A GOVERNMENT OF LAW OR A GOVERNMENT OF MEN?

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WHICH shall it be, a government of law or a government of men?

As the alternative to a government of law is a despotism, whether the despots be many or one, benevolent or malignant, the question admits of but one answer. But are we not more or less conscious of a restless tugging against the bonds of the law and the yoke of the Constitution? Is there not a growing disposition to disregard the limitations which we have placed upon those in authority and a tendency to applaud the doing of things which we wish done, regardless of whether lawful or unlawful? If one in power does things which displease us, we are swift to inquire into his authority; but is that so if the thing done meets with our approval?

The tendency to throw off the obligation of a rigid Constitution has attracted the attention of so wise and intelligent an observer as Mr. James Bryce, now British Ambassador to the United States, who, in a forceful essay on Flexible and Rigid Constitutions, when referring to the protection afforded by rigid constitutions to the minority as a leading argument for their continuance, says:

"A change of view has, however, become noticeable within the last few years. In the new democracies of the United States . . . the multitude no longer fear abuse of power by its rulers. It is itself the ruler, accustomed to be coaxed and flattered. It feels no need for the protection which rigid constitutions give. And in the United States it chafes under these restrictions of legislative power embodied in the Federal Constitution or State Constitutions (as the case may be) which have surrounded the rights of property and the obligation of subsisting contracts with safeguards obnoxious not only to the party called 'Socialists,' but to reformers of other type. As these safeguards are sometimes thought to prevent the application of needed remedies and to secure impunity for abuses which have become intrenched behind them, the aforesaid constitutional provisions

have incurred criticism and censure from various sections, and many attempts have been made by State Legislatures . . . to disregard or evade these restrictions. These attempts are usually defeated by the action of Courts, when it happens that both the Federal Constitution and the functions of the Judiciary are often attacked in the country which was so extravagantly proud of both institutions a half-century ago. This strife between the bench as the defenders of old-fashioned doctrines, embodied in the provisions of a rigid constitution (Federal or State) and of State Legislatures acting at the bidding of a large section of voters, is a remarkable feature of contemporary America."

Has this disinterested and most wise observer overdrawn the dangers which threaten our institutions? Has he mistaken the direction in which we are drifting, or the magnitude of the factors which are undermining our fundamental law, National and State?

Is the obligation to support and uphold the Constitution and the laws made in pursuance thereof dependent upon whether the legislative body, the executive or the judge shall think the public welfare will be best promoted by its enforcement or its disregard? May a legislative body disregard a plain constitutional limitation merely because it may think the public welfare thereby promoted? May a Court disregard a plain law constitutionally passed merely because it may think it unjust or unwise? May one charged with the enforcement or execution of the law decline to execute it as written and modify it if it deems the public good thereby advanced?

One may read and hear upon every hand such sentiments as this: "The law is a means, not an end; a means to be used for the public good, to be modified for the public good and to be interpreted for the public good." Neither do the outcries against constitutional restraints come only from those who find in them barriers against assaults upon property and contract rights, but from the very class who are supposed to be sheltered from popular legislation by the safeguards which a large section of voters wish to sweep away. There is a widely circulated address by one of the ablest of our business men, the head of one of the most important of our great business corporations, complaining of the restraints and inconveniences due to the authority exercised by the States and by limitations upon Federal power, wherein he says:

"Cries for Federal control are the growing-pains of a great people. Let Senator Root and all others who are leaders make no mistake. The

people of the country are not afraid of themselves, and they are no more doubtful of their power as citizens of the United States than they are of their power as citizens of the States. They see their opportunity and they will not try to run away from it. On the contrary, they will crowd every opportunity. Having a given thing to do in common, no one can persuade them that they cannot do it better by doing it once for all than by doing it forty-six times."

Despairing of relief by amending the Federal Constitution from the fate of effort in that direction in the past, he points out that the needful enlargement of Federal power will arise from the action of the Supreme Court, saying:

"But the Constitution has been changed, nevertheless, and it will be changed again. Whatever the demands of the nation's growth and of the nation's welfare may be, whatever new and strange governmental problems may arise, the unwritten Constitution and the Supreme Court will be equal to them."

