

RIGHTEOUSNESS IN GOVERNMENT.

I.

The Constitution of the United States is more than a formula of government; it is the people's covenant of devotion to freedom, justice and righteousness in government.

As a charter, it proceeded from no sovereign save the people themselves; it is the greatest charter in the world, the charter of the liberties of more than a hundred million of American freemen.

Recall the bitter years of "dreadful conflict" and lawlessness and civil rebellion preceding the Constitution of 1789; the jealousies, the hatreds, the self-interests of the thirteen colonies, successful in war but temporarily inadequate to the duties of self-government in peace.

Realize how the framers, sitting in Independence Hall, with great wisdom and tact, secured, by the "more perfect union," embodied in the "Constitution of Philadelphia," a unique and enduring answer to the mighty problems of Federalism; and how the world beheld the miracle of a free and independent people, living in free and independent states, surrendering by noble compact that part of the sovereignty of each State which had to do with international and interstate relations.

There are those who are eager to "break with the past," ignore its lessons and flout its traditions. Such as these prefer not to realize that there are economic laws, forces of human nature, and judgments of the Almighty, which may be learned by patience and diligence, but which are immutable and inescapable.

But our Fathers knew and believed in these eternal precepts of righteousness, justice, and respect for the rights of all, and in this faith they brought forth a mighty nation, conceived in liberty and dedicated to law and equality before the law.

Aside from the unique solution of the problems of Federalism, charting the States and the Nation in their several courses, the greatest concept of the Fathers was that of the *supremacy*

of law, the supremacy of the Supreme Law, a Law of Laws, unchangeable save for the deliberate action of the people themselves.

Into this Higher Law they wrote in lofty phrase the immemorial rights of freemen, sacred as against all government, inalienable and indefeasible rights which are of the essence of Freedom itself.

And it was of the essence of their plan that this Higher Law should be interpreted and made binding by a great Tribunal—a Supreme Court in which was vested the “judicial power of the United States.”

So by the Constitution came the Nation and the Supreme Court of the Nation to support the Constitution. The Constitution was to be upheld as the Supreme Law of the Land by the Supreme Court of the Land. Nothing not done “in pursuance thereof” was to be of any validity or effect.

The interpretation of the Constitution is a judicial act. The judicial power is in the courts. The final judicial power is in the Supreme Court. The judges are sworn to support the Constitution. If the Court, in the exercise of one of the noblest functions known to man, the power of entering judgment as between man and man, or as between man’s government and man, finds that the Constitution is applicable, all else must give way before it; it must furnish the true and only rule of decision. For, so long as the Constitution of the people remains unchanged by the people as they have reserved the right to change it, the people must be regarded as breathing into the ears of the judges, and dictating through the judges the judgment which results from the high decision aforetime of the people themselves. The consciences, the intellects, of the judges are moved by a profound conviction that the judgment which they enter makes good the pledged word of the people and accords with their plain mandate.

II.

In the fall is forecast a battle royal in Congress. It will be an attack on the Constitution and the power of the Supreme Court under the Constitution. The attack will be led by Sena-

tors La Follette and Borah. Among their cohorts are the Federation of Labor, a syndicate comprising hundreds of newspapers, and an army of social workers.

War was declared by Senator La Follette more than a year ago, when the American Federation of Labor unanimously endorsed his proposal of an amendment to the Constitution, to the effect that Congress by repassing a bill by a two-thirds majority could override the Constitution. Senator Borah, more convinced of the present omnipotence of Congress, has introduced a bill prohibiting the Supreme Court from sustaining the Constitution as against an Act of Congress *except by a vote of seven of the nine justices*.

Of the numerous objections to the La Follette proposal, perhaps the most evident is that it would accentuate to an intolerable extent the present centripetal tendency to center all government and power at Washington. Whatever Senator La Follette could secure a two-thirds vote for in Congress, would be a subject of Federal jurisdiction and power, no matter how destructive of the rights of the States and the people thereof. Instead of having the cooling-time, shown, alas! to be all too short, provided by the wisdom of the Fathers, we would have amendments overnight by a two-thirds majority of Congress. The Constitution and constitutional law would be scrapped, for the decisions of Congress would be made upon grounds of political expediency rather than upon sober grounds of judicial interpretation.

