# THE JUDGES, THE LAWYERS, AND THE PEOPLE

## EDITORIAL BY THEODORE ROOSEVELT

### THE DANGER OF NON-PARTISAN NOMINATIONS

I EARNESTLY hope that this year the Progressives of New York State will nominate the very highest type of man for judge. It is a good thing to have a non-partisan judiciary. But unfortunately a judiciary can be nominally non-partisan and yet quite as dangerous to the interests of the people as the most partisan judiciary that has ever occupied the bench.

Of recent years the machines of both parties have tended to come under the control of substantially the same class, the class that represents the alliance between special privilege in business and special privilege in politics. Mr. Murphy at present enjoys unchecked control in the New York State Democratic machine and Mr. Barnes unchecked control in the New York State Republican machine. The events of the last few years have driven Mr. Barnes and Mr. Murphy into close alliance. Gradually their principles have become essentially the same. They look at constitutional questions, State and National, from the same view-point. The machines which they control and manage stand in precisely the same relations to business. The financial powers with which they are both in most intimate alliance are of precisely the same character. These financial and political powers are served by precisely the same type of corporation lawyer.

It is the easiest thing in the world for the Republican and Democratic machines to make a pretense of non-partisanship about the judges, and to nominate two men, one

nominally an irreconcilable Republican and the other nominally an irreconcilable Democrat, who in reality on all matters vitally affecting the powers of privilege occupy identical positions and serve precisely the same interests. If necessary, the two machines are quite willing to nominate men who shall consciously serve these interests—as the Penrose machine in Pennsylvania has repeatedly done, for instance. But ordinarily this is not necessary, and the machines avoid it where possible. Ordinarily all that is needful is to find some upright man of good legal ability who has been bred and trained in a hopelessly outworn political philosophy, in whom the spirit of legalism is both innate and dominant, and who has no knowledge of the needs and desires of the great bulk of his fellow-Americans, and who feels a profound distrust of the legislation necessary to meet these needs and satisfy these desires.

Such a man is usually indorsed with enthusiasm by his local Bar Association without regard to party. Such a man may often be a very good judge indeed, so far as purely judicial functions are concerned—that is, in deciding questions as to a given man's guilt or innocence, or in settling disputes between individuals. But as regards the legislative function of the American judge, a function which judges ought to exercise very sparingly, but which, as a matter of fact, they have of recent years grown to exercise with the utmost recklessness, such a judge may be a reactionary of the type that does quite as much damage as could be done by a man of no principles whatever. There is no candidate for the judgeship, and no judge, so prized nowadays by the big political bosses and the great corporations which profit by privilege, as the honest, narrow-minded lawyer devoted to a dead and gone theory of political economy, whose mind so far as new methods of applying old Constitutional principles are concerned is fossilized, who knows nothing of the vital needs of the average man and woman in our community, and who invokes the Constitution in order to nullify every genuine legislative effort to meet these needs.

The men nominated in New York for judges by the Progressives this fall should be men who accept as a matter of course the view that the Workmen's Compensation Act is Constitutional; that it is Constitutional to limit the hours of women in industry, and to prevent children below a certain age from working; that it is Constitutional to do whatever is necessary to make tenement-houses fit places of abode for those who dwell in them; that it is Constitutional to safeguard women and men in industry from dangerous machinery; that it is Constitutional to limit the hours of those who work in continuous industry; that, in short, it is Constitutional to do whatever the people of the State hold to be necessary in the course of the exercise of the police powers of the State in order to secure social and industrial justice, and that it is desirable for the people themselves to decide, if necessary, what course of conduct must be followed by the Government in order thus to secure justice.