In the same line, a great journal, representing a large conservative class, lately referred to the Supreme Court as a "Continuous Constitutional Convention."

These views, taken from opposite poles of opinion, concur in establishing the existence of a great and impressive body of criticism of the very fundamentals upon which our American constitutional system rests. The seriousness of the matter lies not so much in that relaxation is desired with reference to restraint upon legislative power, Federal and State, as in the fact that such change is largely anticipated through an exercise of legislative power by the Courts in expanding or modifying the Federal Constitution, under guise of constitutional construction, and in obedience to the bidding of an apparent majority public sentiment, as to obviate the necessity of amendment in the manner required by the instrument itself.

I do not propose to touch upon the merits of the ends which either class of opinion seek to advance by a letting down of the constitutional bars which stand in the way of assaults upon contract or property rights nor upon the advantages which are supposed to result to the "business interests" of the country by the unification of legislation affecting them. The thought to which I address myself is the effect upon our institutions if the time shall come when the judiciary shall cease to regard the line which separates judicial and legislative functions by either abdicating their authority as the expounders and defenders of constitutional restraint or by arrogating to themselves the right to destroy

or modify a plain expression of legislative will when constitutionally expounded. The appeal to and criticism of the Courts is one which concerns the State Courts no less than the Courts of the Union, for the tendency is to obliterate the line which divides the legislative and judicial powers as well as the obligation which rests upon every Court to apply and enforce the law of the Constitution whenever it conflicts with the inferior law of ordinary legislation. The contention that the obligation of a Constitution is to be disregarded if it stands in the way of that which is deemed of public advantage, or that a valid law, under the Constitution, is to be interpreted or modified so as to accomplish that which the executive administering it, or a Court called upon to enforce it, shall deem to the public advantage, is destructive of the whole theory upon which our American Commonwealths have been founded, to say nothing of the constitutional relation of the Union and the States to each other. It is a substitution of a government of men for a government of law. It is against this that I warn.

Two political dogmas were of universal acceptance among the generation which converted thirteen dependent colonies into thirteen independent sovereign States, and which later converted these States into an indissoluble union of indissoluble States. These dogmas were: first, that all power resides in the people and that they might institute such government as they saw fit, and that authority conferred by the organic instrument creating such governments was a delegated authority limited by the creative act of the people; and, second, that the best security against usurpation of power would be found in a distribution of the functions of government between independent departments.

In passing, it may be observed that the idea of an absolute democracy found no favor whatever. However valuable or desirable direct popular legislation may be in a small community of intelligent and conservative citizens, the notion was universally regarded as absolutely unworkable upon any large scale. Hence the model upon which the State and Federal Governments were constituted was that of a representative constitutional democracy, and the guarantee to each State of a republican form of government found in the Federal Constitution refers obviously to the character of republican governments which then existed, a form inconsistent with a pure or absolute democracy.

The thought to which I particularly wish to direct attention concerns the distribution of the powers of government.

Nearly a half-century before our Federal Constitution emerged, Montesquieu formulated and defended upon unanswerable philosophical and historical considerations the dogma that neither public nor private liberty could be maintained without a division of the legislative, executive and judicial functions of government. His great treatise upon the Spirit of Laws had then been long translated into the language of every civilized country; was well known to the thoughtful and educated of every nation and had acquired a prodigious influence throughout Europe and America. Concerning the influence of Montesquieu upon the men who made or brought about the adoption of our Federal Constitution, Mr. Bryce, the most discerning and capable of those foreigners who have written of our institutions, in his "American Commonwealth," says:

"No general principle of politics laid such hold on the Constitution-makers and statesmen of America as the dogma that the separation of these three functions is essential to freedom. It had already been made the groundwork of several State Constitutions. It is always reappearing in their writings; it was never absent from their thoughts."

After a comparison of the condition of the people of Continental Europe with that of the English and a consideration of the governments which then existed, Montesquieu thus states his conclusion in respect to the wisdom of such a division of power:

"There is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. Then would be an end of everything, were the same men or the same body to exercise these three powers, that of enacting laws, that of executing them and of trying the cases of individuals."

