the people of the United States, moved perhaps by the result of the Great War, have lost that tenderness of feeling which used to appeal to them when any one man or any combination of men was infringing upon their liberties or upon their rights. We hear no more of it, said the Senator from Illinois. That means that the people of the United States are acquiescing in this merger march, that the people of the United States have come to the conclusion that they are helpless, and that these combinations in all lines of human activity are going to engulf the human race, and at the rate we are moving along the road upon which we are traveling we will soon be led to that awful condition.

The Senator from Illinois in referring to this nomination took up the story of Abraham Lincoln. He gave us a beautiful picture of the ramifications of the Illinois Central Railway, and then said Abraham Lincoln was an attorney for the Illinois Central Railroad. Mr. President, men ought to be judged by the civilization of the day in which they live. When Abraham Lincoln lived, the combination and the march toward monopoly and trusts was an unknown thing. The people of that day would be breathless in astonishment if they could behold the colossal magnified organizations of wealth which exist to-day—banks being organized under one head, railroads into one company, street-railway companies into one organization, gas companies, electric-light companies, all these being pushed on toward combinations until the individual becomes a hired man. And yet these people talk of efficiency and say that the way to get efficiency is through these great combinations.

Go out upon the farms of the country and look at the man living upon the farm which he owns where he is tilling his own soil. Then look at the farm occupied by a tenant farmer. Where is the ingenuity? Where is the efficiency? It is with the man who is master of his own business. But if this combination idea is to go on much longer there will not be a man in the United States from farming to manufacturing who will not be working for somebody else, taking commands from the man who sits at the head of monopoly, with his feet upon a mahogany table, giving orders to the peasants and the hired men who work in the factories, and even those who work in the professional offices—all tending toward combinations. I confess, Mr. President, that I am frightened at the spectacle that is presented.

So even Mr. Hughes's defenders can not defend him without defending trusts and monopolies and combinations of great wealth. The Senator from Illinois said that it did not attract attention any more. I am afraid that is true to a great extent. This slumbering power of human liberty and human freedom may sleep, may be quiet, but in a country like ours, where the common people are educated, there is a limit beyond which combinations can not go. This power will be aroused, lethargy will be thrown off, and although the people may suffer for a while perhaps, nevertheless they will meet the monster of combination in the arena of human freedom, and everybody knows in the end what the outcome must be.

Mr. President, along the pathway of civilization the roads and the sides of the roads of every century at every step disclose the wreck and ruin of empires and governments which have been destroyed in the march of civilization from the beginning to the present time. Almost without exception, we find that it is because those who controlled the property of the country, those who controlled the money, those who controlled everything that was necessary in the way of wealth to keep the Government going had become arrogant; they had become insolent; they had treated those who were poor as though they were slaves, and frequently, indeed, they were slaves. That can not be done with the American people; that can not be done with an educated people. They will not be peasants. Rome fell because wealth was arrogant. The great revolution of France came after those in power, through the acquisition and use of wealth, had chained to the wheels of their chariots the poor people who were not given the right and the liberty to say even that their souls were their own.

When the Senator from Illinois [Mr. GLENN] referred to Russia I thought of that nation as furnishing another instance of combinations of wealth going to their doom. For years, Mr. President—indeed, for centuries—the czarist government of Russia ruled over the people with an iron hand, crushing out the spirit of liberty, the spirit of freedom, but the day came when the monster was hurled from the throne; the day came when the people who had been slaves rose in their might.

The Senator also referred to Bolshevists. They probably went too far. God help us in this country so that we, in our intelligence, may not wait to overthrow combinations of wealth that are rapidly taking control of our Government until bloodshed will be necessary in order to place the Government in the hands of the people. We have other methods; we have intelligence and we have the ballot, and it seems to me we must rise in our might and say that the people shall control their own destinies, their own Government.

What happened in Russia, Mr. President, was nothing unnatural. Such events do not come about without cause. Sow the seed and eventually you will reap the harvest. So I want to warn my fellow Senators, I want to warn by fellow countrymen, that before it is too late, before it gets too far from our grasp, we should rise in our might and demand the right of free citizens and insist that the highest court of the land shall not be controlled by the elements that believe that wealth and money should rule the world. That is the question before us. I say with the greatest respect, but, as I look at it, there is nothing else involved.

The Senator from Illinois has stated that nobody is now saying anything about that subject. If we shall remain silent and lose our liberty and lose our freedom, we shall have no one but ourselves to blame. Mr. President, as a great poet said:

> To sin by silence, when we should protest,
> Makes cowards of men.

We shall find in America those who will speak. Some surprise has been expressed, and has been shared by myself, that interest in the question now before the Senate, starting, perhaps, with no idea that the controversy was going to last for five minutes, has spread all over the country; and the question is asked, Why? The Senator from Illinois is mistaken when he says the voice of the people is silent. They realize what is going on here, and we are getting a response from men and women who love freedom, who love liberty, who are opposed to the domination of our Government by class and organized combined wealth.

It is not surprising either. There are very few communities in the United States whose people have not come, in one way or another, directly or indirectly, in contact with the Power Trust in connection with some little local municipal plant, which, perhaps, has been put out of business, or in some little local election, where the money of the Power Trust or of Wall Street has been brought across the continent to secure control. The trust wins very often, perhaps most of the time; at any rate, they think they have won; they think because the people are silent that they have forgotten about it, but in every community there is a slumbering protest in the hearts of honest men and women.

When this opposition started in regard to the Chief Justiceship of the Supreme Court of the United States the people knew what it meant. They knew, as I shall show before I get through,

what happened when some community, some municipality, some county, some State wanted, perhaps, to supply themselves with water, with gas, with electricity, or with power. What did they find? They ran up against a decision of the Supreme Court of the United States. What did the State commission, given authority under State laws to fix rates, say? They said, "We can not do this for the petitioners because the Supreme Court has settled the question; they fixed the valuation in the Indianapolis Waterworks case." And so between the people and the real enjoyment of the right which they desire to enjoy stands that impassable barrier—an opinion of the Supreme Court of the United States. Therefore they are interested. They are not only interested but, Senators, they know. They know what Mr. Hughes stands for. They have nothing against Mr. Hughes, any more than I have. They respect him; but they know that he stands with organized wealth, and they do not want a representative of that group on the bench of the Supreme Court of the United States.

The Senator from Massachusetts [Mr. GILLETT] said the other day that Mr. Hughes is the greatest lawyer in the United States. He said if a vote were taken by the people of the United States on the question of who was the greatest lawyer it would be unanimous in naming Mr. Hughes. Therefore, he concluded that Mr. Hughes should be put on the Supreme Court and should be made Chief Justice.

Mr. President, that is not enough. Nobody has denied the ability of Mr. Hughes, although he is not a superman; he has many attributes that the common individual has. He makes mistakes, and there are some people who are so treasonable as even believe that there are other lawyers just as great as he is. But admitting for the sake of the argument that he is the greatest lawyer in the United States, should we, for that reason alone, put him on the Supreme Bench? Are we going to consider nothing but ability? If that is all, then it is possible to go to Sing Sing and get candidates to fill the bill. It is possible to go to any State or Federal prison in the United States and find men who are able lawyers; and if they are not found there that is no reason why some of them should not be there. [Laughter.]

In my judgment, Mr. President, there are other qualifications necessary. Without speaking in disrespect of any man, I do not believe a man is fit to go on the Supreme Bench who has never had any opportunity to sympathize or to associate with those who toil and those who labor. Since Mr. Hughes retired from the Supreme Bench and after he got through running for Presidency, he has lived with those of wealth; he has been surrounded by the luxury of combined wealth.

A Senator said the other day that he was a lawyer and would take anybody's case. Probably he would, but since he has been engaged in the practice of law after he retired from the Supreme Bench no one has heard of his having as clients any poor men or poor women. One has to have his hands filled with gold, Mr. President, before he can be admitted by the sentinel to the outer office of Mr. Hughes. It takes big money to employ him. He has worked for that kind of clients; he has associated with them; it has been a part of his life. He has not seen the man who suffers, the man who knows what it is to to be hungry and not have the necessary money with which to buy food. His vision has extended only to that limited area which is circumscribed by yellow gold. He is not to blame for that; I am not criticizing him for it; I am perfectly willing that he should live that kind of a life. I am perfectly willing that he should work for rich clients. I have not fault to find with that; but I am not willing that there should be transferred from that kind of surroundings one who shall sit at the head of the greatest judicial tribunal in the world; I am not willing to say that that kind of man, regardless of his ability, should go on the Supreme Bench.

While I have nothing in the world against him, yet, in my judgment, the man who has never felt the pinch of hunger and who has never known what it was to be cold, who has never associated with those who have earned their bread by the sweat of their faces, but who has lived in luxury, who has never wanted for anything that money could buy, is not fit to sit in judgment in a contest between organized wealth and those who toil.

Mr. President, I am glad to say that those of us in the Senate who take this view are not alone. The other side have the votes here; by a cruel majority they can blot us out; but, Senators, the record which we have made will be read by those who shall be here after we are all dead; the record that we are making here will be read by liberty-loving citizens of this country after we shall have all passed away. A cruel majority can not blot out the record; we will set a light burning that will be a beacon light for future generations and we will make their path a little easier because we made the fight here.

I desire to read, because it expresses the matter so well, an editorial from the Washington News. I presume this editorial, printed here in one of the Scripps-Howard papers, has been printed all over the United States; and, as you all know, in the last campaign these papers enthusiastically supported Mr. Hoover.

SUPREME COURT IDOLATRY

The Senate fight over the appointment of Charles Evans Hughes as Chief Justice of the United States is one of the most significant developments in the political life of this Nation in many years. That is true altogether apart from the virtues or the defects of Hughes's appointment as such.

This explains our repeatedly expressed hope that Hoover appointments would hasten the day when the Holmes-Brandeis dissenting opinions, placing human rights above property rights, would voice the will of the court as a whole. Far from meeting that qualification, Hughes is the outstanding example of a jurist who advocates private corporate interests at the expense of the public interest.

To persons still holding to the myth that a justice's private opinions are of no consequence in this connection because his job is merely to pass as an expert upon technicalities of the law, the Senate opposition to Hughes may seem unjust and beside the point.

But, in fact, the court in major cases has long since become a policy-forming body.

Do not forget that. As I think I shall show before I close, the Supreme Court of the United States has gone beyond the legitimate boundaries where the founders of the Constitution intended that it should go. That is only natural, because it is a human attribute that when you give a man power he takes all you give him and reaches for more; and the Supreme Court is composed of human beings. As I think I shall show before I finish, it has done just that thing. So that it is more than a tribunal passing upon laws. It is laying down policies that the founders of the Constitution intended should be laid down by the Congress; but there is no appeal. We have taken that step; and this is a contest as to whether we will put on the bench another man who is in favor of taking such steps, or whether we are in favor of filling that vacancy with men who would hold the Supreme Court within the bounds that the forefathers intended.

Let me go on with the editorial:

When social and economic issues are involved, the Justices tend to vote their personal opinions as do Members of Congress in passing laws.

That is what is happening in the Supreme Court. This editorial is telling the truth plainly, without any subterfuge.

We have a legislative body, called the House of Representatives, of over 400 men. We have another legislative body, called the Senate, of less than 100 men. We have, in reality, another legislative body, called the Supreme Court, of 9 men; and they are more powerful than all the others put together. We are opposing Mr. Hughes to-day because we are opposed to that kind of government. We believe in the Constitution of the United States as our forefathers gave it to us, untarnished and unblemished, with such amendments as the people, in the way provided by law, shall add to it.

The chief difference is that the court-made law can and does destroy the Congress-made law.

Justice McReynolds's decision of January 6—as we have pointed out before—is a frank admission that such court rulings are determined by "practical" reasons, rather than by any strict interpretation of the law. Thus the court majority has helped to destroy constitutional civil liberties and has completely reversed the purpose and meaning of the antitrust laws, which are now used to free corporations from restraint, while restricting labor organizations.

The curious and dangerous aspect of this long development of Supreme Court supremacy as a virtual lawmaking body is that it has occurred without public awareness.

I doubt the truth of that, as I said a while ago; but everybody was under the impression that the people did not know about it, and the writer of this editorial apparently shares the general opinion that the people were paying no attention to the course of the Supreme Court in fixing policies—not passing on laws, but fixing policies—that control in a little municipality away out in Wyoming or in California or in Nebraska. The fact of the interest that is being taken in this confirmation shows that we were wrong. They were paying attention to it; and when they are once started, they will pay more attention to it.

Instead of watching the court's growing power, the unsuspecting public has come to render the court a degree of reverence which approaches perilously close to idolatry. Of all our American institutions, including the Presidency, it is the one which few dare criticize.

We have lost the early American independence which held no political institution above the critical judgment of sovereign citizens. By what

servile mindedness, by what medieval superstition or mummery of mace and gown have we vested with perfection nine fellow citizens who are political appointees?

The Senate debate on the Hughes nomination is significant because it breaks through this hush-hush and ah-ah atmosphere surrounding the court, daring to examine that political and very human institution for what it is worth.

Like other political bodies, the worth of the Supreme Court will depend largely on the intelligent, constant, and fearless public attention which it receives.

The Supreme Court deserves the respect which it earns by protecting the people's rights—no more respect, and no less.

Mr. President, let me pause to assert that what I shall have to say will have considerable to do with the Supreme Court of the United States, because we are passing upon the right of Mr. Hughes to become Chief Justice of that great court, and I want to make the same reference to the court and to the members of the court that I made to the Senate. I am making no criticisms, no charge against any individual member of the court. I am not for a moment asserting that in any of their opinions or decisions they have not followed their conscientious convictions. The Justice who wrote the opinion from which I am going to quote and which I am going to use simply as a sample to illustrate my point was once a Member of this body. I knew him here. I am proud to say that he was my friend. I hope that he regarded me as a friend. I knew of his ability; I can testify to that, to his honesty, and to his conscientiousness. I have great respect for him, as I have for every other member of that body. But, Mr. President, they are all human; and to a great extent the court has become a political body, appointed very often through political influence, passing on political questions, fixing policies for the people of the United States, legislating, when they should leave that to the Congress.

I desire to read the concluding paragraph of an editorial in the Philadelphia Record, of February 13. I ask unanimous consent to have the entire editorial printed as a part of my remarks.

The VICE PRESIDENT. Without objection, it is so ordered. The editorial is as follows:

[From the Philadelphia Record, of February 13, 1930]

WILL THE SENATE SEAT AS CHIEF JUSTICE A CHAMPION OF MONOPOLY?

"What a suggestive coincidence—that the Senate should spend the birthday of Lincoln, the greatest champion of human rights since Jesus walked the earth, in consideration of the greatest champion of property rights as a nominee for Chief Justice of the United States!"

Thus Senator DILL, Democrat, of Washington, began yesterday his protest against confirming the nomination of Charles Evans Hughes.

Was this merely a slur from an embittered partisan? Just a sample of the "prejudiced opposition" and "radical animus" which a shocked Republican contemporary attributes to all who question that appointment?

Dull must be the mind which thus dismisses the extraordinary revolt against the selection in the Senate.

Heedless must be the citizen who does not perceive that here is an issue more momentous than many of those which have stirred the whole country in a presidential campaign.

A President, who wields vast administrative powers, is elected.

Congress, which enacts the laws of the Nation, is elected.

But the laws which Congress enacts and the President executes are in vital instances not really valid unless and until the Supreme Court so rules.

That tribunal is, in effect, a superlegislative body. It can and does determine to a great degree both the legal principles and the economic and social doctrines which control the development of the Nation and its people.

And the members of the Supreme Court are appointed. The public has nothing directly to say about their selection. The choice is made by the President, subject only to ratification by the Senate.

This method is not only constitutional, but sound. It is consistent with the scheme of government. Throughout the years it has given to the court a personnel commanding unshaken respect and confidence.

By its very nature, nevertheless, the system justifies and requires searching scrutiny of the qualifications of appointees.

The Chief Justice of the United States is more than a highly placed jurist. He is head of one of the three coordinate branches of the Government.

As such, and as an appointed official, he exercises a power commensurate with that of the President himself, who is elected by the votes of the entire citizenship.

What, then, are the implied standards as to his eligibility for that exalted post?

Is it enough to demonstrate that he is a man of unblemished character, of distinguished achievements, learned in the law, experienced in public affairs?

Or are there not besides deeper and absolutely essential requirements—that in his career and his proved convictions he should represent the spirit of justice as well as the letter of the law; that he should be an exponent of progressive and not reactionary thought; that in interpreting the Constitution and enactments under it he should keep as the supreme aim the political, economic, and social welfare of the people whose lives they affect; that as a broad principle he should be more concerned for the safeguarding of human rights than for the advancement of property rights?

These are not abstractions. They go to the heart of national security and individual prosperity and liberty.

With justice and reason, therefore, they have been the tests applied to determine the fitness of Mr. Hughes.

That he has fared badly no one even faintly progressive in conviction will deny.

Stainless in personal repute, distinguished for intellectual stature, and a fine record of public service, he has been formidably challenged as lacking the supreme qualification of judicial impartiality, as being, on the contrary, the outstanding representative of legal, economic, and social reaction, the foremost champion of property rights when they conflict with human rights.

That fundamental issue is crucial to-day. It arises in many forms, but especially, as Senator BORAH made clear, in determination by the Supreme Court of this question:

"What shall constitute the base of the charges levied upon the people by public utilities and those combines which have obtained control of the natural resources of the country and of its facilities of transportation and transmission?"

Where Mr. Hughes stands can not be open to doubt.

He has been counsel before the Supreme Court for scores of powerful corporations. With all his skill and prestige he has contended for their right to dominion.

He has argued that a radio license gives private interests a vested right in perpetuity in the ether channels; that the Government has no power to regulate the great oil companies. He fought to sustain an arbitrary rate increase by a street-railway monopoly. He has striven to break down the antitrust laws for the benefit of big combines.

Borah summed up in weighted words:

"His are not views which ought to be made a permanent part of our legal and economic system. He would go on the bench with the conviction that restraints upon the corporate interests are unwise, that we must leave the course of those powerful interests to their own discretion. His is that extreme view which exalts property rights above all other rights."

What was to be a cut-and-dried formality of acquiescence has become a flaming controversy. And the division in the Senate, overriding party lines, is a reflection of a cleavage throughout the Nation—a rapidly crystallizing issue between policies of reaction and greed and policies of economic and social justice.

The forces have clashed over tariff and farm relief. The conflict was sharpened with the challenging advent of Senator GRUNDY.

Now it touches one of the citadels of governmental authority, the Supreme Court.

Democrats and Progressive Republicans in the Senate are making a crucial stand. And millions of their countrymen look to them to stand fast in this last-ditch fight to preserve rights imperiled by the power of privilege.

Mr. NORRIS. I read the concluding four paragraphs:

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Mr. President, it will not be amiss if in this connection I refer to other things—this tendency to appoint men like Mr. Hughes to various departments, to various bureaus, to various commissions; and again let me say to these others to whom I am going briefly to refer that I have no question of their honesty. I am not questioning either the honesty or the conscientiousness of the President, who sends in the appointments. But while we are considering Mr. Hughes, the President sends to the Senate the name of another man to become a member of the Interstate Commerce Commission, and it turns out that he is a railroad lawyer. He takes the place of a man who withdrew when it was determined that he was a railroad attorney. Now, he may make the best commissioner in the world; but

when you go out to hunt for a man to sit upon a railroad commission, whose duty it is to regulate railroads, will you go to the railroads to get the men? So, it is not only one, but it is many. We found not long ago that the president of the great Pennsylvania Railroad was one of the main spokes in the wheel that selected a judge for life for the middle district of Pennsylvania, and the President sent in his name.

These men, including Mr. Hoover, the President, all conscientious men, believe in big business; they believe in combinations; they believe in mergers. It is their idea that if there can be combinations, if all the business of the country can be merged into a few hands, and the people become hired men and hired women, servants of the corporations, that will be the way to bring prosperity to the people.

It is not only this nomination we are considering; there are others. There are other policies. Congress passed a law not long ago providing for the development of Boulder Dam, out in the western part of the United States. We thought we had fixed it in that statute so that municipalities and States and counties, if they wanted to, could get the power developed at Boulder Dam. We thought we had given them a preference. But what do we find? The lawyer selected by the Secretary of the Interior, who in turn is selected by the President, renders an opinion almost showing on its face that it is made to order, holding that Congress did not mean what it said, or, if it did, there was no reason why its wish should be respected, holding that the Secretary of the Interior could disregard the plain provisions of the law. Why? Again it comes back to the same proposition—big business, monopoly, combination. It was the Power Trust that decision was made to favor.

We hear from time to time that soon the Power Trust is going to be given the power generated at Muscle Shoals, made possible by your money and my money and the money of the other taxpayers of the United States. When it is completed it will be turned over to the greatest trust under the sun.

One class of our citizens believe in that kind of government. They were successful in the last election. They are putting their policies into shape. They are carrying them out. They have the brutal majority to do it.

Along that line I want to call attention to an article in the Nation of February 12, 1930, written by Mr. Paul Anderson. He tells in words better than I can use what has happened at Boulder Dam. It is the same proposition that we have if we vote for Hughes; it is the same idea of government; it is the same scheme; it is the same plan. After he tells about Boulder Dam he takes up the question of the radio.

The radio presents another instance of combination. The radio is one of the greatest inventions of modern times, one whose possibilities are almost uncanny. Think what is liable to happen if there is placed on the Supreme Bench, at the head of the court, the man who was attorney for the Radio Corporation of America, who has dared to advocate that the great Radio Corporation, which was his client, had obtained a vested right in the very air we breathe.

O my God, how can anybody with reason, how can anybody with a spirit of independence, a spirit of human liberty, for a moment think that our people are going to submit to the proposition that the air they breathe is to be owned by one of the greatest corporations in the world, and that we can not talk through it without their consent, without paying them a premium for the privilege. Mr. Anderson takes that up in this article.

At this point in my address I am going to ask unanimous consent to have the article printed. If it were not so long I would read it, because it is a remarkable statement as to what is going on right now in this Capital, what our Government is doing, how the rights of the people are being trampled on. On the one hand, the Supreme Court, whenever it feels disposed, sets aside the action of Congress. On the other hand, the executive department, by a written opinion of an attorney, made undoubtedly to order, says, "You do not need to follow this law if you do not want to. Make one of your own."

That is what we are coming to. Our forefathers believed, and every lover of a democratic form of government knows they were right, that the real rights of human liberty of the people, of men and women and children of any government, rest in the legislative department of the Government.

When our Constitution was founded, our forefathers were making an experiment. They were about to do something that had never yet been done in the civilized world. So they were careful; they were fearful lest they give to the people powers which they could not properly handle. Therefore in the new government there was only one branch, and only a part of that branch, where the people were given direct power.

The Constitution provided that the House of Representatives should be elected by the people. That was the only place where the people were to have a direct voice. The courts were to be appointed for life, the President was to be elected by an electoral college, the Senate was to be elected by the legislatures of the States. We have amended the Constitution somewhat since that time, and this body now has become the real representative body of free people, or at least as much as any other body in the world. This body, the Members of which are elected by the people, is a forum wherein are debated without fear, without limit, I want to say, too, all the questions that are near and dear to liberty-loving people. In this body the minority—and I am one of that minority—have a free voice, a free right to express the sentiments they believe to be right, even though the majority is cruelly large, and can blot out every suggestion of legislation I may propose.

Mr. President, I ask unanimous consent that this article by Mr. Anderson, except the part I have marked out, be printed in the RECORD as a part of my remarks.

The VICE PRESIDENT. Is there objection?

There being no objection, the article was ordered to be printed in the RECORD, as follows:

BOULDER DAM DYNAMITE

By Paul Y. Anderson

WASHINGTON, February 1.—Let us suppose that a number of States and municipalities seeking cheap electric power have succeeded, over the prolonged and bitter opposition of certain private power interests, in inducing the Government to build a large hydroelectric plant with public funds; let us suppose that the private power interests, having lost the fight, have the incredible nerve to ask that the power be given to them instead of to the States and municipalities which made it possible—is it reasonable to suppose that any administration would even momentarily consider granting such a request? Obviously it is not. Yet that is exactly the situation with regard to Boulder Dam as this is written. It is monstrous, shocking, incredible—and true. The facts about that long struggle are well known. Arrayed on one side were the States and cities which wanted Boulder Dam built in order that they might have flood protection and cheap power. Arrayed on the other side were the Southern California Edison and associated companies, which opposed the project because it would either deprive them of business or compel them to reduce rates, or both. Notwithstanding the strenuous and sometimes unscrupulous tactics employed by the power companies, the States and municipalities won. Congress not only voted to build the dam, but it expressly directed the Secretary of the Interior, in disposing of the power, to give preference to the States, municipalities, and other political subdivisions. These latter very promptly applied for every kilowatt of power that could be generated at the dam. Then, to the undisguised amazement of those States and cities—and of Congress—Secretary Wilbur announced a tentative plan under which one-fourth of the power, and two-fifths of the control of the plant, would be allotted to the Southern California Edison and other companies associated with it in the anti-Boulder Dam campaign. The scheme violated the spirit of the law and divided control between hostile elements.

On its face the plan seemed indefensible on any rational or respectable ground, and no attempt was made to conceal the disappointment of the States and municipalities or the resentment in Congress. But something more ominous was in store. Within the past few days Secretary Wilbur has propounded to Solicitor Finney, of his department, a series of questions, the purport of which was this: Would I be legally warranted in ignoring the preference rights of the States and cities and giving the power to "other applicants" if I decided that the "other applicants" offered better financial security and greater contractual responsibility? It seems impossible to mistake the purpose which inspired the questions. And nobody familiar with Solicitor Finney's record could doubt what his answer would be. Solicitor Finney, who advises Secretaries of the Interior as to their legal authority for doing the things they wish to do, furnished the celebrated opinion that the then Secretary, Albert B. Fall, was legally authorized to lease the Teapot Dome and Elk Hills naval oil reserves—which the Supreme Court, in an even more celebrated opinion, rather drastically overruled. He did not fail Secretary Wilbur any more than he had failed Secretary Fall. After sweating manfully for several days and nights he produced a document which declared that "the public interest" was the Secretary's paramount concern and that the paramount element in "the public interest" was financial security and contractual responsibility on the part of the recipients of the power. The preference rights guaranteed the States and municipalities by Congress, he stated, would be amply conserved by providing that they could make subsequent applications for power to the parties receiving it from the Secretary. In other words, the will of Congress would be fulfilled if Secretary Wilbur awarded all the power to the Southern California Edison and its associates on condition that the States and cities might afterward try to get some of it away from them! One could almost hear the companies adding under their breath: "Try and get it!"

Unless this writer is mistaken, the administration in this instance is monkeying with the largest stick of dynamite it has handled thus

far. Congress does not relish having its acts flouted by any Cabinet member, and California is reported to be in a fair frenzy over the prospect of being tricked again by the power interests. HIRAM JOHNSON's present temper on the course of events can only be described as homicidal, and as a political "killer" Hiram is almost without a peer. Of course, Mr. Hoover knows all about these maneuvers. A good many discerning people knew, or felt they knew, what the most important issue was in the last presidential election. Events are vindicating their judgment. The issue was whether the natural power resources of the Government would be turned over to private exploitation. But wouldn't it be an interesting situation if President Hoover were compelled to go before the Republican National Convention in 1932 without the votes of the California delegation?

