The Atlantic

Criticizing the Courts

"The position in which the American courts are placed to-day is a peculiarly delicate one. On the one side are those to whom modern American legislation is the new barbarism threatening the states and nation … On the other side are those who contend that legislation of the new type is necessary and unavoidable."

By George W. Alger

NOVEMBER 1911 ISSUE

In a general sense the question of the right to criticize the courts is no question at all. In a democracy every institution is necessarily the subject of criticism, often of an offensive and painful character; and to this general rule the courts are no exception. Indeed, in one sense, the courts are peculiarly the subject of the criticism of experts. Lawyers who try cases are engaged in testing the judicial capacity of judges. Lawyers who appeal from a lower court to a higher court are engaged in criticizing the judge who was responsible for an unsatisfactory decision. The appeal judges are paid by the state to act as critics of their brethren in the court below. In view of this machinery through which the courts are subjected to the animadversion of professional critics, it would be a hardy or a very foolish man who would assert that criticism of the courts should not be indulged in by laymen.

But, while the general right to criticize is not disputed, there has been evident in recent years, and generally in political campaigns, a somewhat vague attempt to draw an imaginary or real line between the types of criticism which are permissible and those which are not and which constitute what are called 'Attacks upon the Courts.'

If we were to attempt such a classification of current criticisms of the courts, we should find in the group concerning which the right to criticize is unquestionable, such subjects are as the break-down in certain sections of our criminal law, the defects of over-cumbersome procedure, the imperfect condition of judicial machinery, and the time-honored complaint of the law's delay.

Modern conditions are the natural causes for these criticisms. The improvement of judicial machinery is a matter of very considerable importance. The amount of work which has to be done by the courts is enormous in comparison with what was required a half-century ago; and with the increase of litigation, the inevitable result of our more complicated form of society, the strain upon the machinery of the courts has increased. We are applying efficiency tests to industrial processes to promote speed, accuracy, cheapening of cost, conservation of energy, and the adaptation of means to the end sought. These critics demand the application to the courts of the same principle of scientific management which to-day bids fair to revolutionize the machinery of production. There is, they assert, the same need of economic efficiency

in the courts as in business. Their criticisms have a double aspect: one which relates to defects in the machinery of procedure and practice, and aims from a standpoint of efficiency to reconstitute the processes of justice; and the other, to the substitution of a new and more healthful spirit for one in which the broad ethical demands of justice are too often subordinate to unserviceable technicalities and trifles.

On these subjects we have now an aroused public opinion, guided by leaders of recognized standing and authority. A demand for law-reform supported by the leaders of the American Bar, and by the judges themselves, is nowhere considered as in any sense an attack upon the courts, as that much worn phrase is currently used.

The subjects which have been mentioned are not controversial ones, since we are all interested in having our courts improved in efficiency, and our criminal law made sure and speedy. Criticism of the courts for defects in these matters has never written a line in a party platform pledging any political organization to the defense of the courts against attacks upon the judiciary.

The Nuclear Family Was a Mistake

DAVID BROOKS

When, however, we have passed from the consideration of these matters, upon which public opinion is substantially in accord, to the consideration of the relation of the judiciary to the public policy of the state and nation, we have entered the field in which the existence, or at least the extent, of the right to criticize the courts, is challenged or denied as a political issue.

It is the recurrence of an old subject in a new form. The right to criticize the Supreme Court and to question the finality of its decisions on political problems, half a century ago was a subject of debate in the great controversy over the nature of the Constitution, which later culminated in our Civil War. The right to criticize the judiciary and to question the finality of decisions upon economic, industrial, and social problems is the open public question of our own time, and is the fundamental issue in the current discussion of attacks upon the courts and current defenses of the judiciary.