Fundamental as such a separation has come to be regarded by all who love liberty regulated by law, it was almost a novel conception when developed by Montesquieu. The government of England afforded the nearest approach to such a system, and from a comparison of the operation of the English plan and of the English people and their institutions with the governments and condition of the people of Continental States, he deduced the dogma as one of necessary application in every free State. The colonies as they

converted themselves into States took care to embody this separation dogma in their Bill of Rights, a method of putting the matter upon an even higher authority than the Constitution itself, if that were possible. Thus Virginia wrote into her Bill of Rights of June 12th, 1776, that the legislative and executive powers of the State should be separate and distinct from the judiciary. Maryland inserted in her Bill of Rights of November 11th, 1776, the statement:

"That the legislative, executive and judicial powers of government ought to be forever separate and distinct from each other."

The declaration in the Massachusetts Bill of Rights is particularly emphatic. It reads:

"In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judiciary shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws and not men."

It followed from the settled practice of the States in the organization of their respective State governments that when, many years later, the formation of the present Federal Constitution was begun the same separation of powers to be exercised by the Union was made the corner-stone of the structure. Thus by Section 1, Article 1, it is provided that:

"All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."

By Section 1, of Article 2, it is declared that the executive power shall be vested in a President of the United States of America, and by Section 1, of Article 3, it is said that:

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

In the organization of the States the same plan is adopted, and the judicial power is vested in the Courts created by the State in much the same definite terms.

That the exercise of power vested in one branch by another would be a usurpation, and as such null and void, is too plain to need argument.

Thus, to take the case of Congress, it is vested with the entire legislative power delegated by the Constitution. By necessary implication no other department can constitution-

ally exercise any power which is legislative. Neither can the Congress exercise any power which is either executive or judicial, for the very obvious reason that no such power has been granted to it, and also for the reason that whatever the executive power of the United States is, it has been exclusively vested in the President. So with the judicial power of the United States—that power, whatever it is, is, by the Constitution, vested only in the Courts of the United States, and may, therefore, be exerted only by the Courts.

What is the security against a usurpation of power by one department which belongs to another?

There is, of course, the force of public opinion. So long as there is entertained by any decided majority of the people a serious and earnest conviction that the encroachment of one branch of the government upon the domain of another must be resisted at every cost, the boundary line is not likely to be wilfully overstepped. Then there is the solemn obligation of the oath which presumptively binds the conscience of every legislator, executive and judge, that he will respect and obey the organic law, which includes this distribution of powers. These are the only sanctions possessed by the people of any other land for the maintenance of any limitation upon the legislative power. But if these prove unavailing, as they have proven many times, and the executive undertakes to exercise legislative or judicial power, or the legislative body shall assume to combine the functions which pertain to either of the other departments, how shall such usurpation of power be resisted, or the executive trespass be restrained, or the legislative enactment be nullified? Other nations have endeavored, by organic popular legislation called constitutions, to restrain the power of the executive and legislative authority, but the only security provided against the violation of the boundaries thus set consisted in public opinion and the sanctity of an oath. Neither has proven effective. Having an unlimited power to interpret and apply such restrictions, the legislative power has in France, where there has been a succession of constitutions, been found unrestrainable by any such barriers.

"The limitations imposed by French constitutions are not [says Dicey in his Law of the Constitution] in reality laws, since they are not rules which in the last resort will be enforced by the Courts. Their true character is that of maxims of political morality, which derive whatever strength they have from being formally placed in the Constitution and from the resulting force of public opinion."

But under our American system of constitutional government, the power which the Courts have to determine the invalidity of a legislative or executive act as in excess of delegated constitutional power extends also to acts which are in violation of the distribution of governmental functions made by the organic law. While the executive power may not be restrained from the exercise of any executive duty, imperative or discretionary, yet if an official undertake to do an act clearly unauthorized he is but a trespasser and may not resist the restraints of the Courts by holding up as a shield either the office which he holds, if he has exceeded his lawful power, or a statute which is no law because in excess of legislative power. It follows, of course, that rights cannot be enforced which wholly depend upon either a void executive or legislative foundation. The principle that the acts of an executive in excess of his lawful authority are void and restrainable is a well-settled principle of English law. "The principle," says Mr. Bryce in his "American Commonwealth," "is a corner-stone of English liberty."