It grieves me profoundly to relate that the Young plan for a merger of radio, cable, and telegraph communications is quite dead. Conceived—as Owen D. Young himself has confessed—in patriotism and born—as the world knows—to the plaudits of the press, it has perished at the hands of a lamentably unimaginative Senate committee, ably assisted by a number of witnesses who knew exactly what Mr. Young's radio corporation had done to them, and why. The official obsequies may occur any day. Notable among those who had a recent part in the frustration of this magnificent conception was Walter S. Gifford, president of the American Telephone & Telegraph Co. Dignified, as befits the head of the world's largest corporation, and suave beyond description, Mr. Gifford neatly pointed out that a monopoly in international communications would require the acquisition of his own company, which is preparing to lay a huge talking cable from Newfoundland to Ireland. As for the threat of British competition, which so agitated Mr. Young, Mr. Gifford did not rudely characterize it as a "bogy"; he merely indulged in a slight smile and said: "I am not impressed by it." Oddly enough, however, the most grievous thrust was delivered not by the four-billion-dollar Mr. Gifford but by the 29-year-old Detroit policeman, who told in simple language what happened to Detroit, Chicago, Indianapolis, St. Louis, and other cities when they sought to install police radio systems for use in capturing criminals. Mr. Young's messianic Radio Corporation promptly confronted them with two alternatives: The first, that of being sued for patent infringement if they built their own equipment; the second, that of purchasing the equipment from the Radio Corporation at prices ranging from two to four times what it would cost to build it. The city of Detroit, ignoring all threats, proceeded to build its own system, whereupon the Radio Corporation refused to sell it the transmitting tubes, which are vital to its operation, and of which the Radio Corporation of America has a monopoly. The Detroit police department is compelled to get along with tubes bootlegged to it by local broadcasting stations! Nevertheless the results have been astounding. The witness, Lieut. Kenneth R. Cox, and Police Commissioner Rutledge told of an immediate reduction of 54 per cent in the number of burglaries and an increase of 45 per cent in the number of captures and convictions. Murderers were surprised at the scene of their crimes. Bank bandits were surrounded and killed or captured before they could leave the banks they were robbing. Burglars were caught in the act. The police radio system, which Cox perfected while serving as a patrolman in the daytime and amusing himself with radio experiments at night, was pronounced by Commissioner Rutledge to be "the most effective aid devised for the apprehension of criminals during this century." It largely nullifies the advantages of quick get-away afforded by the automobile.

Was the attitude of the Radio Corporation affected by these salutary results? It was not. When Cox was summoned to crime-ridden Chicago to install a similar system, that unhappy city was immediately faced with the R. C. A. ultimatum: "Buy from us, or be sued." God knows, Chicago needed anything that would reduce crime, and the world knows it couldn't afford to be sued. "The result," Lieutenant Cox testified, "is that Chicago is paying $117,000 for equipment, when it could have built a far superior system for $48,000." "And this," exclaimed Senator WHEELER, "is the corporation that was organized for patriotic reasons!" All of which, obviously, prompts the old question: When does the Department of Justice intend to act?

Mr. NORRIS. Mr. President, all the things I have mentioned, it seems to me, have a bearing upon the question before us. All of them lead up to the question whether we want to increase the majority of the Supreme Court that is in favor of the kind of government I have outlined, or whether we are opposed to that, whether we want still to say to the people of the United States that the right—it sometimes reduces itself to a right—of a municipality to own an electric-light plant, the right of a State commission to fix the rates that shall be charged by a public-utility plant, shall be governed by the Supreme Court, or whether in their sovereign right the people, through their legislatures or through Congress, shall have the right to fix the policy and let the Supreme Court pass only on the law.

Let me show what Mr. Hughes and the party to which he belongs are doing; I do not mean political party, I mean economic party, I mean those who believe in the kind of government I have been describing, ruled and controlled by wealth and combinations. Those who believe in mergers blotting out the Government, to be consistent, should vote for Mr. Hughes. Those who do not believe that way, in my judgment should vote against him.

To show what the Supreme Court is doing, I am going to take one case, a very recent case, one decided last month, and I take it only as an illustration. It is only one of dozens. I take it in preference to others, because it is the latest case on the subject decided by the Supreme Court.

This case was decided January 6, 1930. It has been referred to several times in the debate.

It was a case wherein the right of the public service commission to fix a rate of fare for the United Railway & Electric Co. of Baltimore was involved. The question involved, about which everything circled, was the valuation placed upon the property of the railroad company.

The proper authorities had entered an order that this street-railway company in Baltimore should have the right to charge a 10-cent cash fare and that they should be required to sell four tokens for 35 cents. The railway company objected to that order. They said it was confiscatory, they took it into court, and it finally reached the Supreme Court of the United States.

The people of the United States ought to know that the Supreme Court of the United States has said in its decision that the rate fixed over there, a 10-cent cash fare and four tokens for 35 cents, is confiscatory. They said the company was entitled to more money.

Mr. President, I have often thought that if some of these court decisions giving street railways the right to increase their fares are followed generally, and street-car companies are authorized to charge these exorbitant fares, they are going to drive the people away from the street cars, and the next thing we can expect in the District of Columbia—perhaps it will not apply in Baltimore, since there, probably, the question would be taken to the Maryland State Legislature—will be that after fares have been increased and made so high that people will walk in preference to riding, we will be called upon to pass a law compelling people to ride on the street cars, or perhaps the Supreme Court will issue a mandamus against them and order them to do so. It has gone so far over in Baltimore that it seems to me people of ordinary means, the ordinary laborer, the ordinary workingman, the ordinary working girl, can not afford to pay fare on the street cars in Baltimore to ride back and forth; but the Supreme Court says they must increase the fare.

Mr. Justice Sutherland, former United States Senator from Utah, rendered the majority opinion of the court. I want to read a few extracts from the majority opinion and some from the minority opinion, and then I am going to ask permission to print the entire majority opinion and the two dissenting opinions in the RECORD as a part of my remarks.

Let me first say that the question arose as to how much the property was worth. It all revolved about the one question of the value to be put on the property. The points discussed in the opinion and in the dissenting opinions all referred to valuation. The same thing is true of the Indianapolis water-rate case, and the same is true in the recent O'Fallon Railroad case which came up from St. Louis. It is all a question of valuation. I want the country to know what order the Supreme Court of the United States has made for the fixing of valuation. While we are talking about great lawyers and able lawyers, I want to say that any man on a farm out in North Dakota could read this majority opinion and tear it all to pieces. It does not take a lawyer to do that. Things are stated in there that have the backing of the Supreme Court of the United States which would not bear the test of the reasoning of an eighth-grade school child.

In the first place, the tracks were laid in the streets of Baltimore. The people of Baltimore permitted the company to lay the tracks there and never charged them a penny for permitting them to do so. That franchise was given to them; it was free; but when they came to fix a valuation on the railroad for rate-making purposes, the company put a value upon that franchise of $5,000,000. Who is there that does not know that is wrong? Does it take a lawyer to see that sin? Does it take Justice Hughes to say that that is right? But the Supreme Court of the United States said it was right. Justice Sutherland said:

> The commission fixed a rate of fare permitting the company to earn a return of 6.26 per cent on this valuation.

Let us consider that point for a moment. The order which the Supreme Court set aside, and which they said was confiscatory, under their own valuation, under all the sins committed under that valuation, letting the company have their own way, still gave them an income of 6.26 per cent, and the Supreme Court of the United States said it was confiscatory!

Mr. President, in reality this is what the Supreme Court of the United States did. They said it was an unreasonable rate, and when we read the opinion we find them making their argument along that line. But, I contend, and I do not believe any lawyer in the United States will contradict it, that the Supreme Court of the United States has no authority to say whether a rate is reasonable or unreasonable. They only get jurisdiction by virtue of that provision in the Constitution which says we shall not take private property without just compensation. So the question of confiscation is out. It was not for them to say that this railroad company ought to earn 6 per cent or 7 per cent or 8 per cent, but they did say it. The court went away beyond their authority under the Constitution of the United States. Is there a man or woman within the sound of my voice now who will dare to say for a moment that a return of 6.26 per cent constitutes confiscation of property? The very statement of it is its own denial.

Mr. BRATTON. Mr. President——

The PRESIDING OFFICER (Mr. TYDINGS in the chair). Does the Senator from Nebraska yield to the Senator from New Mexico?

Mr. NORRIS. I yield.

Mr. BRATTON. I was very much interested in what the Senator said a moment ago about including in valuing the Baltimore property an item of $5,000,000 for easement.

Mr. NORRIS. Yes; they did call it an "easement."

Mr. BRATTON. As I understand it, and I think the fact is, the law of Maryland, disclosed by Mr. Justice Brandeis's dissenting opinion, expressly forbids including a franchise in fixing valuation for rate-making purposes.

Mr. NORRIS. That is true.

Mr. BRATTON. But in order to circumvent that inhibition under the law of Maryland they denominated the right to lay their tracks in the streets and use the streets for that purpose as an easement.

Mr. NORRIS. Yes; they called it an easement instead of a franchise.

Mr. BRATTON. And fixed a value upon that so-called easement of $5,000,000 when the law of the State forbade putting any value whatever upon a franchise.

Mr. NORRIS. That is true. The Senator anticipated me. I am going to go a little further than he did, however.

Mr. GLASS. Mr. President——

The PRESIDING OFFICER. Does the Senator from Nebraska yield to the Senator from Virginia?

Mr. NORRIS. I yield.

Mr. GLASS. Right on that point, the Supreme Court of the United States has not the constitutional right to determine a question of that sort, and since it has determined that 6.26 per cent profit is confiscatory, would not that mean, carrying it to its logical conclusion, that the minimum restriction in a great majority of the States of the Nation upon the rate of rediscount, which generally speaking is 6 per cent, is confiscatory?

Mr. NORRIS. Yes; I think it would.

Mr. GLASS. And would it not mean that the limit of profit prescribed by the Federal statute for the Federal reserve banks now practically controlling the credits of the country is confiscatory?

Mr. NORRIS. I should think that might apply if we carry it into the banking business.

Mr. President, I have forgotten just where I was when the Senator from New Mexico [Mr. BRATTON] interrupted me, but I want to go a little further with the idea that his question brings out. As Senators will find when they read this opinion, Maryland has said by statute that no street railway shall have a right, for the purpose of increasing rates, to put any value upon a franchise for the use of the street that did not cost it anything. What did these people do? They laid their tracks in the streets of Baltimore, but they said, "That is not a franchise, that is an easement, and the legislature has not said we should not charge upon easements, so we will call that $5,000,000." That little fiction, it seems to me, could not get by a schoolboy, who would see that that was merely a method of evading the law. But suppose there were no statutes; let us say that the statute was silent; where is the economist who will for a moment contend that a street railway has the right to value a franchise for which it paid nothing, but which was given to it by the public, for the purpose of charging the public a rate upon the public's own property, upon the public's own gift—for that is what it means.

But that is not all, Mr. President. Maryland, by statute, has fixed 6 per cent as the maximum amount of interest that can be collected in that State. Think of that! If the Senator who is now gracing the Chair, the senior Senator from Maryland [Mr. TYDINGS] should go home to-night and to-morrow should borrow some money from a bank in Baltimore and agree to pay 7 per cent for it, he would not need to pay it under the law of Maryland. That would be usury. Six per cent is the maximum in Maryland under the statutes of that State, and yet the Supreme Court of the United States has said that when it comes to a street railway company having a monopoly, a return of 6.26 per cent is confiscation, even though there is included in the valuation an item of $5,000,000 for something that never cost them a penny.

That is the doctrine of the Supreme Court. That is the faction of the Supreme Court which will admit Mr. Hughes to full membership just as soon as we confirm his nomination which is now before us. Are we going to stand for it? Are we going to put that burden upon the American people? The next question that goes to the Supreme Court may come from some little town in North Carolina over an electric-light rate, and the Supreme Court will decide the same way in that case. So when we say that this does not amount to much because it is only Federal laws this court will consider and pass on, I say they will pass on a case from any school district in the United States if it is so shaped that they can invoke the doctrine of confiscation.

There is another item in this valuation. Let me read further from Justice Sutherland:

> The commission fixed a rate of fare permitting the company to earn a return of 6.26 per cent on this valuation. The case resolves itself into the simple question whether that return is so inadequate as to result in a deprivation of property in violation of the due process of law clause of the fourteenth amendment.

The Supreme Court held that it does. Further on Justice Sutherland said:

> There is much evidence in the record to the effect that in order to induce the investment of capital in the enterprise or to enable the company to compete successfully in the market for money to finance its operations, a net return upon the valuation fixed by the commission should not be far from 8 per cent.

That is what they say—8 per cent. If they get less than that it is confiscation. You have to violate the law of your own State. You can pad your valuation with millions of dollars for something that never cost you a penny and add such items all together and get 8 per cent on the entire thing and tax the people of the community to pay it, and make them pay it, too.

There was another question involved in valuation and that was the question of depreciation. The authorities of Maryland said that they should set aside a certain amount for depreciation, and here is an economic question that comes into the case and not a question of law. Members of the Supreme Court are passing on an economic question, a business question that is met by every business corporation in the United States, as will be seen from these opinions.

> Depreciation shall be reckoned on the cost of the thing that is depreciated or the present value.

That is a little different from fixing a valuation for rate-making purposes. That question is not involved. It is a question of depreciation. The authorities of Maryland said that the depreciation should be reckoned upon the cost of the thing that was depreciated and the Supreme Court of the United States said it had to be reckoned upon the present value of the thing depreciated, making a vast difference and increasing the valuation several million dollars.

Under the theory that $5,000,000 ought to be excluded because nothing was paid for the franchise, and that depreciation ought to be reckoned upon the cost of the property depreciating, then the rate which was fixed, which the court set aside, would bring a return of 7.74 per cent, or almost 8 per cent. That was the real question involved; that was the only honest basis of the valuation of the property under which the company, which has a monopoly, would have a return of 7.74 per cent; but the Supreme Court set that aside, because they said it was "confiscation of property."

There will be found in the dissenting opinion of Justice Brandeis a most elaborate analysis of that proposition, in which he goes into the customary practices of business. Some think there ought to be no item of depreciation in connection with such a property as a railroad, and there is a very good argument in support of such a position. They contend that the railroad should be kept in repair, and that the expense of keeping in repair and the replacement of the parts which wear out constitute a part of the upkeep. If that be correct, there is no justification for the item of appreciation and no such item is necessary. However, for the purpose of this case we must assume that some allowance is going to be made for depreciation, and the only question involved is, On what shall depreciа-

tion be based? I quote further the majority opinion of Mr. Justice Sutherland:

Sound business management requires that after paying all expenses of operation, setting aside the necessary sums for depreciation, payment of the interest and reasonable dividends, there should still remain something to be passed to the surplus account; and a rate of return which does not admit of that being done is not sufficient to assure confidence in the financial soundness of the utility to maintain its credit and to enable it to raise money necessary for the proper discharge of its public duties.

I do not think anybody will find fault with that statement; I think it is sound doctrine; but let us go on to the next sentence:

In this view of the matter, a return of 6.26 per cent is clearly inadequate.

There, it seems to me, it is as plain as the shining sun that the court is wrong, and it does not require a lawyer to see it. Even the State of Maryland has provided by law that a private citizen can not collect more than 6 per cent, but the Supreme Court of the United States says this corporation need not be satisfied with over 6 per cent but that it has a right to complain and to get 8 per cent, notwithstanding the law of Maryland.

The opinion continues:

In the light of recent decisions of this court and other Federal decisions—

Now listen—

it is not certain that rates securing a return of 7½ per cent or even 8 per cent on the value of the property would not be necessary to avoid confiscation.

That is plain; the Supreme Court is entitled to some credit for speaking plainly, for it practically said in that sentence to every utility of the United States, no matter where located, to every municipality in the United States that has an electric-light plant operated by a private party, a railroad, a gas company, or water company, "If you are getting less than 8 per cent, come here to this tribunal and we will declare that you must be paid more." A payment of less than that amount is "confiscation," the court says. Where do we expect that doctrine to carry us? What right has the court to say that? No authority has given it a right to fix rates; no provision of the Constitution has delegated to the Supreme Court the right to say what rate is reasonable or unreasonable. It has no such authority; it has taken it; it has assumed it; and because there is no appeal the people must abide by its decision. That is the reason why the people are interested in the selection of the right kind of men to sit on the Supreme Court Bench. I will now read a little more from Mr. Justice Sutherland's opinion:

The allowance for annual depreciation made by the commission was based upon cost.

That is the question upon which I was speaking a while ago.

The court of appeals held that this was erroneous and that it should have been based upon present value. The court's view of the matter was plainly right.

I wish I could ask every citizen of the United States on that question to read the argument of Justice Brandeis and the authorities from which he quotes, not courts, not tribunals, but business institutions and private corporations all over the known world as to their practice. It is not a question of law, but it is an economic question. The Supreme Court is again legislating. The opinion states—and it makes no other argument, to speak of, but merely makes the statement that depreciation should be reckoned on present value.

One of the items of expense to be ascertained and deducted is the amount necessary to restore property worn out or impaired, so as continuously to maintain it as near as practicable at the same level of efficiency for the public service.

Again, the court says:

It is the settled rule of this court that the rate base is present value, and it would be wholly illogical to adopt a different rule for depreciation.

That is the only argument they make. They fly in the face of all economic decisions in the United States, as will be seen from the opinion of Mr. Justice Brandeis, and in the face of a decision of the Supreme Court itself.

So word has gone out to every State and every municipality and every little hamlet, upon all of which the heavy hand of the Supreme Court of the United States rests, that every private corporation supplying them with any of the necessities of life can go to that court and get relief if they are receiving less than 8 per cent on their investment. Not only that, but the Supreme Court will let them put in as a part of their value things that the people gave to them. The court will let them charge 8 per cent upon the streets of the city, owned by the people, and will let them do it in perpetuity, throughout all eternity. That is the law which has come down to us from the Supreme Court of the United States. It is no wonder that the people will rise up in anger when they realize that President Hoover wants to perpetuate that kind of a rule in the highest judicial tribunal of the land.

Mr. President, I want to read a few extracts from the dissenting opinion written by Mr. Justice Brandeis and concurred in by Mr. Justcie Holmes and Mr. Justice Stone, the latter of whom also wrote an opinion of his own.

The claim—

Says Justice Brandeis—

is that the order confiscates its property because the fare fixed will yield, according to estimates, no more than 6.26 per cent upon the assumed value. There are several reasons why I think the order should be held valid.

A net return of 6.26 per cent upon the present value of the property of a street railway enjoying a monopoly in one of the oldest, largest, and richest cities on the Atlantic seaboard would seem to be compensatory.

Is there a man, woman, or child in the United States who would contradict that statement of Justice Brandeis? Nobody except a majority of the members of the Supreme Court has ever undertaken to dispute a proposition as plain as that.

Moreover, the estimated return is in fact much larger, if the rules which I deem applicable are followed. It is 6.70 per cent if, in valuing the rate base, the prevailing rule which eliminates franchises from a rate base is applied.

Take that $5,000,000 out, and under the company's own figures at the rate of which it complained it would be getting a return of 6.70 per cent on its investment.

Now, listen to this:

And it is 7.78 per cent if also, in lieu of the deduction for depreciation ordered by the court of appeals, the amount is fixed, either by the method of an annual depreciation charge computed according to the rules commonly applied in business, or by some alternative method, at the sum which the long experience of this railway proves to have been adequate for it.

This is an old street railway. It knows from experience how long a rail will last, how long the average switch will last, how long the average car will last, and so on.

Justice Brandeis says, further on:

We are concerned solely with the adequacy or inadequacy of the return under the guaranties of the Federal law. In determining whether a prescribed rate is confiscatory under the Federal Constitution, franchises are not to be included in valuing the plant, except for such amounts as were actually paid to the State, or a political subdivision thereof, as consideration for the grant.

It is admitted in this case that the company gave nothing for the franchise, that the streets were given to them free.

Franchises to lay pipes or tracks in the public streets, like franchises to conduct the business as a corporation, are not donations to a utility of property by the use of which profit may be made. They are privileges granted to utilities to enable them to employ their property in the public service and make profit out of such use of that property. As stated in the New Hampshire statute, "all such franchises, rights, and privileges being granted in the public interest only" are "not justly subject to capitalization against the public."

The right to the streets is called an easement.

Had the "easements" been called franchises it is probable that no value would have been ascribed to them for rate-making purposes. For the Maryland public utilities law, in common with the statutes of many States, forbids the capitalization of franchises.

Mr. President, let us consider the situation for a moment. Here is the State of Maryland providing by law that 6 per cent is the legal rate of interest. Here is a public-utility corporation coming to the great city of Baltimore and saying, "Let us put in a street-car outfit and car tracks here"; and the city says, "All right; put them in." They put in these tracks. They have operated them for many years. The city did not charge the street-car company a penny for the right to use the streets. Then the company came to charge a rate, and it is necessary, therefore, to fix the value of that franchise; so they just add $5,000,000 as the value of what they call an easement, the right to lay their track in the street. Because they do that, it therefore follows, if that is to be allowed, that a rate of 8 per cent interest through all eternity—if Baltimore lives that long—will be charged against the people of that city, who made the rail-

road company a present of the very thing on which the company are charging them interest!

Can that be defended? That is the law of the Supreme Court of the United States, and we are about to elevate to the Supreme Bench another man who belongs to the same class of people, appointed by the same class of people, whose whole record shows that he stands for that doctrine.

Then, Mr. President, they take off a depreciation which increases the rate. The more they take off, the larger the rate has to be to bring an ample return. They take off a rate on a valuation plan that does not have the approval of any business institution in the world, as Mr. Justice Brandeis shows.

Let me read some of the things he said about it. This is from Mr. Justice Brandeis's dissenting opinion:

Third. The business device known as the depreciation charge appears not to have been widely adopted in America until after the beginning of this century. Its use is still stoutly resisted by many concerns. Wherever adopted, the depreciation charge is based on the original cost of the plant to the owner.

Then he goes on:

When the great changes in price levels incident to the World War led some to question the wisdom of the practice of basing the charge on original cost, the Chamber of Commerce of the United States warned business men against the fallacy of departing from the accepted basis. And that warning has been recently repeated: "When the cost of an asset, less any salvage value, has been recovered, the process of depreciation stops—the consumer has paid for that particular item of service."

Then he goes on, and he gives a list—two or three pages—of the leading business institutions of the country that stand for this proposition, with nobody on the other side. I ask to have that list printed as a part of my remarks.

There being no objection, the matter referred to was ordered to be printed in the RECORD, as follows:

(1904) H. L. C. Hall, Manufacturing Costs, 132; (1905) B. C. Bean, Cost of Production, 75–98; (1911) H. A. Evans, Cost Keeping and Scientific Management, 30–35; S. Walton and S. W. Gilman, Auditing and Cost Accounts (11 Modern Business), 63–70; F. E. Webner, Factory Costs, 171; (1913) R. H. Montgomery, Auditing Theory and Practice, 317–339, (1921 ed.) vol. 1, p. 634; (1915) F. H. Baugh, Principles and Practice of Cost Accounting, 42, 46–51; (1916) C. H. Scovell, Cost Accounting and Burden Application, 81–89; (1918) H. C. Adams, American Railway Accounting, 99–100, 279; R. B. Kester, Accounting Theory and Practice, vol. 2, 99–209, 202; (1920) I. A. Berndt, Costs, Their Compilation and Use in Management, 101–106; Hodge and McKinsey, Principles of Accounting, 74–75; J. F. Sherwood, Public Accounting and Auditing, vol. 1, 145–154; (1921) DeW. C. Eggleston and F. B. Robinson, Business Costs, 294–304; G. S. Armstrong, Essentials of Industrial Costing, 169–179; D. E. Burchell, Industrial Accounting, series 1, No. 3, I, A. 2.d.(3); (1922) G. E. Bennett, Advanced Accounting, 212–234, 219; (1923) P. M. Atkins, Industrial Cost Accounting for Executives, 119–122; E. J. Borton, Cost Accounting Principles and Methods, 82–83; (1924) J. H. Bliss, Management Through Accounts, 304–314; W. H. Bell, Auditing, 232–240; H. P. Cobb, Shoe Factory Accounting and Cost Keeping, 232–240; C. B. Couchman, The Balance Sheet, 22–23, 49–56, 201–203; J. L. Dohr, Cost Accounting Theory and Practice, 378–387, 380; F. W. Kilduff, Auditing and Accounting Handbook, 380; E. L. Kohler and P. W. Pettengill, Principles of Auditing, 112–114; W. B. Lawrence, Cost Accounting, 308–310; A. B. Manning, Elements of Cost Accounting, 80; C. H. Scovell, Interest as a Cost, 83–84; F. E. Webner, Factory Overhead, 227; (1925) D. F. Morland and R. W. McKee, Accounting for the Petroleum Industry, 43–53; (1926) R. E. Belt, Foundry Cost Accounting, 240–243; DeW. Eggleston, Auditing Procedure, 319–320; (1927) S. Bell, Practical Accounting, 130–143; T. A. Budd and E. N. Wright, The Interpretation of Accounts, 195, 251–263, 253; H. R. Hatfield, Accounting, 145–146; (1928) C. R. Boland, Shoe Industry Accounting, 158–159; H. E. Gregory, Accounting Reports in Business Management, 158, 164–166; W. H. Hemingway, The National Financial Statement Interpreter, § 12, pp. 13–20; G. A. Prochazka, Accounting and Cost Finding for the Chemical Industries, 206–211; (1929) A. H. Church, Manufacturing Costs and Accounts, 5, 205ff; R. H. Montgomery, Auditing (revision by W. J. Graham), 116–119; T. H. Sanders, Industrial Accounting, 144–145. See E. A. Saliers, Depreciation, Principles, and Applications (1923), 56, 410, 425. At the fourth international cost conference of the National Association of Cost Accountants, held in Buffalo, N. Y., September 10–13, 1923, the question whether depreciation charges should be based on original cost or replacement value was debated. On a vote at the close of the debate "nearly all rose" in favor of original cost. (N. A. C. C. Yearbook, 1923, pp. 183–201, at 201.) The rule is the same in England. (E. W. Newman, The Theory and Practice of Costing (1921), 20.)

National Coal Association, annual meeting at Chicago, May 21–23, 1919, report and suggestions of committee on standard system of accounting and analysis of costs of production; see also W. B. Reed, Bituminous Coal Mine Accounting, 1922, pp. 119–126; Midland Club (manufacturing confectioners, Chicago), Official Cost Accounting and Cost Finding Plan, 1919, p. 43; United Typothetæ of America: Standard Cost Finding System, pp. 4, 7; Treatise on the Practical Accounting System for Printers, 1921, p. 15; The Standard Book on Cost Finding, by E. J. Koch, published by U. T. of A., pp. 13–14; Treatise on the Standard Accounting System for Printers, Interlocking with the Standard Cost Finding System, 1920, pp. 44–45; Tanners' Council: Uniform Cost Accounting System for the Harness Leather Division of the Tanning Industry, officially adopted December 1, 1921, p. 31; Uniform Cost Accounting System for the Sole and Belting Leather Division of the Tanning Industry, 1921, p. 31; Uniform Cost Accounting System for the Calf, Kip, and Side Upper; Glove, Bag, and Strap; and Patent Leather Divisions of the Tanning Industry, 1922, pp. 35, 48; Uniform Cost Accounting System for the Goat and Cabretta Leather Division of the Tanning Industry, 1922, p. 27; National Retail Coal Merchants' Association, Complete Uniform Accounting System for Retail Coal Merchants, 1922, Account A–120, p. 6; the Associated Knit Underwear Manufacturers of America, Cost Control for Knit Underwear Factories, 1924, p. 52; National Knitted Outerwear Associaton (Inc.), Cost Accounting Manual for the Knitted Outerwear Industry (by W. Lutz), 1924, pp. 18–20; American Drop Forging Institute, Cost Committee, Essentials of Drop Forging Accounting, 1924, pp. 36–37; Rubber Association of America (Inc.), Manual of Accounts and Budgetary Control for the Rubber Industry, by the accounting committee, 1926, pp. 70, 71, 75, 79, 82; Packing House Accounting, by committee on accounting of the Institute of American Meat Packers, 1929, p. 325; Cost Accounting for Throwsters, issued by commission throwsters' division of The Silk Association of America (Inc.), 1928, pp. 29–30; Cost Accounting for Broad Silk Weavers, issued by the board silk division of The Silk Association of America (Inc.), 1929, pp. 44–45.

