

# MAJORITY RULE AND THE JUDICIARY

AN EXAMINATION OF CURRENT PROPOSALS FOR  
CONSTITUTIONAL CHANGE AFFECTING  
THE RELATION OF COURTS  
TO LEGISLATION

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WITH AN INTRODUCTION BY  
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## INTRODUCTION

Mr. Ransom has rendered a service of marked value to the commonwealth by his clear exposition of the meaning and the need of the proposition for a referendum to, or review by, the people themselves of certain classes of judicial decisions by State courts. In discussing this matter, and all similar matters, really able and broad-minded lawyers—men of the stamp of Dean Lewis, of the University of Pennsylvania Law School, and Dean Kirchway, of the Columbia University Law School—can render service such as no laymen can render.

But no lawyer can render this service unless he remembers, as Mr. Ransom emphasizes, that the question is one *which concerns the people as a whole*. Neither the members of the bar nor the men on the bench have, as such and of right, any greater concern in the matter than other citizens. The constitution is the property of the people, not of any one class of the people. Its proper administration and interpretation concern immedi-

ately and vitally the people as a whole. From this stand-point, judges and lawyers are merely instruments for securing the right solution of certain questions in which all good citizens are equally concerned. How completely the self-styled republican leaders of to-day have wandered from the principles of Abraham Lincoln is shown by their refusal to apply to this question the principles which Lincoln laid down in discussing the Dred Scott case. He scornfully refused to treat the decision of the Supreme Court in that case as permanently binding on the people, or as a matter only for judges and lawyers; and he explicitly laid down the doctrine that the people were the masters of the courts, and that it was for the people and not for the courts to determine the principles and policies in accordance with which our constitution was to be interpreted and our government administered.

Our prime concern is to get justice. When the spirit of mere legalism, the spirit of hair-splitting technicality, interferes with justice, then it is our highest duty to war against this spirit, whether it shows itself in the courts or anywhere else. The judge has no more right than any other offi-

cial to be set up over the people as an irremovable and irresponsible despot. He has no more right than any other official to decide for the people what the people ought to think about questions of vital public policy, such as the proper handling of corporations and the proper methods of securing the welfare of farmers, wage workers, small business men, and small professional men. If in any State judges have given such bad service that it is necessary to render them liable to removal by the people, I should not hesitate to adopt the principle of the recall, a principle which for a century and a third has been explicitly recognized and insisted on as righteous in the Massachusetts constitution. But where, as in New York and Illinois, the trouble has been with the heads rather than the hearts of the judges, where the courts have delivered absurd and iniquitous decisions against the interests of the people in various constitutional cases although the judges themselves are reputable and honorable men, what is needed is not to recall the judge to private life, but to make his decision—or the constitution as he interprets it—square with justice and common-sense.

It is the people, and not the judges, who are entitled to say what their constitution means, for the constitution is theirs, it belongs to them and not to their servants in office—any other theory is incompatible with the foundation principles of our government. If we, the people, choose to protect tenement-house dwellers in their homes, or women in sweat-shops and factories, or wage-earners in dangerous and unhealthy trades, or if we, the people, choose to define and regulate the conditions of corporate activity, it is for us, and not for our servants, to decide on the course we deem wise to follow. We cannot take any other position without admitting that we are less fit for self-government than the people of England, of Canada, of France, who possess and exercise this very power. But the plan I propose for our people seems to me more democratic, and from every stand-point better, than the plan in vogue in France, England, and Canada, where the legislature is supreme over the courts. I propose to make the people supreme over both.

Two or three months ago, some eminent corporation lawyers of New York undertook the formation of what they styled an Independent Ju-

diciary Association. They proposed, to use their own words, "to combat the spread of two ideas," namely, the recall of judges and the referendum to the people of a certain class of cases of constitutional decisions; and they asserted, in President Taft's words, that these ideas laid "the axe at the foot of the tree of well-ordered freedom."

On April 10, 1912, speaking of this proposal, at Philadelphia, I said:

Many of the signers are distinguished men, standing high in their community; but we can gain a clew as to just what kind of well-ordered freedom they have in mind, the kind of "freedom" to the defence of which they are rushing, when we see among the signers of this call the names of attorneys for a number of corporations not distinguished for a high-keyed sense of civic duty, nor for their disinterested conduct toward the public; such as, for instance, the Standard Oil Company, the Sugar Trust, the American Tobacco Company, the Metropolitan Traction Company of New York, and certain defunct corporations, the looting of which has passed into the history of financial and stock-jobbing scandal and forms one of its blackest chapters. I find also the name of one of the attorneys for the Northern Securities Company, which some years ago was dissolved at the suit of the government instituted by my di-

