not this court have said, under these facts, 'This corporation violates a law of congress,' and stop there—and stop there? Why was it necessary for us to go in an elaborate and ingenious argument, worthy of the genius of the chief justice, and attempt to show that this act should be interpreted as if it contained the word 'reasonable' or the word 'unreasonable?' Whether it contains those words or not is of no consequence in this case under this act. If there ever was a case since the organization of this court in which a vast amount of an elaborate and able opinion is pure obiter dicta—obiter dicta pure and simple—it is the opinion delivered by the court in this case, as to the construction of this anti-trust act of 1890. I can not escape that conclusion."

As Justice Harlan well says, in order to find the defendant companies guilty it was not necessary for the court to discuss the question of reasonableness or unreasonableness, for in both cases the court decided that the defendants were guilty even if the anti-trust law was amended so as to prohibit, not every contract in restraint of trade but only contracts that unreasonably restrain trade. The court might have met the arguments of the counsel for the defendants by saying: "The question which you raise is immaterial and irrelevant. It is not necessary for us to decide whether the defendants would be guilty, if the statute were construed according to the contention of the government. We may assume for the purposes of this case, without deciding the question on its merits, that the law reads as you say it ought to read, still defendant companies are guilty of not only unreasonable restraint of trade but of outrageous and inexcusable restraint of trade. They can not hope to escape under any contruction of the law. In finding against them, however, it is not necessary for us to consider hypothetical cases. We are dealing with the cases before the court. These defendants are undoubtedly guilty. They are guilty of clear and unmistakable violation of the law and they can not escape the consequences by questioning the language of the statute; they would be guilty if we construed the statute, as they ask, to prohibit only unreasonable restraint." The court might have said this, and if it had done so it would have been acting in harmony with precedent, but instead of doing this the court goes out of its way to interpret the law, not for the benefit of those then before the court but for the benefit of those who may hereafter be brought before the court. The public recognizes that the decision is important, not because of its effect upon the Standard Oil company and the Tobacco company, but because it furnishes a new interpretation of the law—an interpretation that brings a smile to the face of every trust magnate but arouses deep concern in the breasts of those who regard a private monopoly as indefensible and intolerable.

Fifth—The decision of the court is so revolutionary that it not only reverses a decision that has stood for fifteen years, but it amends a law enacted by congress, which the court refused to amend in the Trans-Missouri Freight case. It is true that Chief Justice White, then an associate justice, dissented, but according to our law the decision of the majority of the court stands as the decision of the court—even when that majority rests upon the opinion of one justice; and to make it stronger still, even when the opinion of that justice has changed between two arguments of the case, as did the opinion of one of the justices in the income tax case. It is no slight matter for the supreme court of the United States to reverse itself upon an important question, because a reversal can not but affect rights based upon the former decision and interests built up upon that decision as a foundation. But the reversal of a former decision is the more serious when such reversal involves an encroachment upon the legislative branch of the government. Justice Harlan in his dissenting opinion very properly calls attention to the language of the court when this identical question was before them in the Trans-Missouri Freight case. He quotes the following from the decision in that case: "To say, therefore, that the act excludes agreements which are not in unreasonable restraint of trade, and which tend simply to keep up reasonable rates for transportation, is substantially to leave the question of unreasonableness to the companies themselves. But assuming that agreements of this nature are not void at common law and that the various cases cited by the learned courts below show it, the answer to the statement of their validity now is to be found in the terms of the statute under consideration. The arguments which have been addressed to us against the inclusion of all contracts in restraint of trade, as provided for by the language of the act, have been based upon the alleged presumption that congress, notwithstanding the language of the act, could not have intended to embrace all contracts, but only such contracts as were in unreasonable restraint of trade. Under these circumstances we are, therefore, asked to hold that the act of congress excepts contracts which are not in unreasonable retraint of trade, and which only keep rates up to a reasonable price, notwithstanding the language of the act makes no such exception. In other words, we are asked to read into the act by way of judicial legislation an exception that is not placed there by the lawmaking branch of the government, and this is to be done upon the theory that the impolicy of such legislation is so clear that it can not be supposed congress intended the natural import of the language it used. This we can not and ought not to do. If the act ought to read, as contended for by defendants, congress is the body to amend it and not this court, by a process of judicial legislation wholly unjustifiable."

It will be seen that the court at that time not only refused to amend the anti-trust law by inserting the word "unreasonable," but declared that it had no constitutional right to do so. The court now does the very thing which the court then declared to be unconstitutional. What higher condemnation is there than condemnation spoken by the highest court of our land? Of course, the last decision supersedes any former decision. If the court declares today that the insertion of the word "unreasonable" in the anti-trust law would not be judicial construction but a legislative act, prohibited by the constitution—if the court decides that today, and next year a new set of judges reverses the decision, the new decision would stand as the supreme law of the land, but it would not lessen the moral weight of the former decision. The court which decides that it has no right to exercise a certain power—thus deciding against itself—must have weight with an unprejudiced mind, even though the court, composed of different judges, decides later that it possesses the power formerly denied. We understand the natural tendency to enlarge upon one's powers—a tendency from which courts are not entirely free, and we can not at once rid our minds of the impression that the opinion of the former court deserves careful consideration.