The question rarely, however, is expressed concretely in this form. Ordinarily the issue becomes available for political purposes in the highly utilitarian literature of party platforms, through the form or manner of criticism upon court decisions, on grave public questions, indulged in by prominent public men in an opposite camp; and the 'defense-of-the-judiciary' planks, evoked by such utterances deal with rebukes of the manner of these criticisms more than with their substance. The Republican planks which defended the courts against Bryan and the criticisms of the Income Tax decision, and the Democratic planks which defended the courts against Lincoln and his criticism of the Dred Scott case, and more recently against Roosevelt and his criticism of the Bakeshop and Sugar Trust cases, are alike in this regard.

There exists to-day, no doubt, a wholesome public opinion which protects our courts generally from the vilification and coarse libeling to which our legislative and executive officers are constantly exposed. To a certain extent, party platforms which protest against attacks upon the courts are healthy expressions of the public opinion.

It is encouraging feature of our democracy that at least in our attitude toward the courts, we have, by general consent, decided to be civil. It is an attitude which to-day protects our courts from that criticism, unlimited either as to form or substance, which relentlessly pursues prominent members of coördinate branches of our government. It is a comparatively modern development of democracy.

The distinction made between the courts and other executive and legislative officers as to the form of criticism applicable to them did not exist at the time our government was founded, nor in the so-called 'Golden Age' of the Supreme Court. It was recognized neither by the public nor by the great statesmen of the past. Jefferson, for example, indulged in criticism of the Federal Judiciary which would be intolerable to-day from any living public man. 'The Judiciary of the United States,' he declared, 'is a subtle corps of sappers and miners, constantly working underground to undermine the foundations of our confederate fabric.' His followers, who shared his bitter animosity against Marshall, joined with him in his repeated attacks upon the great

Chief Justice. After the Jeffersonian resistance to the power asserted by Marshall in his court to declare laws to be unconstitutional had ceased; after the disappearance of the Jacksonian doctrine, asserted in the matter of the rechartering of the Bank of the United States, that each branch of the government was a law unto itself as to the construction of the Constitution, and that the executive might on this theory disregard a construction given to that instrument by the Supreme Court in holding that such a bank was authorized by the Constitution; after the disappearance of the still more dangerous heresy, originated by Jackson, that the executive might refuse to compel the enforcement of a resisted judgment of the Supreme Court if that judgment happened to be displeasing to the executive, — after these and other contest for power between the executive, legislative, and judicial branches of our government for the time being had been settled, the modern doctrine of judicial immunity from political criticism began.

That immunity John Marshall never enjoyed. During substantially the whole of his judicial career, while he was rendering that long series of constitutional decision, political decisions in the higher sense of the word, through which not merely the extension, but the very existence of our national life was made possible, he was the object of partisan criticism of the bitterest kind. The old nationalism of Marshall was an alarming doctrine to the early Jeffersonians. The development, through these decisions, of a nation, where Jefferson desired merely a confederation of jealous states, required not merely judicial decisions, but public discussions of those decisions and the final acceptance of them by the people as wise statesmanship, as well as sound interpretations of our fundamental law.

Marshall ceased to be the subject of political discussion only when public opinion had concluded that an American nation, harmonized by a great American court, was not a

menace to the sovereign states. No one would have dreamed of saying at any time during the first twenty years of Marshall's incumbency in the Supreme Court that any decision of that court was to be taken as the final word on the relation between the states of the nation; that is, taken as the final word in the sense that the political problem involved in it was not to be discussed, criticized, defended, or condemned.

It was largely through the discussion of the expansive principles of Marshall's constitutional nationalism that public opinion became formed. Those principles were tested in public debates on the great question whether, under the Constitution, there was or should be an American nation rather than a mere federation of states. They were discussed and were understood—not in their narrower sense as legal decisions, but in their wider sense as constitutional political principles—by a public which listened to the great debates between Webster and Calhoun.