In the one case as in the other the question can only arise for judicial determination in a justiciable matter involving rights of persons or property affected by the act of usurpation. Unless, therefore, the encroachment by one department upon the domain of the other becomes involved in a case justiciable in character, there is no way by which the separation of the functions of government may be made effective through the Courts.

Much of the popular opinion concerning the scope of the power of the Courts grows out of a misconception of the authority under which Courts assume to declare a legislative enactment void if found repugnant to the organic law of a constitution. From the beginning it has been claimed by American Courts as a proper function of the Courts under our American constitutional system. It is a doctrine which originated in the Courts of the States long before the adoption of the Federal Constitution. Professor Thayer, in his Constitutional Cases, refers to no less than five decisions by State Courts prior to the adoption of the Constitution of the United States, in which it was held that the power of State legislation was limited by constitutional restrictions, and that it was the duty of the judicial power to declare legislation repugnant to such superior law void and unenforceable whenever necessary to determine the rights of parties

in pending cases. The earliest of reported cases is that of Commonwealth *v.* Caton, decided by the Virginia Court of Appeals in 1782. Neither that case, nor either of the decisions I refer to, are cited by Chief-Justice Marshall in Marbury *v.* Madison, although they afforded a body of opinion of commanding influence which one cannot suppose the great Chief Justice to have been ignorant of, especially as one of them was from his own State.

This doctrine was challenged by many extreme Republicans, and the principle was asserted by no less a statesman than Mr. Jefferson that a Legislature was itself the judge of the meaning and scope of a State Constitution, and that the Courts had no authority superior to the Legislature in applying the Constitution. The doctrine, however, was generally accepted, and at this time is regarded as a proper judicial function by an overwhelming majority of public opinion. But of late, with the great influx of an enormous mass of immigrants unaccustomed to democratic government and wholly unfamiliar with the American constitutional idea, there has been a great increase in the number of those voters who object to any restraint upon the will of the majority as voiced in either Congress or the State legislative assemblies, and therefore consider this power to annul a law as the usurpation of legislative authority.

That the power thus exercised in doing these things is not legislative, but judicial, will be plainly evident if we do but stop to consider the nature of an American Constitution. If those instruments are merely accepted declarations of moral and political principles to which the people have given their assent and which officials are pledged to uphold, as is the case with a political party platform, then it is a flagrant act of usurpation and a defiance of the legislative will when the Courts refuse to give effect to legislation, even though it may violate so-called constitutional principles. The very corner-stone of American constitutional law is, that the instruments under which the State governments were organized, and the same is true of the Federal Constitution, were acts of organic sovereign legislation, defining and limiting the scope of the governments organized thereunder. It is, therefore, a profound fact that both State and Federal governments are governments exercising delegated, and therefore limited, powers. *There is no deposit of unlimited power in any government organized under the American*

system of constitutional governments. It follows, therefore, that neither State nor Congressional legislation which is in excess of delegated power may be enacted or enforced without a disregard of the supreme will of the people as expressed in the underlying legislation contained in the constating instruments enacted by them.

From these conceptions result two kinds of law differing in authority:

(*a*) The organic underlying law, which we call a constitution, being law enacted by the people in their collective capacity as the source of authority and whereby they defined the powers delegated to each of the great governmental departments created by such primary enactments.

(*b*) Secondary law—that is, enactments by the legislative bodies organized under the primary and superior law contained in the Constitution.

But when the union of States was organized under the present Constitution, whereby there was delegated to the central government the powers therein enumerated, there arose another body of law superior to the primary law found in the State Constitutions. Thenceforward the legislation of a State Legislature was subject to comparison with three higher and superior kinds of law, and it was valid only: first, if it did not conflict with the Constitution of the State; second, if it did not conflict with a valid law of Congress; and, third, if it did not conflict with the Constitution of the United States.