In a nutshell, the proposal is anti-constitutional and subversive of our liberties, giving the lie to the basis of our peace and prosperity during nearly a century and a half of American freedom.

Turning now to the Borah proposal, it has not even the merit of novelty. For Senator Borah is attempting to thresh over old straw, to fight an issue that was decided in Congress a century ago, *and decided correctly*. At that time the resentment came from the advocates of States' rights who saw the Constitution upheld as against State laws which invaded national territory. Now the attack comes from the opposite quarter,

apparently for the purpose of added centralization of power at Washington. If the plan were adopted, the opinions of three justices voting against six would be the law of the land. Six justices might vote to sustain the Constitution, yet the Constitution would go down. The plan would introduce minority rule, and there is nothing which is more hateful in a court or elsewhere.

The argument in favor of the plan involves a distorted view of the Constitution and of the function of the Supreme Court in maintaining it. Under the Borah plan Congress might act by a majority of one in each branch and the Supreme Court stand two to one for the Constitution, yet the Constitution would be a dead letter. If you will allow your imaginations a moment's play, you will perceive some of the many anomalies which would result.

It is argued that Congress is a co-ordinate branch of the Government, is bound by the Constitution, its members are sworn to regard it, and hence a presumption of constitutionality arises. We know that too often this is a legal fiction in the teeth of the facts. We know, too, that this presumption of constitutionality is given by the courts greater weight than the facts justify. But when, with all respect to the action of a co-ordinate branch, the branch of the Government having the final duty to decide under and enforce the Constitution, arrives, by a majority vote, at the conclusion, clear to the consciences and intellects of the majority of the justices, that the Constitution *has* been violated, there can be no answer except to enter judgment *for the Constitution*, and against Congress. To permit a *minority* to rule in the Supreme Court only in cases in which the citizen claims rights *under the Constitution*, and to permit the majority to rule in all other cases, is to sink the Constitution to the lowest category, from which it can never again arise to its present high estate.

But it is argued, the Supreme Court has struck down acts of Congress by a five-to-four vote, and this fact has lessened respect for the Court and for the law. In view of exaggerations and misstatements, let us examine the facts. There have been

less than fifty acts of Congress declared unconstitutional in nearly 140 years. There have been only seventeen five-to-four decisions (or majority of one decisions) on acts of Congress. There have been in the history of the Court only nine cases in which the Constitution was sustained by a majority of one, and eight cases in which the aegis of the Constitution was denied by a vote of one. There have been dissents in other cases, but in the main the Court has been unanimous. And if you were to examine today the five-to-four decisions upholding the Constitution, I believe you would wonder at the dissents in most of the cases, for the history of the Supreme Court is the history of our Nation, and the Supreme Court has been obliged to decide cases involving questions enshrouded in partisan bias and popular clamor. What lawyer would say today that the five justices of the Supreme Court were not right in *ex parte Garland*¹ when, over the dissent of four of their brethren, they struck down as *ex post facto* and void an act of Congress which sought to require, as a condition precedent to practise at the bar of the Supreme Court, an oath that the attorney had never taken up arms against the Union.

We know that the Supreme Court of the United States only decides actual cases. In cases in which the right claimed arises out of the Constitution, the Supreme Law of the Land, the method of decision must be the same as in other cases, or in effect we shall have added a new and startling proviso to Article 6: This Constitution shall be the Supreme Law of the Land—"provided that seven out of the nine justices of the Supreme Court think it is."

III.

Numerous arguments have been advanced in favor of the proposed changes.

That the power to sustain the Constitution was a usurped power. The bibliography of this curious misunderstanding has grown considerably in the last ten years. But to one who has

¹ 4 Wall. (U. S.) 333 (1866).

examined the records and the indisputable evidence that the power was intended to be conferred and that the adoption of the Constitution, already in great doubt, would probably never have taken place except for the belief that the States would be protected in their rights by the rulings of the Supreme Court sustaining the Constitution, there seems to be something almost perverse in the persistent misunderstanding of a small group. The remarks of the framers against a *veto by the Supreme Court and the Executive*, have been distorted into a disavowal of the judicial power of the Supreme Court in respect of construing the Constitution in actual cases. The power of the Supreme Court is not that of veto. Its exercise involves no political decision or power. It involves merely the ascertainment of the meaning of the supreme law.