Mr. NORRIS. He says further:

The business men's practice of using a depreciation charge based on the original cost of the plant in determining the profits or losses of a particular year has abundant official sanction and encouragement. The practice was prescribed by the Interstate Commerce Commission in 1907—

Now, listen to this—

when, in cooperation with the Association of American Railway Accounting Officers, it drafted the rule, which is still in force, requiring steam railroads to make an annual depreciation charge on equipment. It has been consistently applied by the Federal Government in assessing taxes on net income and corporate profits, and by the tax officials of the several States for determining the net profits or income of individuals and corporations. Since 1911 it has been applied by the United States Bureau of the Census. Since 1915 it has been recommended by the Department of Agriculture. Since 1917 by the Bureau of Mines. In 1916 it was adopted by the Federal Trade Commission in recommendations concerning depreciation issued to manufacturers. In 1917 it was prescribed by the United States Fuel Administration and by the War Ordnance Department. In 1918 by the Aircraft Production Board. In 1921 it was prescribed by the Federal Power Commission, and it is continued in the revised rules of 1928. In 1923 it was adopted by the depreciation section of the Interstate Commerce Commission in the report of tentative conclusions concerning depreciation charges submitted to the steam railroads, telephone companies, and carriers by water, pursuant to paragraph 5 of section 20 of the interstate commerce act, as amended by transportation act, 1920. On November 2, 1926, it was prescribed by the commission in Telephone and Railroad Depreciation Charges (118 I. C. C. 295). A depreciation charge based on original cost has been uniformly applied by the public-utility commissions of the several States when determining net income, past or expected, for rate-making purposes.

Fourth. In 1927 the business men's practice of basing the depreciation charge on cost was applied by this court in United States *v.* Ludley (274 U. S. 295, 300–301), a Federal income-tax case, saying: "The amount of the allowance for depreciation is the sum which should be set aside for the taxable year in order that, at the end of the useful life of the plant in the business, the aggregate of the sums set aside will (with the salvage value) suffice to provide an amount equal to the original cost."

All those authorities, besides 50 or 60 that I have not read; and, in support of the decision of the majority of the court, not a single authority cited! They do it by main strength.

It makes me think of the Senator from Indiana [Mr. WATSON] yesterday here, when he boasted of the fact that he had behind him the votes necessary to put this nomination through. Oh, that is not the work of a statesman! That is the work of a man who boasts and brags. That is the work of a political machine. "I have the votes, I will notify you. We can put it across." That kind of a system, that kind of a sentiment, has brought down to ruin many a government in the history of this world.

Mr. President, I read one more extract from Mr. Justice Brandeis. He says, speaking of the depreciation charge:

It is clear that the management of the railways deemed the charge of 5 per cent of gross revenues adequate. On that assumption it paid dividends on the common stock in each year from 1923 through 1927.

I hope you will get this, because this is an important proposition. This railroad company had been setting aside 5 per cent from 1923 clear through to 1927. They had been doing just what they refused to do after that year.

If the addition to the depreciation charge ordered by the court of appeals was proper for the year 1928, it should have also been made in the preceding five years.

Get that. If that rule had been followed during the preceding five years, this street-car company would not have been allowed under the law to pay a single cent of dividends, and yet they paid them. They would have been liable criminally under the laws of Maryland; and yet that is what they are doing now. That is what they were asking the Supreme Court to permit them to do after 1927.

Upon such a recasting of the accounts—

Says Mr. Justice Brandeis—

no profits were earned after 1924, and there was no surplus fund from which dividends could have been paid legally. If the contention now urged by the railways is sound, the management misrepresented by its published accounts its financial condition and the results of operation of the several years, and it paid dividends in violation of law.

You would hardly think the Supreme Court of the United States would put its hand of approval upon that conduct; but it has, and we are helpless.

Mr. President, we might spend a month in going through other opinions showing where the Supreme Court is drifting. I know that we who are fearful that we are going to take a misstep are going to be defeated in this contest. We all realized from the very beginning that we had no hope of victory; that you have a cruel majority; that you have boasted of it; and that you will put across whatever program you desire. Yet we feel justified in having taken up the time of the Senate and, I hope, attracted the attention of the country during the last two or three days to call to the attention of all our liberty-loving citizens the terrible condition that confronts us now and that we are called upon to vote on when we vote on this nomination. We feel it deeply. We have felt that it was a duty that we owed to our country and to humanity generally.

We believe that if we permit the Supreme Court to go on drifting, drifting, there will soon be heard the crashing of the old ship of state upon the rocks of destruction. We want to avoid it. We are patriotic. We want to save our country from this danger. We want to save the people of the United States, for the burdens that this other doctrine will heap upon their backs will make every man who sweats and toils for his home, for his fireside, contribute a large amount of his earnings in the way of taxes to keep up this unholy, this ungodly theory that combinations of wealth, that monopolies and mergers are the only things that are entitled to consideration at the hands of government.

We want a Supreme Court that will stand between the people and destruction and robbery. If we have called attention to it, we did it in a respectful way. We have done it without any feeling of hatred or animosity. We have done it in a feeling of charity. We have done it in a conscientious belief that some good will come out of the truth when it permeates this great country, and that profit will come perhaps even to the Supreme Court if they will read the debates of the Senate, and if the majority members of that court will even read the dissenting opinions of their brethren, Brandeis, Holmes, and Stone; and that out of it all, somewhere, in some way, good will come.

The PRESIDING OFFICER (Mr. TYDINGS in the chair). Without objection, the request of the Senator from Nebraska that the matter to which he has referred be incorporated in the RECORD is granted.

The matter referred to is as follows:

SUPREME COURT OF THE UNITED STATES

Nos. 55 and 64. October term, 1929

THE UNITED RAILWAYS & ELECTRIC CO. OF BALTIMORE, APPELLANT, *v.* HAROLD E. WEST, CHAIRMAN, AND J. FRANK HARPER AND STEUART PURCELL, MEMBERS, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND—HAROLD E. WEST, CHAIRMAN, AND J. FRANK HARPER AND STEUART PURCELL, MEMBERS, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND, APPELLANTS, *v.* THE UNITED RAILWAYS & ELECTRIC CO. OF BALTIMORE. APPEALS FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

(January 6, 1930)

Mr. Justice Sutherland delivered the opinion of the court.

The first of these titles (No. 55) is an appeal, and the second (No. 64) a cross appeal, from a decree of the Court of Appeals of Maryland. The case arose from an order of the State public service commission limiting the rate of passenger fares to be charged by the United Railways & Electric Co. for carrying passengers over its lines in the city of Baltimore. The company, by its appeal, attacks the commission's order as confiscatory. The cross-appeal seeks to raise the question whether the amount for annual depreciation allowed the company should be calculated upon the present value of the company's property or upon its cost.

Upon application of the company to the commission, made in 1927, for an increase in fares, the commission passed an order making an increase, but not to the extent sought. Thereupon, suit was brought in a State circuit court on the grounds that the rate fixed by the commission was confiscatory and that the annual allowance for depreciation was calculated upon a wrong basis, namely, upon cost, instead of present value of depreciable property. The circuit court, in an able opinion, sustained the company upon both grounds, and enjoined the enforcement of the commission's order. On appeal, the court of appeals upheld the view of the circuit court in respect of depreciation, but held the rate of return not confiscatory. (155 Md. 572.) Thereupon, the commission increased the depreciation allowance in accordance with the decree of the court and adjusted the rate of fare to the extent necessary to absorb the increased allowance. A second suit and an appeal to the court of appeals followed, and that court entered a decree (— Md. —; 145 Atl. 340) sustaining the action of the commission; and it is that decree which is here for review.

The facts, so far as we find it necessary to review them, are not in dispute. The company since 1899 has owned and operated all the street railway lines in the city of Baltimore. Its present capital structure consists of $24,000,000 of common stock, $38,000,000 of ordinary bonded indebtedness, and $14,000,000 of perpetual-income bonds redeemable at the option of the company after 1949. Due to the increased use of automobiles, the total number of passengers carried has for some time steadily decreased, while the number carried during the "rush hours" has increased. This has resulted in an increase of expenses in proportion to the whole number of passengers carried, since equipment, etc., must be maintained and men employed sufficient to care for the increased business of the "rush hours," notwithstanding their reduced productiveness during the hours of decreased business. Since the war operating expenses have almost if not quite doubled.

The present value of the property used was fixed by the commission at $75,000,000, and this amount was accepted without question by both parties in the State circuit court and in the court of appeals. Included in this valuation is $5,000,000 for easements in the streets of Baltimore. The court of appeals had held in another and earlier case, Miles *v.* Pub. Serv. Comm., 151 Md. 337, that the easements constituted an interest in real estate and that in making up the rate base their value should be included. The commission in the present case, accordingly, included the amount in the valuation and made no attack upon the item in the courts below, where it passed as a matter not in dispute. The item is now challenged by counsel for the commission in this court, and other objections to the valuation are suggested, likewise for the first time. We do not find it necessary to consider this challenge or these objections, for, if they ever possessed substance, they come too late. In the further consideration of the case, therefore, we accept, for all purposes, the valuation of $75,000,000 as it was accepted and acted upon by parties, commission, and courts below.

The commission fixed a rate of fare permitting the company to earn a return of 6.26 per cent on this valuation; and, so far as No. 55 is concerned, the case resolves itself into the simple question whether that return is so inadequate as to result in a deprivation of property in violation of the due process of law clause of the fourteenth amendment. In answering that question, the fundamental principle to be observed is that the property of a public utility, although devoted to the public service and impressed with a public interest, is still private property; and neither the corpus of that property nor the use thereof constitutionally can be taken for a compulsory price which falls below the measure of just compensation. One is confiscation no less than the other.

What is a fair return within this principle can not be settled by invoking decisions of this court made years ago based upon conditions radically different from those which prevail to-day. The problem is one to be tested primarily by present-day conditions. Annual returns upon capital and enterprise, like wages of employees, cost of maintenance, and related expenses, have materially increased the country over. This is common knowledge. A rate of return upon capital invested in street-railway lines and other public utilities which might have been proper a few years ago no longer furnishes a safe criterion either for the present or the future. Lincoln Gas Co. *v.* Lincoln, 250 U. S. 256, 268. Nor can a rule be laid down which will apply uniformly to all sorts of utilities. What may be a fair return for one may be inadequate for another, depending upon circumstances, locality, and risk. Willcox *v.* Consolidated Gas Co., 212 U. S. 19, 48–50. The general rule recently has been stated in Bluefield Co. *v.* Pub. Serv. Comm., 262 U. S. 679, 692–695:

"What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on

the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally.

* * * * * * *

"Investors take into account the result of past operations, especially in recent years, when determining the terms upon which they will invest in such an undertaking. Low, uncertain, or irregular income makes for low prices for the securities of the utility and higher rates of interest to be demanded by investors. The fact that the company may not insist as a matter of constitutional right that past losses be made up by rates to be applied in the present and future tends to weaken credit, and the fact that the utility is protected against being compelled to serve for confiscatory rates tends to support it. In this case the record shows that the rate of return has been low through a long period up to the time of the inquiry by the commission here involved."

What will constitute a fair return in a given case is not capable of exact mathematical demonstration. It is a matter more or less of approximation about which conclusions may differ. The court in the discharge of its constitutional duty on the issue of confiscation must determine the amount to the best of its ability in the exercise of a fair, enlightened, and "independent judgment as to both law and facts." Ohio Valley Co. *v.* Ben Avon Borough, 253 U. S. 287, 289; Bluefield Co. *v.* Pub. Serv. Comm., supra, pp. 689, 692; Lehigh Valley R. R. *v.* Commissioners, 278 U. S. 24, 36.

There is much evidence in the record to the effect that in order to induce the investment of capital in the enterprise or to enable the company to compete successfully in the market for money to finance its operations, a net return upon the valuation fixed by the commission should be not far from 8 per cent. Since 1920 the company has borrowed from time to time some $18,000,000, upon which it has been obliged to pay an average rate of interest ranging well over 7 per cent and this has been the experience of street-railway lines quite generally. Upon the valuation fixed, with an allowance for depreciation calculated with reference to that valuation, and upon the then prescribed rates, the company for the years 1920 to 1926, both inclusive, obtained a return of little more than 5 per cent per annum. It is manifest that just compensation for a utility, requiring for efficient public service skillful and prudent management as well as use of the plant, and whose rates are subject to public regulation, is more than current interest on mere investment. Sound business management requires that after paying all expenses of operation, setting aside the necessary sums for depreciation, payment of interest and reasonable dividends, there should still remain something to be passed to the surplus account; and a rate of return which does not admit of that being done is not sufficient to assure confidence in the financial soundness of the utility to maintain its credit and enable it to raise money necessary for the proper discharge of its public duties. In this view of the matter, a return of 6.26 per cent is clearly inadequate. In the light of recent decisions of this court and other Federal decisions, it is not certain that rates securing a return of 7½ per cent, or even 8 per cent, on the value of the property would not be necessary to avoid confiscation.[1] But this we need not decide, since the company itself sought from the commission a rate which it appears would produce a return of about 7.44 per cent, at the same time insisting that such return fell short of being adequate. Upon the present record, we are of opinion that to enforce rates producing less than this would be confiscatory and in violation of the due process clause of the fourteenth amendment.

Complaint also is made of the action of the commission in abolishing the second-fare zone established by the company on what is called the Halethorpe line and substituting a single fare for the two fares theretofore exacted. Halethorpe is an unincorporated community lying outside of the limits of Baltimore City. With a single fare, the extension of the line to Halethorpe is not profitable, but, nevertheless, it is an integral part of the railway system and it will be enough if the commission shall so readjust the fares as to yield a fair return upon the property, including the Halethorpe line, as a whole. If in doing so the commission shall choose not to restore the second fare but to retain in force the single fare, we perceive no constitutional objection.

The commission sought a review of the question in respect of the annual depreciation allowance, both by a cross appeal and later by petition for certiorari. The question of jurisdiction on the cross appeal as well as the consideration of the petition for certiorari were postponed to the hearing on the merits. We do not now find it necessary to decide either matter. As the amount of depreciation to be allowed was contested throughout, is a necessary element to be determined in fixing the rate of fare, and is closely related in substance to the case brought here by the company's appeal, it well may be considered in connection therewith. In these circumstances neither cross appeal nor certiorari is necessary to present the question.

The allowance for annual depreciation made by the commission was based upon cost. The court of appeals held that this was erroneous and that it should have been based upon present value. The court's view of the matter was plainly right. One of the items of expense to be ascertained and deducted is the amount necessary to restore property worn out or impaired, so as continuously to maintain it as nearly as practicable at the same level of efficiency for the public service. The amount set aside periodically for this purpose is the so-called depreciation allowance. Manifestly this allowance can not be limited by the original cost, because, if values have advanced, the allowance is not sufficient to maintain the level of efficiency. The utility "is entitled to see that from earnings the value of the property invested is kept unimpaired, so that at the end of any given term of years the original investment remains as it was at the beginning." Knoxville *v.* Water Co., 212 U. S. 1, 13–14. This naturally calls for expenditures equal to the cost of the worn-out equipment at the time of replacement; and this, for all practical purposes, means present value. It is the settled rule of this court that the rate base is present value, and it would be wholly illogical to adopt a different rule for depreciation. As the Supreme Court of Michigan, in Utilities Commission *v.* Telephone Co., 228 Mich. 658, 666, has aptly said: "If the rate base is present fair value, then the depreciation base as to depreciable property is the same thing. There is no principle to sustain a holding that a utility may earn on the present fair value of its property devoted to public service, but that it must accept and the public must pay depreciation on book cost or investment cost regardless of present fair value. We repeat, the purpose of permitting a depreciation charge is to compensate the utility for property consumed in service, and the duty of the commission, guided by experience in rate making, is to spread this charge fairly over the years of the life of the property." And see S. W. Tel. Co. *v.* Pub. Serv. Comm., 262 U. S. 276, 288; Georgia Ry. *v.* R. R. Comm., 262 U. S. 625, 633.

We conclude that an injunction should have been granted against the commission's order.

No. 55. Decree reversed and cause remanded for further proceedings not inconsistent with this opinion.

No. 64. Cross appeal dismissed. Certiorari denied.

A true copy.

Test:

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*Clerk Supreme Court, United States.*

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SUPREME COURT OF THE UNITED STATES

Nos. 55 and 64. October term, 1929

THE UNITED RAILWAYS & ELECTRIC CO., APPELLANT, *v.* HAROLD E. WEST, CHAIRMAN, ET AL., ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND—HAROLD E. WEST, CHAIRMAN, ET AL., APPELLANT AND PETITIONER, *v.* THE UNITED RAILWAYS & ELECTRIC CO., ON APPEAL FROM AND CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

(January 6, 1930)

Mr. Justice Brandeis dissenting.

Acting under the direction of the Court of Appeals, Public Service Commission *v.* United Railways & Electric Co., 155 Md. 572, the commission entered on November 28, 1928, an order permitting the railways to increase its rate of fare to 10 cents cash, four tokens for 35 cents.[1] That order was sustained in United Railways & Electric Co. *v.*

[1] See, for example, Galveston Elec. Co. *v.* Galveston, 258 U. S. 388, 400; Brush Elec. Co. *v.* Galveston, 262 U. S. 443; City of Fort Smith *v.* Southwestern Bell Tel. Co., 270 U. S. 627, affirming per curiam Southwestern Bell Tel. Co. *v.* City of Fort Smith, 294 Fed. 102, 108; Patterson *v.* Mobile Gas Co., 271 U. S. 131, affirming in part Mobile Gas Co. *v.* Patterson, 293 Fed. 208, 221; McCardle *v.* Indianapolis Co., 272 U. S. 400, 419 and note; Ottinger *v.* Brooklyn Union Co., 272 U. S. 579, modifying and affirming Kings County Lighting Co. *v.* Prendergast, 7 F. (2d) 192, and Brooklyn Union Gas Co. *v.* Prendergast, 7 F. (2d) 628; R. R. Commission *v.* Duluth St. Ry., 273 U. S. 625, affirming Duluth St. Ry. Co. *v.* Railroad and Warehouse Commission, 4 F. (2d) 543; City of Minneapolis *v* Rand, 285 Fed. 818, 830; New York Telephone Co. *v.* Prendergast, 300 Fed. 822, 826; Id., 11 F. (2d) 162, 163; New York & Richmond Gas Co. *v.* Prendergast, 10 F. (2d) 167, 209.

[1] The rate of fare on the railways' lines had been 5 cents until 1918. Then it applied for authority to increase its fares "purely as a war emergency and during the period of war conditions." Six increases have since been granted: To 6 cents on January 7, 1919, Re United Rys. & Elec. Co., P. U. R. 1919C, 74; to 7 cents cash, 4 tokens for 26 cents, on September 30, 1919, Re United Rys. & Elec. Co., P. U. R. 1920A, 1; to a flat 7 cents on December 31, 1919, Re United Rys. & Elec. Co., P. U. R. 1920A, 995; to 8 cents, 2 tokens for 15 cents, on May 26, 1924, Re United Rys. & Elec. Co., P. U. R. 1924D, 713. This was the rate of fare when, on August 1, 1927, the railways filed with the commission the present application for a flat 10-cent fare. In its original decision thereon the commission authorized a fare of 9 cents cash, 3 tokens for 25 cents, Re United Rys. & Elec. Co., P. U. R. 1928C, 604. To provide the additional revenue required by the decision of the court of appeals concerning depreciation, the commission then raised the fare to 10 cents cash, 4 tokens for 35 cents, Re United Rys. & Elec. Co., P. U. R. 1929A, 180. The railways is still seeking to secure a flat 10-cent fare. The railways had by order of the commission been protected from jitney competition. See P. U. R. 1928C, 604, 632.

West, 145 Atl. 340, and the railways has appealed to this court. The claim is that the order confiscates its property because the fare fixed will yield, according to the estimates, no more than 6.26 per cent upon the assumed value. There are several reasons why I think the order should be held valid.

A net return of 6.26 per cent upon the present value of the property of a street railway enjoying a monopoly in one of the oldest, largest, and richest cities on the Atlantic seaboard would seem to be compensatory. Moreover, the estimated return is in fact much larger, if the rules which I deem applicable are followed. It is 6.70 per cent if, in valuing the rate base, the prevailing rule which eliminates franchises from a rate base is applied. And it is 7.78 per cent if also, in lieu of the deduction for depreciation ordered by the Court of Appeals, the amount is fixed, either by the method of an annual depreciation charge computed according to the rules commonly applied in business, or by some alternative method, at the sum which the long experience of this railway proves to have been adequate for it.

First. The value of the plant adopted by the commission as the rate base was fixed by it at $75,000,000 in a separate valuation case, decided on March 9, 1926, modified, pursuant to directions of the court of appeals,[2] on February 1, 1928, and not before us for review, Re United Railway & Electric Co., P. U. R. 1926C, 441; P. U. R., 1928B, 737. Included in this total is $5,000,000 representing the value placed upon the railways' so-called "easements." If they are excluded, the estimated yield found by the commission would be increased by 0.44 per cent. That is, the net earnings, estimated at $4,691,606 would yield, on a $70,000,000 rate base, 6.70 per cent. The people's counsel contended that since these "easements" are merely the privileges gratuitously granted to the railways by various county and municipal franchises to lay tracks and operate street cars on the public highways,[3] they should be excluded from the rate base when considering whether the order is confiscatory in violation of the Federal Constitution. This alleged error of Federal law in the valuation may be considered on this appeal. For the rate allowed by the commission is attacked on the assumption that the return on the property is only 6.26 per cent.[4] Compare United States *v.* American Railway Express Co., 265 U. S. 425, 435; Union Tool Co. *v.* Wilson, 259 U. S. 107, 111.

Where a rate order is alleged to be void under the Federal Constitution because confiscatory, the question whether a specific class of property should be included in the rate base is to be determined not by the State law but by the Federal law. Whether the return is sufficient under the State law is a question which does not concern us. We are concerned solely with the adequacy or inadequacy of the return under the guarantees of the Federal law. In determining whether a prescribed rate is confiscatory under the Federal Constitution, franchises are not to be included in valuing the plant, except for such amounts as were actually paid to the State or a political subdivision thereof as consideration for the grant. Cedar Rapids Gas Light Co. *v.* Cedar Rapids, 223 U. S. 655, 669; Des Moines Gas Co. *v.* Des Moines, 238 U. S. 153, 169; Galveston Electric Co. *v.* Galveston, 258 U. S. 388, 396; Georgia Railway & Power Co. *v.* Railroad Commission, 262 U. S. 625, 632.[5] Franchises to lay pipes or tracks in the public streets, like franchises to conduct the business as a corporation, are not donations to a utility of property by the use of which profit may be made. They are privileges granted to utilities to enable them to employ their property in the public service and make profit out of such use of that property. As stated in the New Hampshire statute, "all such franchises, rights, and privileges being granted in the public interest only" are "not justly subject to capitalization against the public."[6]

Had the "easements" been called franchises it is probable that no value would have been ascribed to them for rate-making purposes. For the Maryland public utilities law, in common with the statutes of many States,[7] forbids the capitalization of franchises. But calling these privileges "easements" does not differentiate them for rate purposes from ordinary corporate franchises, when applying the Federal Constitution. In none of the cases excluding franchises from plant value was any distinction made in this respect between ordinary corporate franchises and franchises to use the public streets, although many of the cases involved privileges of the latter type. The court of appeals and the commission were influenced by the fact that the so-called easements were taxed. This fact does not justify including them in the rate base. Corporate franchises are frequently taxed;[8] and although taxed, are not valued for rate purposes. Compare Georgia Ry. & Power Co. *v.* Railroad Commission, 278 Fed. 242, 244–245. The "easements" differ from ordinary franchises only in the technicality that, under the law of Maryland, the right to use the streets is, for taxation purposes, real property, whereas ordinary franchises are personal property.

Second. The amount which the commission fixed in its original report as the appropriate depreciation charge was $883,544. That sum is 5 per cent of the estimated gross revenues. Referring to the method of arriving at the amount of the charge the commission there said: "The commission believes that it might be more logical to base the annual allowance for depreciation upon the cost of depreciable property rather than upon gross revenues. The relation between gross revenues and depreciation is remote and indirect, while there is a direct relation between the cost of a piece of property and the amount that ought to be set aside for its consumption by use. However, the allowance which this commission has made for depreciation, 5 per cent of the gross revenues, has provided fairly well for current depreciation and retirements. * * * Moreover, there is a broad twilight zone between depreciation and maintenance, and it may well be (and without any impropriety) that the maintenance account has been used to a certain extent to provide for depreciation. * * * Any increase in the gross revenues resulting from an increase in fares would increase the amounts that would be set aside for depreciation and maintenance."[9] Without deciding that this allowance was inadequate, the court of appeals held that, as a matter of law, the depreciation charge should be based upon the then value of the depreciable property as distinguished from its cost; and directed the commission to revise its estimates accordingly. Pursuant to that direction, the commission added, in its supplemental report, $755,116 to the depreciation charge. The addition was, I think, ordered by the court of appeals under a misapprehension of the nature and function of the depreciation charge. And, in considering the adequacy of the return under the Federal Constitution, the estimate of the net earnings should accordingly be increased by $755,116, which, on the rate base of $70,000,000, would add 1.08 per cent to the estimated return.

That the court of appeals erred in its decision becomes clear when the nature and purpose of the depreciation charge are analyzed and the methods of determining its proper amount are considered. The annual account of a street railway or other business is designed to show the profit or loss, and to acquaint those interested with the condition of the business. To be true, the account must reflect all the operating expenses incurred within the accounting period. One of these is the wearing out of plant. Minor parts, which have short lives and are consumed wholly within the year, are replaced as a part of current repairs.[10] Larger plant units, unlike supplies, do not wear out within a single accounting period. They have varying service lives, some remaining useful for many years. Experience teaches that at the end of some period of time most of these units, too, will wear out physically or cease to be useful in the service. If the initial outlay for such units is entirely disregarded, the annual account will not reflect the true results of operation and the initial investment may be lost. If, on the other hand, this original expense is treated as part of the operating expenses of the year in which the plant unit was purchased or was retired or replaced, the account again will not reflect the true results of operation. For operations in one year will then be burdened with an expense which is properly chargeable against a much longer period of use. Therefore, in ascertaining the profits of a year it is generally deemed necessary to apportion to the operations of that year a part of

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[2] Miles *v.* Public Service Comm., 151 Md. 337.

[3] A small part of these "easements" are privileges granted by franchises to operate street cars on portions of the streets which the public uses only at intersections with other streets.

[4] The commission's opinions and orders in the valuation proceeding are referred to in the several pleadings and are printed as part of the record in this case.

[5] Also Westinghouse El. & Mfg. Co. *v.* Denver Tramway Co., 3 F. (2d) 285, 302, affirmed sub nom. City and County of Denver *v.* Denver Tramway Co., 23 F. (2d) 287; Pub. Util. Comm. *v.* Capital Traction Co., 17 F. (2d) 673, 675–676; Re Capital City Telegraph Co., P. U. R. 1928D, 763, 766, 776 (Mo.); Re Tracy Gas Co., P. U. R. 1927C, 177, 181 (Cal.); Re Southern Pacific Co., P. U. R. 1926A, 298, 303; Re Potomac Electric Power Co., 1917D, 563, 680. No case has been found which accepts the rule laid down by the court of appeals.

[6] New Hampshire—P. L. 1926, vol. 2, ch. 241, sec. 10, p. 943.

[7] Arizona—Rev. Stat. 1913, § 2328 (b), p. 811; California—Public utilities law, § 52b, Deering Codes & Gen. L. Supp. 1925–1927; Act 6386, § 52 (b), p. 1811; Idaho—Comp. Stat. 1919, vol. 1, § 4290, p. 1221; Illinois—Cahill's Rev. Stat. 1929, ch. 11a, § 36, p. 2047; Indiana—Burns' Ann. Stat. 1926, vol. 3, § 12763, p. 1258; Maryland—Bagby's Ann. Code, 1924, vol. 1, art. 23, § 381, p. 832; Missouri—Rev. Stat. 1919, vol. 3, §§ 10466, 10484, 10508, pp. 3425, 3262, 3279; Nebraska—Comp.. Stat. 1922, § 676, p. 321, amended by L. 1925, ch. 141; New Hampshire—P. L. 1926, vol. 2, ch. 241, § 10, p. 943; New Jersey—1911–1924, Cum. Supp. to Comp. Stat. vol. 2, *167–24, p. 2886; New York—Cahill's Cons. L. 1923, ch. 49, §§ 69, 101, pp. 1746, 1759; 1929 Supp. ch. 49, §§ 55, 82, pp. 282, 283; Pennsylvania—Stat. 1920 (West Pub. Co.) § 18095, p. 1745. Some of the statutes, in addition to prohibiting the capitalization of franchises, specifically direct that no franchise shall be valued for rate-making purposes; Iowa—Code, 1927, § 8315, p. 1076; Minnesota—Gen. Stat. 1923, ch. 28, § 4823, p. 683; § 5304, p. 733; North Dakota—Supp. to Comp. Laws, 1913–1925, ch. 13B, § 4609c37, p. 969; § 4609c40, p. 971; Ohio—Throckmorton's Ann. Code, 1929 §§ 614–23, 614–46, 614–59, pp. 156, 160, 164; Wisconsin—Stat. 1925, vol. 1, 184.15, p. 1446.