rection; I notice the name of the attorney for the New York Stock Exchange; and I do not overlook that of a member of the bar of New York who some years ago was denounced by the very papers now applauding him and his associates, as a retained "accelerator of public opinion" in favor of certain measures of the Metropolitan Street Railway Company, which at that time were under general denunciation in New York as "traction grabs." These embattled attorneys for the defence of special interests oppose my proposal solely because they make it their life work to uphold privilege against the cause of justice, and against the interests of the people as a whole. They speak as if the matter were one only for the decision of lawyers. I hold that it is one for the decision of the people as a whole, and that lawyers have no rights in the matter beyond those of any other good citizens. I hold that some basis of accommodation must be found between the declared policy of the States on matters of social justice within the proper scope of regulation in the interest of health, of decent living, and working conditions and morals, and the attempt of the courts to substitute their own ideas on these subjects for the declarations of the people made through their elected representatives in the several States.

I do not question the good purpose of some of the eminent corporation attorneys of whom I

speak. But they are intelligent men, trained in their profession, and certain of them have at least a smattering of knowledge of the constitutions of our own and other countries. On the assumption that they have both intelligence and knowledge, it is impossible to credit them with good faith in the fears that they have expressed as above referred to, except on the supposition that their long experience as attorneys for corporations has finally rendered them genuinely unable to understand justice, and genuinely unable to think of a judge except as an instrument devised to protect privilege against the rights of the people by invoking the technicalities of the law for the purpose of preventing the obtaining of justice under the law.

This is a strong statement, and I would not make it of ordinary men who are misled by reading those New York papers owned or controlled by Wall Street, and who are misled by their belief in the men whom these papers speak of as leaders of the bar. As regards these citizens, I have nothing to say except that I wish it were possible for them to have access to channels of information which were not wilfully poisoned. But the case is wholly different, so far as the eminent lawyers themselves are concerned. These

men are not to be excused on the plea of ignorance. My proposal is for the exercise of the referendum, or right of review, by the people themselves in a certain class of decisions of constitutional questions in which the courts decide against the power of the people to do elementary justice. When under the "police power" or "general welfare" powers of government the legislature of a given State passes an act to do social or industrial justice, and the State court declares that the law is unconstitutional, then I propose that the people themselves, the masters of both legislature and court, shall, after due deliberation, decide which of their servants is to be sustained, so far as the particular act is concerned. When men of trained intelligence call this "putting the axe to the foot of the tree of well-ordered freedom," it is quite impossible to reconcile their assertion both with good faith and with even reasonably full knowledge of the facts.

All that is necessary to do in order to prove the correctness of this statement is to call attention to plain and obvious facts. Consider the present practice in various countries in which there is substantially the same "well-ordered freedom" as

in our own land—for instance, the republic of France—and various great English-speaking commonwealths of the British Empire, such as England and Canada, all of which are governed by their parliaments in substantially the same manner that we are governed. In these countries the decision of the legislature on constitutional questions is absolute and not subject to action by the judiciary, and whenever the courts make a decision which the legislature regards as establishing a construction of the constitution which is unwarranted, the legislature, if it chooses, can by law override that construction and establish its own construction of the constitution. Not long ago this very method was adopted in England. On that occasion the courts had held that labor unions could be treated as corporations and sued, and money taken from them by process of law. Parliament at once passed a law overriding the decision and summarily declared that the constitution should thereafter be construed by the courts in the directly opposite sense to the construction which they had adopted.

My proposal is merely to secure to the people the right which the Supreme Court of the United

States, speaking through Mr. Justice Holmes, in the Oklahoma Bank Cases, said they undoubtedly should possess. My proposal is that the people shall have the power to decide for themselves, in the last resort, what legislation is necessary in exercising the "police powers," the "general welfare" powers, so as to give expression to the general morality and the general or common opinion of what is right and proper. In England, Canada, and the other countries I have mentioned, no one dreams that the courts have a right to express an opinion in such matters, as against the will of the people shown by the action of the legislature. I do not propose to go so far as this. I merely propose to make legislature and court alike responsible to the sober and deliberate judgment of the people, who are masters of both legislatures and courts. This proposal is precisely and exactly in line with Lincoln's attitude toward the Supreme Court in the Dred Scott case, and with the doctrine he laid down for the rule of the people in his first inaugural as President.

I am not dealing with any case of ordinary justice as between man and man. Nor am I speaking of the recall of judges by popular vote, a measure

which I personally think should not be adopted in any community unless it proves impossible in any other way to get the judges to do justice—and I will add that nothing will so tend to strengthen the movement for the recall of judges as action seeking to buttress special privilege in the courts and to make them the bulwarks of injustice instead of justice. I am advocating the introduction of a system which will obviate the need of such a drastic measure as the recall. But it must be understood that my purpose is to get justice, and if justice is resolutely denied by the courts, I would adopt the recall or any other expedient which was found necessary for the achievement of the purpose.