That the proposed Borah plan does not mean minority rule because Congress is a large body and Congress has spoken. There have been curious attempts to avoid the apparently unanswerable thesis that whenever a decision is entrusted to, and necessarily to be exercised by, a body of more than two constituent parts, the decision must be by the majority. (Thus, in the Constitution of the World Court, a casting vote is given to the President Judge.) Any machinery by which a *minority* rules is *prima facie* an abnormality, if not an absurdity. But it is argued that this is not a case of minority rule, because Congress, a very numerous body, has already passed on the question and has ruled in favor of the constitutionality of its own act. Of course, the argument ignores the difference between the function of Congress and the function of the Supreme Court. The politicians in Congress make their decisions from political considerations. They may believe that the proposed bill is a good thing for the country, or for the public, or that it is a good thing for the record of the individual who voted for it; militant minorities have a well-known stimulating effect on the vote of politicians. Theirs is not the final duty to pass upon the constitutionality of the act. They are not obliged to give, nor do they always give, reasons for the faith that is in them. Their vote on one act, involving an implied assertion of their

belief in its constitutionality, will not return to plague them in respect of another.

Contrast the situation in a Court, in which the Judges have no political axes to grind, nor any desire save to comply with their oaths of office. In written judgments they must give reasons for their decisions, and these reasons are exposed to criticism by the profession and by the public. The pressure to decide in accordance with the majority in Congress and the wishes of the then administration must be very great, even as against the sanctity of the oath of office. At any rate, in passing upon the meaning of the Supreme Law, they are functioning purely as judges. The politicians sitting in Congress, in making the same decisions for themselves, are functioning as *political judges*. A political judge, in or out of Congress, is not likely to inspire respect or confidence. The point is that mental confusion is involved in denying that the Borah plan would dethrone majority rule in the Supreme Court and substitute the rule of the minority. The judges are acting in a wholly different sphere and their responsibility and their functioning is distinct from the responsibility and functioning of the members of Congress.

That the presumption of the validity of the act of a co-ordinate branch of the Government should preclude action by the Supreme Court sustaining the Constitution by a five-to-four vote.

It is said that an adherence to the rule that a statute is not to be declared unconstitutional, except in plain cases, is in conflict with the sustaining of the Constitution by a bare majority. How can it be a clear case, it is argued, when four out of nine judges are of the contrary opinion? Any Supreme Court, by a five-to-four vote, may decide that the plaintiff was guilty of contributory negligence as a matter of law—though four of the justices think that he used ordinary prudence; or that there was no evidence to sustain a judgment against a will, although four out of the nine justices think there was sufficient evidence; or that there was no reasonable doubt of the guilt of the defendant in a murder case, although four of the justices think there

was a reasonable doubt. The House of Lords sometimes reverses decisions of the Court of Appeals (whose judges are said in general to be of the highest professional standing) by a vote of three to two. The World Court may enter judgments in matters of utmost moment by the casting vote of the President Judge. Congress, in both branches, may adopt legislation of the most sweeping character by a majority of one in each branch. Wherever deliberations or decisions are called for, and there is a possibility of difference, the majority must rule. And the majority which rules is *the majority in the particular body to which the decision is entrusted*. Thus the Supreme Court of the United States, by a five-to-four vote, may reverse a decision of the Circuit Court, which affirmed unanimously a decision of the District Court. A majority of all the judges who heard the case may be in favor of the losing party. This fact may be given weight by the Justices of the Supreme Court, but is not conclusive upon their decision. The responsibility is theirs.

It may be doubted whether the presumption of constitutionality is a sound or true presumption. Should there be comity as against the Constitution? Should not the question be decided by the Supreme Court on its merits after a close scrutiny, in an effort to decide whether the act and the Constitution are in antagonism?

When the question is whether the Constitution protects the citizen against the consequences of executive or legislative action, why should there be a presumption that the Constitution does not afford the protection? Whatever may have been the calibre of the earlier legislators of the country, could it be seriously contended on behalf of our law-making bodies today that in care and reverence they consider the scope and extent of their powers under the Constitution? And even if they do this, does not the fact remain that the final responsibility is that of the justices of the Supreme Court? Should this responsibility be abated or minimized by resorting to a presumption that the framers and people intended Congress to have any power which Congress might affect to exercise?