It was to no small extent because the great judicial decisions of Marshall stood the test of these debates, because the national principle of Marshall, expounded by Webster, appealed to the people of the North as something not only sound but worth fighting for, that the war was fought and the nation saved. The criticism of the judiciary which prevailed during most of Marshall's term of office did the court little harm, and did the nation infinite good; for it was essential, not only that the Constitution should be construed, but that the construction which made the federation of states a nation, should be known, weighed, balanced, tested, and accepted by the people.

The notion that the Constitution is a sacred puzzle for lawyers, concerning which the opinion of the people is unimportant, certainly did not exist in Marshall's time among statesmen, or even among lawyers whose opinions have escaped oblivion. The Jeffersonian critics were met, not by assuring them that they were attacking the courts

and were enemies of organized society, but by replying to their criticisms in debate, thereby putting a wholesome public opinion behind the court.

The more lawyer-like attitude toward the court and the Constitution, the attitude that the decision of the court on a constitutional proposition is not only final but undiscussable, and that public opinion in opposition to it is morally wrong, had its first conspicuous expression after Marshall's death, when Chief Justice Taney tore the safety-valve from the national machine, in the Dred Scott case, by substantially declaring that there was no way under the Constitution for the law-making branch of the nation to deal with the problem of chattel slavery.

Up to the death of Marshall, the criticism of the Supreme Court had been directed merely against its extension of the life of the nation by a broad construction of the Constitution. Taney's decision was a contraction of the constitutional life of the nation by the declaration of its powerlessness to act on a matter which peculiarly needed national action. The friends of slavery asserted that the Dred Scott decision was not debatable; that the decision made by that august tribunal must be accepted in silence, and that the only lawful and orderly escape from its conclusion was by the amendment of the Constitution itself on the subject covered by the decision, — a thing absolutely impossible.

In all ages there have been classes of men, wise after events and not in them, who 'build the tombs of the prophets and garnish the sepulchers of the righteous, and say that if they had lived in the days of their fathers, they would not, like them, have shed the blood of the prophets'. This class in our own country is prone to look back to Lincoln's attacks upon the Dred Scott case, and upon the court which rendered that decision, and assure itself that if it had lived in the same period it would have sided with him in the criticism of that decision. But the principle upon which Lincoln

acted is far more important and vital to-day than the decision which he attacked. We, all of us, are unable to see to-day that when the Supreme Court declared that the nation was powerless to remedy by law the iniquities of an industrial system which required law, it left no alternative for those who stood for freedom, but war. We can look back and see that the acceptance of Douglas's position was impossible.

We are all able to see now, in the classic conflict between a small man and a great man, the distinction between a narrowly juristic and a statesmanlike attitude toward the courts. What we differ about is the application of the same principle, which we admit was correct when expressed and applied by Lincoln, to the social, industrial, and economic rather than political problems of our own time. Most of us are ready to say that Lincoln, who was a great and far-seeing statesman and who is dead, was right; and that Judge Douglas, who is also dead and whom subsequent events and the judgment of history have found to be neither a statesman nor a great man, was wrong. But the same class that believed Douglas right when he was campaigning for the political issue which he called the supremacy of the courts, in the recrudescence of that issue in our own time are followers of his spirit to-day; and the principle which Lincoln maintained has, among them now, as few friends as it had when he was alive.

It would be a rash person who would deny that Douglas's doctrine is not substantially that with which defenders of the courts meet their critics to-day. Lincoln asserted the right of the people to criticize particular decisions as embodying dangerous doctrines, and, more especially, when such particular decisions, as in the Dred Scott case, clog the whole machinery of government and leave it powerless to act where action is essential.

'We believe,' he declared, 'as much as Judge Douglas, perhaps more, in obedience to and respect for the judicial department of government. We think its decisions on

constitutional questions *when fully settled* should control not only the particular case decided, but the general policy of the country, subject to be disturbed only by amendments to the Constitution, as provided in that instrument itself. More than that would be revolution. But we think the Dred Scott decision is erroneous. We know the court that made it has often overruled its own decisions, and we shall do what we can to have it overrule this.'

