THE RIGHT OF THE PEOPLE TO REVIEW JUDGE-MADE LAW

BY THEODORE ROOSEVELT

THERE are few recent pamphlets in the interest of decent citizenship and of sound political thinking better deserving to be read and studied by thoughtful people of sound character than that which was circulated nearly a year ago containing the speech of acceptance delivered by Mr. Justice Samuel Seabury, of the Supreme Court of the State of New York, in accepting the nomination of the National Progressive party to the position of Associate Judge of the Court of Appeals of the State of New York. Mr. Justice Seabury is now a Judge of the Supreme Court of the State of New York. He was, when elected, a prominent member of the bar of New York. He is the son of a clergyman who for many years was rector of the Church of the Annunciation. He is a descendant of the Samuel Seabury who was the first Bishop of the Protestant Episcopal Church in America. It is idle to talk of such a man as an irresponsible agitator. He began his speech with the following words:

I accept the nomination of the National Progressive party for the office of Associate Judge of the Court of Appeals. Whether we poll many votes or few, I am your candidate until the polls close on election day.

The contest in which you are engaged is an attempt to dethrone privilege and monopoly and to establish social justice. In none of the three great branches of the Government is there a greater necessity for this contest than in the judicial branch. Already great progress has been made through the executive and legislative departments of the Government. These efforts for social reform can amount to nothing unless the judicial department of the Government shall cease to be the bulwark of privilege and private monopoly.

Just as in the old slavery days the slave-owners relied upon the courts when they could no longer defeat the popular will through the executive and legislative departments, so to-day the forces of monopoly and privilege—battling to prevent the establishment of just social conditions—place their chief reliance upon the high appellate courts.

In other States the courts of last resort have shown an appreciation of modern tendencies and a willingness to aid in the establishment of just social conditions. No such spirit has been manifested by the Court of Appeals of this State. It has resorted to strained and technical constructions of Constitutional provisions in order to nullify remedial legislation, and a long series of decisions upon the labor laws of the State demonstrate that the Court is dominated by a spirit of reactionism.

I do not mean to be understood as saying that the judges do other than that which they conceive to be their duty, or that they are consciously the servants of monopoly and privilege. Their reactionary decisions are the natural results of their mental attitude and the class bias which unconsciously dominates them. Whatever their intentions, the decisions which they have made, and the spirit which actuates the Court in its consistent and persistent opposition to every fundamental social reform, have resulted in obstructing justice and in weakening the confidence of the people in their courts.

If social reforms are to be adopted, and if the gross abuses which now exist and cause cruel injustice to the workers are to be removed, the people must take an interest in their courts and use care and intelligence in the selection of their judges.

This year, when the only State officers to be elected are the Judges of the Court of Appeals, your party has done well to call attention to these conditions and to distinctly and squarely present this issue to the people. I am so heartily in sympathy with your views on this subject, and believe so firmly in the necessity for a protest against these conditions, that I should feel recreant to my convictions if I refused to stand up and be counted with you on your side of this great issue. I have been, and I am now, a Progressive Democrat, and as such it is appropriate that I should ally myself with you in this campaign, because your party at this time in this State is the only party which stands for progressive principles.

The Republican and Democratic parties in this State are the absolute bought-and-owned tools of special privilege. They exist only for the purpose of perpetuating present social maladjustments and to prevent all social and political reforms.

The attitude of both parties toward the Court of Appeals nomination throws an interesting light upon the manner in which these parties unite while pretending to oppose one another.

There is not a monopoly interest or beneficiary of privilege anywhere in the State that does not desire the election of Judges Werner

and Hiscock. All of the corporation-owned press are a unit for their election. The Democratic party did not believe that it was politically expedient to indorse these men openly; so it selected two men whom it has neither the desire nor intention of electing to office. The battle which is to be waged between Werner and Hiscock on behalf of the Republicans and Bartlett and Elkus on behalf of the Democrats is a mere sham battle. The Democratic party deliberately named Bartlett and Elkus for the purpose of aiding the election of Werner and Hiscock.