[8] Society For Savings *v.* Coite, 6 Wall. 594; Cream of Wheat Co. *v.* Grand Forks, 253 U. S. 325, 328; Roberts & Schaefer Co. *v.* Emmerson, 271 U. S. 50, 55.

[9] P. U. R. 1928C, 604, 637, 640, 641.

[10] Compare Classification of Operating Revenues and Operating Expenses of Steam Roads, prescribed by Interstate Commerce Commission, issue of 1914, Special Instructions No. 2, p. 31. As to practice of the telephone companies (Bell system), see testimony on rehearing of Telephone and Railroad Depreciation Charges, 118 I. C. C. 295, Docket Nos. 14700 and 15100, L. G. Woodford, Mar. 19, 1928 (printed by American Tel. & Tel. Co.), pp. 52–53.

the total expense incident to the wearing out of plant. This apportionment is commonly made by means of a depreciation charge.[11]

It is urged by the railways that if the base used in determining what is a fair return on the use of its property is the present value, then logically the base to be used in determining the depreciation charge—a charge for the consumption of plant in service—must also be the present value of the property consumed.[12] Much that I said about valuation in Southwestern Bell Telephone Co. *v.* Public Service Commission (262 U. S. 276, 289) and St. Louis & O'Fallon Railroad Co. *v.* United States (279 U. S. 461, 488) applies to the depreciation charge. But acceptance of the doctrine of Smyth against Ames does not require that the depreciation charge be based on present value of plant, for an annual depreciation charge is not a measure of the actual consumption of plant during the year. No such measure has yet been invented. There is no regularity in the development of depreciation. It does not proceed in accordance with any mathematical law. There is nothing in business experience or in the training of experts which enables man to say to what extent service life will be impaired by the operations of a single year or of a series of years less than the service life.[13]

Where a plant intended, like a street railway, for continuing operation is maintained at a constant level of efficiency it is rarely possible to determine definitely whether or not its service life has in fact lessened within a particular year. The life expectancy of a plant, like that of an individual, may be in fact greater, because of unusual repairs or other causes, at the end of a particular year than it was at the beginning.[14] And even where it is known that there has been some lessening of service life within the year, it is never possible to determine with accuracy what percentage of the unit's service life has, in fact, been so consumed. Nor is it essential to the aim of the charge that this fact should be known. The main purpose of the charge is that irrespective of the rate of depreciation there shall be produced, through annual contributions, by the end of the service life of the depreciable plant, an amount equal to the total net expense of its retirement.[15] To that end it is necessary only that some reasonable plan of distribution be adopted. Since it is impossible to ascertain what percentage of the service life is consumed in any year,[16] it is either assumed that depreciation proceeds at some average rate (thus accepting the approximation to fact customarily obtained through the process of averaging) or the annual charge is fixed without any regard to the rate of depreciation.

The depreciation charge is an allowance made pursuant to a plan of distribution of the total net expense of plant retirement. It is a bookkeeping device introduced in the exercise of practical judgment to serve three purposes. It preserves the integrity of the investment. Compare Knoxville *v.* Knoxville Water Co. (212 U. S. 1, 13–14). It serves to distribute equitably throughout the several years of service life the only expense of plant retirement which is capable of reasonable ascertainment—the known cost less the estimated salvage value. And it enables those interested, through applying that plan of distribution, to ascertain as nearly as is possible the actual financial results of the year's operation. Many methods of calculating the amount of the allowance are used.[17] The charges to operating expenses in the several years and in the aggregate vary according to the method adopted.[18] But under none of these methods of fixing the depreciation charge is an attempt made to determine the percentage of actual consumption of plant falling within a particular year or within any period of years less than the service life.[19]

Third. The business device known as the depreciation charge appears not to have been widely adopted in America until after the beginning of this century.[20] Its use is still stoutly resisted by many concerns.[21] Wherever adopted, the depreciation charge is based on the original cost of the plant to the owner. When the great changes in price levels incident to the World War led some to question the wisdom of the practice of basing the charge on original cost, the Chamber of Commerce of the United States warned business men against the fallacy of departing from the accepted basis.[22] And that warning has been recently repeated: "When the cost of an asset, less any salvage value, has been recovered, the process of depreciation stops—the consumer has paid for that particular item of service. There are those who maintain that the obligation of the consumer is one rather of replacement—building for building, machine for machine. According to this view depreciation should be based on replacement cost rather than actual cost. The replacement theory substitutes for something certain and definite, the actual cost, a cost of reproduction which is highly speculative and conjectural and requiring frequent revision. It, moreover, seeks to establish for one expense a basis of computation fundamentally different from that used for the other expenses of doing business. Insurance is charged on a basis of actual premiums paid, not on the basis of probable premiums three years hence; rent on the amount actually paid, not on the problematical rate of the next lease; salaries, light, heat, power, supplies are all charged at actual, not upon a future contingent cost. As one writer has expressed it, 'The fact that the plant can not be replaced at the same cost, but only at much more, has nothing to do with the cost of its product but only with the cost of future product turned out by the subsequent plant.' As the product goes through your factory it should be burdened with expired, not anticipated, costs. Charge depreciation upon actual cost less any salvage."[23]

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[11] The depreciation charge or allowance is the annual or monthly amount thus apportioned as the year's equitable share of the expense of ultimate retirement of plant. The yearly charge is by many concerns allocated in monthly installments. A depreciation reserve is a bookkeeping classification to which the depreciation charges are periodically credited. A depreciation fund is a fund separately maintained in which amounts charged for depreciation are periodically deposited. A depreciation reserve does not necessarily connote the existence of a separate fund.—E. A. Saliers, Depreciation, Principles, and Applications (1923) 80; W. A. Paton and R. A. Stevenson, Principles of Accounting (1918), 491–505.

[12] If the depreciation charge measured the actual consumption of plant, the logic of this conclusion might seem forceful. It should be pointed out, therefore, that, apart from the fact developed in the text, that the charge does not measure the actual consumption of plant, the contention is specious. A business man investing in a long-lived plant does not expect to have its value returned to him in installments corresponding to the loss of service life. The most that a continuing business like a street railway may expect is that at the end of the service life it shall be reimbursed with the then value of the original investment, or with funds sufficient to replace the plant. As will be shown presently, there is no basis for assuming that either the value of the original investment or the replacement cost will, at the end of the service life, equal or approximate the present value. See note 49, infra.

[13] "Depreciation of physical units used in connection with public utilities or, indeed, with any other industries, does not proceed in accordance with any mathematical law. * * * There is no regularity in the development of the increasing need for repairs; there is no regularity in the progress of depreciation; but in order to devise a reasonable plan for laying aside allowances from year to year to make good the depreciation as it accrues, and to provide for the accumulation of a sum equivalent to the cost less salvage of a unit by the time it is retired, some theory of depreciation progress must be assumed on which such allowances may be based." (81 Am. Soc. of Civil Eng. Transactions (1917), 1311, 1462–1463. Compare E. A. Saliers, op. cit., note 11, at p. 132.)

[14] "In our valuation work they (the railroad companies) have consistently taken the position that no depreciation exists in a railroad property which is maintained in 100 per cent efficiency." (Proposed Report of Interstate Commerce Commission on Telephone and Railroad Depreciation Charges, Docket Nos. 14700 and 15100, Aug. 15, 1929, p. 20.)

[15] Some contend "that where accruing depreciation is dependent, not upon lapse of time but upon amount and extent of use, it is unscientific to provide for depreciation charges in equal annual installments, and that these charges should be made to correspond with units of use rather than of time. By relating the charges to units of use they contend that the burden of the charges will be spread more equitably, to the financial advantage of the carrier, over alternating periods of light and heavy traffic." Proposed report of the Interstate Commerce Commission, note 14, supra, p. 15. The practices of street railways differ in respect to the manner of laying the year's contribution to the depreciation reserve. Some lay a fixed percentage upon the gross revenues; some a number of cents per car-mile; some a fixed percentage on the cost of the depreciable plant. Though expressed in different terms, the amount contemplated to be charged may in fact be based on cost. See, e. g., Re Elizabethtown Water Co., P. U. R. 1927E, 39.

[16] See testimony on rehearing of Telephone and Railroad Depreciation Charges, note 10, supra, A. B. Crunden, Mar. 21, 1928 (printed by American Telephone & Telegraph Co.), pp. 108–109; Dr. M. R. Maltbie, June 27, 1928, transcript, p. 1396.

[17] See note 56, infra.

[18] See note 55, *infra*.

[19] See E. A. Saliers, *op. cit.*, note 11, supra, at p. 132: "This method reducing balance, * * * does not take into account either the actual rapidity with which depreciation occurs, or the various modifying factors which may show their influence at any time. Since this objection is common to all methods, other considerations will probably lead to a choice."

[20] The first case in which this court expressly recognized a depreciation allowance as a part of operating expenses is Knoxville *v.* Knoxville Water Co., 212 U. S. 1, 13, decided in 1909. In earlier cases cognizance was not taken of it. Compare Union Pacific R. R. Co. *v.* United States, 99 U. S. 402, 420; United States *v.* Kansas Pacific Ry Co., 99 U. S. 455, 459; San Diego Land & Town Co. *v.* Jasper, 189 U. S. 439, 446. See also Lincoln Gas Co. *v.* Lincoln, 223 U. S. 349, 363. Among street railways, the Milwaukee Electric Railway & Light Co. became the pioneer by adopting it in 1897. Others followed in 1905. (31 Street Ry Journal 169–170, 687–688). In England the adoption of the depreciation charge had been hastened by a provision in the income tax law. (Customs and Inland Revenue Act, 1878, 41 Vict., ch. 15, sec. 12.) Massachusetts Acts, 1849, ch. 191, provided that the annual report required of railroads should give full information on "Estimated depreciation beyond the renewals, viz, road and bridges, buildings, engines, and cars." See also Act, 1846, ch. 251. But in Massachusetts, as elsewhere in the United States, depreciation charges have not been customary among railroads, except in respect to equipment, pursuant to the rule prescribed by the Interstate Commerce Commission in 1907.

[21] See Telephone and Railroad Depreciation Charges, 118 I. C. C. 295, 301–303; Proposed Report of August 15, 1929, note 14, supra, p. 5–12, 17–20; H. E. Riggs, Depreciation of Public-Utility Properties (1922), 78–92.

[22] See a pamphlet, Depreciation, issued on October 15, 1921, by the fabricated productions department (now the department of manufacture) of the Chamber of Commerce of the United States.

[23] See pamphlet Depreciation, Treatment in Production Costs, issued by Department of Manufacture, Chamber of Commerce of the United States, No. 512 (May, 1929), p. 7. In the Foreword it is said: "In presenting this treatise on depreciation we have drawn not only on our own resources but also have had the cooperation of many manufacturers, industrial engineers, and accountants."

Such is to-day, and ever has been, the practice of public accountants.[24] Their statements are prepared in accordance with principles of accounting which are well established, generally accepted, and uniformly applied. By those accustomed to read the language of accounting a depreciation charge is understood as meaning the appropriate contribution for that year to the amount required to make good the cost of the plant which ultimately must be retired. On that basis public accountants certify to investors and bankers the results of operation, whether of public utilities or of manufacturing or mercantile concerns. Corporate securities are issued, bought, and sold, and vast loans are made daily in reliance upon statements so prepared. The compelling logic of facts which led business men to introduce a depreciation charge has led them to continue to base it on the original cost of the plant despite the great changes in the price level incident to the World War. Basing the depreciation charge on cost is a rule prescribed or recommended by those associations of business men who have had occasion since the World War to consider the subject.[25]

Business men naturally took the plant at cost, as that is how they treat other articles consumed in operation. The plant, undepreciated, is commonly carried on the books at cost; and it is retired at cost. The net profit or loss of a business transaction is commonly ascertained by deducting from the gross receipts the expenditures incurred in producing them. Business men realized fully that the requirements for replacement might be more or less than the original cost. But they realized also that to attempt to make the depreciation account reflect economic conditions and changes would entail entry upon new fields of conjecture and prophecy which would defeat its purposes. For there is no basis in experience which can justify predicting whether a replacement, renewal, or substitution falling in some future year will cost more or less than it would at present, or more or less than the unit cost when it was acquired.

The business men's practice of using a depreciation charge based on the original cost of the plant in determining the profits or losses of a particular year has abundant official sanction and encouragement. The practice was prescribed by the Interstate Commerce Commission in 1907,[26] when, in cooperation with the Association of American Railway Accounting Officers, it drafted the rule, which is still in force,[27] requiring steam railroads to make an annual depreciation charge on equipment. It has been consistently applied by the Federal Government in assessing taxes on net income and corporate profits;[28] and by the tax officials of the several States for determining the net profits or income of individuals and corporations.[29] Since 1911, it has been applied by the United States Bureau of the Census.[30] Since 1915, it has been recommended by the Department of Agriculture.[31] Since 1917, by the Bureau of Mines.[32] In 1916, it was adopted by the Federal Trade Commission in recommendations concerning depreciation issued to manufacturers.[33] In 1917, it was prescribed by the United States Fuel Administration [34] and by the War Ordnance Department.[35] In 1918, by the Air Craft Production Board.[36]

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[24] (1904) H. L. C. Hall, Manufacturing Costs, 132; (1905) B. C. Bean, Cost of Production, 75–98; (1911) H. A. Evans, Cost Keeping and Scientific Management, 30–35; S. Walton and S. W. Gilman, Auditing and Cost Accounts (11 Modern Business), 63–70; F. E. Webner, Factory Costs, 171; (1913) R. H. Montgomery, Auditing Theory and Practice, 317–339 (1921 ed.), vol. 1, p. 634; (1915) F. H. Baugh, Principles and Practice of Cost Accounting, 42, 46–51; (1916) C. H. Scovell, Cost Accounting and Burden Application, 81–89; (1918) H. C. Adams, American Railway Accounting, 99–100, 279; R. B. Kester, Accounting Theory and Practice, vol. 2, 99–209, 202; (1920) I. A. Berndt, Costs, Their Compilation and Use in Management, 101–106; Hodge and McKinsey, Principles of Accounting, 74–75; J. F. Sherwood, Public Accounting and Auditing, vol. 1, 145–154; (1921) DeW. C. Eggleston and F. B. Robinson, Business Costs, 294–304; G. S. Armstrong, Essentials of Industrial Costing, 169–179; D. E. Burchell, Industrial Accounting, Series 1, No. 3, I, A. 2d. (3); (1922) G. E. Bennett, Advanced Accounting, 212–234, 219; (1923) P. M. Atkins, Industrial Cost Accounting for Executives, 119–122; E. J. Borton, Cost Accounting Principles and Methods, 82–83; (1924) J. H. Bliss, Management Through Accounts, 304–314; W. H. Bell, Auditing, 232–240; H. P. Cobb, Shoe Factory Accounting and Cost Keeping, 232–240; C. B. Couchman, The Balance Sheet, 22–23, 49–56, 201–203; J. L. Dohr, Cost Accounting Theory and Practice, 378–387, 380; F. W. Kilduff, Auditing and Accounting Handbook, 380; E. L. Kohler and P. W. Pettengill, Principles of Auditing, 112–114; W. B. Lawrence, Cost Accounting, 308–310; A. B. Manning, Elements of Cost Accounting, 80; C. H. Scovell, Interest As A Cost, 83–84; F. E. Webner, Factory Overhead, 227; (1925) D. F. Morland and R. W. McKee, Accounting for the Petroleum Industry, 43–53; (1926) R. E. Belt, Foundry Cost Accounting, 240–243; DeW. Eggleston, Auditing Procedure, 319–320; (1927) S. Bell, Practical Accounting, 130–143; T. A. Budd and E. N. Wright, The Interpretation of Accounts, 195, 251–263, 253; H. R. Hatfield, Accounting, 145–146; (1928) C. R. Boland, Shoe Industry Accounting, 158–159; H. E. Gregory, Accounting Reports in Business Management, 158, 164–166; W. H. Hemingway, The National Financial Statement Interpreter, sec. 12, pp. 13–20; G. A. Prochazka, Accounting and Cost Finding for the Chemical Industries, 206–211; (1929) A. H. Church, Manufacturing Costs and Accounts, 5, 205ff; R. H. Montgomery, Auditing (revision by W. J. Graham), 116–119; T. H. Sanders, Industrial Accounting, 144–145. See E. A. Saliers, Depreciation, Principles, and Applications (1923), 56, 410, 425. At the Fourth International Cost Conference of the National Association of Cost Accountants, held in Buffalo, N. Y., Sept. 10–13, 1923, the question whether depreciation charges should be based on original cost or replacement value was debated. On a vote at the close of the debate "nearly all rose" in favor of original cost. N. A: C. C. Yearbook, 1923, pp. 183–201 at 201. The rule is the same in England. E. W. Newman, The Theory and Practice of Costing (1921), 20.

[25] National Coal Association, Annual Meeting at Chicago, May 21–23, 1919, Report and Suggestions of Committee on Standard System of Accounting and Analysis of Costs of Production, see also W. B. Reed, Bituminous Coal Mine Accounting, 1922, pp. 119–126; Midland Club (Manufacturing Confectioners, Chicago) Official Cost Accounting and Cost Finding Plan, 1919, p. 43; United Typothetæ of America: Standard Cost Finding System, pp. 4, 7, Treatise On The Practical Accounting System for Printers, 1921, p. 15, The Standard Book on Cost Finding by E. J. Koch, published by U. T. of A., pp. 13–14, Treatise on the Standard Accounting System for Printers, Interlocking With the Standard Cost Finding System, 1920, pp. 44–45; Tanners' Council: Uniform Cost Accounting System for the Harness Leather Division of the Tanning Industry, officially adopted Dec. 1, 1921, p. 31, Uniform Cost Accounting System for the Sole and Belting Leather Division of the Tanning Industry, 1921, p. 31, Uniform Cost Accounting System for the Calf, Kip, and Side Upper; Glove, Bag, and Strap; and Patent Leather Divisions of the Tanning Industry, 1922, pp. 35, 48, Uniform Cost Accounting System for the Goat and Cabretta Leather Division of the Tanning Industry, 1922, p. 27; National Retail Coal Merchants Association, Complete Uniform Accounting System for Retail Coal Merchants, 1922, Account A–120, p. 6; The Associated Knit Underwear Manufacturers of America, Cost Control for Knit Underwear Factories, 1924, p. 52; National Knitted Outerwear Association (Inc.), Cost Accounting Manual for the Knitted Outerwear Industry (by W. Lutz), 1924, pp. 18–20; American Drop Forging Institute, Cost Committee, Essentials of Drop Forging Accounting, 1924, pp. 36–37; Rubber Association of America (Inc.), Manual of Accounts and Budgetary Control for the Rubber Industry, by the Accounting Committee, 1926, pp. 70, 71, 75, 79, 82; Packing House Accounting, by Committee on Accounting of the Institute of American Meat Packers, 1929, p. 325; Cost Accounting for Throwsters, issued by Commission Throwsters' Division of The Silk Association of America (Inc.), 1928, pp. 29–30; Cost Accounting for Broad Silk Weavers, issued by The Broad Silk Division of The Silk Association of America (Inc.), 1929, pp. 44–45. As there stated: "The use of replacement cost as a basis for depreciation charges has been eliminated due to the following reasons: 1. Depreciation is charged to manufacturing cost to absorb the reduction in value of capital assets through the effect of use and time. It does not represent an accumulation for the purpose of acquiring assets in the future. 2. The replacement cost theory is impractical because it would require a constant revaluation of assets. It is, furthermore, unlikely that any manufacturer would rebuild the same plant 10 years after its construction. 3. The depreciation charge absorbed in the cost of the product represents a charge for the use of present manufacturing facilities and can not have any connection with assets to be acquired in the future. The depreciation charge on new and more efficient equipment to be acquired in the future may be higher and, perhaps, offset by a general reduction in manufacturing cost per unit. It is not logical to base all other cost elements on present expenses and make the one exception in the case of depreciation" (p. 45).

[26] Classification of Operating Expenses as Prescribed by the Interstate Commerce Commission, Third Revised Issue 1907, pp. 10–12, 38, 44–51.

[27] Classification of Operating Revenues and Operating Expenses of Steam Roads Prescribed by the Interstate Commerce Commission, Issue of 1914, pp. 59, 61–68. Cf. Special Instructions 8, Id. p. 33.

[28] Act of Oct. 3, 1913, ch. 16, Sec. II, B, 38 Stat. 114, 167, United States Internal Revenue Regulations No. 33, Jan. 5, 1914, art. 129–146, p. 69–73; Act of Sept. 8, 1916, ch. 463, secs. 5(a) and 6(a), 39 Stat. 756, 759, 760, Regulations No. 33 (revised 1918), art. 159–165, pp. 80–82; act of Feb. 24, 1919 (revenue act of 1918), ch. 18, sec. 214(a), pars. (8) & (10), sec. 234 (a), pars. (7) & (9), 40 Stat. 1057, 1067–1068, 1078, Regulations 45, arts. 161–171, pp. 62–66; act of Nov. 23, 1921, ch. 136, § 214(a), pars. (8) & (10), and § 234(a), pars. (7) & (9), 42 Stat. 227, 240, 241, 255, 256, Regulations 62, arts. 161–171, pp. 74–78; act of June 2, 1924, ch. 234, § 214(a), pars. (8) & (9) and sec. 234(a), pars. (7) & (8), 43 Stat. 253, 270–271, 284–285, Regulations 65, arts. 161–171, pp. 54–58; act of Feb. 26, 1926, ch. 27, sec. 214(a), pars. (8) & (9) and sec. 234(a), pars. (7) & (8); 44 Stat. (part 2), 9, 27, 42–43, Regulations 69, arts. 161–170, pp. 56–60; act of May 29, 1928, ch. 852, sec. 23, pars. (k) & (l), secs. 113 & 114, 45 Stat. 791, 800, 818, 821, Regulations 74, arts. 201–210, pp. 51–56. See also Bureau of Internal Revenue, Bulletin "F," Income Tax, Depreciation, and Obsolescence (1920) 18; Outline for the Study of Depreciation and Maintenance, prepared by the Bureau of Internal Revenue (1926).

[29] N. L. McLaren and V. K. Butler, California Tax Laws of 1929, 117ff; Prentice-Hall Massachusetts State Tax Service (Personal), 1926–1928, pars. 13875–13877, p. 13559; Mississippi Income Tax Law of 1924 (issued by State tax commission), sec. 12 (a) (8), Regulations No. 1 (1925), arts. 136–138, pp. 52–53; New York State Tax Commission, Income Tax Bureau, Manual 22 (1922), arts. 171–176, pp. 35–36, Manual 25 (1925), arts. 171–176, pp. 33–34, C. C. H., 1928–29, Personal Income Tax, par. 4511, p. 2793; G. R. Harper, A Digest of the Oregon State Income Tax Act and Regulations (1924), 18; Wisconsin Tax Service (Henry B. Nelson (Inc.)), 1929, vol. 1, pp. 163–164.

[30] Uniform Accounts for Systems of Water Supply, arranged by the U. S. Bureau of the Census, American Water Works Association, and others (1911), 27.

[31] U. S. Department of Agriculture, Bulletin 178, Mar. 1, 1915, Cooperative Organization Business Methods, pp. 13–14; Bulletin 236, May 1, 1915, A System of Accounts for Farmers' Cooperative Elevators, p. 16; Bulletin 225, May 7, 1915, A System of Accounting for Cooperative Fruit Associations, p. 20; Bulletin 362, May 6, 1916, A System of Accounts for Primary Grain Elevators, p. 17; Bulletin 590, Feb. 27, 1918, A System of Accounting for Fruit Shipping Organizations, p. 23; Bulletin 985, A System of Accounting for Cotton Ginneries, pp. 23, 27.

[32] Department of the Interior, Bureau of Mines, Bulletin 158, Petroleum Technology 43, Cost Accounting for Oil Producers, 1917, pp. 111–112; Technical Paper 250, Metal Mine Accounting, 1920, p. 26.

[33] Federal Trade Commission, Fundamentals of a Cost System for Manufacturers, July 1, 1916, 12–13.

[34] U. S. Fuel Administration, A System of Accounts for Retail Coal Dealers, Nov. 1, 1917, p. 17.

[35] War Department, Office of the Chief of Ordnance, Form 2941, Definition of "Cost" Pertaining to Contracts, June 27, 1917, pp. 9–11.

[36] Bureau of Air Craft Production, General Ruling No. 28, May 3, 1918, of the rulings board of the finance department to the effect that in cost-plus contracts depreciation must be based on original cost and "In no case shall depreciation be based on the cost of reproduction at present prices." See E. A. Saliers, op. cit., note 11, p. 56.

In 1921, it was prescribed by the Federal Power Commission,[37] and it is continued in the revised rules of 1928.[38] In 1923, it was adopted by the depreciation section of the Interstate Commerce Commission in the report of tentative conclusions concerning depreciation charges submitted to the steam railroads, telephone companies, and carriers by water,[39] pursuant to paragraph 5 of section 20 of the interstate commerce act, as amended by transportation act, 1920.[40] On November 2, 1926, it was prescribed by the commission in Telephone and Railroad Depreciation Charges, 118 I. C. C. 295. A depreciation charge based on original cost has been uniformly applied by the public utility commissions of the several States when determining net income, past or expected, for rate-making purposes.[41]

[37] Rules and Regulations Governing the Administration of the Federal Water Power Act (1921), Regulation 16.

[38] Rules and Regulations Governing the Administration of the Federal Water Power Act (1928), Regulation 16, pp. 31–36.

[39] Bureau of Accounts, Depreciation Section, Report of the Preliminary Investigation of Depreciation Charges in Connection with Steam Roads and the Tentative Conclusions and Recommendations of the Depreciation Section for the Regulation of Such Charges, Docket No. 15100, Aug. 23, 1923, pp. 11–13; Same for Telephone Companies, Docket No. 14700, Mar. 10, 1923, pp. 6, 18–21.

[40] Act of Feb. 28, 1920, ch. 91, 41 Stat. 456, 493.

[41] Illinois—Re Middle States Telephone Co., P. U. R. 1929B, 390, 396; Re Dixon Water Co., P. U. R. 1929B, 403, 408; Re Vermont Telephone & Exchange Co., P. U. R. 1929B, 411, 415; Re East St. Louis & Interurban Water Co., P. U. R. 1928A, 57, 68; Re Pekin Water Works Co., P. U. R. 1928C, 266, 276; Re Kinloch-Bloomington Tel. Co., P. U. R. 1927E, 135, 142; Indiana—Re Home Tel. Co. of Elkhart County, P. U. R. 1928A, 445, 455; Re Logansport Home Tel. Co., 1928E, 714, 725; Re Butler Tel. Co., P. U. R. 1925A, 240, 242, P. U. R. 1927C, 800, 804; Minnesota—Re Duluth Ry. Co., P. U. R. 1927A, 41, 52, 55; Missouri—Re Capital City Water Co., P. U. R. 1928C, 436, 460–461; Re Clinton County Telephone Co., P. U. R. 1928B, 796, 807; Re Capital City Water Co., P. U. R. 1925D, 41, 56, 57; Nebraska—Re Platte Valley Tel. Corp., P. U. R. 1928C, 193, 200; Re Meadow Grove Tel. Co., 1928D, 472, 477; Re Madison Tel. Co., P. U. R. 1929B, 385, 389; New Jersey—Re Elizabethtown Water Co., P. U. R. 1927E, 39, 63; Re Coast Gas Co., P. U. R. 1923A, 349, 366; New York—Baird *v.* Burleson, P. U. R. 1920D, 529, 538; Utah—Re Big Spring Electric Co., P. U. R. 1927A, 655, 665–667; Wisconsin—Re Wisconsin-Minnesota Light & Power Co., P. U. R. 1920D, 428, 433–435; Milwaukee Electric Ry. & Light Co. *v.* Milwaukee, P. U. R. 1918E, 1, 58; but see Re Wisconsin Telephone Co., P. U. R. 1928B, 434; West Virginia—Re Cumberland & Allegheny Gas Co., P. U. R. 1928B, 20, 80; Re Clarksburg Light & Heat Co., P. U. R. 1928B, 290, 322–325; Re Pittsburgh & West Virginia Gas Co., P. U. R. 1927D, 844, 851; South Carolina—Re Rock Hill Tel. Co., P. U. R. 1928E, 221, 230, "We are of opinion that the cost of the property is the only possible reasonable authority upon which depreciation can be calculated. Depreciation is a reserve to equalize retirements and not a reserve to equalize replacements. A rate of depreciation based upon original cost even is little more than an intelligent guess, but based upon reproduction costs is the blindest kind of speculation. With the known original cost of a unit and an engineer's estimate of its service life and salvage value, * * * some semblance of accuracy might be reached. To guess its service life and salvage value is bad enough, but who would venture to guess what it would cost to reproduce it 10 or 20 years thereafter? * * * Depreciation reserve is intended to keep the investment level, but not to insure the hazards of varying future."