That many of the questions decided by the Supreme Court

are not questions of law but economic questions. Of course, many questions of constitutional law have an economic bearing, but is it correct to say that these questions are not questions of constitutional law, or, if questions of constitutional law, that they are controlled by the economic or social point of view of the person deciding them? Many cases decided by the Supreme Court have a political significance. Yet we know that such cases have not been decided from political considerations any more than Chief Justice Marshall made his famous and fearless decision in the case of *United States v. Aaron Burr*² from political considerations. *Ex parte Garland*³ may be taken as typically a political case, yet four Republican judges were in the majority in favor of a Southern lawyer whom Congress would have deprived of a constitutional right. *Pollock v. Farmers' Trust Company*⁴ had grave economic consequences upon our system of Federal taxation and is a favorite theme for the critics of the Supreme Court to harp upon, with a *crecendo* on the alleged change of opinion of one of the justices. But who doubted that these cases were clearly cases of law to be decided by judges sitting in a court rather than politicians sitting in Congress? The question whether it is compatible with the concepts of American constitutional freedom to discriminate as between union and non-union labor so that unions and union laborers have a favored position before the law, and so that a non-union man is handicapped in various ways, may have its economic implications but is necessarily a question of law.

Freedom of contract is a part of American constitutional freedom. As between the sphere of legislative power to prevent contracts contrary to the general welfare and the realm of unassailable individual initiative—to invade which sanctuary would be conceded by all to be a grossly unfair, arbitrary and unconstitutional aggression by Congress—there must be a boundary fixed by the "thou shalt not" of the Constitution. If freedom is to remain anything more than an airy concept, this

² Fed. Cas. No. 14,693; 25 Fed. Cas. 55 (1807); see also 4 Cranch (U. S.) 470.

³ Note 1 *supra*.

⁴ 158 U. S. 601 (1895).

boundary must be marked off by judges unaffected by the political view of the moment. The most ardent advocate of the police power must concede that, if Congress is to be the final judge as to the scope of the police power, the Constitution becomes worthless. There must be some contracts, to prohibit or limit which would be incompatible with freemen living in a free State. On one side it is said that freedom of contract is the rule and restriction the exception; on the other, Mr. Justice Holmes points out the numerous respects in which the state has interfered to limit the generality of freedom of contract.

After all it may be a question of terminology, but is it not the sounder view that, no matter what the economic or political consequences are in these cases, the question remains a question of law for judges in court, because the inquiry is as to the meaning and scope of the words of the Constitution as applied to given states of fact, and, above all, in some of the most important cases, is an effort to answer the question, "What is Freedom?" Is it compatible with a free government, for example, that no one should be permitted to carry on any business unless all his employees are members of a union? And if a man wishes to attempt an open shop or continue an open shop, can the legislature make it a crime on his part to fail to continue in his employ a union worker? Suppose Congress should attempt an exactly contrary policy, prohibiting labor union activities altogether, would the millions of union men of the country regard America as a free country? On the other hand, if Congress should attempt to favor union men as against non-union men, would America remain a free state? Read *Adair v. United States*⁵ and *Coppage v. Kansas*⁶ and consider the consequences either way.

That our system of constitutional limitations is unlike the British way and the British way is the better. The present writer has been subjected to arguments such as, "Why a written Constitution?" Great Britain has none. Parliament is supreme and the British institutions have survived. The British, in 1911,

⁵208 U. S. 161 (1908).

⁶236 U. S. 1 (1915).

even abolished the veto of the House of Lords. Why not abolish the veto of the Supreme Court? Why isn't the British system better?

The answer is, Great Britain has no real constitution as we understand the word "constitution." The real protection of the British is found in the homogeneity, intelligence, and the sense of fair play of the British people and their Parliaments. The most enthusiastic American, however, will not assert that we are a homogeneous people or that we are as law-abiding as the British.