Judge Douglas asserted that a political issue based upon the criticism of this single decision involved or implied an attack upon the whole judicial system and created, he declared, 'a distinct and naked issue between the friends and enemies of the Constitution, the friends and enemies of the supremacy of the laws.'

If Douglas was wrong and his doctrine was unsound at the time when it was enunciated, the political tendencies of our own day afford still less excuse for its reaffirmation. The problems of our day are essentially different from those which formed the subject of the great debates prior to the Civil War. The political relation of the states to the nation is settled. Our questions are not political in the old sense of the word, but primarily economic, social, and industrial. They are problems of corporations and labor-unions, of the regulation of railroads and industrial trusts, of taxation, of conservation of natural resources, of congestion and concentration, of natural and artificial industrial inequality. Back of all these problems is the fundamental one of the extent to which, under our constitutional system, they may be dealt with by law—and law of a new type.

As society becomes more complex, the whole tendency of legislation is to attempt to deal with the individual as a member of the state, instead of dealing, as formerly, with the state as a mere mathematical sum total of individuals, whose individual rights as

such must be preserved, at least in theory, at the cost of society as a whole, and, far too often, at the cost of the individual himself.

This principle is old and well-established in Europe, and consistent with the necessities of continental government. It is new with us. It is a decided variation from American traditions. It is at variance in particular with the economic theory current when we adopted our Constitution, an economic theory which, having been unconsciously adopted, has tinged the interpretation by our courts of the broad generalities of our Constitution.

A historical discussion of the principle of the laissez-faire doctrine of Quesnay and Adam Smith would be out of place here. Its merit from the standpoint of history is in the immense service it rendered in the destruction of a bewildering network of ancient, meddlesome interferences with the liberty of the individual, a despotism which was rarely benevolent and almost uniformly destructive of the enterprise and initiative of the individual, and of natural and proper opportunities for self-development. No one can study the causes which led to the French Revolution without seeing that the overgrowth of the state supervision of the citizen, nor for the benefit of the state, but to afford luxuries to a selfish, idle, and fearfully extravagant court, was one of the main cause for the termination of the old régime.

The cry for individual freedom from governmental interference, the shibboleth that the government is best which governs least, was a natural reaction from the bondage of regulations of the past. This principle Europe soon found to be unworkable under continental conditions. America, however, tried it under economic conditions unlike those in Europe, — in a new country with immense areas of free land, with few cities, where the opportunities for individual initiative were by nature apparently unlimited, and for a long time in their exercise involved no conflict with the interests of society as a whole.

As our society becomes more complex, with the enormous growth of our population, with the development of our cities, new industrial, social, and economic conditions are presenting problems for solution of the greatest difficulty. These questions in Europe are legislative questions, pure and simple. With us they are something more. One of the most important questions which confronts us in America is one which does not exist in Europe, and that is the exact relation of the courts to American economic problems. This is the main basis for current discussions of the judiciary. The principal critics of the judiciary to-day are those who are insisting that the economic and social questions which confront us, in so far as they can be affected at all by any branch of government, can be solved only by legislative and executive action, and require the greatest flexibility and freedom in those branches of government for the adaptation of the means to the end in accomplishing the result sought. They meet with criticism, and often with harsh criticism, and often with harsh criticism, each decision of the courts which in their judgment unnecessarily limits legislative and executive power in these matters. They are insisting that the courts should not still further complicate the enormously difficult problems confronting legislative bodies and executive officials, by imposing upon them constitutional limitations which are economic theories in disguise.

It is noteworthy that in America a considerable part of this criticism comes from a class which in no other country has any like attitude toward the judiciary, — the humanitarians who interest themselves in social problems, who study the conditions of the working classes, who are allied in one association or another in endeavoring to improve social and industrial conditions in the country, and who formulate and support the legislation which aims at mitigating evils which threaten the lives of the poor.