Whether the man nominated as judge intends to vote for the Progressive electors is of small consequence; but it is of vital consequence that he should stand whole-heartedly for every feature of the Progressive platform as enunciated in Chicago. If a judge were only to deal with lawyers, then it would be right to consider primarily the view that the various Bar Associations may take of it. But judges deal not only with individual rights of men and women, but under the American system of government they deal with the fundamental rights of men and women in masses, with the right of the people to secure social justice. From this standpoint the interest of the local Bar Association or the local Chamber of Commerce is no more important than the interest of the labor union or the grange, than the interest of the individual clerk, or retail trader, or wage-worker, or small farmer.

I trust that the Progressives will nominate for judges men who have actually shown, as Judge Hotchkiss, for instance, has shown, that they stand abreast of the right sentiment of the day; that they recognize the needs of our people and the rights of the people: that they recognize that the judge, like the legislator and the executive, is the servant of the people, is responsible to them, and must strive for their well-being.

### THE BAR ASSOCIATION AND THE POPULAR REVIEW OF JUDICIAL DECISIONS

It is stated in the press that the American Bar Association, through its legislative committee, intends to take adverse action on the position of the Progressive party regarding the right of the people to determine for themselves whether the judges properly

represent them in deciding a certain class of Constitutional questions.

I hope that this action will not be taken. I hope this primarily for the sake of the Bar Association itself. The honest men who are deluded into opposing us in this matter are merely strengthening the hands of the very able but by no means honest men who are bent on making and keeping the courts bulwarks of privilege and special interests as against popular rights. The questions with which our proposal deals are questions in which the judges' decision is in no proper sense of the word judicial. On the contrary, in these questions the action of the courts here in America—and nowhere else in the civilized world save in one or two places where, under carefully guarded limitations, our plan has been followed—is in reality of a strictly legislative character, the courts exercising the very highest legislative power, that of the final decision as to whether the law can exist at all. In such a case the greatest lawyer in the land has not one particle more interest in the decision than the humblest citizen, and the Bar Associations have not one particle more right to treat the matter as coming within the scope of their action than have ministers' meetings, or medical conventions, or labor unions, or granges.

The great corporation lawyers have a special and peculiar interest in serving their clients in these matters. It is to the special interest of their clients, and therefore of themselves, that the public should be kept befogged on this subject and that the courts should be kept and continued as instruments of privilege. For this purpose they desire that the members of the high and honorable profession of the law should be committed, nominally in favor of the courts, really in favor of destroying the confidence of the people in the courts, to a course of conduct which can result only in making the courts the instruments and bulwarks of privilege. Every upright and intelligent lawyer who approaches these matters from the broad standpoint of good citizenship—precisely as the upright and intelligent banker, or farmer, or mechanic, or railway man should approach them—ought to be on his guard against following the lead of these men to the certain ultimate detriment of his own profession and the certain ultimate detriment of the whole country. It will be a bad thing both for the legal profession and for the country itself if our people as a whole grow to feel that the leaders in the great profession of the law are, as a rule, the enemies of justice and of popular right, and the upholders, not only of special privilege, but of legal chicanery employed for the defense of special privilege. In no way can this impression be deepened more certainly than by assuming the position that, in legislation for promoting social and industrial justice and the economic welfare of our people, the lawyer is, as a member of his profession, interested in securing the right of the judges to exercise an irresponsible veto power over the people. There was a time when this veto power was used with such wise caution as to avoid raising the issue of how to deal with the power when it was abused; but during the last few decades it has been used with a recklessness which has completely changed the whole bearing of the question.

I wish that sincere men would turn to Mr. Ransom's book[1] on this subject, just published by the Scribners. I wish that they would turn to the legal essays of Dean Thayer, the great Dean of the Harvard Law School, and read the first essay, that on Constitutional Law. Let them study what Dean Thayer therein says, and what he quotes from judicial opinions rendered fifty and one hundred years ago in this country, as to the extreme unwisdom of the use and abuse of this power by judges with the recklessness characterizing its use and abuse of recent years.