If the British Parliament were so minded, it could, with absolute power, enact and put into effect the equivalent of nearly fifty acts of Congress which have been inoperative in the United States because at variance with the fundamental law and beyond the power of the representatives of the people. Some of these acts of Congress have been declared void because they violate the rights of the States, but many of them have been stricken down because they violate the rights of individuals, because the efforts of Congress were incompatible with freedom itself. *Pro tanto* Congress sought to enslave the people contrary to the will of the people themselves as set forth in their chosen instrument. And the Supreme Court enforced the rights of the people as against the aggression of Congress upon these rights. Read over the bill of rights, re-read some of the cases in which its sacred phrases have been made a living power for justice, reflect that in Great Britain there is nothing except tradition (or revolution) to prevent Parliament from acting counter to any of the principles of elemental justice and fair play embodied in our bill of rights. Parliament can compel a man in a criminal case to be a witness against himself. Congress attempted it but was foiled by the Supreme Court in *Counselman v. Hitchcock*.⁷ Parliament may take private property for public use without just compensation; the United States was prevented from doing this only by decisions of the Supreme Court.⁸

⁷ 142 U. S. 547 (1892).

⁸ U. S. v. New River Collieries Co., 276 Fed. 690 (1921), affirmed by Supreme Court, May 21, 1923, and reported in 43 Sup. Ct. 565.

Senator Borah, the author of one of the proposals, in his speech of August 7, 1911, on the subject of recall of judges, paid brilliant tribute to the Constitution and the Supreme Court:

“Would any American, looking back over such scenes and realizing that perhaps the difficulties which we have known are small compared with those which we are to know, burden a court with any other consideration or subject it to any other influences than that of a full, faithful, and fearless construction of the Constitution, of the laws of the land, *regardless of the temporary benefits, or supposed benefits, to be derived from a temporizing construction?* The people had made the constitution. It had been referred to them, and they had approved it. It was the people’s law, and John Marshall, in the supreme majesty of his genius, made it the title deed to nationality, as the people intended it should be. Passing conditions and temporary circumstances would have modified it, but he did not accede to these conditions or circumstances.

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“Does the executive, the legislature, furnish the hearing and the protection for the friendless which are furnished by the courts?”

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“It would necessarily bring it into politics; you could not prevent it. Merciful justice! Have we not enough politics in our system already, such as it is? Shall we now include the courts? You are much mistaken if you think the people want more politics; *they want less.* If you will give me a law-making department which is intelligent and true to the people, an executive department fearless and true, *with the judicial system which we now have,* I will show you the best governed and the happiest people in the world.

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“When the people have written the law, then let us have an independent judge, free from any political fear, to interpret the law as written until the people rewrite it.

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"Not a court beyond the possibility of error, not a court whose opinions are to be deemed above the reach of fair and honest criticism, but a court which, whether viewed as to the reach and scope and power of its jurisdiction, or as to its influence and standing, its ability and learning, its dedication and consecration to the service of mankind, is the greatest tribunal for order and justice yet created among men."

The function of the Constitution and the Supreme Court is resented as an interference with the people's will. But the Constitution is the final word in the will of the people and the solemn pronouncement of the Supreme Court as to its meaning is the real voice of the people. All that the Constitution and the Supreme Court restrain is the lawless attempt of Congress, inadvertently or wilfully, to frustrate the will of the people and to seize for themselves the supreme power in the state.

In his admirable and fascinating work on "The Spirit of Common Law," Dean Pound elaborates the criticism of our system in practice, that it tends to prevent the free exercise of the legitimate desires of the people. One's concepts as to the extent of the need for ready change may depend upon one's philosophical temperament, but what is there that the people have really wanted and that would be good for them that they have been denied by the Constitution as construed by the Supreme Court? Two, and only two, constitutional amendments have been passed to meet the decision of the Supreme Court, one preventing actions by individuals against states and the other permitting an income tax. Humbly I concur with Senator Borah in believing that the Supreme Court is not infallible. Perhaps we would choose different illustrations of its lack of inerrancy. While one's own concepts of righteousness in government may, in rare cases, prevent one from giving adherence to the Supreme Court's decisions, nevertheless, the fact that the final decision is made by a Court composed of judges uninfluenced by political considerations and that in close or doubtful cases the views of the judges are embodied in written judgments, is a boon to good government.

One of the strongest reasons for the existence of a World Court is that it will tend to furnish a continuous, consistent and permanent body of international law. In like manner, the discussion in, and decisions by, the Supreme Court of the United States, of fundamental and far-reaching problems of natural justice and elemental freedom, develop a tradition of that righteousness in government which exalteth a nation.

Ira Jewell Williams.

Philadelphia, Pennsylvania.