In its second report in the instant case the commission said: "The plan of providing for retirements at cost is that followed by the Interstate Commerce Commission and the utility regulatory commissions of most of the States and by all other utilities under the jurisdiction of this commission." P. U. R. 1929A, 180, 181.

The cost basis is required in the following classifications of accounts prescribed by the commissions of: Colorado—Uniform System of Accounts for electric light and power utilities, 1915, account No. 351, pp. 29–30; account No. 775, pp. 67–68; Uniform System of Accounts for gas utilities, 1916, account No. 351, p. 28, account No. 775, pp. 56–57; Uniform System of Accounts for water utilities, 1920, account No. 351, pp. 25–26, account No. 775, pp. 65–66; California—Uniform Classification of Accounts for telephone companies, 1913, pp. 54–55; for water corporations, 1919, pp. 14–15, account No. 29; for gas corporations, 1915, account No. 29, p. 15; for electric corporations, 1919, account No. 29, p. 15; Connecticut—Uniform System of Accounts for water companies, 1922, account No. 180, p. 17; Georgia—Uniform System of Accounts for telephone companies, 1920, pp. 6–7, account No. 12, p. 12, account No. 19, p. 16; Idaho—Uniform System of Accounts for water corporations, 1914, account 402, pp. 92–93; account W6, p. 10; for electric light and power companies, 1914, account 54, p. 29, account 215, p. 95; Indiana—Uniform System of Accounts for water utilities, 1920, account 370, p. 52, account 335, p. 82; for electric utilities, 1920, account 297, p. 73, account 309, p. 46; for heating utilities, 1920, account 22, p. 18, and account 118, p. 35; for electric railways, 1913, p. 52–53; Kansas—Uniform System of Accounts for class D telephone companies, 1920, p. 4; Massachusetts—Uniform System of Accounts for gas and electric companies, 1921, account G678, p. 96, E678, p. 118, also pp. 27–28; Minnesota—Uniform System of Accounts for telephone companies class C and D, 1918, accounting circular No. 52, account 360, pp. 24–25; Missouri—Uniform System of Accounts for class D telephone corporations, Public Service Commission General Order No. 22, 1918, pp. 9–10; Montana—Uniform Classification of Accounts for gas utilities, 1913, pp. 20–21, 35; for electric utilities (undated but after 1919), pp. 25, 42–43; for telephone utilities, 1913, pp. 22, 35; for water utilities (undated but after 1919), 26, 42; for street railways, 1913, 26, 41; New Hampshire—Uniform Classification of Accounts for gas utilities, Accounting Circular No. 2, 1914, account 220, p. 88, account 98, p. 53–54; New Jersey—Uniform System of Accounts for electric light, heat, and power utilities, 1915, account 215, pp. 26–27, account 494, p. 77; for street or traction railway utilities, 1919, p. 18 (the accounts here are called "Accrued Amortization of Capital" and "General Amortization" instead of "Depreciation Reserve" and "Depreciation Account" or "Expense"); Pennsylvania—Uniform Classification of Accounts for common carriers by motor vehicle, class A, 1928, account 179, p. 31–32; class B, 1928, account 179, p. 26; class C, 1928, p. 20. No information has been found about the practice in the States not listed.

Fourth. In 1927 the business men's practice of basing the depreciation charge on cost was applied by this court in United States *v.* Ludey (274 U. S. 295, 300–301), a Federal income-tax case, saying, "The amount of the allowance for depreciation is the sum which should be set aside for the taxable year, in order that, at the end of the useful life of the plant in the business, the aggregate of the sums set aside will (with the salvage value) suffice to provide an amount equal to the original cost." [42] I know of nothing in the Federal Constitution, or in the decisions of this court, which should lead us to reject, in determining net profits, the rule sanctioned by the universal practice of business men and governmental departments. For, whether the expense in plant consumption can be more nearly approximated by using a depreciation charge based on original cost or by one based upon fluctuating present values is a problem to be solved, not by legal reasoning, but by the exercise of practical judgment based on facts and business experience. The practice of using an annual depreciation charge based on original cost [43] when determining for purposes of investment, taxation or regulation, the net profits of a business, or the return upon property was not adopted in ignorance of the rule of Smyth *v.* Ames (169 U. S. 466). That decision, rendered in 1898, antedates the general employment of public accountants; [44] and also antedates the general introduction here of the practice of making a depreciation charge. The decision of the Court of Appeals of Maryland here under review, as well as State ex rel. Hopkins *v.* Southwestern Bell Telephone Co. (115 Kans. 236)[45] and Michigan Public Utilities Commission *v.* Michigan State Telephone Co. (228 Mich. 658),[46] were all decided after this court reaffirmed the rule of Smyth *v.* Ames in Southwestern Bell Telephone Co. *v.* Public Service Commission (262 U. S. 276). But since this decision, as before, the Bell Telephone Cos. have persisted in basing their depreciation charges upon the original cost of the depreciable property, Board of Public Utility Coms. *v.* New York Tel. Co. (271 U. S. 23, 27). And they have insisted that the order of the Interstate Commerce Commission requiring a depreciation charge, 118 I. C. C. 295, should be so framed as to permit the continuance of that accounting practice.[47] The protest of the railroads in that proceeding against basing the charge on cost was made for the first time in 1927 in their petitions for a rehearing. And this protest came only from those who insist that no depreciation charge whatsoever shall be made.[48]

To use a depreciation charge as the measure of the year's consumption of plant, and at the same time reject original cost as the basis of the charge, is inadmissible. It is a perversion of this business device. No method for the ascertainment of the amount of the charge yet invented is workable if fluctuating present values be taken as the basis. Every known method contemplates, and is dependent upon, the accumulation or credit of a fixed amount in a given number of years. The distribution of plant expense expressed in the depreciation charge is justified by the approximation to the fact as to the year's plant consumption which is obtained by applying the doctrine of averages. But if fluctuating present values are substituted for original cost there is no stable base to which the process of averaging can be applied. For thereby the only stable factor involved in fixing a depreciation charge would be eliminated. Each year the present value may be different. The cost of replacement at the termination of the service life of the several units

[42] The railways must hereafter assume the anomalous position of classing the additional $755,116 as an operating expense in its report to the commission, and as part of its net income, in its income-tax returns.

[43] When original cost is not known, or when property is acquired in some unusual way not involving purchase, some other base must, of course, be taken. But it is always a stable one. Original cost, as used in this opinion includes other such stable bases. Compare revenue act of 1928, act of May 29, 1928, ch. 852, sec. 113, 45 Stat. 791, 818; Interstate Commerce Commission rules cited in notes 26 and 27, supra.

[44] The first American statute providing for examination of accountants and the use of the title "C. P. A." was enacted by New York in 1896. Accountants' Handbook, edited by E. A. Saliers, p. 1326.

[45] In that case the special commissioner to whom the case was referred stated in his opinion (printed as an appendix to the opinion of the Supreme Court, pp. 271–322, at p. 292) that if the return is figured on the present value of the utility's property, then the depreciation allowance must also be so figured. The Supreme Court did not mention this question in its opinion.

[46] The Michigan Supreme Court made a statement similar to that of the special commissioner in the Kansas case, but did not disturb the finding of the commission. The court made no reference to the insurmountable practical difficulties presented.

[47] Telephone and Railroad Depreciation Charges, 118 I. C. C. 295, 301; testimony on behalf of the Bell System Companies, upon rehearing Mar. 19, 20, 21, 1928 (printed by American Tel. & Tel. Co.), pp. 6, 11–13, 98. See their brief submitted on original argument, p. 48: "The amount of the depreciation expense is the cost of the property used up; that is, it is the dollars consumed. Therefore it is the cost less the salvage realized at retirement." Also original record, May 1, 1923, pp. 12, 13, 20; Proposed Report of Aug. 15, 1929, p. 14; Preliminary Report of Depreciation Section, Docket No. 14700, note 39, supra, pp. 6–7.

[48] In Telephone and Railroad Depreciation Charges, 118 I. C. C. 295, 344, the commission said: "It is agreed by all that depreciation should be based primarily upon the original cost to the accounting company of the unit of property in question." In the petition for rehearing filed by the President's conference committee on valuation, however, it was stated, p. 15: "Consideration should be given to the question of whether accounting depreciation, as the order conceives it, should be estimated upon the basis of original cost or of present value, * * *." A similar statement is made for the first time in the petition for rehearing filed by the New York Central lines at p. 5.

or of the composite life can not be foretold.[49] To use as a measure of the year's consumption of plant a depreciation charge based on fluctuating present values substitutes conjecture for experience. Such a system would require the consumer of to-day to pay for an assumed operating expense which has never been incurred and which may never arise.

The depreciation charge is frequently likened to the annual premium in legal reserve life insurance. The life insurance premium is calculated on an agreed value of the human life—comparable to the known cost of plant—not on a fluctuating value, unknown and unknowable. The field of life insurance presented a problem comparable to that here involved. Despite the large experience embodied in the standard mortality tables and the relative simplicity of the problem there presented, the actual mortality was found to vary so widely from that for which the premiums had provided that their rate was found to work serious injustice either to the insurer or to the insured. The transaction resulted sometimes in bankruptcy of the insurer; sometimes in his securing profits which were extortionate; and rarely in his receiving only the intended fair compensation for the service rendered. Because every attempt to approximate more nearly the amount of premium required proved futile, justice was sought and found in the system of strictly mutual insurance. Under that system the premium charged is made clearly ample; and the part which proves not to have been needed enures in some form of benefit to him who paid it.

Similarly, if, instead of applying the rule of Smyth *v.* Ames, the rate base of a utility were fixed at the amount prudently invested, the inevitable errors incident to estimating service life and net expense in plant consumption could never result in injustice either to the utility or to the community. For if the amount set aside for depreciation proved inadequate and investment of new capital became necessary, the utility would be permitted to earn a return on the new capital. And if the amount set aside for depreciation proved to be excessive, the income from the surplus reserve would operate as a credit to reduce the capital charge which the rates must earn. If the railways should ever suffer injustice from adopting cost of plant as the basis for calculating the depreciation charge, it will be an unavoidable incident of applying in valuation the rule of Smyth *v.* Ames. This risk, if it exists, can not be escaped by basing the charge on present value. For this suggested escape, besides being entirely conjectural, is instinct with certainty of injustice either to the community or the railways. The possibility of such injustice admonishes us, as it did in deciding the constitutional questions concerning interstate commerce, Foster Packing Co. *v.* Haydel, 278 U. S. 1, 10; Federal Trade Commission *v.* Pacific Paper Association, 273 U. S. 52, 64; and taxation, Mountain Timber Co. *v.* Washington, 243 U. S. 219, 237; Shaffer *v.* Carter, 252 U. S. 37, 55; Farmers Loan & Trust Co. *v.* Minnesota, No. 26, p. 4, decided this day, that rate regulation is an intensely practical matter.

Fifth. Public officials, investors, and most large businesses are convinced of the practical value of the depreciation charge as a guide to knowledge of the results of operation. Many States require public utilities to make such a charge.[50] But most railroads, some gas and electric companies, and some other concerns, deny the propriety of making any annual depreciation charge.[51] They insist that the making of such a charge will serve rather to mislead than to aid in determining the financial result of the year's operations. They urge that the current cost of maintaining the plant, whether by repair, renewals, or replacements, should be treated as a part of the maintenance account, at least in systems consisting of large and diversified properties intended for continuous operation and requiring a constant level of efficiency. They insist that, in such systems, retirements, replacements, and renewals attain a uniform rate and tend to be equal each year; that, therefore, no great disproportion in revenues and operating expenses in the various years results if the whole expenditure made for renewals or replacements in any year is treated as an expense of operation of that year and the retirements of property are not otherwise reflected in any specific charge. They admit that it may be desirable to create a special reserve to enable the company to spread the cost of retiring certain large units of property over a series of years, thus preventing a disproportionate burden upon the operations of a single year. But they say that such a reserve is not properly called a depreciation reserve. Moreover, they contend that when a large unit is retired, not because it has been worn out but because some more efficient substitute has been found, the cost of retirement should be spread over the future, so that it may fall upon those who will gain the benefit of the enhanced efficiency. Compare Kansas City Southern Railway *v.* United States (231 U. S. 423, 440–441). Under the replacement method of accounting advocated by the railroads and others there is no depreciation charge and no depreciation reserve. Operating expenses are charged directly with replacements at their cost. This method does not concern itself with all retirements but only with retirements which are replaced.[52]

Despite the seemingly unanswerable logic of a depreciation charge, they oppose its adoption, urging the uncertainties inherent in the predetermination of service life and of salvage value, and the disagreement among experts as to the most equitable plan of distributing the total net plant expense among the several years of service. They point out that each step in the process of fixing a depreciation charge is beset with difficulties because of the variables which attend every determination involved. The first step is to estimate how long the depreciable plant will remain in service. Engineers calculate with certitude its composite service life by applying weighted averages to the data concerning the several property units. But their exactitude is delusive. Each unit has its individual life, dependent upon the effect of physical exhaustion, obsolescence, inadequacy, and public requirement.[53] The physical duration of the life depends largely upon the conditions of the use; and these can not be foretold. The process of obsolescence is even less predictable. Advances in the arts are constantly being made which would require retirement at some time, even if the unit were endowed with perpetual physical life. But these advances do not proceed at a uniform pace. The normal progress of invention is stimulated or retarded by the ever-changing conditions of business. Moreover, it is the practical embodiment of inventions which produces obsolescence; and business conditions determine even more largely the time and the extent to which new inventions are embodied in improved machines. The march toward inadequacy, as distinguished from obsolescence, is likewise erratic.

The protestants point out that uncertainty is incident also to the second step in the process of fixing the appropriate depreciation

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[49] In part, costs and values in the several future years will depend upon the general price level. As to this, even the economist can know nothing, save how the general price level has heretofore fluctuated from year to year; and that periods of rising prices have ever been followed by periods of falling prices. But cost and value in the several future years will depend in part upon factors other than the general price level. Even if the general price level for every future year were known it would still be impossible to predict with reasonable accuracy the then cost or value of a unit then to be replaced, renewed, or retired. For despite a higher general price level the part might be procurable at smaller costs, by reason of economies introduced in its manufacture and changes in the methods and means of performing the work. See Excess Income of St. Louis & O'Fallon Ry. Co., 124 I. C. C. 3, 29, 41.

[50] Alabama: Code of 1928, § 9769, p. 1758. Arizona: Revised Stat. 1913 (Civil Code), title 9, § 2325, p. 807. California: Deering, Gen. Laws, 1923, vol. 2, act 6386, § 49, p. 2721. Colorado: Comp. L. 1921, § 2945, p. 928. Idaho: Comp. Stat. 1919, vol. 1, § 2473, p. 703. Illinois: Cahill's Rev. Stat. 1929, ch. 111a, § 29, p. 2045. Indiana: Burns Ann. Stat., 1926, vol. 3, §§ 12693–12696, p. 1245. Massachusetts: Acts 1921, ch. 268, § 1, p. 308, inserting new § 5A after § 5; Mass. Gen. L., 1921, p. 1624; Gen. L., 1921, vol. 2, ch. 164, § 57, p. 1818. Minnesota: Gen. Stat., 1923, § 5305, p. 733; Mason's Stat. 1927, § 5305, p. 1107. Missouri: Rev. Stat., 1919, §§ 10470, 10488, and 10512, pp. 3250, 3266, 3283. Nebraska: Constitution, art. 10, § 5 (Comp. Stat., 1922, p. 96). New Hampshire: P. L. 1926, vol. 2, ch. 240, §§ 9, 10, 11, p. 936. New Jersey: 1911–1924, Cum. Supp. to Comp. Stat., vol. 2, *167–17(f), p. 2883. Ohio: Throckmorton's Ann. Code, 1929, §§ 614–49 and 614–50, p. 161. Oregon: Olson's Oreg. L., 1920, vol. 2, § 6046, p. 2422. Pennsylvania: Stat. 1920 (West Pub. Co.), §§ 18066, 18146, pp. 1742, 1752. Tennessee: Shannon's Ann. Code, 1926 Supp., § 3059a88(c), p. 733. Wisconsin: Stat. 1925, 196.09, p. 1550. Most of these statutes require the maintenance of a separate depreciation fund. Some require only a reserve. In Maryland the commission's power over accounting methods is held to include the power to require depreciation accounting, but not the maintaining of a separate fund. See Havre de Grace Bridge Co. *v.* Public Service Commission, 132 Md. 16.

[51] See note 21, supra; G. O. May, Carrier Property Consumed in Operation and the Regulation of Profits, 43 Q. J. Ec. 208–14; R. A. Carter and W. L. Ransom, Depreciation Charges of Railroads and Public Utilities, a memorandum filed with the depreciation section of the bureau of accounts of the Interstate Commerce Commission (1921).

[52] A modification of the depreciation reserve method is the "retirement reserve" recommended by the National Association of Railroad and Utilities Commissioners. This reserve does not involve necessary periodic charges of specific amounts to operating expenses. To this reserve are credited "such amounts as are charged to the operating expense account * * * appropriated from surplus, or both, to cover the retirement loss represented by the excess of the original cost plus cost of dismantling, over the salvage value of fixed capital retired from service." To the operating expense, "Retirement expense," are charged "amounts * * * in addition to amounts appropriated from surplus, to provide a reserve against which may be charged the original cost of all property retired from service, plus cost of dismantling, less salvage." (Proceedings, 37th Ann. Convention, 1925, pp. 441, 458; 32d Ann. Convention, 1920, Appendix 1, pp. 21, 76, 106, Appendix 2, pp. 21, 88.)

[53] The adequacy of a depreciation charge depends, among other things, upon the liberality of the particular concern's practice in respect to maintenance, 81 Amer. Soc. Civil Eng. Transactions (1917), 1490; R. H. Montgomery, Auditing Theory and Practice (1921) Vol. 1, p. 625. It depends in part upon the scope of the causes of retirement to be covered by it. As to what is the proper scope, opinion differs widely. The telephone companies (Bell System) contend that the charge should cover all causes of retirement not provided for by ordinary maintenance charges, including extraordinary casualties like storm and fire. 118 I. C. C. 340. Others insist that the charge should not include any allowance for contingent or presently unascertainable obsolescence, inadequacy, changes in the art, public requirements, storm casualties, or extraordinary repairs or expense of similar character. 118 I. C. C. 341. Still others insist that the charge should cover only exhaustion due to wear and tear and lapse of time, collectively called superannuation, but not obsolescence, inadequacy, and the like, which are said to be precipitate in their operation. The Proposed Report of the Interstate Commerce Commission on Telephone and Railroad Depreciation Charges, Docket Nos. 14700 and 15100, August 15, 1929, pp. 27–28, defines depreciation as "the loss in service value not restored by current maintenance and incurred in connection with the consumption or prospective retirement of property in the course of service from causes against which the carrier is not protected by insurance, which are known to be in current operation, and whose effect can be forecast with a reasonable approach to accuracy."

charge. A plant unit rarely remains in service until consumed physically. Scrap remains; and this must be accounted for, since it is the net expense of the exhaustion of plant which the depreciation charge is to cover. Such scrap value is often a very large factor in the calculation of plant expense.[54] The probable salvage on the unit when retired at the end of its service life must, therefore, be estimated. But its future value is never knowable.

And, finally, the protestants show that after the net expense in plant consumption is thus estimated, there remains the task of distributing it equitably over the assumed service life—the allocation of the amount as charges of the several years. There are many recognized methods for calculating these amounts, each method having strenuous advocates; and the amounts thus to be charged, in the aggregate as well as in the successive years, differ widely according to the method adopted.[55] Under the straight-line method, the aggregate of the charges of the several years equals the net plant expense for the whole period of service life; and the charge is the same for all the years. Under the sinking fund method, the aggregate of the charges of the several years is less than the net plant expense for the whole period; because the proceeds of each year's charge are deemed to have been continuously invested at compound interest and the balance is assumed to be obtained from interest accumulations. Other methods of distributing the total charge produce still other results in the amount of the charges laid upon the operating expense of the several years of service.[56]

We have no occasion to decide now whether the view taken by the Interstate Commerce Commission in Telephone and Railroad Depreciation Charges, 118 I. C. C. 295, or the protest of the railroads, gas, and electric companies should prevail.[57] For in neither event was the court of appeals justified in directing an increase in the allowance. The adequacy of a depreciation charge is dependent in large measure upon the practice of the individual concern with respect to its maintenance account. The commission found that the railways' property was well maintained and that the allowance of $883,544, together with the usual maintenance charges, would be adequate to keep the property at a constant level of efficiency. It found further, on the basis of the company's experience, that the charges previously allowed had served "fairly well" to take care of current depreciation and retirements. The depreciation charge was established by the railways in 1912 and was fixed by it, of its own motion, at 5 per cent of the gross revenues. The charge at that rate had been continued ever since and had yielded each year an increasing sum. For the gross revenues had grown steadily. In the early years they grew through increase of the number of passengers carried; since 1919, through the repeated increases in the rate of fare. In nearly every year, the allowance had exceeded the charges for retirements. After charging retirements, whether replaced or not, to the reserve, there remained a credit on August 31, 1927, of $1,413,793. The allowance of $883,544 is equal to 5 per cent of the estimated gross revenues for 1928. The increase of this allowance for 1928 over that for 1914 was greater proportionately than the increase of the 1928 value of the railways' property over its 1914 value.[58]

The estimated charge of $883,544 was thus clearly ample as the year's share of the expense of plant retirement based on cost. But even if the annual depreciation allowance could be made to correspond with the actual consumption of plant, there was nothing in the record to show that the value of the part of plant to be consumed in 1928 would exceed that amount. Nor is there anything in the record or in the findings to show that $883,544, together with the usual maintenance charges and under the improved methods of construction, would be inadequate to provide, at the prices then prevailing, for the replacements required in that year, and also for the year's contribution to a special reserve under the plan advocated by the railroads before the Interstate Commerce Commission. On the contrary, the company's history[59] and the present advances in the street railway industry strongly indicate that, by employing new equipment of lesser value,[60] the railways could render more efficient service at smaller operating costs. Neither the trial court nor the court of appeals made any finding on these matters. The commission's finding that $883,544 was an adequate depreciation charge should therefore have been accepted by the court of appeals, whether the sum allowed be deemed a depreciation charge properly so called or be treated as the year's contribution to a special reserve to supplement the usual maintenance charges.

It is clear that the management of the railways deemed the charge of 5 per cent of gross revenues adequate. On that assumption it paid dividends on the common stock in each year from 1923 through 1927.[61] If the addition to the depreciation charge ordered by the court of appeals was proper for the year 1928, it should have also been made in the preceding five years.[62] Upon such a recasting of the accounts no profits were earned after 1924; and there was no surplus fund from which dividends could have been paid legally. If the contention now urged by the railways is sound, the management misrepresented by its published accounts its financial condition and the results of operation of the several years, and it paid dividends in violation of law.[63]

Mr. Justice Holmes joins in this opinion.

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SUPREME COURT OF THE UNITED STATES

Nos. 55–64. October term, 1929

THE UNITED RAILWAYS & ELECTRIC CO. OF BALTIMORE, APPELLANT, *v.* HAROLD E. WEST, CHAIRMAN, AND J. FRANK HARPER AND STEUART PURCELL, MEMBERS, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND. HAROLD E. WEST, CHAIRMAN, AND J. FRANK HARPER AND STEUART PURCELL, MEMBERS, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND, APPELLANTS, *v.* THE UNITED RAILWAYS & ELECTRIC CO. OF BALTIMORE. APPEALS FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

(January 6, 1930)

Opinion of Mr. Justice Stone:

I agree with what Mr. Justice Brandeis has said, both as to the propriety of excluding from the rate base the value of the franchise or easement donated to the railway company and with respect to the method of ascertaining depreciation. But of this I would say a further word.

I will assume, for present purposes, that as a result of Smyth *v.* Ames (169 U. S. 466), the function of a depreciation account for rate-

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[54] In the case of telephone companies the value of the salvage recovered runs as high as 45 per cent of the original cost of the property. Testimony of Dr. M. R. Maltbie, note 16, supra, pp. 1459–1460.

[55] Thus, if a unit costs $100, has a service life of 25 years and no salvage value, and the rate of interest is 5 per cent, the charge to operating expenses for depreciation in each of the following years would be:

| Year | Under straight-line method | Under sinking-fund method | Under fixed percentage of diminishing value method | Under annuity method |
|---|---|---|---|---|
| Fifth | $4.00 | $2.10 | $8.05 | $2.55 |
| Tenth | 4.00 | 2.10 | 3.21 | 3.25 |
| Fifteenth | 4.00 | 2.10 | 1.28 | 4.15 |
| Twentieth | 4.00 | 2.10 | .51 | 5.29 |
| Twenty-fifth | 4.00 | 2.10 | .20 | 6.76 |
| The aggregate of the charges in all the years at the end of the twenty-fifth year would be | 100.00 | 52.38 | 99.00 | 100.00 |

See E. A. Saliers, op. cit., note 11, supra, 144, 148, 154, 161.

[56] Other methods are: Reducing balance; annuity; compound interest or equal annual payment; unit cost; working hour; sum-of-the-year digits. See E. A. Saliers, op cit., note 11, supra, 129–179; R. B. Kester, Accounting Theory and Practice (1918), vol. 2, 150–186; J. B. Canning, The Economics of Accountancy (1929), 265–309; 81 Am. Soc. Civil Eng. Transactions (1917), 1463–1484.

[57] Nor need we express an opinion on the relation between a utility's depreciation reserve and the valuation of the accrued depreciation of its property. See Proposed Report of the Interstate Commerce Commission, note 14, supra, at pp. 20–24. While it is true that the annual depreciation charge does not purport to measure the current actual consumption of plant, it may be that the credit balance in the depreciation reserve is good evidence of the amount of accrued depreciation. See New York Telephone Co. *v.* Prendergast, District Court, Southern District of New York, decided November 7, 1929. It may also be that so much of the depreciation reserve as has not been used for retirements or replacements should be subtracted from the present value of the utility's property in determining the rate base, on the theory that the amounts thus contributed by the public represent a part payment for the property consumed or to be consumed in service. Compare Burns' Ann. Ind. Stat. (1926), vol. 3, secs. 12693–12696, p. 1245. These matters are not involved in the case at bar and as to them no opinion is expressed.

[58] In determining the reproduction cost of the company's depreciable property, the commission applied an index figure of 1.54 to the 1914 value. P. U. R. 1926C, 441, 464. If the depreciation charge for 1914, $469,395, is multiplied by the same index figure, the product is $160,676 less than the allowance originally made for 1928. The additions to plant since 1914, $7,500,000, required a proportional increase in the depreciation charge of only $145,500.

[59] See Re United Rys. & Elec. Co., P. U. R. 1928C, 604, 633–634.

[60] See 73 Electric Ry. Journal (1929) 693, 705, 758, 831, 843.