Under our constitution the court has the final word as to a law, and the only way in which the public can protest against judicial legislatio is through the legislative branch of the government. While the constitution divides the federal government into three branches, each independent of the other, it gives to the supreme court the power of interpretation, and this transcends, for the time being, the powers vested in the legislature. But the people are not mocked; they can by legislation restrict the construction of the court and prohibit a construction which will nullify a statute.

Then, too, the people can reach a court through the changes that are constantly occurring in the personnel of the court. It would have been difficult fifteen years ago to conceive of such a change in the court as would result in an eight-to-one decision overruling the decision of that date, but, since such a change has taken place, it is possible to conceive of another change during the next fifteen years that will bring at least a majority of the court back to the rule that prevailed before the so-called "rule of reason" took violent possession of the court. It is possible, also, that congress may see fit to express its disapproval of the construction placed upon the anti-trust law by the court in the Standard Oil and Tobacco cases. It may see fit to pass some of the bills already introduced, specifically declaring that the law prohibits all restraint of trade—not merely unreasonable restraint.

While I think that this ought to be done in order that the present law may not be robbed of such strength as it possesses, such legislation should be accompanied by further legislation that will fix arbitrarily the percentage of the total product which one corporation can control. The law, as it formerly stood and as it was previously construed, was uncertain enough—it was difficult for a corporation to know exactly what it might or might not lawfully do, but this uncertainty is greatly increased by the insertion of the word "unreasonable." The democratic platform of 1908 set forth a remedy which would, in the opinion of those who urge it, afford substantial relief to the public without doing injustice to any corporation. The platform contemplates the licensing of any corporation engaged in interstate commerce, when that corporation controls as much as 25 per cent of the total product; corporations controlling a less proportion would not be affected by the plan. Corporations taking out the proposed license would be subject to any restrictions that congress thought necessary to the proper conduct of their business, as well as to the laws of any state in which they did business, and no corporation would be permitted to control more than one-half of the total product. We should have this additional legislation clearly and specifically drawing the line between the corporations engaged in legitimate work and the corporations which are engaged in unlawful transactions. Such legislation is demanded in the interest of the public and in the interest of legitimate business as well. It is not right to assume that any large percentage of our business men desire to engage in transactions which are harmful to the public, and those who are engaged in intentional wrongdoing should be segregated and subjected to punishment. Legitimate business has too long had to bear the odium thrown upon it by those guilty of conduct indefensible in morals as well as repugnant to the letter and spirit of the statutes.

Before passing from this branch of the subject it may be worth while to inquire whether the court, in entering upon judicial legislation, does not encourage those who favor a change in the method of selecting judges. Whatever may be said in favor of the appointment for life of men engaged in INTERPRETING the law, no good reason can be given for the appointment, especially for life, of a LEGISLATIVE body. Nothing is more abhorrent to our institutions than an appointive legislative body. Even the United States senate is elective and its members hold office for a specified term, and yet the sentiment in favor of popular election is so strong that we are upon the eve of a change which will make senators elective by direct vote of the people. If the supreme court is to become a legislative body what reason can be given for not making it elective also? The people would submit much more willingly to judicial legislation if they had a chance to elect the judges for fixed terms. Will they consent to legislation on important questions by a court whose members are not only appointed by the president but appoited FOR LIFE? Justice Harlan thus answers the question: "Nobody can tell what will happen. When this American people come to the conclusion that the judiciary of this land is usurping to itself the functions of the legislative department of the government, and, by judicial construction only, is declaring what is the public policy of the United States, we will find trouble. Ninety millions of people—all sorts of people—with all sorts of opinions, are not going to submit to the usurpation by the judiciary of the functions of other departments of the government and the power on its part to declare what is the public policy of the United States."

Sixth—Attention has been called to a number of questions raised by the decision of the court—but there is one point which above all others, challenges the attention of the public at this time. What will be the effect of the court's decision on the statute which it CONSTRUES (to use its language) or, (to use the language of the dissenting justice) VIRTUALLY REPEALS? The anti-trust law of 1890 reads: "EVERY contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, etc." The court declares that the statute should be construed (or amended) to read "Every contract, combination in the form of trust or otherwise or conspiracy in UNREASONABLE restraint of trade or commerce, etc." Of one thing there is no doubt, namely, that this construction or amendment of the law excludes from the penalties of the act SOME corporations that might, by the construction placed upon it fifteen years ago, be found guilty of a violation of the law. That is, it LESSENS the number of corporations to which it applies, and to this extent WEAKENS the law as a protection to the public.

To understand this decision we must remember that after the decision of fifteen years ago the great corporations attempted to secure an amendment to the law EXACTLY IN LINE WITH THE PRESENT DECISION. While this effort has been continuous it is only necessary to refer to the attempt cited by Justice Harlan in his dissenting opinion. This instance is used not only because it is a recent attempt (made in 1909) but because the judiciary committee of the senate filed an elaborate report, setting forth the reasons why the word "unreasonable"