The same powerful interests which dictated the nominations of Judges Werner and Hiscock in the Republican Convention were back of the leaders who control the Democratic State Committee. These interests desire the election of Werner and Hiscock, and the Democratic party, obedient to these interests, has done what it could to insure their election.

It is interesting to note that both Judges Werner and Hiscock endeavored to get the Progressive nomination, and that the interests back of them would have felt perfectly safe if they had been nominated by our party, even if they had recanted in public the opinions which, as Judges, they had previously expressed.

There is no danger of any one suspecting the Democratic nominees of radicalism. I unhesitatingly vouch for their reactionism, and will guarantee that if, by some accident of politics, they should, contrary to the expectation and desire of those who nominated them, be elected, they will obstruct all efforts of the people at fundamental social reform as effectively as Judges Werner and Hiscock could do.

It makes no difference to the public whether a judge who is sworn to enforce the law which the people enact believes in a high tariff or a low tariff, or what he believes as to the initiative and referendum, or what his views may be upon the foreign policy of the Nation. These are matters that cannot affect his judicial action.

In making this declaration Judge Seabury declared that he was a Democrat. He had supported Mr. Wilson in the Presidential campaign of 1912. The Progressives of the State of New York, and in my judgment quite rightly, paid no heed whatever to this when they nominated Judge Seabury. I felt in the matter precisely as my fellow-Progressives did. I knew that Judge Seabury had voted against me, just as I knew Judge Hand had voted against me when I ran for President in 1904. But my interest was not as to whether these judges believed in a high tariff or a low tariff, nor as to what were their views concerning the single tax. What concerned us at that time was what they felt on the questions affecting the judiciary which were so vitally important to the people of this State and to the country at large. Judge Seabury in his speech summed up his views as follows:

In view of the powers which judges are now exercising, it is important, however, to ascertain what the general mental attitude of a judge is.

It is important that he should not be so dominated by class bias that he will go out of his way to declare unconstitutional a legislative act because it tends to improve the conditions of the workers.

It is important to ascertain whether a judge of an Appellate Court lives in the atmosphere of the present century, or whether he finds the atmosphere of the Middle Ages more congenial to him.

We have in our court of last resort some altogether estimable gentlemen whose views upon social, economic, and industrial questions would have been somewhat behind their age if they had lived at the time of Columbus. This mental attitude, coupled with a strong unconscious class bias in favor of the few who have been enriched by unjust laws, makes the worst possible kind of a judge.

Your platform criticises the decision of the Court of Appeals in the Ives Case. I think the criticism is just. In that case the Court of Appeals went out of its way to strike down as unconstitutional a law designed to establish just conditions among those injured while engaged in manual labor. With many words and assurances that it was an excellent law that they were nullifying, they nevertheless struck down that law. The Court of Appeals declared the Workingmen's Compensation Law invalid, not because it offended against any provision of the Constitution, but because they disapproved of the policy of such legislation. If nothing more is accomplished by the candidacy of Judge Hand and myself than to emphasize a protest against that decision and the others like it which the Court of Appeals of this State has persistently rendered, and the spirit in which those decisions were made, our candidacy will not have been in vain.

The Court, in the Ives Case, attempted to do more than decide the issues between Ives and the railroad company. It attempted to lay down a rule of action which should bind the Legislature and the people in the future. In effect it prohibited the Legislature from enacting a just workingmen's compensation law. The result of that decision is that a vast amount of injustice has been done to the working classes.

Why is it that other States may lawfully enact a workingmen's compensation law which cannot be enacted in this State?

The reason is not to be found in the Consti-

tution, because the same Constitutional provisions exist in those States that exist in this State.

It is not because the people of this State do not want such a law, because they have shown that they do.

It is not because the Legislature refuses to enact such a law, because the Legislature of this State did enact this law.