[61] The company was not, of course, restricted to a depreciation charge of 5 per cent of gross revenues. That was only the amount which the commission deemed adequate. But the company was free to reserve a greater amount, without paying dividends, if it believed a greater amount was necessary. (Cf. Havre de Grace Bridge Co. *v.* Public Service Comm., 132 Md. 16.)

[62] The value of the depreciable property in each of the five years preceding 1928 was almost constant, and at least equal to that in 1928. (P. U. R. 1928C, 604, 639, P. U. R. 1929A, 180, 183.)

[63] In each of those years annual dividends amounting to $818,448 were paid. The recorded surplus at the beginning of 1923 was $1,553,097.83. If the depreciation allowance contended for had been made in each of those years, this surplus would have been wiped out in 1925, and there would have remained a deficit after payment of dividends of $416,568 in 1925, $1,027,837 in 1926, and $2,140,146 in 1927. Instead, the railways reported a surplus of $2,005,473 at the end of 1925, $2,020,863 at the end of 1926, and $1,588,823 at the end of 1927. See Moody's Manual of Investments (Public Utilities), 1929, pp. 375–376; Poor's Public Utility Section, 1929, p. 968. In declaring these dividends the management did not overlook the necessity of adequate provision for depreciation. For, in the several rate cases before the commission, it had insisted that the depreciation allowances were inadequate.

making purposes must be taken to be the establishment of a fund for the replacement of plant rather than the restoration of cost or value of the original plant investment. But what amount annually carried to reserve will be sufficient to replace all the elements of a composite property purchased at various times, at varying price levels, as they wear out or become obsolete, is a question not of law but of fact. It is a question which must be answered on the basis of a prediction of the salvage value of the obsolete elements, the character of the articles which will be selected to replace them when replacement is necessary, and their cost at the time of replacement.

Obviously, that question can not be answered by a priori reasoning. Experience is our only guide, tempered by the consideration of such special or unusual facts and circumstances as would tend to modify the results of experience. Experience, which embraces the past 15 years of high-price levels, and the studies of experts, resulting in the universally accepted practice of accountants and business economists, as recounted in detail by Mr. Justice Brandeis, have demonstrated that depreciation reserve, calculated on the basis of cost, has proven to be the most trustworthy guide in determining the amount required to replace, at the end of their useful life, the constantly shifting elements of a property such as the present. Costs of renewals made during the present prolonged period of high prices and diminishing replacement costs tend to offset the higher cost of replacing articles purchased in periods of lower prices. I think that we should be guided by that experience and practice in the absence of proof of any special circumstances showing that they are inapplicable to the particular situation with which we are now concerned.

Such proof, in the present case, is wanting. The only circumstance relied on for a different basis of depreciation, and one which is embraced in that experience, is the current high price level, which has raised the present reproduction value of the carrier's property, as a whole, above its cost. That, of course, might be a controlling consideration if we were dealing with present replacements or their present cost, instead of replacements to be made at various uncertain dates in the future, of articles purchased at different times in the past at varying price levels. But I can not say that since prices at the present moment are high, as a result of postwar inflation, a rate of return which is sufficient to yield 7.78 per cent on present reproduction value, after adequate depreciation, based on cost of the carrier's property, is confiscatory because logic requires the prediction that the elements of petitioner's property can not, in years to come, be renewed or replaced with adequate substitutes, at less than the present average reproduction cost of the entire property—and this in the face of the facts that the cost of replacements in the past 15 years has been for the most part at higher price levels than at present; that the amount allowed by the commission for depreciation has been in practice more than sufficient for all replacement requirements throughout the period of higher price levels, and that the company has declared and paid dividends which were earned only if this depreciation reserve was adequate.

To say that the present price level is necessarily the true measure of future replacement cost is to substitute for a relevant fact which I should have thought ought to be established as are other facts, a rule of law which seems not to follow from Smyth *v.* Ames, and to be founded neither upon experience nor expert opinion, and to be unworkable in practice. In the present case it can be applied only by disregarding evidence which would seem persuasively to establish the very fact to be ascertained.

Mr. RANSDELL. Mr. President and Senators, during this debate there have been so many references to the Shreveport rate case, which originated in my State, that I feel it my duty to make a plain, simple statement of the facts in that very important case, and to state what was really determined by the Supreme Court when Justice Hughes, as its organ, rendered his decision therein.

A little explanation is necessary. Prior to 1911 the city of Shreveport, La., sought business in what might be called the neutral area of eastern Texas, between Shreveport and Dallas, and Shreveport and Houston.

It is about 40 miles from the city of Shreveport to the Texas line, and 189 miles from Shreveport to Dallas. It is about 231 miles from Shreveport to the city of Houston along the line of the Houston, East & West Texas Railway, and the Houston-Shreveport Railway. The Texas & Pacific Railway runs direct from Shreveport to Dallas.

Shreveport is a very enterprising, prosperous city in northwest Louisiana, in which there are a number of energetic progressive merchants, who sought to sell goods in Texas, the Texas line being only 40 miles away.

The Texas-Pacific Railroad had a rate system under which the same class of goods carried east from Dallas to Texas points 160 miles paid a freight rate of 60 cents a hundred. Points 160 miles eastward from Dallas on the Texas-Pacific enjoyed a freight rate of 60 cents. The identical commerce going west on the Texas-Pacific from Shreveport into Texas, thereby becoming interstate commerce, was allowed to go only 55 miles for 60 cents. I hope Senators follow me in that. In the intrastate business along the Texas-Pacific Railroad east from Dallas 60 cents carried a certain commodity of a certain grade and quality 160 miles. If that same commodity were shipped westward from Shreveport into Texas, the same railroad would carry it only 55 miles for 60 cents, which, as Senators will see, was a very great discrimination against Louisiana.

Mr. BROOKHART. Mr. President——

Mr. RANSDELL. I hope the Senator will not interrupt me. I have a line of argument which I wish to make. When I get through I will be delighted to stand here for an hour, if necessary, and answer the Senator; but I prefer not to be interrupted at present.

The PRESIDING OFFICER. The Senator from Louisiana declines to yield.

Mr. RANSDELL. There were a number of similar discriminations along the line of the railway from Shreveport to Houston. Let me give some of the actual cases taken from the report of the Supreme Court. I read from the decision in Houston & Texas Railway *v.* United States (234 U. S. 342 et seq).

The situation may be briefly described: Shreveport, La., is about 40 miles from the Texas State line, and 231 miles from Houston, Tex., on the line of the Houston, East & West Texas and Houston & Shreveport companies (which are affiliated in interest); it is 189 miles from Dallas, Tex., on the line of the Texas & Pacific. Shreveport competes with both cities for the trade of the intervening territory. The rates on these lines from Dallas and Houston, respectively, eastward to intermediate points in Texas were much less, according to distance, than from Shreveport westward to the same points.

Bear in mind, now, on the same railroad.

It is undisputed that the difference was substantial and injuriously affected the commerce of Shreveport. It appeared, for example, that a rate of 60 cents carried first-class traffic a distance of 160 miles to the eastward from Dallas, while the same rate would carry the same class of traffic only 55 miles into Texas from Shreveport.

The westbound rate being three times as high per mile as eastbound over the same railroad.

The first-class rate from Houston to Lufkin, Tex., 118.2 miles, was 50 cents per 100 pounds; while the rate from Shreveport to the same point, 112.5 miles, was 69 cents.

Mr. GLASS. Mr. President——

Mr. RANSDELL. I trust the Senator will not interrupt me. I will be glad to answer questions after I get through.

Mr. GLASS. I do not desire to interrupt the Senator for a controversy, but for information right on the point he is presenting now.

Mr. RANSDELL. If I permit the Senator to interrupt me, I will have to allow others to do so. I will be glad to give all the information I possibly can, as I am very familiar with this case and intend to discuss it fully.

Senators therefore will see that to carry freight southeast from Shreveport for 112 miles cost 69 cents, plus, and to carry freight on the same road from Houston northeast 118 miles toward Shreveport cost 50 cents per 100 pounds. The discrimination can be readily seen.

The rate on wagons from Dallas to Marshall, Tex., 147.7 miles, was 38.8 cents; and from Shreveport to Marshall, 42 miles, 56 cents.

As well as I can figure that out, it cost six times as much per mile to ship wagons westward from Shreveport to Marshall as to ship those same wagons eastward from Dallas to Marshall.

The rate on furniture from Dallas to Longview, Tex., 124 miles, was 24.8 cents; and that from Shreveport to Longview, 65.7 miles, was 35 cents. These instances of differences in rates are merely illustrative; they serve to indicate the character of the rate adjustment.

Senators, those were the cold facts. The enterprising city of Shreveport sought to do a great deal of business in the rich territory of Texas, and the railroads serving Texas and Shreveport alike charged anywhere from one and one-half times to six times as much per mile to carry the goods from Shreveport as from Houston and Dallas.

That being the situation, the Louisiana Railroad Commission in 1911 appealed to the Interstate Commerce Commission for relief, alleging that there was unjust and unfair discrimination against the State of Louisiana and the municipality of Shreveport. After a very full hearing, the Interstate Commerce Commission entered an order requiring the railroads not to continue that discrimination. The commission fixed what seemed to be a fair mileage rate, adopting, in that instance, the rate which had been adopted and put into effect by the Railroad Rate Commission of the State of Texas, and requiring those roads, in doing

business in that territory, so to adjust their intrastate rate as to remove the discrimination against the city of Shreveport and the State of Louisiana.

When that order of the commission went into effect the railroads sought to enjoin it, and brought suit in the Commerce Court, which, as Senators remember, existed at that time. The Commerce Court sustained the order of the commission, maintained it in full force and effect, and the case was then appealed to the Supreme Court of the United States.

I would like to bring out some of the interesting points made by the Interstate Commerce Commission, because, in my judgment, the conclusion which several Senators have reached, that the decision of the Supreme Court, with Mr. Hughes as its organ, reflected on the rights of the States, is not correct. On the other hand, in my judgment, there never has been a decision in our Republic which did more to protect the rights of the States in the important matter of rates than this very Shreveport case. I know the people of Louisiana feel that way.

They felt they were discriminated against seriously prior to the decisions, first, of the Interstate Commerce Commission, then of the Commerce Court, and finally of the Supreme Court, because it was practically impossible for Shreveport and Louisiana to do business in Texas under the unfair freight rates just described. No one can compete under such great discriminations.

In discussing this case the Commerce Court—I read from Federal Reporter 205, pages 380 et seq., Justice Knapp being the organ of the court—said among other things:

> There is no dispute about the material facts, and they are easily comprehended. The interstate rates of petitioner from Shreveport, La., to Dallas, Tex., and intermediate points on its lines, are very much higher in proportion to distance than the State rates of petitioner from Dallas to the same intermediate points in the State of Texas * * *. Under such an injustice of freight charges it is obvious that Shreveport is severely, if not fatally, handicapped in its competition with Dallas for the trade of the intervening territory, most of which is situated in the State of Texas. It appears that operating conditions are substantially the same throughout the entire line and in both directions between the two cities, and petitioner makes no claim that the disparity in rates can be justified by differences in the cost of transportation. Indeed, it seems to be conceded—and certainly no other inference is permissible—that the rate situation here in question would clearly constitute undue prejudice to Shreveport and undue preference to Dallas, within the meaning of the third section of the act.
>
> In the report of the Interstate Commerce Commission "upon which that order is based, the commission has found upon convincing proofs therein recited that the local rates here involved were imposed by the Texas commission for the purpose of favoring the industries and communities of that State."

I want it distinctly understood that I am not criticizing the Texas commission. I am simply relating the facts.

> Indeed the evidence is said "to demonstrate that Texas has a policy of her own with respect to the protection of home industries, which has been made effective by consistent and vigorous action on the part of her commission." And in this policy, as is further found, the petitioner and other carriers in like situation have apparently acquiesced. This plainly means, nor is it seriously disputed, that these Texas rates were prescribed not with reference to their intrinsic reasonableness or on the basis of just compensation for the service rendered, but with the undisguised intention of giving preference and advantage to the dealers of that State as against their competitors in Louisiana and other States. As Commissioner Lane, a member of the Interstate Commerce Commission, puts it, "The Texas commission is acting in loco parentis to the jobbing interests of Texas."

It has been indicated in the debate that Mr. Justice Hughes was initiating a new principle in writing the great decision which he submitted in the Shreveport rate case. Let me read one or two decisions to show that that is incorrect. I read first from a decision rendered by Mr. Justice Peckham in the Eubank case (184 U. S. 36), in which he said:

> We fully recognize the rule that the effect of a State constitutional provision or of any State legislation upon interstate commerce must be direct and not merely incidental and unimportant; but it seems to us that where the necessary result of enforcing the provision may be to limit or prohibit the transportation of articles from without the State to a point within it, or from a point within to a point without the State, interstate commerce is thereby affected, and may be thereby to a certain extent directly regulated, and in that event the effect of the provision is direct and important, and not a mere incident.

Again in the case of Pullman Co. (216 U. S. 65) Mr. Chief Justice White as the organ of the court, said:

> A State may not exert its concededly lawful powers in such a manner as to enforce a direct burden on interstate commerce.

What was Texas doing in the famous Shreveport case but exercising its power to impose a terrific burden upon the commerce of the sister State of Louisiana, and, of course, if it affected Louisiana in that way, Arkansas, Tennessee, Missouri, Kansas, Oklahoma, and all adjacent States would have been affected in the same way? Justice White proceeded:

> Even though a power exerted by a State, when inherently considered, may not in and of itself abstractly impose a direct burden on interstate commerce, nevertheless such exertion of authority will be a direct burden on such commerce if the power as exercised operates a discrimination against that commerce, or, what is equivalent thereto, discriminates against the right to carry it on.

Those two decisions were rendered long before Mr. Hughes rendered his, and he referred to a great many cases bearing out his views.

Before taking up this decision directly let me again remind the Senate that this controversy arose upon the initiative of the State of Louisiana and the municipality of Shreveport, which complained that the Texas railroads were discriminating very seriously against their commerce; that in response to their request the Interstate Commerce Commission rendered an order preventing such discrimination in the future; that the railroads then brought suit in the Commerce Court which, after the fullest hearing and one of the clearest decisions I have ever read, affirmed the finding of the Interstate Commerce Commission on every point and dismissed the case. Thereupon it was appealed to the Supreme Court and what happened therein? That court was presided over by Mr. Chief Justice White. Justice Holmes was a member, as was also Justice Van Devanter, of the present Supreme Court. Seven of the judges—one of whom was Chief Justice White—concurred in the opinion which Mr. Justice Hughes rendered, and only two dissented, Justices Lurton and Pitney. So we have, first, the Interstate Commerce Commission, then the Commerce Court, in a unanimous opinion, and next seven members of the Supreme Court of the United States, then composed of nine members, all agreeing that the unjust discrimination practiced against the city of Shreveport and the State of Louisiana must no longer be permitted.

I will read just a few paragraphs from the opinion of Justice Hughes, which appears in Two hundred and thirty-fourth United States Reports, Houston & Texas Railway against the United States, page 342 et seq., Mr. Hughes said:

> The complaint was that the appellants and other interested carriers maintained unreasonable rates from Shreveport, La., to various points in Texas, and, further, that these carriers in the adjustment of rates over their respective lines unjustly discriminated in favor of traffic within the State of Texas and against similar traffic between Louisiana and Texas. The carriers filed answers; numerous pleas of intervention were made, etc.

He then said:

> The Interstate Commerce Commission found that the interstate class rates out of Shreveport to main Texas points were unreasonable and it established maximum class rates for this traffic. These rates, we understand, were substantially the same as the class rates fixed by the railroad commission of Texas, and charged by the carriers for transportation for similar distances in that State. The Interstate Commerce Commission also found that the carriers maintained "higher rates from Shreveport to points in Texas" than were in force "from cities in Texas to such points under substantially similar conditions and circumstances"—

And I wish to add, over the same railroad, identically the same road—

> and that "thereby" an unlawful and undue preference and advantage was given to the Texas cities and a "discrimination" that was "undue and unlawful" was effected against Shreveport. In order to correct this discrimination, the carriers were directed to desist from charging higher rates for the transportation of any commodity from Shreveport to Dallas and Houston, respectively, and intermediate points than were contemporaneously charged for the carriage of such commodities from Dallas and Houston toward Shreveport for equal distances, as the commission found that relation of rates should be reasonable.

Senators, what was the basis of the original convention that finally resulted in the adoption of the immortal Constitution under which we live and of which we are so justly proud? It was disputes over transportation across State lines. It was to create a union of States where all could be treated alike, fairly, and justly, without discriminations for or against any member.

Transportation by water and by rail ought to be so regulated as to treat all sections fairly, and the men who initiated our original Constitutional Convention were inspired by the necessity of proper regulation and control of interstate transportation.

In the case under discussion we find Louisiana being discriminated against in a remarkable way by Texas; and what did it do? It appealed to the Interstate Commerce Commission. And why? Because under section 3 of the commerce act this clause is found:

That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Can anyone contend that Louisiana was not suffering a great disadvantage because of these discriminatory rates? How could merchants in the city of Shreveport compete on anything like fair terms with those in the cities of Dallas and Houston, who were given rates in some instances only one-sixth of the rates charged to the merchants of the city of Shreveport on their goods shipped into Texas? It was an unfair discrimination, a serious discrimination; it was an invasion of the rights of the sovereign State of Louisiana.

Senators, I yield to no man in my admiration of and respect for the rights of the States; I glory in State rights; and I have often said we are tending too much toward centralization in our Government; that Washington is becoming too strong and the States growing weaker year by year. I would be delighted to assist in decentralization in Federal affairs and further strengthening the states if it be possible, but as to interstate commerce there is no way, of which I am aware, to decentralize. We require a great Federal organization such as the Interstate Commerce Commission to regulate and maintain interstate commerce on fair and equal terms; and if in the exercise of that duty it becomes necessary to make intrastate rates subordinate to those that are interstate that result follows as inevitably as night follows day; it can not be avoided. Continuing with this decision, Mr. Justice Hughes states:

The use of the instrument of interstate commerce in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for Federal intervention.

How could Louisiana obtain relief except by appealing to the Interstate Commerce Commission; and how could the Interstate Commerce Commission under the state of facts which no man disputes—no Senator on this floor will dispute them—refuse to give the desired relief, and require the railroads to treat Louisiana commerce in the same way, no better but certainly no worse than they treated Texas commerce? That is all the decision meant. Mr. Justice Hughes continued:

Here, the commission expressly found that unjust discrimination existed under substantially similar conditions of transportation and the inquiry is whether the commission has power to correct it. We are of the opinion that the limitation of the proviso in section 1 does not apply to a case of this sort. * * * The commission, having before it a plain case of unreasonable discrimination on the part of interstate carriers against interstate trade, carefully examined the question of its authority and decided that it had the power to make this remedial order. The Commerce Court sustained the authority of the commission and it is clear that we should not reverse the decree unless the law has been misapplied. This we can not say; on the contrary, we are convinced that the authority of the commission was adequate. * * * We are not unmindful of the gravity of the question that is presented when State and Federal views conflict. But it was recognized in the beginning that the Nation could not prosper if interstate and foreign trade were governed by many masters, and, where the interests of the freedom of interstate commerce are involved, the judgment of Congress and of the agencies it lawfully establishes must control.

Senators, I have explained the case fully and again say that, in my judgment, this decision so far from reflecting upon Mr. Justice Hughes is very much to his credit. It is an extremely learned and fair decision; it is one which confirmed a careful finding of the Interstate Commerce Commission, followed by one of the ablest decisions ever rendered by the Commerce Court. It is reasoned by Justice Hughes in the most forceful manner, backed by innumerable authorities, and I for one, as a citizen of Louisiana and the Union, thank him for permitting the merchants of my State to do business which they had a right to do in the State of Texas on terms of equality with the people of that great Commonwealth.

Mr. BROOKHART. Mr. President——

The VICE PRESIDENT. Does the Senator from Louisiana yield to the Senator from Iowa?

Mr. RANSDELL. I am glad to yield to the Senator from Iowa.

Mr. BROOKHART. In the first place, I should like to ask the Senator if he would not be better pleased if the Supreme Court and the Interstate Commerce Commission had reduced the Louisiana rates to the level of the Texas rates?

Mr. RANSDELL. That is not the question. I am not discussing the question of those rates; I am discussing the question whether or not the Supreme Court acted properly in requiring equality of rates between Louisiana and Texas. The rates may have been too high; as to that I do not know; but so long as the people of Shreveport received the same rates per mile over the Texas-Pacific Railroad that were accorded to the people of Texas over the Texas-Pacific Railroad, I have no complaint. That is all the court decided; it did not go into the question of whether the rates should be lower or higher.

Mr. BROOKHART. If the Louisiana rates had been reduced to the level of the Texas rates, that would have given to Louisiana the same equality?

Mr. RANSDELL. I believe they did put the rates down to the same rate per mile as the Texas rates.

Mr. BROOKHART. No; they put the rates up.

Mr. RANSDELL. But, at any rate, they required them to carry on business in a fair and equitable manner between Texas and Louisiana.

Mr. BROOKHART. Let me call the Senator's attention to a proviso of the law. He read a part of the law, but I call his attention to the proviso at the end of it, which reads as follows:

*Provided, however,* That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State, and not shipped to it from a foreign country or to any State or Territory as aforesaid.

Mr. RANSDELL. That is correct.

Mr. BROOKHART. So that the law prohibited them from interfering with a rate of that kind, and yet this decision did interfere with and overthrow it.

Mr. RANSDELL. Both the Commerce Court and the Supreme Court held that the proviso did not apply.

Mr. BROOKHART. That is what I am objecting to, that the court, or judges of the court, would crawl around a plain provision of the law and in some kind of way evade the law. That decision was in violation of the law of the United States?

Mr. HAWES obtained the floor.

Mr. RANSDELL. Mr. President, I should like to ask the Senator from Iowa a question.

The VICE PRESIDENT. The Senator from Missouri has been recognized.

Mr. RANSDELL. I think that so long as the debate was going on between the Senator from Iowa and myself——

The VICE PRESIDENT. The Senator from Louisiana had taken his seat. The Senator can ask a question with the permission of the Senator from Missouri.

Mr. RANSDELL. I will ask the Senator from Missouri, then, if he will not do me the courtesy, so long as I have been questioned by the Senator from Iowa, to permit me to ask the Senator from Iowa a question?

Mr. HAWES. I yield to the Senator; but I should like to remark that law students all over the United States have discussed the Shreveport case for the last 15 years, and I think it is pretty generally understood.

Mr. RANSDELL. Perhaps so; but some Senators do not seem to understand it, because they declare that it was in derogation of the rights of the States, while I look upon it as a protection of the rights of the States, the greatest protection ever afforded them in matters of transportation. I wish to ask the Senator from Iowa if the decision had not been rendered what would have happened to Shreveport? What other decision could have been rendered that would have required the two railroads to treat Shreveport fairly and equitably, along with Dallas and Houston?

Mr. BROOKHART. This is what could have happened, and the court would have the right to do it: It could have ordered the railroad to reduce the Shreveport rate down to the level of the other rate, and that would have been much better for Shreveport than what was accomplished under the decision.

Mr. RANSDELL. I am glad the Senator thinks so; but could Shreveport do any business under those circumstances? The Senator knows perfectly well it could not.

Mr. BROOKHART. It certainly could have if it could have gotten the rates reduced.

Mr. BLEASE. Mr. President——

The VICE PRESIDENT. Does the Senator from Missouri yield to the Senator from South Carolina?

Mr. BLEASE. I suggest the absence of a quorum.

The VICE PRESIDENT. Does the Senator from Missouri yield for that purpose?

Mr. HAWES. I yield.

The VICE PRESIDENT. The Secretary will call the roll.

The legislative clerk called the roll, and the following Senators answered to their names:

| | | | |
|---|---|---|---|
| Allen | Dill | Jones | Shortridge |
| Ashurst | Fess | Kean | Simmons |
| Baird | Fletcher | Kendrick | Smoot |
| Barkley | Frazier | Keyes | Steck |
| Bingham | George | La Follette | Steiwer |
| Black | Gillett | McCulloch | Stephens |
| Blaine | Glass | McKellar | Sullivan |
| Blease | Glenn | McMaster | Swanson |
| Borah | Goff | McNary | Thomas, Idaho |
| Bratton | Goldsborough | Metcalf | Thomas, Okla. |
| Brock | Gould | Norbeck | Townsend |
| Brookhart | Greene | Norris | Trammell |
| Broussard | Grundy | Nye | Tydings |
| Capper | Hale | Oddie | Vandenberg |
| Caraway | Harris | Overman | Wagner |
| Connally | Harrison | Patterson | Walcott |
| Copeland | Hastings | Phipps | Walsh, Mass. |
| Couzens | Hatfield | Pine | Walsh, Mont. |
| Cutting | Hawes | Ransdell | Waterman |
| Dale | Hebert | Schall | Watson |
| Deneen | Johnson | Sheppard | Wheeler |

The VICE PRESIDENT. Eighty-four Senators have answered to their names. A quorum is present.

Mr. HAWES. Mr. President, for the greater portion of two days the Senate has been busy discussing various Supreme Court opinions. Portions of opinions, extracts from opinions, have been read into the RECORD. The discussion has brought the Supreme Court of the United States, through the Senate, before the bar of the American people.

It is because of my devotion to the Supreme Court, it is because of my great respect for it and the eminent men who serve as our justices, that I have been reluctantly and with great hesitation forced to the position that it is my duty to vote against the confirmation of Judge Hughes. It is a painful thing for me, because in my service in Washington, in the House and the Senate, when a bill came in with the Executive approval I have always given to it the most sympathetic consideration.

When I have been in doubt about such legislation I have given the benefit of the doubt to the national administration. Since I have been a Member of this body I have voted for the confirmation of every appointee sent here by President Coolidge and by President Hoover; and it is a painful thing for me to-day to vote against the confirmation of a man selected for the very highest office in all America.

In my opinion, the office of Chief Justice of the United States is a greater office than that of President of the United States. That position not only should be above suspicion but it ought to be removed even from criticism. I am not one of those who believe in legislative review of judicial decision; nor do I believe in appealing from the Supreme Court in discussions upon the floor of the Senate or upon the floor of the House unless it is for the purpose of illustrating the necessity of new legislation. So, in part, I arrive at the conclusion of opposition from a somewhat different mental attitude from those who have preceded me.

I can not disassociate from my mind the thought that Judge Hughes, once a member of the Supreme Bench, no matter what his judicial poise at that time might have been, since that time and for many years has been engaged in active partisan politics. Every man has the right to do that. In fact, it is the duty of every man to take an active, vigorous part in the political affairs of his country. But, having accepted at one time the lofty appointment to this highest judicial tribunal, he left it voluntarily to enter again the political field. We all remember, in the last campaign, his eloquent words coming over the radio and coming from different portions of the United States. His voice and the voice of the Senator from Idaho [Mr. BORAH] were the two voices that carried greater weight and went further and did more for Mr. Hoover's election than the voices of any other 20 men in all America in the Republican Party.

Mr. President, if the name of John W. Davis—he having gone through a political campaign—were sent to the Senate for confirmation as a Supreme Court justice, I believe that the ordeal of combat through which he went in his political campaign would destroy his judicial poise.

We go back sometimes to our school days. My mind travels back to my class at the old law school, and I picked men preparing themselves for the law. There was one type of mind, the advocate's mind. There was another type, the judicial mind. The advocate was not a proper man to select as judge. So well recognized is that fact by the English bar that there is a strict distinction drawn between lawyers—one called a counselor, the other called a barrister. Men might excel in either one of these learned branches of the law; but the barrister was not by temperament the man to be selected for judge.

After Mr. Hughes had left the bench, because of his association on the bench and because of his great ability as an advocate—as a barrister—the great business of America flocked to him. All those nice, keen distinctions which the Supreme Court must draw were handed to him, on one side or the other, to present to this tribunal for determination. Every case that reaches the Supreme Court involves something that touches the Constitution of the United States. Every cause of litigation represented before that court by this eminent man called for an interpretation by the Supreme Court. I am wondering, Mr. President, how many times, when fundamental questions come before that court, Justice Hughes, being the honorable, upright man that he is, will be called upon to excuse himself. I am wondering, when we have these 4 to 5 decisions, and he has passed upon a point in issue, what will happen in that court—what loss of efficiency, what loss of decision, may occur.