An example of this type of criticism of the courts was given at the recent Child-Welfare Exhibition in New York. It was a series of photographs of the interiors of tenement houses in the terribly congested district of that city, showing men, women, and little children huddled together in small, unventilated rooms, filled with one kind of merchandise or another, and engaged in that unregulated 'home work' which is the main cause of that congestion: a form of industry destructive of every principle of home life, and in which not only are adults sweated, but children of all ages labor incredible hours for pittances incredibly small, — children for whose protection in the thousands of tenements to which these industries have now spread, even an army of factory inspectors would be inadequate. Over these series of photographs, to suggest that these conditions are its result, was printed a quotation from a decision of the Court of Appeals, holding, nearly twenty-seven years ago, that the legislature could not take away from the individual worker the right to transform his home into a workshop, and that legislation was unconstitutional which attempted to prevent that congestion 'by forcing him from his home and its hallowed associations and beneficent influences to ply his trade elsewhere.'

The relation of the courts to economics is not settled. It is an enormously important political problem, a problem which affects and involves the whole future of American government. It requires discussion. It forbids finality to judicial decisions which involve this problem until the best wisdom of the courts has been supplemented and properly modified and influenced by the best opinion of the people. Take a single example, the much-discussed recent decision of the New York Court of Appeals in the Workmen's Compensation Act case, with which the public is now generally familiar.

Here we have a situation which gives a concrete illustration of the whole problem. New York, like other American industrial states, had and has a system, or rather lack of system, of dealing by law with the enormous number of accidents in factories and industrial establishments, which its own courts admit is unjust to the worker, inadequate, inefficient, and uncertain. The legislature appointed a Commission to make a careful and extended examination of these defects and injustices, and of the problem of industrial accidents generally. The Commission made a report to the legislature and recommended certain legislation. That legislation was of an extraordinarily radical character. Yet it was passed, not only with a most surprising lack of protest from the employing classes, but with the active support and approval of great employers, who realized the weight and injustice of the great burden of accident-loss which is thrown upon the helpless workers and their families.

This legislation was supported by associations of the Bar in the state, whose representatives urged that the gross injustice of the present system needed radical changes, and recommended the legislation presented by the Commission. This legislation was based upon a principle, not new and untried, but in successful operation in England and in every great commercial country in Europe. When this law was tested in the courts, the Court of Appeals, however, declared that this principle—which was social justice as recognized in England and on the Continent—was in New York confiscation of property of employers without due process of law; and that under the constitution of New York, and the fourteenth amendment of the Constitution of the nation, the state was powerless to enact a law of this kind unless the people should accomplish the superhuman task of amending both constitutions. A proposed amendment of the state constitution is now before the legislature as I write.

Optimistic, indeed, are those to whom there appears to be nothing dangerous to the future of American government in such conflicts between the court and the legislature! To the critics of the judiciary there seem open but two alternatives: either to accept, with the socialists, such decisions as final declarations of the powerlessness of the American state to bring about justice by law, and of the breakdown of constitutional government; or to try by further discussion, and by criticism of such judicial conclusions, to reach a definition of 'due process of law' which does not involve either the collapse of justice through legislative paralysis produced by the courts, or, on the other hand, an actual rather than a fanciful confiscation of property or property-rights.

Time alone will tell whether critics of such decisions are conservative or radical forces in our society. When Turgot was advocating the abolition of the Jurandes and Maîtrises, he was attacked as a dangerous radical. History now regards him as a great conservative, who foresaw that the continuance of intolerable abuses meant increasing distress and discontent, and perhaps revolution. The supporters of government by law, who defended the Dred Scott case against political criticism, considered themselves conservatives. The principle they defended made for war.