It is not because a Governor could not be found who would approve such a law, because so great a Constitutional lawyer as Mr. Justice Hughes did, as Governor of the State, approve this law.

What, then, is the reason why such a law is denied to the people of this State and may be enjoyed by the people of other States?

The only reason is, that in other States the courts of last resort have upheld such a law, while in this State the Court of Appeals has nullified such a law.

The difference, therefore, lies in the personnel of the Court. The reason exists in the Court —not in the Constitution.

The legal doctrines known as the "fellow-servant rule," the "assumption of risk," "contributory negligence," and "details of the work" are all the result of judge-made law. They were brought into the law by the decisions of judges, not by statutes enacted by legislatures. Realizing the injustice which these rules have worked, the civilized states of modern times have been trying to get rid of them. In Great Britain and her colonies, in Germany, France, and Austria, liberal and fair labor laws have been adopted. This is also the case in many States of the Union.

Against the progress which has been made in other States and nations the Court of Appeals of New York stands like a rock. Not content with exercising legislative functions in such a way as to make unjust laws, it assumes the reactionary position of declaring unconstitutional remedial legislation which seeks to do away with the injustice resulting from judge-made law.

Judge Seabury in these statements is merely putting in more elaborate form the argument already made by Mr. Justice Holmes, of the United States Supreme Court. These Judges, although their language is cautious, in effect do actually point out that the people who object to all social changes, the Bourbons of our civilization, the men who by their reactionary attitude do more than any other men to invite the violence of the extreme Socialists and even the Anarchists, are trying to substitute the divine right of irresponsible judges for the divine right of kings. Justice Holmes, in speaking of the antagonism to all forward movement by these worthy Bourbons, says that it is their fear of progress which "has led the people who no longer hope to control legislatures to look to the courts as the expounders of the Constitution, and that in some courts new principles have been discovered outside the bodies of those instruments which may be generalized into acceptance of the economic doctrine which prevailed about fifty years ago, and the wholesale prohibition of what a tribunal of lawyers does not think about right." Justice Harlan, one of the ablest men who ever sat on the Supreme Court, declared in a dissenting opinion that that great Court, in its interpretation of the Sherman Anti-Trust Act, had usurped the Constitutional functions of the legislative branch of the Government, and that "there is abroad in our land a most harmful tendency to bring about the amending of Constitutions and legislative enactments by means alone of judicial construction."

In the New York Bakeshop Case the Legislature had forbidden excessive hours of labor by bakers under unhealthy conditions. Twenty-two judges passed upon this law first and last. Twelve declared the Act constitutional; only ten declared it unconstitutional. But the Supreme Court of the Nation, which passed upon it last, contained five men who thought it unconstitutional, merely because, in their opinion, they—good, worthy men who knew nothing whatever of the conditions of life and labor, and whose proper functions were in no sense such as to warrant them in passing judgment on the matter—believed that no sound economic or social reasons had been shown sufficient to warrant the New York Legislature in restricting the hours of labor in this particular industry. Justice Holmes, whom I have already quoted, spoke of this decision as follows: "This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agree with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this Court that State constitutions and State laws may regulate life in many ways which we, as legislators, might think as injudicious or, if you like, as tyrannical as this, and which, equally with this, interfere with the liberty to contract. . . . The Fourteenth Amend-

ment does not enact Mr. Herbert Spencer's 'Social Statics.' A constitution is not intended to embody a particular economic theory, whether of paternalism in the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."

In a later case involving the Federal Employers' Liability Act Mr. Justice Moody declared as follows:

> The economic opinions of judges and their views of the requirements of justice and public policy, even when crystallized into well-settled doctrines of law, have no Constitutional sanctity. They are binding upon succeeding judges, but while they may influence, they cannot control legislators. Legislators have their own economic theories, their views of justice and public policy, and their views when embodied in written law must prevail.