Mr. NORRIS. Mr. President——

The VICE PRESIDENT. Does the Senator from Missouri yield to the Senator from Nebraska?

Mr. HAWES. I yield to the Senator.

Mr. NORRIS. Right along the line the Senator is speaking on, I wonder if he is aware of the fact that in addition to the cases he is speaking of in which Mr. Hughes has been counsel, I think it was developed to-day before the lobby committee that the bill relating to Muscle Shoals that has been pending off and on here for several years, and I understand is to be introduced again, providing for the turning over of Muscle Shoals to the Cyanamid Co., was prepared by Mr. Hughes, although there has been no litigation about it. The contract that is included in the bill was drawn by Mr. Hughes, so I understand; and if Congress in legislating should follow the advocates of that measure and enact that bill into law, would not that be another instance, in addition to the ones the Senator has mentioned, where Mr. Hughes would be disqualified to sit in judgment?

Mr. HAWES. Mr. President, I believe Judge Hughes to be an honorable man. I believe he is an exceptionally able man. I think that he has a fine sense of the proprieties; and I am sure that if a matter were presented to the Supreme Court in which he had any part he would, as a lawyer and as a gentleman, excuse himself from participating in its consideration.

Mr. President, I am disappointed in this appointment. The Nation had two excitements in one day. We were told that genial, pleasant judge that the Nation loved was to resign because of ill health. With hardly an intermission of a minute, without loss of time, the name of Judge Hughes was sent to the Senate for consideration and confirmation.

In every State in the Union there is a supreme court, composed of men of trained minds and judicial temperament, from whom the President might have made selection. There are great lawyers throughout the land, men of high attainment and distinction, who did not have the complications of prior position on the Supreme Court and the great affluence in their practice following position upon the Supreme Court, nor of a candidacy for President, or of being the chief bugleman in the last presidential campaign. They are men of judicial temperament and judicial poise, great lawyers. There was not time given even for the American people to think, let alone for lawyers to advise, or for bar associations of the States to make recommendations. It was one and the same action. The sorrowful story came that Judge Taft was too weak to continue on the Supreme Court, and then, within the same hour, came the appointment of Judge Hughes.

Mr. President, I find, and other men find, a great difference in the capacity of lawyers. Citizens go to one lawyer for the law, a master of the law, and then they select another lawyer because of his ability in the court room and in the trial of a case. I concede freely that Judge Hughes is a great trial lawyer. So great had his reputation become that close cases going before the Supreme Court came to him almost en masse. He was retained in nearly every important issue that has been in our Supreme Court for many years.

Now, Senators, we all have a feeling of embarrassment. An embarrassment comes to me very forcibly personally, for the first time in my congressional life opposing the appointment of any President, I always having leaned toward administrative

measures, and it is unpleasant to find that my convictions will not permit me to support this nomination.

For two days men on both sides of this Chamber have discussed Supreme Court decisions. The Shreveport case, which has been in the possession of law students for 15 years, a textbook, occupies hours before the Senate of the United States for its interpretation. One Senator places one interpretation upon it, and another Senator a different interpretation.

I am sure that if this confirmation takes place there will come the thing all lawyers dread, the thing which I, an old-fashioned American, dread most, the dragging of our Supreme Court into continual discussions in the Senate and in the House of Representatives. If Judge Hughes is confirmed, with all his ability, with the facts going to the United States as they have in the last few days, every act of the Supreme Court in which there is a division will be the subject of debate not only in the House of Representatives but in the Senate.

Mr. President, under our scheme of Government, we all understand it is a series of checks and balances. We know that it is the sole duty of the Supreme Court to interpret the Constitution of the United States, and the forefathers tried to provide a means by which that court could say to the Congress of the United States, "Thus far shall you go, and no farther," and that the court would say to the Executive, "Mr. President, you may go so far, and at this point you stop." It is an arbitrator, if you please, between the Executive and the Congress. It therefore may say to the Congress, "You have gone too far. Here you must stop. You have violated the intent of the Constitution"; or to say the same thing to the President.

A situation may be created calling for an appeal to the Senate, an appeal to the House, judicial decrees may be followed by condemnation and threat of legislation.

Mr. President, my opposition to Mr. Hughes is upon the ground that, with all his ability, with all his training, and despite the many high positions he has held, it will injure the prestige of the court to have a man on the bench who may be charged with the consideration of politics.

Understand me, Mr. President, in the field of politics there is a great opportunity for public service, but in the field of politics, as in the equipment of an advocate in court, some of the finer balance may be lost.

I have a feeling that the thing was not graciously done, that the great American bar should have had an opportunity to make suggestions, that the President might have thought of Supreme Court judges in the States, men of great ability, men who were not in politics, men whose distinction at the bar was not attained as advocates, but as judges, and I am sure he could have selected that sort of lawyer, and we would not have, as we may have from now on, political discussions of the Supreme Court, its decisions, its opinions, and its processes.

Mr. President, I wanted to explain my individual position in this matter, because I had intended to vote for Mr. Hughes. The distinguished junior Senator from Virginia [Mr. GLASS], a scholar, a student of government, in his speech directed my attention to the quick change from the Supreme Bench to a candidacy for the Presidency, to the active campaign, the participation in political debates, things which take from the best of men that poise, that calm, that considered judgment which should be possessed by a member of the Supreme Court.

Mr. GEORGE and Mr. FESS addressed the Chair.

The VICE PRESIDENT. The Senator from Georgia.

Mr. GEORGE. Does the Senator from Ohio desire to address the Senate?

Mr. FESS. I was going to say that if we could get a vote now I would desist from speaking. Otherwise, I would like to make some remarks.

The VICE PRESIDENT. The Senator from Georgia has the floor.

Mr. NORRIS. Mr. President, I have been informed that the Senator from Georgia prefers to speak on the motion I intend to offer. If no one else desires to speak before that motion is offered and the Senator would rather talk on the motion, I will make it now. I did not want to make it until all the Senators who wanted to talk on the main question had concluded.

Mr. GEORGE. I understood that the Senator proposed to make such a motion.

Mr. NORRIS. I do not know that it makes any particular difference, but I would be glad to make the motion now if the Senator from Georgia would like to have me do so.

Mr. GEORGE. Mr. President, I am aware of the fact that the senior Senator from Indiana [Mr. WATSON], the distinguished leader of the majority, has indicated his purpose to hold the Senate in session until a vote is reached on this nomination, and I presume he will adhere to his program. It occurs to me, however, that inasmuch as there are probably several other speeches to be made, it would be a very much better course to allow this matter to go over until to-morrow morning, as we have been accustomed to letting important matters go over to the following day after the Senate has been in session until 5 or 6 o'clock. I merely make the suggestion, because I do not believe that the Senate has been called upon or will be called upon to consider any matter of greater importance, if, indeed it can be called upon to consider any matter of equal importance at this time.

Mr. President, personally I have with great reluctance reached the conclusion that I should vote to recommit this nomination to the Committee on the Judiciary, if such a motion is made, as I understand the Senator from Nebraska proposes to make it. I repeat, I have reached that conclusion with great reluctance, because I have the highest opinion of the legal ability of the nominee, and certainly his personal integrity and character are beyond question or reproach.

Mr. Hughes has for a number of years been recognized as among the leaders of the American bar, if, indeed, he has not been recognized as the leader of the bar of the United States. That recognition has been accorded him both in this country and abroad. Therefore it is with great reluctance that any Senator would feel himself compelled to vote for a motion to recommit this nomination to the Committee on the Judiciary for further consideration or to vote against the confirmation of Mr. Hughes.

Mr. President, much has been said about the Shreveport decision. The purport of that decision can not be misunderstood. I have no disposition to discuss it. Under the decision the State commissions have been stripped of all power—and there is no need to quibble about it—over intrastate rates, and they have not at this moment authority over anything of any importance except the location of a depot or the length of a siding within the State. It is not worth while to quarrel with the logic of the decision, but as an American citizen I regret the decision. It seems to me that it is a fair statement that the decision might as well have recognized that within the jurisdiction reserved to the States the States were equally supreme as the General Government within the jurisdiction given it under the Constitution.

The decision wholly ignores the fact, the vital and essential fact, that a common carrier may at one and the same time be an interstate carrier and an intrastate carrier. It is not even suggested in the decision, but by easy stages the reasoning of the court proceeds upon the broad premise that the local regulation must yield to general regulation when the general power is exercised to the final conclusion of the court. With the logical processes of the decision no lawyer would quarrel. Admitting the premise and conceding that the premise is well taken, I dare say no lawyer would controvert the soundness of the decision. Conceding that the premise is well taken, the decision, so far as the main question is concerned, is in harmony with past pronunciations of the court and of law writers; yet the carrier may at one and the same time partake of the double capacity of interstate and of intrastate carrier. It was never the intention of the Congress to strip the State of all power and authority over the regulation of rates wholly within the State.

But, Mr. President, the decision came on June 8, 1914. The distinguished author of that decision in 1916 was the candidate of a great political party for the Presidency of the United States. I do not suggest that the decision was written with a view to the subsequent candidacy of the author of the decision. I would not make such a suggestion. But is it not pertinent to ask whether any carrier voted against or exercised its influence against the writer of that opinion in the campaign of 1916?

Mr. President, those who wrote the Constitution contemplated clearly that when a man went upon the Supreme Bench—indeed, upon the Federal bench—he would go there for life, because there was no limitation upon his term of office. He was to hold office during good behavior. Certainly those who framed the Constitution contemplated that when any man went upon the Supreme Bench he would remain there during his lifetime or until he reached the age subsequently fixed for his voluntary retirement. It is not the circumstance that Mr. Hughes became the candidate of his party for the Presidency in 1916, it is not the circumstance that he led a great political party in that campaign, but it is the significant fact that in the circumstances he was willing to lead it and that he had not put away political ambition, because, unfortunately, there is no way to reason to the contrary.

What happened? In 1915 and in early 1916 the political parties were casting about for their candidates. The Democratic Party, of course, had its mind centered upon the then President of the United States to succeed himself; that is to say, it regarded Mr. Wilson, of course, as its candidate. Now, either Mr. Hughes entertained the ambition, or the respon-

sibility to lead his party was pressed upon him by his political conferees. Did the writers of the Constitution contemplate a situation in which a justice upon the Supreme Bench would himself be willing to entertain political ambitions or would permit those of his political creed and faith to urge upon him as a party responsibility the obligation to lead his party?

I ask, and let the country answer, can there be any moral doubt of the simple proposition that an office for life or during good behavior was intended above every other consideration to remove the holder of the office, not only from participation in politics, but from any disposition to invite or accept responsibility of political leadership?

Let no Senator evade the question when he faces this very solemn obligation and responsibility. In the absence of language in the convention and in the public discussion of the day no one could doubt that the primary purpose was to remove the holder of such an office from the necessity or excuse of further participation in political affairs.

This unfortunate decision came in June, 1914. The author of it was a candidate for the Presidency of the United States in June, 1916. Again I do not intimate that the decision was written with the conscious purpose upon the part of its author to become a candidate, but the fact is the fact, and I ask would anyone ascribe to Mr. Hughes the conscious desire to become a candidate or would anyone ascribe to him the willingness to yield to the demand of his party conferees to lead his party in 1916? One can not ascribe either motive to Mr. Hughes and yet be willing to vote for his confirmation.

If Mr. Hughes himself wanted to be President of the United States at the time that he held the commission as an Associate Justice of the Supreme Court of the United States, obviously one would say that having left the bench he should never go back upon the bench. If on the other hand those men with whom he had been associated in political combat and battle through the years felt justified in going to him and demanding of him that he assume the leadership of his party in the campaign of 1916, I submit that I can not vote for his return to the bench. Taking either horn of the dilemma he became the candidate of his party in 1916. He did it of his own volition or he did it at the demand of those with whom he had worked and labored in the capacity of partisans. I am charging nothing, but human nature is human nature, and when there are only two motives that can actuate any man living, we have to explain human conduct upon the assumption that one or the other of those motives must have been present.

There was no call for Mr. Hughes that arose spontaneously from all of the people of the United States regardless of party because he was not elected in the election of 1916. Everyone knows that the majority of voters in the United States at this hour normally at least vote the Republican ticket and in 1916 they were not of any different opinion. The demand therefore for Mr. Hughes to give up his position as Associate Justice of the Supreme Court of the United States was not in response to the call of that inarticulate mass to which perhaps any man might at least feel justified in yielding, because he was not elected in that campaign.

Mr. President, Mr. Hughes is a great figure; I concede that he is not only a national but is an international figure; and yet I can not escape the conclusion that no man should leave the Supreme Court Bench and again enter into an active contest for public office and then be willing, after the experience that Mr. Hughes has had, to accept a position upon that bench.

Mr. Hughes has been a partisan—and I think we might speak frankly about it—in every campaign since the campaign of 1916. His has been the final voice upon which his party relied in the campaign of 1920, in the campaign of 1924, and again in the campaign of 1928. He voluntarily elected to leave the bench, let us assume in response to a demand from his party, when his party had no right to demand that he leave the bench, when Mr. Hughes owed it to the American people, and to the Supreme Court of the United States, to say to his partisans, "You dare not suggest to me that I resign my position and take up the gage of battle in a partisan contest." But he did that; and in the campaign of 1920, in the campaign of 1924, and in the campaign of 1928, he was a partisan, and now his name comes to the Senate for the office of Chief Justice of the Supreme Court of the United States.

The distinguished Senator from Missouri [Mr. HAWES] has well said that, hardly had the country received the announcement of the resignation of the former Chief Justice, before the country was advised of the purpose of the President to appoint Mr. Hughes as Chief Justice of the Supreme Court. Mr. President, there may have been hours in the history of this Republic when a prompt appointment of Chief Justice of the Supreme Court, in the event of a vacancy in that high office, might have been expected and accepted as in due course; but every man must know that there has been the most rapid and the most menacing centralization of wealth in the United States in every great field in the last quarter of a century, indeed, in the last decade, that our history records. Men in both political parties, men of all political views, men of independent judgment, have marveled at the rapidity with which our commercial units have moved and merged into larger and larger units. The President of the United States could not have been unaware of the present state of unrest in this country. Mr. Hughes, with his very great ability, with his keen appreciation of international and of national affairs and movements, could not have been unaware of the grave necessity for reasonable opportunity for the American people to express themselves calmly and deliberately upon this the most important matter affecting their welfare.

The appointment is made by the President; it comes to the Senate for its advice and consent. Then the Chief Justice is confirmed and goes into office for life. Between the interval of the resignation of former Chief Justice Taft and the announcement of the appointment of Mr. Hughes, what opportunity had the American people to express themselves? It is said that the name of Mr. Hughes has been acclaimed by the press, by individuals, by men and women in all political parties all over the country—indeed, throughout the world—as a proper and happy choice as successor to the retiring Chief Justice. Be it so, Mr. President; but never before did we stand at a break in our history where the rapid concentration of wealth, where unusual economic movements and combinations called for more deliberation, for more sincere consideration of the full effect of important public action than at this time; yet Mr. Hughes, who had voluntarily left the bench, who had become a partisan in political campaigns through the very last one, was selected almost before the country had time to realize that Mr. Chief Justice Taft had offered his resignation to the President.

Because of the outstanding capacity and ability of Mr. Hughes as a lawyer, because of his unusual prominence, one almost takes his political life in his hands when he suggests that at such an hour no President ever faced a more solemn duty to hear from the American people, humble though they may be, in every town, in every countryside, in every remote hamlet in the United States; but before the news went back to the country, before it could travel back to the out-of-the-way places in this Republic, Mr. Hughes was appointed by the President as the Chief Justice and his name has been sent to the Senate.

I do not for a moment venture to offer any advice to the head of the present administration, but I dare say that if the head of the present administration would consult the responsible leaders of his party in this House and in the other House of Congress, he would have far less difficulty with many of his major problems.

Can any man face the American people in this hour of unrest, in this hour of the bread line—the constantly increasing bread line—in every great city of the Nation, can any man face the conditions that exist in the Nation and say that the decision of the President, hastily made, should have been made or that Mr. Hughes, with a just appreciation of the tremendous import of his act, should have hastened to accept the appointment, hastily made, in the circumstances that I have indicated, and which no one can controvert.

The solemn truth is that the obligation rests upon the Senate to give the citizen back in the obscure village, at the country crossroads, an opportunity to be heard upon this appointment above every other appointment, above all other appointments. Why should he not be heard? Why should he be forestalled? Why should he be denied the privilege of making his voice heard here through his representatives? How many Senators had a line from a single constituent suggesting the name of a single American lawyer for this important post before the announcement came from the White House that the President had acted? How many were there? Did anyone receive such a communication? I dare say not; but, if one, certainly not many Senators received any suggestion from any source of any suitable name for this important office at this particular time.

Senators, it is idle to reason about the duties and responsibilities of the ordinary court. It is beside the question, it is begging the question, to say that a man who has represented this interest and that interest and this corporation and that corporation when he goes upon the bench will be able to decide cases, if he is big enough and if he is honest and if he is intelligent enough, upon their merits. I do not question the correctness of the statement for one moment when the decision relates wholly to the rights of litigants.

When the question is whether or not the right of property runs to A as against B; when the question is one between private litigants, individuals, companies, associations, corporations, or even political divisions, I do not question the capacity of Mr. Hughes to serve as an upright, as an able judge—indeed, one who would reflect the very greatest honor upon any trial court in America. But the Supreme Court of the United States at this hour only incidentally passes upon the rights of litigants. It only incidentally deals with the rights of litigants. It deals with great, fundamental policies.

Let me read just a few lines from one of their latest decisions, to which reference has already been made, to show you what the Supreme Court is now doing—indeed, what it must do. I read from the case cited by the Senator from Idaho [Mr. BORAH], again by the distinguished Senator from Nebraska [Mr. NORRIS], and others who have spoken upon this matter; and, bear in mind, this is what the Supreme Court itself declares that it is now doing.

I quote:

> The commission fixed a rate of fare permitting the company to earn a return of 6.26 per cent on this valuation; and, so far as No. 55 is concerned, the case resolves itself into the simple question whether that return is so inadequate as to result in a deprivation of property in violation of the due process of law clause of the fourteenth amendment. In answering that question, the fundamental principle to be observed is that the property of a public utility, although devoted to the public service and impressed with a public interest, is still private property; and neither the corpus of that property nor the use thereof constitutionally can be taken for a compulsory price which falls below the measure of just compensation.
>
> This is common knowledge.

I am quoting the language of the court itself:

> A rate of return upon capital invested in street-railway lines and other public utilities, which might have been proper a few years ago, no longer furnishes a safe criterion either for the present or the future. (Lincoln Gas Co. *v.* Lincoln, 250 U. S. 256, 268.)

What is the safe criterion? It rests, therefore, in the judgment of the court, and nowhere else.

> Nor can a rule be laid down which will apply uniformly to all sorts of utilities. What may be a fair return for one may be inadequate for another, depending upon circumstances, locality, and risk.

Then the court proceeds to say that in this case a return of 6.26 per cent—over 6¼ per cent net to the company—is actually confiscatory; and it very strongly suggests that a return of even 8 per cent might not be more than fairly compensatory, if compensatory.

The point is, Mr. President, that the court itself is authority for the proposition that it must weigh the facts, not in the light of past decisions of the court, not in the light of legislative enactments, nor in the light of any guide save its own judgment upon the facts, under the conditions that exist when it is called upon to reach a decision upon the important question of public policy.

Mr. WHEELER. Mr. President——

The PRESIDING OFFICER (Mr. ODDIE in the chair). Does the Senator from Georgia yield to the Senator from Montana?

Mr. GEORGE. I do.

Mr. WHEELER. I desire to call the attention of the Senator from Georgia to the fact that Mr. Hughes was the chief counsel in the Interborough case, decided by the Supreme Court, wherein he was contending for an 8-cent fare for the Interborough Co. in the city of New York, notwithstanding the fact that they had a charter from the city of New York providing that only a 5-cent fare should be charged. So he has been arguing on the side of the utilities on this most important public question that is before the court.

Mr. GEORGE. Exactly, Mr. President; but let me repeat: The court sits to determine matters of great public policy. Legislative act or legislative decree is not a guide to the court in this instance, because, if the decision of the Supreme Court which has been commented upon here for two days is to stand, the recapture clause in the transportation act is not worth the paper upon which it is written; for there provision is made for the recapture of all over and above 6 per cent of the net earnings of the carriers of this country, and the court solemnly says that 6.26 per cent is confiscatory!

It is true that the court might say that the condition of the utility, the element of risk involved, and other variable quantities, might take the ordinary carrier by rail out from under the rule that they have announced here; but in saying that a rate is confiscatory, whether for a steam railroad, a street railroad, an electric-light plant, a utility company, or a telephone or telegraph or radio company—if radio shall be declared a common carrier, which it seems to me is inevitable—the Supreme Court, in passing upon whether the rate is confiscatory, is not bound by any act of Congress, because it does not get its power from any act of Congress to strike down a confiscatory rate.

The Supreme Court simply says that the Constitution will not permit private property to be taken for public use without just compensation; and if the rate is confiscatory, the court is bound to strike it down. Equally so, if what the Congress declares to be the proper rate is found by the court to be confiscatory, it is bound to strike it down; and under the language and reasoning of the decision of the 6th of January of this year the recapture provision of the transportation act is void, and it awaits but the decision of the Supreme Court now to pronounce it void unless the court distinguishes a case involving that question from the case actually before it and decided on the 6th of January of this year.

Mr. President, I do not make any assault upon the Supreme Court. That is not my attitude. I recall that our Constitution declares that—

> This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.

I do not raise my voice in protest to the final power of the courts to safeguard the liberties of the individual, to safeguard the liberties of the citizen against extra constitutional acts of the Congress—not at all. But I desire to press upon the Senate again that the Supreme Court does not pass upon the right of private litigants, save as a mere incident to the exercise of its broader and more far-reaching powers; but, on the contrary, it lays down the great rules of public policy that must make for the economic welfare of the masses of men in America through all the coming years, or must add to the burdens under which the common man labors; and it does it despite legislative action to the contrary. It does it despite its own decisions written in the past. It does it despite its decision contemporaneously rendered in another case; and it does it upon the broad rule that it must determine, in the light of the facts in that record, whether the rate is confiscatory.

Mr. President, at a time when wealth has been concentrated to a degree unknown in any previous day of our history, when men are troubled, and honest men and women of all political creeds and faiths are asking the question, "How far is concentration to go? How far is the individual to be pushed? How far is the individual to be shoved out of business and crushed under the terrific weight of the modern economic structure?"—in that hour I ask the question, Is it not the right; is it not the high duty of the Senate, to inquire into the economic beliefs, into the economic views, into the announced convictions of any man who is to be elevated to the office of Chief Justice of the United States, where virtually his conscience and his judgment constitute the sole standard by which great questions of public policy are to be decided?

Mr. President, I had thought to refer to some of the utterances of Mr. Hughes, but I shall not do it, because it would confuse what I have tried to say to the Senate, and what the country to-morrow will ask of the Senate. Make no mistake about it, Senators; you are raising an issue that will be answered in the campaign in 1930, and again in 1932.

I will read but one sentence. The country will recall the Newberry case. I pass over the fact as of little importance that Mr. Hughes appeared in behalf of Mr. Newberry in the Supreme Court. Indeed, I do not attach any particular significance to it. The vote on whether Senator Newberry should be entitled to retain his seat came in the Senate in 1922, and in that year Mr. Hughes, then Secretary of State under the Harding administration, the next after he had surrendered his seat as Associate Justice of the Supreme Court of the United States in order to run for the Presidency, wrote a letter, which one of his party caused to be printed in the RECORD. That letter closes with these memorable words from Mr. Hughes, then Secretary of State:

> The plain fact is that Senator Newberry was wrongly and most unjustly convicted and his conviction was set aside. Despite the long period of preparation, the rigid investigation, the careful choosing of their ground, the long-drawn-out trial, the attempt in every possible way to besmirch, and the zeal, ability, and even bitterness of his pursuers, their endeavor to establish a violation of law on the part of Senator Newberry completely failed.

Let us grant all that. Then Mr. Hughes said:

> And accordingly Senator Newberry stood as a Senator duly elected by the people of the State of Michigan and entitled to his seat in the Senate of the United States.

That was in August, 1922, in the midst of a political campaign, the unmistakable utterance of a partisan, which Mr.

Hughes has ever been since he gave up his position on the Supreme Bench of the United States.

I do not now raise issue with Mr. Hughes; I leave it to the judgment of the American people whether Newberry was duly elected by the voters of Michigan and was entitled to his seat in the Senate of the United States. There is the letter written by the then Secretary of State, now the nominee for the Chief Justiceship of the Supreme Court of the United States, brought into this Chamber, where the fierce controversy over the right of Senator Newberry to retain his seat had been going on for months.

Mr. President, as I began, let me say in concluding, that I have reluctantly, most reluctantly, reached the conclusion that I would vote to recommit this nomination to the Committee on the Judiciary, and would vote against the confirmation, if confirmation is immediately asked, in the light of all the facts, a few of which I have endeavored to discuss, particularly at a time when every consideration which should appeal to reasonable men earnestly desirous of promoting the general welfare, demands that the people of the United States have the right to be heard through their chosen representatives in this body upon this most important matter.

Mr. NORRIS. Mr. President, now that it is practically 6 o'clock, I want to suggest to the Senator from Indiana there are four or five other Senators who desire to speak, and that we take a recess until to-morrow at 11 o'clock.

Mr. WATSON. Mr. President, I am not for that proposition. Yesterday we had in the open Senate a good-faith agreement——

Mr. NORRIS. Oh, no.

Mr. WATSON. That we would vote——

Mr. McKELLAR. Oh, no, Mr. President.

Mr. WATSON. That we would vote this day——

Mr. NORRIS. No.

Mr. WATSON. Before the Senate adjourned.

Mr. NORRIS. Mr. President——

Mr. WATSON. That is the exact language in the RECORD.

Mr. NORRIS. Mr. President, I do not know what is in the RECORD. I thought we would get through before this time, but we did not get through, and distinctly there was no agreement made. I never consented to any agreement that we should vote to-day. I suggested to the Senator that he make the announcement that he would expect to reach a vote and would hold the Senate in session.

When the Senator from Indiana made the suggestion that he would hold us here, the Senator from Virginia [Mr. GLASS] said, "If you have the votes to do it," and that is when the Senator from Indiana said he did have the votes and that he was going to do it.

Mr. GLASS. But there was no agreement.

Mr. NORRIS. Absolutely no agreement.

Mr. GLASS. There was absolutely no agreement.

Mr. BRATTON. Mr. President——

Mr. GLASS. There would not have been any agreement.

Mr. BRATTON. Will the Senator yield?

The VICE PRESIDENT. Does the Senator from Nebraska yield to the Senator from New Mexico?

Mr. NORRIS. Let me first suggest to the Senator from Indiana that I think the Senator ought to make a motion for a recess.

Mr. WATSON. No; I shall not make the motion.

Mr. NORRIS. Then, Mr. President, I move that the Senate take a recess until 11 o'clock to-morrow, and upon that I ask for the yeas and nays.

The yeas and nays were ordered, and the legislative clerk proceeded to call the roll.

Mr. THOMAS of Oklahoma (when his name was called). On this question I have a pair with the junior Senator from Indiana [Mr. ROBINSON]. I understand that if he were present he would vote "nay." If I were permitted to vote, I would vote "yea."

Mr. TYDINGS (when his name was called). I have a general pair with the senior Senator from Rhode Island [Mr. METCALF]. If he were present, I understand he would vote "nay," and if permitted to vote I would vote "yea."

Mr. WATSON (when his name was called). I have a general pair with the senior Senator from South Carolina [Mr. SMITH], who is confined to his home by illness. I transfer that pair to the senior Senator from Pennsylvania [Mr. REED] and vote "nay."

The roll call was concluded.

Mr. THOMAS of Oklahoma. I transfer my pair with the junior Senator from Indiana [Mr. ROBINSON] to the junior Senator from Arkansas [Mr. CARAWAY] and vote "yea."

Mr. SCHALL. My colleague [Mr. SHIPSTEAD] is unavoidably absent. I ask that this announcement may stand for the day.