The mental attitude in which their successors defend the courts against such criticism of decisions involving economic questions makes for socialism. A statement of that attitude except in a fragmentary way is difficult in the limits of a magazine article, and it is with hesitation that I attempt it. It is, however, something like this. A large class of well-meaning, educated, well-to-do people in our country view with alarm, not so much the causes for industrial discontent as the means proposed at times to remedy social maladjustment. This class includes not only those whose opposition is based upon purely selfish interests, and whose opinions are negligible in all discussions of principle, but another class deserving of the highest consideration, as representing a sane and intelligent conservatism. To this class our modern legislative tendencies are distinctly alarming. They note the increasing number of statutes which regulate, inspect, limit, or prohibit industrial activities which had formerly been free from state interference or control. They fear more the meddlesome hand of crude or careless

legislation than those evils of unregulated industry which the law-makers seek to mitigate or remove.

To these conservatives, the courts seem the main, and at times the only power against what is to them the new barbarism, whose principal means of expression is legislation. They look to the past, and see in the regulative legislation of our own time an attempt to revive in a new form cumbrous, unworkable, and destructive systems of legislation which belong to the Middle Ages in England, and which France threw off with the Revolution. They say that history affords clear proof that the adoption of that theory of industrial liberty which began with the French economic philosophers of the laissez-faire school contributed more to the enormous development of industry in the nineteenth century than any single force; that the impetus to individual initiative, generated by the removal of legal restraints upon individual liberty, has transformed the whole industrial and social world in which it has been applied; and that to sacrifice that principle, or to limit it by unwise legislation, is not progress but retrogression, the repudiation of a priceless birthright.

They see what we all see, that our political parties for the most part have no programmes which deal with fundamentals; that reference in party platforms to economic problems are almost invariably vague generalities. They see that in the absence of party-programmes on these subjects, a growing volume of questionable legislation is proposed in state legislatures and at Washington. They see bad laws enacted, and worse laws proposed. Some of all this is due to corruption; some to a desire to gratify mere mob passion; and some of it, and indeed most of it, to a genuine but often ill-advised and ineffectual desire to meet and remedy social and industrial evils which require law. To stem this current they look to the courts. They are asking the courts to enlarge their functions by declaring such legislation

unconstitutional; by interpreting laws which they do not nullify, in such manner as to remove their sting by ignoring their plain meaning. Some of the more Bourbon of these advocates of judicial aggression have even proposed the abdication by the legislature and Congress of their functions in dealing with certain of these vexed questions, and the leaving of them to the courts for solution: urging, for example, that the common law and the courts can, if undisturbed by meddling legislation, furnish an adequate remedy for the problems of industrial trusts; that the Sherman Anti-trust Law, with its sweeping generalities, should not be amended or repealed, but left for the Supreme Court to furnish the missing statesmanship in its composition.[1]

This principle, that the extension of the power of the court in the sphere of government is or may be an antidote for bad legislation and tendencies toward executive aggression, is a modern heresy, and a dangerous one. It aims to place in the judge a responsibility and a power which the Constitution never gave, and which the courts cannot exercise and should not exercise. There is no country in the world governed by courts. There is no place in the American system for such an experiment. The over-development of the judiciary is no cure for legislative corruption or inefficiency. One of the most healthful indications of the vitality of American democracy is the general recognition of the weak spots in our government, — defects which these conservatives point at incessantly, and for which they offer judicial aggression as a cure. The common sense of the people rejects that cure as a dangerous nostrum, but the disease is recognized, — the partial breakdown of the machinery for law-making and law-enforcing, and the failure of that machinery to produce officials capable either of enacting, enforcing, or applying the kind of law which our present needs demand.