In the Trans-Missouri Freight Association Case, Mr. Justice White, now Chief Justice of the Supreme Court, condemned the majority decision on the ground that it "tests the right of contract by the conception of that right entertained at the time of the year-books (many centuries ago) instead of by the light of reason and the necessities of modern society."

Mr. Taft, in defending the courts for actions of the kind that is condemned by Justices Holmes, Harlan, Moody, White, and Seabury, has recently said that legislation by judges in their construction of the Constitution and the interpretation of laws "is one of the most valuable and indispensable functions that courts perform. . . . This may give rise to judge-made law, but it is generally the best law we have."

I do not for a moment question the sincerity of those who hold with Mr. Taft that the judge-made law of the kind I have above quoted is the best law we have. Many worthy, although, as I believe, short-sighted, citizens believe that the courts give us "the best law we have" when they declare that we have not the right to pass a workmen's compensation act in New York, or that we have not the right to pass a law prohibiting the excessive labor of men in dangerous industries, or that we have not the right to pass a law allowing a crippled girl to recover damages from the employer whose brutal disregard of danger to her life and limbs from his machinery is responsible for her crippling. Mr. Taft holds that the laws of this kind, enacted by judges in defiance of the popular will, are "the best laws we have." He is entirely within his rights in taking this view, and I have no question that a large number of respectable men agree with him. He and they have as much right to their judgment as I have to mine when I take the opposite view. All I contend is that, if the views I hold on these subjects are those of the majority of the people, then we have the right to embody our views in law.

Where I do emphatically disagree with Mr. Taft and his supporters is when they in effect declare that the people are not to have the power to review judge-made law, although they have the power to review the law made by the legislators.

It is mere mockery to say that existing methods of constitutional amendment provide an adequate means of upsetting decisions such as these. During the last decade several hundred National and State laws have been declared unconstitutional by courts; and in only a small fraction of the cases has it been possible to bring these "judge-made laws" before the people for final decision. Consider, for instance, one case in which such popular decision was finally reached.

The Supreme Court of the Nation had again and again held that we have the right to have an income tax. For over a hundred years, therefore, we lived under a Constitution which permitted an income tax. But a worthy and upright judge changed his mind one day, and the people of the United States woke up next morning to find that they were living under a new Constitution which did not permit them to have an income tax; the decision having being rendered by a five-to-four vote. It took one man only a few hours to amend the then existing Constitution of the Nation so that, instead of permitting an income tax, it forbade it: but it took the entire people of the United States fourteen years before they could overcome the effect of this one man's change of opinion and get back the Constitution under which the people had lived for over a century prior to the issuing of the opinion wherein this judge formed a decisive member of the majority of the Court.

In the Sarah Knisley's Arm Case, the Court of Appeals of the State of New York decided

(Continued on page following illustrations)

that if an employer failed to comply with the law in protecting women in industry from dangerous machinery, and that if nevertheless a woman, having knowledge, continued to work, she had no right to recover damages; that is, they decided that the deeply wronged party was oppressed and the party that did the wrong protected by the Constitution which was supposed to guarantee justice. For sixteen years this was the law, until finally the Court reversed itself and established justice. I hold that in this instance the people ought to have had the right to establish justice sixteen years earlier, so that it might have been the law during the sixteen years when injustice was the law. Under the pressure of enlightened public opinion, I believe that the Bakeshop Case has now been well-nigh repealed by various other decisions of the Supreme Court; but the matter is open to doubt, and it should not be open to doubt.

We have passed a Constitutional amendment designed to do away with the Ives decision; but whether we have succeeded or not cannot be told until the Court that rendered the Ives decision passes with supreme power upon the effort of the people to undo what the Court formerly did.