Mr. FESS. I desire to announce that on this vote the junior Senator from Kentucky [Mr. ROBSION] is paired with the senior Senator from Alabama [Mr. HEFLIN].

Mr. SHEPPARD. I desire to announce that the senior Senator from Arkansas [Mr. ROBINSON] has a general pair with the junior Senator from Nebraska [Mr. HOWELL].

The result was announced—yeas 35, nays 45, as follows:

YEAS—35

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| Black | Couzens | Hawes | Sheppard |
| Blaine | Cutting | Johnson | Simmons |
| Blease | Dill | La Follette | Stephens |
| Borah | Fletcher | McKellar | Thomas, Okla. |
| Bratton | Frazier | McMaster | Wagner |
| Brock | George | Norbeck | Walsh, Mass. |
| Brookhart | Glass | Norris | Walsh, Mont. |
| Connally | Harris | Nye | Wheeler |
| Copeland | Harrison | Overman | |

NAYS—45

| | | | |
|---|---|---|---|
| Allen | Goldsborough | McCulloch | Sullivan |
| Ashurst | Gould | McNary | Swanson |
| Baird | Greene | Oddie | Thomas, Idaho |
| Bingham | Grundy | Patterson | Townsend |
| Broussard | Hale | Phipps | Trammell |
| Capper | Hastings | Pine | Vandenberg |
| Dale | Hatfield | Ransdell | Walcott |
| Deneen | Hebert | Schall | Waterman |
| Fess | Jones | Shortridge | Watson |
| Gillett | Kean | Smoot | |
| Glenn | Kendrick | Steck | |
| Goff | Keyes | Steiwer | |

NOT VOTING—16

| | | | |
|---|---|---|---|
| Barkley | Howell | Pittman | Robsion, Ky. |
| Caraway | King | Reed | Shipstead |
| Hayden | Metcalf | Robinson, Ark. | Smith |
| Heflin | Moses | Robinson, Ind. | Tydings |

So the Senate refused to take a recess.

Mr. WALSH of Montana. Mr. President, I am in receipt of a letter from an esteemed friend, a highly intelligent and respected citizen of Boston, Mass., which is pertinent to the motion of which notice has been given to recommit this nomination, if not, indeed, to the matter that is now before us.

It will be recalled that while the Great War was in progress and our country was bending every energy to bring it to a successful termination a great clamor arose concerning charges of corruption in the manufacture and production of airplanes for service in the war. As it grew and the anvil chorus rang, the President of the United States, then charged with the gravest duty that could be imposed upon any official, evidencing a desire to have the charges sifted to the very bottom, designated for that purpose Charles Evans Hughes, then his late rival in the election of 1916 for the office of President of the United States, and enjoying a well-earned reputation for being a thoroughgoing investigator. Mr. Hughes made a report, commented upon in the letter from which I read now, as follows:

President Wilson appointed Mr. Hughes a special investigator. Such trust in his rival of two years earlier created surely a binding obligation to be absolutely fair. Mr. Hughes reported on November 1, 1918, just before the critical congressional elections of that year. He asked that the principal representative of the Government in the airplane industry, Colonel Deeds, be court-martialed, quoting against him in particular four telegrams which had passed between Deeds and certain former business associates, reporting that there had been "highly improper conduct" and stating that the last of the telegrams "puts in a strong light the relations of the parties."

Thereupon the War Department took up the question of a court-martial and reported January 16, 1919. The board of review pointed out that in publishing the four telegrams to the discredit of Deeds, Mr. Hughes had omitted a fifth telegram sent by Deeds, which, if published, would have shown Deeds to have been innocent. The board said:

"Perusal of these telegrams as a series clearly indicates a very large degree of solicitude on the part of Colonel Deeds to protect the best interests of the Government and negatives the implications raised by Judge Hughes."

The Secretary of War thereupon issued this statement:

"The unanimous report of this board of review, approved by the Acting Judge Advocate General, recommends that Colonel Deeds be not tried by court-martial on any of the grounds suggested, and this recommendation has been approved by me.

"Colonel Deeds was one of a large group of men who came to Washington at great personal and pecuniary sacrifice to render service to the Government in the great emergency caused by our participation in the war.

"My duty as Secretary of War with regard to any public servant under my jurisdiction is clearly to bring about proper punishment for wrongdoing and equally clearly to protect those public servants whose conduct is faithful and upright against embarrassment, humiliation, or loss.

"Very wide publicity has been attached to the acts of Colonel Deeds as a member of the aircraft board. Whether it will ever be possible to overtake the judgments which have been formed upon partial infor-

mation on this subject, I do not know; but this department will make every effort to procure the widest publicity for the action now taken and for the grounds upon which it rests."

If the nomination were recommitted, Mr. President, it would seem to me that the matters herein discussed would be a most proper subject for inquiry. It will be remembered in this connection that the administration of President Wilson going out in 1921, indeed the opposing party getting control of both branches of the Congress in the elections of 1918, on being installed in the legislative branch after the 4th of March, 1921, insisted on all manner of investigations for the purpose of establishing charges of fraud against officials of the Government under President Wilson.

It will be remembered that thereafter the Attorney General of the United States, Harry M. Daugherty, came to the Congress of the United States and represented that gigantic frauds, frauds of mammoth proportions, had been perpetrated, and asked for the most liberal appropriations from Congress for the purpose of ferreting out those frauds and prosecuting those guilty of them. The Congress freely and, as my recollection now serves me, unanimously granted the request, and, of course, it is history that they all came to naught and that no indictments were found at all except, as my recollection is, two that were dismissed upon demurrer or other preliminary proceedings.

Accordingly, the suggestion here that all that Mr. Hughes was able to find in this inquiry were the charges that were afterwards proven to be unfounded against Colonel Deeds, and that if he had turned in all of the matter that was in his hands Colonel Deeds would have likewise been exonerated, is such a grave charge against Mr. Hughes that it perhaps ought to be more fully sounded.

Mr. President, it will doubtless be remembered that I voted in the committee to report favorably the nomination of Mr. Hughes. I am convinced, however, upon the most mature reflection that I did not at that time give due weight to many of the considerations which have been adverted to in the somewhat protracted debate here, and I am convinced that I ought not to adhere to the position which I then took.

It will be remembered that when the nomination for a Federal judgeship in the State of Kansas was before us recently, I called attention to a provision of the constitution of that State which provided that no person who was elected a judge of the supreme court of that State, or perhaps any judge, should be eligible to appointment to any office, either State or Federal, during the time for which he was elected. I called attention to the observations made by many judges construing similar provisions of State constitutions concerning the considerations which prompted the incorporation of provisions of that kind in the constitutions of something more, I believe, than 20 different States, evidencing a settled conviction of the people of the Union that it is entirely unwise to leave before a judge of a court, particularly of a high court, temptation even to utilize his position for the purpose of promoting his political ambition for higher office.

Reflecting upon that matter, Mr. President, I reached the conclusion that that is a wise provision to incorporate in the constitutions of the various States, and if the policy indicated by it is a salutary one, it must of course apply with increased power and force to the Supreme Court of the United States. My conviction in that regard has been powerfully strengthened by the declaration of Judge Hughes himself.

When the idea was first advanced to him of becoming the candidate of the Republican Party in 1916, apparently his own sense of the propriety revolted against it, and he announced that under no consideration could be become a seeker after such an office or any office. Perhaps the possibility of his becoming a candidate at that time might not have appeared so bright, but when it appeared later that in all probability the nomination was his for the asking, he evidently succumbed to the temptation, a course which he had himself condemned, and which it seems to me now is an offense of such a character as that it ought not to be condoned and ought not to be indorsed by action elevating him to the bench.

There is another matter which operates somewhat powerfully with me, perhaps, because I was somewhat closely identified with the circumstances. Mr. Hughes sat at the same board as a member of the Cabinet of President Harding with Secretary Fall when he was treasonably and corruptly giving away to private interests the oil reserves of the Navy, with Harry Daugherty when he was engaged in the orgy of corruption that has shocked the Nation; when Forbes was pillaging the disabled veterans of the funds provided for their care by a generous Government; when Miller, the trusted servant of the Government of the United States, was pilfering from the funds intrusted to his care as Alien Property Custodian.

I have always found it difficult to understand how any man in the position such as that occupied by Mr. Hughes, as an associate in the Cabinet of President Harding, keen lawyer as he is, and as everybody recognizes him to be—I have found it difficult to understand how it was that he could be entirely oblivious of the riot of corruption that was about him. But, Mr. President, if he was so ignorant, it has always seemed to me that thereafter, when the sordid story was unfolded, and the guilt of the parties was established to the satisfaction of every right-thinking man in the country and afterwards confirmed by the courts—it has always seemed to me that it was up to Mr. Hughes at least to utter one word of condemnation of those acts, in order that a public sentiment might be developed in this country that would bring speedy and severe justice to the perpetrators of these crimes. The silence of Mr. Hughes has always been entirely inexplicable.

For these reasons, Mr. President, and for others which have been elaborated in the debate—which has been on a high plane—I am constrained to do what Mr. Hughes himself did upon a momentous occasion—change my mind—and, accordingly, I shall vote against his confirmation.

The VICE PRESIDENT. The question is, Shall the Senate advise and consent to the nomination of Charles E. Hughes?

Mr. JOHNSON. Mr. President, I suggest the absence of a quorum.

The VICE PRESIDENT. The clerk will call the roll.

The legislative clerk called the roll, and the following Senators answered to their names:

| | | | |
|---|---|---|---|
| Allen | Dill | Jones | Shortridge |
| Ashurst | Fess | Kean | Simmons |
| Baird | Fletcher | Kendrick | Smoot |
| Barkley | Frazier | Keyes | Steck |
| Bingham | George | La Follette | Steiwer |
| Black | Glass | McCulloch | Stephens |
| Blaine | Glenn | McKellar | Sullivan |
| Blease | Goff | McMaster | Swanson |
| Borah | Goldsborough | McNary | Thomas, Idaho |
| Bratton | Gould | Norbeck | Thomas, Okla. |
| Brock | Greene | Norris | Townsend |
| Brookhart | Grundy | Nye | Trammell |
| Broussard | Hale | Oddie | Tydings |
| Capper | Harris | Overman | Vandenberg |
| Connally | Harrison | Patterson | Wagner |
| Copeland | Hastings | Phipps | Walcott |
| Couzens | Hatfield | Pine | Walsh, Mass. |
| Cutting | Hawes | Ransdell | Walsh, Mont. |
| Dale | Hebert | Schall | Waterman |
| Deneen | Johnson | Sheppard | Watson |

The VICE PRESIDENT. Eighty Senators have answered to their names. A quorum is present. The question is, Shall the Senate advise and consent to the nomination of Charles E. Hughes?

Mr. McKELLAR and Mr. WATSON addressed the Chair.

The VICE PRESIDENT. The Senator from Tennessee.

Mr. McKELLAR. Mr. President, I have a sore throat and therefore can not make the speech which I had intended to make. I wish merely to state my conclusions and the reasons for the vote I shall cast.

I shall vote against the confirmation of Mr. Hughes for the following reasons:

First. Because of his age. He is the oldest man ever appointed to the Supreme Court. He will not be eligible for retirement until he is 78 years old. I call attention to section 714 of the Revised Statutes, as follows:

> When any judge of any court of the United States resigns his office after having held his commission as such at least 10 years and having attained the age of 70 years, he shall, during the residue of his natural life, receive the same salary which was by law payable to him at the time of his resignation.

Under that statute, naturally his former service could not be counted in conjunction with the service upon which he may now enter. I understand a different view is held by some, but I have no doubt about the correctness of my construction of the act.

In addition to that, Mr. President, I want to quote Mr. Hughes himself on this subject. I quote from an article appearing in the New York Times, May 21, 1927:

> "TOO OLD," SAYS HUGHES, AT 65, TO RUN FOR THE PRESIDENCY
>
> Declaring that he was "too old to run for President," Charles Evans Hughes, after reading in the morning papers yesterday of a movement to start a Hughes boom in the event that President Coolidge should decide not to become a candidate for reelection, issued a statement declaring he would not accept a nomination. He was 65 years old April 11.
>
> "I know nothing of the movement to which reference is made," Mr. Hughes said. "There should be no doubt as to my own attitude. I am for President Coolidge, first, last, and all the time, and I believe that he will be renominated and reelected. I do not wish my name

to be used in any contingency. I am too old to run for President, and I would neither seek nor accept the nomination."

I take it, Mr. President, that all of us who are familiar with the duties of the Chief Justice of this the greatest of all courts must know that a man who is too old to run for President is too old to perform the duties of the Chief Justice of the United States.

Second. Because, though Mr. Hughes had a perfect right after leaving public service to practice law and to represent clients, commonly known as trusts and combinations, or, according to Mr. Roosevelt, "malefactors of great wealth," yet when he made that decision he should have known it meant his absolute retirement from the highest court in the land, the judges of which have to take the following oath of office, and I want to call the especial attention of the Senate to what in these days might be called the very remarkable oath that the Chief Justice is required to take:

I, ———, do solemnly swear (or affirm) that I will administer justice without regard to persons and do equal right to the poor and the rich—

To the poor and the rich—

and that I will faithfully and impartially discharge and perform all the duties incumbent on me as Chief Justice, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God.

That is the oath prescribed by section 712 of the Revised Statutes.

In view of the environment of Mr. Hughes during the last 10 years, how can anyone think that he will represent both the poor and the rich on the bench of the Supreme Court?

Third. Because I believe his economic and business views are at war with the highest and best interests of the people generally.

Fourth. Because his former opinions show that it is his economic view that money invested in a public-service corporation must have a reasonable return by taxation of all the people using the service of such corporation, whether such corporation earns a reasonable return or not. His opinions further show that he considers it perfectly proper that, in addition to a reasonable return on the money actually invested, the corporation is entitled to have a portion of its earnings obtained from the people placed in its capital account and receive additional returns on such profits. I do not think that is a correct economic view.

Fifth. Because he believes in permitting public-service corporations to make contracts with cities as to rates of fare and then permitting them to violate such contracts if they conflict with the doctrine of reasonable returns to the corporation.

Sixth. Because, in my judgment, his whole history shows that he puts corporate wealth and profits above the rights of the plain citizen.

Seventh. Because in 1922, as chairman of President Harding's Disarmament Conference, as it was probably improperly called, he agreed to sink the greatest battleship fleet that America ever had, without regard to the best interests of America.

Eighth. Mr. Hughes stands for everything in political and governmental affairs to which I am opposed. He stands against everything that I favor. Then, why, as one of 97 executives authorized by our Constitution to appoint him, should I vote for his appointment, when I do not approve what he stands for? I shall not do it.

I concede the high character and honesty of Mr. Hughes, and I regret personally that I have to vote against him, but as he stands for those economic principles of Government to which I am opposed, and, as he has taken the lead in putting into the judicially decreed law of our land economic theories of great value to those of great wealth, without considering the rights of the plain people or the "poor" people as required by his oath of office, I can not cast my vote for him.

Mr. NORRIS. Mr. President, I move that the nomination be referred back to the Committee on the Judiciary.

Mr. BRATTON. On that motion I call for the yeas and nays.

The yeas and nays were ordered, and the legislative clerk proceeded to call the roll.

Mr. GOULD (when his name was called). I have a general pair with the Senator from Utah [Mr. KING]. I transfer that pair to the Senator from New Hampshire [Mr. MOSES] and will vote. I vote "nay."

Mr. KEYES (when Mr. MOSES's name was called). My colleague [Mr. MOSES] is necessarily absent. If present, he would vote "nay."

Mr. LA FOLLETTE (when Mr. SHIPSTEAD'S name was called). I desire to announce the unavoidable absence of the senior Senator from Minnesota [Mr. SHIPSTEAD]. If he were present, he would vote "yea."

Mr. THOMAS of Oklahoma (when his name was called). On this question I have a general pair with the junior Senator from Indiana [Mr. ROBINSON]. I transfer that pair to the senior Senator from Maryland [Mr. TYDINGS] and will vote. I vote "yea."

Mr. WATSON (when his name was called). Making the same announcement as on the previous vote with reference to my pair and its transfer, I vote "nay."

The roll call was concluded.

Mr. NORRIS. I desire to announce that my colleague [Mr. HOWELL] is unavoidably detained from the Senate. He is paired with the senior Senator from Arkansas [Mr. ROBINSON]. If my colleague were present, he would vote "yea."

Mr. BROCK. I have a pair with the Senator from Minnesota [Mr. SHIPSTEAD], and therefore withhold my vote.

Mr. SHEPPARD. The Senator from Arkansas [Mr. ROBINSON] has requested that he be paired in favor of confirmation. Accordingly he has been paired on this question with the Senator from Nebraska [Mr. HOWELL], who, if present, would vote "yea." The Senator from Arkansas is detained by attendance at the Naval Arms Conference in London.

I also desire to announce that the Senator from Arkansas [Mr. CARAWAY], who would vote "yea" on this question, is paired with the Senator from Rhode Island [Mr. METCALF], who would vote "nay."

Mr. FESS. I am authorized to announce that the senior Senator from Pennsylvania [Mr. REED], being absent at the conference in London, is detained from the Senate, and if he were present would vote "nay"; also, that the Senator from New Hampshire [Mr. MOSES], if present, would vote "nay."

Mr. BARKLEY. I am authorized to announce that my colleague [Mr. ROBSION of Kentucky] is unavoidably absent from the city.

Mr. BLACK. My colleague the senior Senator from Alabama [Mr. HEFLIN] is absent from the city. I am not informed as to how he would vote on this particular question. He has a general pair with the junior Senator from Kentucky [Mr. ROBSION].

The result was announced—yeas 31, nays 49, as follows:

YEAS—31

| | | | |
|---|---|---|---|
| Barkley | Couzens | Hawes | Overman |
| Black | Cutting | Johnson | Sheppard |
| Blaine | Dill | La Follette | Simmons |
| Blease | Fletcher | McKellar | Thomas, Okla. |
| Borah | Frazier | McMaster | Trammell |
| Bratton | George | Norbeck | Walsh, Mont. |
| Brookhart | Glass | Norris | Wheeler |
| Connally | Harris | Nye | |

NAYS—49

| | | | |
|---|---|---|---|
| Allen | Goldsborough | McCulloch | Sullivan |
| Ashurst | Gould | McNary | Swanson |
| Baird | Greene | Oddie | Thomas, Idaho |
| Bingham | Grundy | Patterson | Townsend |
| Broussard | Hale | Phipps | Vandenberg |
| Capper | Harrison | Pine | Wagner |
| Copeland | Hastings | Ransdell | Walcott |
| Dale | Hatfield | Schall | Walsh, Mass. |
| Deneen | Hebert | Shortridge | Waterman |
| Fess | Jones | Smoot | Watson |
| Gillett | Kean | Steck | |
| Glenn | Kendrick | Steiwer | |
| Goff | Keyes | Stephens | |

NOT VOTING—16

| | | | |
|---|---|---|---|
| Brock | Howell | Pittman | Robsion, Ky. |
| Caraway | King | Reed | Shipstead |
| Hayden | Metcalf | Robinson, Ark. | Smith |
| Heflin | Moses | Robinson, Ind. | Tydings |

So the motion to recommit was rejected.

The VICE PRESIDENT. The question is, Shall the Senate advise and consent to the nomination?

Mr. McKELLAR and others called for the yeas and nays, and they were ordered.

The VICE PRESIDENT. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. BROCK (when his name was called). I have a pair with the senior Senator from Minnesota [Mr. SHIPSTEAD] and withhold my vote.

Mr. GOULD (when his name was called). I have a general pair with the junior Senator from Utah [Mr. KING], who is in the hospital. I transfer that pair to the senior Senator from New Hampshire [Mr. MOSES] and vote "yea."

Mr. BLACK (when Mr. HEFLIN'S name was called). My colleague the senior Senator from Alabama [Mr. HEFLIN] is absent from the city. He has a general pair with the junior Senator from Kentucky [Mr. ROBSION]. I am not informed as to how my colleague would vote on this nomination if present.

Mr. NORRIS (when Mr. HOWELL'S name was called). My colleague [Mr. HOWELL] is unavoidably detained from the Senate. He is paired with the senior Senator from Arkansas [Mr. ROBINSON]. If my colleague were present, he would vote "nay."

Mr. KEYES (when Mr. MOSES's name was called). My colleague [Mr. MOSES] is necessarily absent. If present, he would vote "yea."

Mr. FESS (when Mr. REED's name was called). I desire to announce that the senior Senator from Pennsylvania [Mr. REED] is detained at the Naval Arms Conference in London. If present, he would vote "yea."

Mr. SHEPPARD (when the name of Mr. ROBINSON of Arkansas was called). The senior Senator from Arkansas has been paired, at his request, in favor of the confirmation. He is paired with the junior Senator from Nebraska [Mr. HOWELL], who, if present, would vote "nay." The Senator from Arkansas is detained in attendance at the Naval Arms Conference in London.

Mr. THOMAS of Oklahoma (when his name was called). On this question I have a pair with the junior Senator from Indiana [Mr. ROBINSON]. I understand that if he were present he would vote "yea." If I were permitted to vote, I would vote "nay."

Mr. WATSON (when his name was called). I have a general pair with the senior Senator from South Carolina [Mr. SMITH], who is detained at home by reason of illness, and who, I am informed, would vote "nay" if present. I transfer my pair to the senior Senator from Pennsylvania [Mr. REED] and vote "yea."

The roll call was concluded.

Mr. SHEPPARD. The senior Senator from Maryland [Mr. TYDINGS] is unavoidably detained from the Senate. If present, he would vote "nay." He is paired with the senior Senator from Rhode Island [Mr. METCALF], who would, if present, vote "yea."

Mr. FESS. The junior Senator from Kentucky [Mr. ROBSION], if present, would vote "yea."

The result was announced—yeas 52, nays 26, as follows:

YEAS—52

| | | | |
|---|---|---|---|
| Allen | Glenn | Kendrick | Steiwer |
| Ashurst | Goff | Keyes | Stephens |
| Baird | Goldsborough | McCulloch | Sullivan |
| Barkley | Gould | McNary | Swanson |
| Bingham | Greene | Oddie | Thomas, Idaho |
| Broussard | Grundy | Patterson | Townsend |
| Capper | Hale | Phipps | Trammell |
| Copeland | Harrison | Pine | Vandenberg |
| Dale | Hastings | Ransdell | Wagner |
| Deneen | Hatfield | Schall | Walcott |
| Fess | Hebert | Shortridge | Walsh, Mass. |
| Fletcher | Jones | Smoot | Waterman |
| Gillett | Kean | Steck | Watson |

NAYS—26

| | | | |
|---|---|---|---|
| Black | Couzens | Johnson | Overman |
| Blaine | Dill | La Follette | Sheppard |
| Blease | Frazier | McKellar | Simmons |
| Borah | George | McMaster | Walsh, Mont. |
| Bratton | Glass | Norbeck | Wheeler |
| Brookhart | Harris | Norris | |
| Connally | Hawes | Nye | |

NOT VOTING—18

| | | | |
|---|---|---|---|
| Brock | Howell | Reed | Smith |
| Caraway | King | Robinson, Ark. | Thomas, Okla. |
| Cutting | Metcalf | Robinson, Ind. | Tydings |
| Hayden | Moses | Robsion, Ky. | |
| Heflin | Pittman | Shipstead | |

So the Senate advised and consented to the nomination of Charles Evans Hughes to be Chief Justice of the United States.

The VICE PRESIDENT. The President will be notified.

LEGISLATIVE SESSION

Mr. SMOOT. Mr. President, if there is no particular necessity for proceeding with the Executive Calendar, I would like to have the Senate return to legislative session, and take a recess. I ask that the Senate return to legislative session.

The VICE PRESIDENT. Is there objection? The Chair hears none, and the Senate resumed legislative session.

Mr. BLEASE. Mr. President, what becomes of the balance of the names on the Executive Calendar?

The VICE PRESIDENT. They were passed over.

AGRICULTURAL POSSIBILITIES OF THE FLORIDA EVERGLADES

Mr. FLETCHER presented a communication from the Secretary of War, transmitting a report of Mr. E. R. Lloyd made to Col. Mark Brooke, Corps of Engineers, division engineer at New Orleans, La., on the agricultural possibilities of the Florida Everglades, submitted in connection with proposed river and harbor and flood-control improvements in the State of Florida, with an accompanying copy of a memorandum from the Chief of Engineers of the Army, which was ordered to be printed as a document, with an illustration.

RECESS

Mr. SMOOT. I move that the Senate take a recess until to-morrow morning at 11 o'clock.

The motion was agreed to; and the Senate (at 6 o'clock and 50 minutes p. m.) took a recess until to-morrow, Friday, February 14, 1930, at 11 o'clock a. m.

CONFIRMATION

*Executive nomination confirmed by the Senate February 13 (legislative day of January 6), 1930*

CHIEF JUSTICE OF THE UNITED STATES

Charles Evans Hughes.

## HOUSE OF REPRESENTATIVES

THURSDAY, *February 13, 1930*

The House met at 12 o'clock noon.

The Chaplain, Rev. James Shera Montgomery, offered the following prayer:

Our Father, from whom all blessings flow, Thou dost continue to pour abroad divine beneficence and Thy patience and mercies transcend our greatest conception. We ask Thee to interpret for us our daily tasks and duties. O Thou who dost breathe upon the whole creation, reveal Thyself unto those who seek the truth. In our affections, in our friendships, and in our labors may we have the underlying strength of God. We pray for this Congress and the entire citizenship of our Republic. As the nations are looking toward us may intemperate indulgence and ambition be destroyed. Come to every heart and fill it with love and give to every human faculty divine power. Amen.

The Journal of the proceedings of yesterday was read and approved.

MESSAGE FROM THE PRESIDENT

A message in writing from the President of the United States was communicated to the House by Mr. Latta, one of his secretaries, who also informed the House that on the following dates the President approved and signed bills and joint resolutions of the House of the following titles:

On February 6, 1930:

H. J. Res. 170. Joint resolution providing for a study and review of the policies of the United States in Haiti.

On February 7, 1930:

H. J. Res. 240. Joint resolution making an appropriation to enable the Secretary of Agriculture to meet an emergency caused by an outbreak of the pink bollworm in the State of Arizona;

H. J. Res. 241. Joint resolution making an additional appropriation for the fiscal year 1930 for the cooperative construction of rural post roads;

H. J. Res. 242. Joint resolution making an appropriation to carry out the provisions of the act entitled "An act to enable the mothers and widows of the deceased soldiers, sailors, and marines of the American forces now interred in the cemeteries of Europe to make a pilgrimage to these cemeteries," approved March 2, 1929;

H. R. 5191. An act to authorize the State of Nebraska to make additional use of Niobrara Island;

H. R. 6621. An act to extend the times for commencing and completing the construction of a bridge across the water between the mainland at or near Cedar Point and Dauphin Island, Ala.; and

H. R. 7642. An act to extend the time for completing the construction of the approaches of the municipal bridge across the Mississippi River at St. Louis, Mo.

On February 8, 1930:

H. J. Res. 232. Joint resolution to amend the joint resolution entitled "Joint resolution to provide for eradication of pink bollworm and authorizing an appropriation therefor," approved May 21, 1928.

ENROLLED JOINT RESOLUTION SIGNED

Mr. CAMPBELL of Pennsylvania, from the Committee on Enrolled Bills, reported that that committee had examined and found truly enrolled a joint resolution of the House of the following title, which was thereupon signed by the Speaker:

H. J. Res. 245. Joint resolution making an additional appropriation for personal services in the office of the Treasurer of the United States for the fiscal year ending June 30, 1930.

THE OREGON BOUNDARY SETTLEMENT OF 1846

Mr. KORELL. Mr. Speaker, I ask unanimous consent to extend my remarks in the RECORD upon the legislative trails to the far West, and to incorporate with them some data compiled by the legislative reference bureau of the Library of Congress.

The SPEAKER. The gentleman from Oregon asks unanimous consent to extend his remarks in the RECORD in the manner indicated. Is there objection?

There was no objection.

Mr. KORELL. Mr. Speaker, prior to his withdrawal from Congress, my colleague, the late Nicholas J. Sinnott, undertook