If in any case the legislature has passed a law under the "police power" for the purpose of promoting social and industrial justice, and the courts declare it in conflict with the "due process" clause of the State constitution as laid down by the people, then I propose that after a period of due deliberation, a period which could not be less than two years after the election of the legislature which passed the original law, the people shall themselves have the right to declare whether or not the pro-

posed law is to be treated as constitutional. It is a matter of mere terminology whether this is called a method of "construing" or "applying" the constitution, or "a quicker method of getting the constitution amended." It is certainly far superior to the ordinary method of getting the constitution amended, because it is quick, definite, and certain. It will apply merely to the act at issue, and therefore will be definite and clear in its action; whereas actual experience with, for instance, the Fourteenth Amendment to the national constitution has shown us that an amendment passed by the people with one purpose may be given by the courts a construction which makes it apply to wholly different purposes and in a wholly different manner. The Fourteenth Amendment has been construed by the courts to apply to a multitude of cases, to which it is positive that the people who passed the amendment had not the remotest idea of applying it.

Some of our opponents say that under my proposal there would be conflicting interpretations by the people of the constitution. In the first place, this is mere guess-work on the part of our opponents. In the next place, the people could

not decide in more conflicting fashion, could not possibly make their decisions conflict with one another to a greater degree, than has actually been the case with the courts. No popular vote could reverse an earlier popular vote more completely than did the later decisions in the Supreme Court, in the *Legal Tender Cases* and the *Income Tax Cases*, when compared with the earlier decisions. At this moment the courts of Massachusetts, Iowa, and Washington, and the Supreme Court of the nation, construe the clauses of the constitution to permit one thing, and the Court of Appeals in New York construes identically the same language to mean the direct reverse; and this not as regards unimportant matters, but as regards matters of vital importance to the welfare of hundreds of thousands of citizens, in cases like the *Workingmen's Compensation Act* and the act limiting the hours of labor for women in factories.

The best way to test the merits of my proposal is to consider a few specimen cases to which it would apply. Within the last thirty years the Court of Appeals of New York has been one of the most formidable obstacles in the way of getting industrial justice which men who strive for

justice have had to encounter. Among very many other laws which this court has made abortive, or decided not to be laws, on the ground that they conflict with the constitution, are the following:

*First.*—The law for preventing the manufacture of tobacco in tenement houses. The decision of the court in this case retarded by at least twenty years the work of tenement-house reform, and was directly responsible for causing hundreds of thousands of American men and women now alive to be brought up under conditions of reeking filth and squalor, which immeasurably decreased their chance of turning out to be good citizens. Yet this decision was rendered by well-meaning men who knew law, but who did not know life, and who based their decision on the ground that they would not permit legislation to interfere with the “sanctity of the home”—the home in question, in many cases, having precisely the sanctity which attaches to one foul room in which two large families, one with a boarder, live and work day and night, the tobacco they manufacture being surrounded with every form of filth.

*Second.*—The court held unconstitutional the law under which a girl was endeavoring to recover

damages for the loss of her arm, taken off because dangerous machinery was not guarded. In this case the judges announced that they were “protecting the girl’s liberty” to work where she would endanger life and limb if she chose! Of course, as the girl had no liberty save the liberty of starving or else of working under the dangerous condition named, the courts were merely protecting the “liberty” of her employer to endanger the lives of his employees, or kill, or cripple them with immunity to himself. I do not believe that there is an instance in our entire history in which a majority of the voters have shown such tyrannous and callous indifference to the sufferings of a minority as were shown by these doubtless well-meaning judges in this case.

*Third.*—When the legislature of New York passed a law limiting the hours of labor of women in factories to ten hours a day for six days a week, and forbade their being employed after nine in the evening and before six in the morning, the New York Court of Appeals declared it unconstitutional, and a malign inspiration induced them to state in their opinion that the time had come for courts “fearlessly to interpose” a barrier against

such legislation. Fearlessly! The fact was that the courts "fearlessly" condemned helpless women to be worked at inhuman toil for hours so long as to make it impossible that they should retain health or strength; and "fearlessly" upheld the right of big factory owners and small sweat-shop owners to coin money out of the blood of wretched girls whom they worked haggard for their own profit. To protect such wrong-doers was, of course, an outrage upon the decent and high-minded owners who did not wish to work the women and girls to an excessive degree, but who were forced to do so by the competition of the callous factory owners whom the court, by this decision, aided and abetted in their wrong-doing. Court after court in other States, including so conservative a State as Massachusetts, have declared such a law constitutional; yet the Court of Appeals in New York declared the law unconstitutional. No popular majority vote could ever be more inconsistent with another popular majority vote than is the record of the Court of Appeals in the State of New York in this matter, when compared with the record of other courts in other States.