I wish, moreover, that they would turn to the Eleventh Amendment to the Constitution of the United States, and inquire for themselves about the circumstances of its adoption. These circumstances were as follows: A very few years after the Constitution was adopted, the Supreme Court in a certain case ruled that the citizen of one State could sue another State in the Federal courts, under the judicial provisions of the Constitution. The people of the United States did not approve of this decision, and they accordingly passed the Eleventh Amendment, which provides that the Constitutional provisions in question are "not to be construed" as the Supreme Court had construed them. This is exactly and precisely what the Progressives propose to have done, alike for the Nation and for the several States. The only difference is that we desire to secure more expeditious action in cases of this kind than is possible under the cumbrous existing sys-

[1] Majority Rule and the Judiciary. By William L. Ransom. Charles Scribner's Sons, New York. 60 cents net.

tem of Constitutional amendments. There was no need for such expedition in the early days when the courts exercised this great power with cautious moderation and wisdom. But it is now used so recklessly that it is absolutely necessary, if we are to go forward along the path of social and economic reform, that the people shall be able to act, after due deliberation of course, but not after interminable procrastination.

Let me illustrate specifically what I mean. The Court of Appeals of New York has decided that the ten million people of the State of New York cannot have a Workmen's Compensation Act, on the ground that it conflicts with certain language in the Constitution. The Supreme Court of the Nation and certain State courts like those of Iowa and Washington have held that the identical language should be construed in exactly the opposite way, and that the legislation in question is clearly Constitutional. There probably never was a more flagrant denial of justice by any court than the denial of justice by the Court of Appeals of New York in this case—and it is worth calling the attention of our conservative friends, who in this matter are clinging to the coat-tails of those mighty champions of the Constitution, Messrs. Barnes and Murphy, Penrose and Guggenheim, to the fact that no popular vote by the people of any State ever resulted in a more flagrant denial of justice than was the denial of justice in this decision by the highest court of the wealthiest and most populous State in the Union. But there was much more than a denial of justice in the case. It was a sweeping denial that the people have power to do justice at all. It was the assertion of the right of certain well-meaning elderly men, who know nothing of the needs and conditions of life of their ten million of fellow-citizens, to dictate to these ten million what they should do and should not do in the exercise of the fundamentals of self-government.

Now, my contention is that the Bar Association has in no shape or way any special interest in this decision, or any special knowledge which entitles it to take the position that the people shall be kept powerless to right the wrong that has been done. Every brakeman, switchman, engineer, conductor, or fireman, every bricklayer or banker, every farmer or hired man, every clergyman or settlement worker, has just as much right as any lawyer in this matter. Nor is this all. Not only has the average outsider just as much right as the lawyer to his opinion, but it is at least probable that his opinion will be as valuable. It is not primarily a legal question at all. It should be decided by the people themselves as a matter of public policy; and the courts should never interfere with the decision of the people in this particular kind of question of public policy. The decision of the Court of Appeals of New York in this matter can be upheld only by holding the thesis that the Supreme Court of the Nation knows nothing of the Constitution of the Nation and has shamefully misconstrued it, and that the highest courts of Iowa and Washington have been guilty of a like shameful ignorance and misconstruction of their own State Constitutions. The fact is that the Court had no business even to treat the law in this case as involving a Constitutional question. The question involved is purely a question of public policy, a question for settlement by the legislative branch of the Government in response to the clearly thought out demand of the people.

This is true of all these questions of social justice. Our contention is that the people themselves and not the courts must be given something like the same power in this country in such cases that the people have in all other civilized countries. We contend that the people have the right to say whether they wish an eight-hour law for women, whether they wish to put a stop to unhealthful and dangerous conditions of life and work in factories, whether they wish to put a stop to the labor of children, whether they wish to create for all continuous industries what the wise heads of certain of those industries have already created—that is, an eight-hour day, a three-shift day, and also a six-day week—for the workingmen in those industries. We Progressives may be right or we may be wrong in our position on these several matters; but we hold that it is for our fellow-countrymen, and not for their public servants, however worthy, who are in irremovable positions on the bench, to say whether we are right or wrong. That is, we hold that the people have the right to decide for themselves what their position shall be on these fundamental questions, and that they have not surrendered this power to any body of public officials.