My contention is that we are not concerned with the question whether Mr. Taft and his followers are right or wrong in holding that the judge-made laws that forbid compensation to injured employees, that forbid the limiting of hours of labor in dangerous trades, that forbid the recovery by maimed women of damages from careless or brutal employers, are "the best laws we have." We are greatly concerned, however, with the question as to whether we have or have not the right to decide these questions for ourselves instead of having them decided for us by men whose decisions we regard as unjust. We hold that the people themselves should be given the right to say finally and conclusively whether they do or do not agree with these decisions, and whether these decisions are or are not to stand as the law of the land—not the law adopted by the people themselves, but the law imposed on them from without and against their protests.

This is all that is meant by the somewhat misleading term "recall of judicial decisions." What we aim to accomplish would be better expressed by the phrase "the right of the people to review judge-made law." This of course includes the right of the people to review judge-made constitutions, which is what all constitutions must become if their meaning is to be determined with practical finality by judicial decisions. The constitutions are now in almost all cases adopted by popular vote. A constitution is merely the highest expression of the law. Constitution-making is the highest form of law-making. It is emphatically the act of the people themselves. But if the power is, not theoretically but in actual practice, granted to a small group of men, however well-meaning, to put any interpretation they please upon what the people have done, it amounts in practice to taking away the right of the people to make their own constitutions and their own laws.

In practice, the people can control their legislative bodies. The legislator is elected for a short time, and he can be speedily replaced if he misrepresents his constituents. Moreover, wherever the people find that they are thus misrepresented by the legislators, they can, by the adoption of the initiative and referendum, take the remedy into their own hands. Now, all that those of us who are discontented with the reactionary or Bourbon decisions, such as those alluded to above, desire to do is to give the people the same right to make their own laws so far as the judges are concerned that they now have so far as the legislators are concerned. I am really advocating only that the people be actually, and not merely theoretically, given the right which the eminent judges above quoted say is theirs and cannot lawfully or with propriety be taken from them. I am not speaking of any ordinary decision in the course of the administration of justice between man and man. I am not speaking of judicial decisions properly so-called at all. I am speaking of the function, assumed by the American court almost alone among the courts of civilized nations, to enact laws; for this is precisely what the courts have done in such cases as those mentioned above, even though the enactment take what is seemingly a merely prohibitory form.

If the lawmaking power is not responsible to the people for whom the laws are made, then our American system of government is a failure. The courts are as emphatically the servants of the people in this matter as are the legislators themselves. Unquestionably the court must pay no heed to the wishes of the people in doing justice as between man and man, precisely as the legislative and executive officers must pay no

heed to the wishes of the people or any other consideration when the question is one in which violence or corruption or any other immorality is involved. The public servant must serve his own conscience or he cannot serve the public, and this is true of judicial precisely as it is true of legislative and executive officers. But in matters of policy the public servant must also represent the people or else our representative government is a sham. It is for the people themselves to make their own laws. It is not only their right but their duty to insist that their views in lawmaking shall obtain, and not the antagonistic views of their servants, whether these servants be on the bench, in the legislature, or in executive office. If the legislature takes one view of the powers defined by the Constitution and the court takes another view, then it should be the right of the people to decide between their two sets of servants and say which view is correct. I ask for the necessary Constitutional amendment which will give the people the power lawfully to exercise this right.

I care nothing for the methods of obtaining this result so long as the result is lawfully obtained, and I care less than nothing for the terminology used in describing the methods. Whether the process is styled "a quick method of amending the Constitution" or "the exercise of the right of the people in a specific case to pass on the interpretation of the Constitution" is to my mind of no consequence. The fundamental question is that the people shall have the right to make their own laws, and to declare what these laws are, if their judgment differs from that of their servants in public life. The right should be exercised with self-control and caution. It should be exercised sparingly. But it should exist and should be available for exercise. The highest right of a free people is the right to make their own laws; and this right does not exist if, under the pretense of interpretation, an outside body can nullify the laws. Whether in such cases the nullifying body calls itself a legislature or a court or an executive is not of the slightest consequence. Whether we are dealing with a legislature-made law or with a judge-made law is not of the slightest consequence. A free people must have power over its own laws. It must have power to review legislature-made law; therefore it should have power to review judge-made law.