The enactments of Congress were also subject to comparison with the Constitution of the United States, for if they conflicted therewith they were invalid as in excess of the granted powers of Congress.

As a result of these limitations upon the lawmaking power, Federal and State, the judicial power, when a case arose which required for its determination an application of the existing law, if there appeared to be a conflict between two applicable laws, is required to decide which was the law of higher obligation. There was nothing novel in the exercise of this authority. It was a function similar in character to that which the Courts had from all time been exercising when a conflict between two laws appeared. In such case, whether the conflict was between two sections of the same statute, or two statutes passed by the same legislative authority, the judge was compelled to say which was the

law which it was his duty to enforce. If a conflict arose between a legislative enactment and a constitutional provision, it must follow that the law of higher obligation must be enforced and the conflicting law declared of no force because its enactment was in excess of the power of the enacting body. The authority exercised is no assumption of political or legislative power, but an application of the elementary rule that the acts of an agent in excess of his authority do not bind his principal. The clear obligation of the judge is to enforce the Constitution as the law of highest obligation. If the exercise of that duty require him to declare that an enactment in the form of law is no law, because repugnant to the law of primary obligation, he is obviously obeying the supreme expression of the popular will as found in a law directly enacted by the sovereign authority of the people. That this function should not be understood by the millions who have come among us from lands where constitutional limitations are either unknown or are unenforceable for lack of any definite means of compelling obedience, and therefore regarded as an exercise of legislative power, is not strange. The American dogma that all power resides in the people, and that public officials of every class are but agents executing the power delegated to them through the direct legislation, which constitutes what we call a constitution, is the very root principle upon which we have organized our Federal as well as our State Governments. When this is understood there is no mystery to be explained, no usurpation to be defended when the judge declares that he must follow the superior rather than the inferior law.

That no English judge would venture to declare a statute void which had been in due course passed by the English Parliament is due to conditions fundamentally different from those which confront an American judge.

The so-called Constitution of that country consists only in a body of ancient usages, practices, understandings and statutes declaratory of the principles upon which the government is supposed to be administered. But none of the precedents or statutes have any authority higher than the Parliament itself, and hence do not stand in the way of any legislation whatever, although the effect be to repeal or alter the most fundamental of the principles upon which the government is supposed to be administered. Of these practices, usages or understandings constituting the English Consti-

tution, the one least challenged or questioned is that the Parliament stands for and speaks with the voice of the whole British people. Its enactments stand, therefore, upon the same plane and are entitled to the same authority as the extraordinary legislation embodied in an American Constitution. So long as the English people are content to regard the voice of the English Parliament as the voice of the English people, and its enactments uncontrollable except by and through a subsequent Parliament, the English judge has no function to exercise which corresponds with that of an American judge when he declares a legislative act void as in conflict with a superior law of obligation. The constitutional duty of the English judge is to apply the enactments of Parliament as the law of highest obligation, there being under English institutions no superior law with which he may compare it, and hence no repugnancy to render it void and no excess of authority in its enactment.

The primary purpose of every such organic instrument of government is to limit the power and control the conduct of the legislative authority by an overruling Constitution, an instrument amendable or repealable only by the people in the manner of its enactment, or as provided by the instrument itself. In the course of events exigencies have arisen and may again arise where constitutional impediments prevent the attainment of ends through ordinary legislation which a temporary majority, or an impatient executive officer, may deem necessary in the public interest. Every such occasion operates as a strain upon the fundamental structure of our government. Whether the general interests will be best subserved by a disregard of constitutional barriers or by obedience to the slow processes for constitutional amendments is a question which goes to the very fundamentals of our institutions. To override constitutional methods spells revolution and tends to the destruction of a government of law. To yield to the clamor of a temporary majority upon the pretence that otherwise popular government is prevented is but to overthrow the barriers which the people themselves, under great deliberation, have erected against their own impulsive majorities. These impediments to hasty action are intended not only as bulwarks for the defence of minorities, but as defences against hotfooted action by temporary majorities in supposed exigencies.