*Fourth.*—The Workingmen's Compensation Act, but a year or two ago, was declared unconstitutional by the New York court, on account of its (alleged) taking of property without due process of law, although a directly reverse decision on precisely similar language in the constitution, had been rendered not only by the State courts of Iowa and Washington, but by the Supreme Court of the United States. This decision illustrates in ideal fashion what I mean when I say that human rights stand above property rights when the two conflict. Here again it is worth while to point out that no vote by popular majority could render the constitution more uncertain of construction than the Court of Appeals rendered it by making this decision, in the teeth of the decision of the Supreme Court of the United States and of other State courts; and throughout our history no decision by a majority of the people in any State has shown more flagrant disregard of the elementary rights of a minority. No popular vote in any State has ever more flagrantly denied justice than did this decision by the highest court in the State of New York but a year or two ago.

Now in these instances arising in New York,

the people of the State of New York, under the plan I propose, after due deliberation, would have had an opportunity to decide for themselves whether the constitution, which they themselves made, should or should not be so construed as to prevent their doing elementary justice in those matters. My proposal is merely to give the people an effective constitutional weapon for use against wrong and injustice.

Our opponents in effect take the position that the people have not the right to secure workmen's compensation laws, or laws limiting the hours of labor for women in factories, or laws protecting workers from dangerous machinery, or laws making conditions decent in tenement houses. It is a mere sham for any man to say that he approves of such laws, so long as he upholds the courts in declaring them unconstitutional, and fails to approve thorough-going action which will give the people power, with reasonable speed, to upset such court decisions and secure real and substantial justice.

In a recent article, Professor Scofield has shown that the State courts of Illinois have behaved no better than the State courts of New York in these

matters. He quotes the emphatic criticism of these decisions of which I complain, by the late Dean Thayer of the Harvard Law School. He says that these decisions make of the law a weapon with which the strong can strike down the weak; that they make of the law not a shield to protect the people, but a sword to strike down the people; that they are arbitrary, and that our protest against them represents one phase of the struggle against arbitrary power and in favor of the law of the land; and he sees that my proposal is merely a constitutional method to restore to the State law-making bodies the power which the Supreme Court of the nation says belongs to them.

There are sincere and well-meaning men of timid nature who are frightened by the talk of the "tyranny of the majority." Those worthy gentlemen are nearly a century behind the times. It is true that De Tocqueville, writing about eighty years ago, said that in this country there was great tyranny by the majority. His statement may have been true then, although certainly not to the degree he insisted, but it is not true now. That profound and keen thinker, James Bryce, in

"The American Commonwealth," treats of this in his chapter on the "tyranny of the majority," by saying that it does not exist. His own words are that:

It is no longer a blemish on the American system, and the charges against democracy from the supposed example of America are groundless. The fact that the danger once dreaded has now disappeared is no small evidence of the recuperative forces of the American government and the healthy tone of the American people.

I shall protest against the tyranny of the majority whenever it arises, just as I shall protest against every other form of tyranny. But at present we are suffering in no way from the tyranny of the majority. We suffer from the tyranny of the bosses and the special interests—that is, from the tyranny of minorities. Our respectable opponents among the leaders of business and the bar are acting as the servants and spokesmen of the special interests and are standing cheek by jowl with the worst representatives of politics, when they seek to keep the courts in the grasp of privilege and of the politicians; for this is all they accomplish when they prevent them from

being responsible in proper fashion to the people. These worthy gentlemen speak as if the judges were somehow imposed on us by Heaven, and were responsible only to Heaven. As a matter of fact, judges are human just like other people, and in this country they will either be chosen by the people and be responsible to the people, or they will be chosen by and be responsible to the bosses and the special interests and the political and financial beneficiaries of privilege. In the course they are taking, the great corporation lawyers are, in some cases certainly unconsciously, and in other cases I fear consciously, acting in behalf of the special interests, political and financial, and in favor of privilege, and against the interests of the plain people, and against the cause of justice and of human right.

I wish to keep the courts independent. But at present the independence of the courts is far more frequently menaced by special privilege than by any popular tyranny. I wish to protect them against both. The safe way to prevent popular discontent with the courts from becoming acute and chronic, is to provide the people with the simple, direct, effective, and yet limited power to

secure the interpretation of their own constitution in accordance with their own deliberate judgment, by the method I have above outlined.

THEODORE ROOSEVELT.

SAGAMORE HILL,  
July 1, 1912.