We are slowly reacting from the madness of mob democracy, the democracy which fills our ballots with a vast number of elective offices, bewildering to the voter, beyond his capacity of intelligent choice. We are recognizing these causes of the weakness of the state. We are everywhere planning revisions of our laws, in an effort to attain greater legislative and executive efficiency and honesty, by changes, for example, in electoral machinery in relation to the nomination of candidates for public office. One of the most recent of these new proposals, the judicial recall, is however a direct attack upon the independence of the bench. The advocates of judicial aggression must accept their full share of responsibility for this menace to judicial freedom, for it is an equally indefensible counter-proposition to their own heresy. Friends who multiply for us hosts of new enemies are liabilities, and not assets. Those who wish to use the courts to stunt or sterilize democracy are not true friends of the judiciary, despite their many protestations, or of the American system of constitutional government.

For the courts to maintain at all times under such conditions, between such widely divergent views, the position which the law and the Constitution require, is difficult. To satisfy both schools is impossible. That there should be criticism of the courts under such circumstances, with such jealous scrutiny of each important constitutional decision is inevitable. It is to the credit of the courts that the volume of public criticism is not greater; that the occasions for it, either fanciful or real, are comparatively so few. It is particularly to their credit that reactionary decisions are so infrequent, and that so generally they have taken in the consideration of legislation a true position, well expressed by Judge Harlan, when, in Atkin *vs.* Kansas, he said: —

'No evils arising from such legislation could be more far-reaching than those which might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and

upon grounds merely of justice and reason or wisdom annul statutes that had received the sanction of the people's representatives.'

The position in which the American courts are placed to-day is a peculiarly delicate one. On the one side are those to whom modern American legislation is the new barbarism threatening the states and nation with a rank growth of meddlesome, inefficient, unenforcible laws injurious to industrial development, a growth noxious yet inevitable, unless restricted, as they ask to have it restricted, by new judicial limitations. On the other side are those who contend that legislation of the new type is necessary and unavoidable, that the collective principle so clearly expressed in industry in the great aggregations of capital, can only be governed, so as to preserve an actual rather than a nominal individual freedom, by the enactment of wise law; and they too are looking to the courts to sanction, and not to destroy, new legislative programmes, and to permit such increase of governmental control over industry as will prevent the exploitation of the people. Hence the issue of criticizing the courts; hence unreasoning defense, and at times intemperate censure, of judicial decisions involving the Bakeshop Law, the Workmen's Compensation Law, the Sherman Anti-Trust Law, the Oklahoma Bank-Guaranty Law, the Interstate Commerce Law, and other legislative experiments with the collective principle.

That such an issue should exist is inevitable. A conservative institution is always subject to strain and stress in a period of progress, and in our country the courts have always been our greatest and best conservative institution. No single fact, however, more clearly indicates the general respect and confidence of the people for the kind of conservatism which the courts have so long expressed, than that no substantial faction of party in our country to-day desires the judiciary to throw off that conservatism and become 'radical,' or even 'progressive,' as that term is currently used. What we ask

form our courts is, in fuller measure, that which in the main we are conscious that we receive; a conservatism which is consistent with a not too remote possibility of progress, a conservatism free form all entanglements with either radicalism or reaction, a conservatism which harmonizes the past with the future by preserving the present from violent oscillations through contending forces.

1. *Since this article was written, the United States Supreme Court has decided the long pending Standard Oil case. The amendment to the Sherman Anti-trust Law, which Congress has repeatedly refused to make since 1896, and which the President in his message of January 1910 refused to recommend, as involving an extension of judicial power dangerous to the judiciary itself, has been now written into this law, amid general rejoicing in the business world, by judicial interpretation. In his message President Taft had said, 'It has been proposed, however, that the word "reasonable" should be made a part of the statute and then that it should be left to the court to say what is a reasonable restraint of trade, what is a reasonable suppression of competition, what is a reasonable monopoly. I venture that this is to put into the hands of the courts a power impossible to exercise on any consistent principle which will insure the uniformity of decision essential to just judgment. It is to thrust upon the courts a burden which they have no precedents to enable them to carry, and to give them a power approaching the arbitrary, the abuse of which might involve our whole judicial system in disaster.'* ↩