To say that we can reach the matter by the ordinary form of Constitutional amendment is merely to befog the issue. Our system of Constitutional amendment is so

cumbrous and complicated that in such cases as we have in mind there would be interminable delay before the needed amendment could be adopted; and then there would have to be legislation under the amendment; and then another series of lawsuits and another series of decisions by the same courts that had rendered the objectionable decision in the first place. The talk of meeting the difficulty by the ordinary process of Constitutional amendment amounts merely to saying that no relief whatever is to be given. Take the decision of the Court of Appeals in this Workmen's Compensation Act. This was a peculiarly flagrant decision, a peculiarly flagrant denial of justice and denial of the right of the people of New York to do what the people of almost every other civilized industrial community have done or are doing. At the next election, or the next election but one, after this decision was rendered, the people should have had the right to vote whether or not they desired the Workmen's Compensation Law to be treated as constitutional. (I do not care whether the language should imply that the Constitution is to be construed as authorizing such an act or whether it should imply that the act is to become a law anyhow, notwithstanding the supposed inhibition of the Constitution.)

What has actually happened has been a series of wrangles as to what ought to be the proper form of amendment to the Constitution, these wrangles being taken part in by the various Bar Associations. Moreover, because of this mischievous and unrighteous decision, legislators not only in New York but elsewhere are now spending their time in the endeavor, not to enact a Compensation Act which will do the most effective justice, but to use such ingenious language in the Compensation Act as will enable adroit lawyers to weave in and out and through the decision of the New York Court of Appeals in such fashion as to persuade the judges that the proposed law is really different from the old law, and ought to be sustained. All of this means that a premium has been put upon delay and upon legal chicanery at the expense of justice. Justice has been foully abused by those who should be the special guardians of justice.

And yet it is now announced in the press that the American Bar Association proposes to fly to the defense, not of justice, but of the betrayers of justice! At least let any man who votes as the papers say the members of the Bar Association propose to vote cast off hypocrisy. Let it be understood distinctly that such a vote as I speak of will be a vote against the enactment of an eight-hour law for women, a vote against workmen's compensation laws, against prohibiting the labor of children, against laws for safety appliances, in short, against all legislation aimed to secure social and industrial justice. It is not only nonsense but hypocritical nonsense to claim to be for any of these laws and at the same time to uphold the right of reactionary judges to veto these laws, without giving to the people the right, without delay, to vote specifically that these laws shall be valid.

I wish people would visualize these matters and not treat them as merely abstract. In this very year 1912, hundreds, probably thousands, of accidents are happening in the State of New York of the kind which would have been covered by the Workmen's Compensation Act. Every widow or orphan who is denied justice because of the death of the husband or father; every crippled brakeman or engineer or steel worker or worker on a big building who is crippled in the course of his work but is denied compensation; every woman who is worked in sweat-shop or factory twelve or fourteen or sixteen hours until her health breaks and she is left to starve or to see her children starve; every girl who loses a hand or arm because machinery is not properly safeguarded and is then left to go through life crippled and unrecompensed—all these and the thousands like them are suffering cruel wrong and injustice because certain well-meaning judges have sacrificed justice on the altar of a dead philosophy and have forbidden the people to exercise their right of self-government in so far as this right means the securing of justice to the humble and the helpless.

There is but one way to prevent the endless repetition of such wrongs, and that is in these cases to give to the people the power which the Progressive platform proposes to give to them. We in New York must do our part by nominating judges who unreservedly and fully accept every provision of the Progressive platform. Meanwhile the American Bar Association should not discredit itself, and at least attempt to hurt the cause of social reform, by condemning the proposal to give to the people the right which it is essential that they should possess if they intend effectively to prevent the limitless repetition of these wrongs in the future.