The American scheme of limiting and controlling not only

executive but legislative power by express constitutional limitations enforceable through the Courts was the single unique improvement in the art and science of government made by the generation which first embodied the idea in their several State Constitutions and then in that of the Union.

Speculative jurists have suggested that if legislation should be found absolutely unreasonable or opposed to a universal idea of natural justice that a Court might refuse to enforce or apply it, and here and there may be found a dictum to that effect. But Sir William Blackstone regarded the legislative power as so uncontrollable that no Court might justify a refusal to enforce it as law for any reason. Thus he says:

"If the Parliament will positively enact a thing to be done which is unreasonable, I know of no power which can control it . . . for that were to set the judicial power above that of the legislative, which would be subversive of all government."

But he adds:

"if some collateral matter arises out of the general words and happens to be unreasonable, then the judges are in decency to conclude that this consequence was not foreseen by the Parliament, and therefore they are at liberty to expound the statute by equity and only *quoad hoc* disregard it. Thus if an act of Parliament give a man power to try all causes that may arise in his manor; yet if a cause should arise in which he himself is a party, the act is construed not to mean that, because it is unreasonable that any man should determine his own quarrel."

But this would not be to disregard or reject the act at all, but to enforce it according to the intent and purpose of the lawmakers, which, if the words be doubtful, is not to be regarded as intending that which would be unreasonable or contrary to natural justice. But Sir William Blackstone lays down in a very positive way that if the legislative power be unqualified, "no Court has the power to defeat the intent of the Legislature, when couched in such evident and express words as leave no doubt whether it was the intent of the Legislature or no."

In Calder *v.* Bull, 3 Dallas, 388, this question of whether it is within the scope of judicial power to refuse to give effect to a plain legislative enactment, which is not repugnant to the Constitution merely because the statute seems to be absurd and unreasonable, was discussed, and Mr. Justice Chase lays down one limitation which is of far-reaching importance—namely, that "the nature and ends of

legislative power will limit the exercise of it." Mr. Justice Iredell in the same case seems to concur with Sir William Blackstone in the view that it is not for the Courts to set up their judgment against that of the lawmaking power as to the reasonableness or justice of a statute if its meaning be plain and the intent of the law unobscure.

The Constitution of the United States includes a specific enumeration of the subjects in respect to which the Congress may legislate. This is not true of most, if true of any, of our State Constitutions. There is usually a grant of legislative power limited by specific reservations. Referring to this, Judge Raney, in Cincinnati, etc., R. Co. *v.* Commission, 1, Ohio State, 77, 86, said, in reference to the extent of the legislative power under such grant, that "this must therefore always be determined from the nature of the power exercised. If it is found to fall within the general terms of the grant, we can only look to other parts of the Constitution for limitations upon it; if none are found none exist. He adds:

"But as the General Assembly, like the other departments of government, exercises only a delegated authority, it cannot be doubted that any act passed by it not falling fairly within the scope of legislative power is as clearly void as though expressly prohibited."

In Loan Association *v.* Topeka, 20 Wall, 655, Mr. Justice Miller, referring to the implied limitations upon the legislative power, said:

"There are limitations on such power which grow out of the essential nature of all free governments,"

and that legislation under the guise of taxation might, if the purpose was not public,

"none the less be robbery because it is done under the form of law and is called taxation. This is not legislation. It is a decree under legislative form."

When a legislative enactment goes so far as to infringe upon the fundamental maxims of a free government and disregard rights of person or property which it is the declared object of our governments, State and National, to secure, it will be generally found that every such act conflicts with some positive provision of both State and National organic law, and that it will not be necessary to resort to general maxims and unexpressed restraints dependent upon implied limitations.

Montesquieu has been cited as entertaining the notion that the judges have no power of construing or interpreting any constitutional or statute law. He says:

"In republics the very nature of the constitution requires the judges to follow the letter of the law; otherwise the law might be explained to the prejudice of citizens in cases where their honor, property or life is concerned."

This is a narrow view of his meaning. What he obviously meant was that the function of a judge does not include any alteration, modification or amendment of any authoritative enactment of the legislative body, and that a judge may not explain it away if he happens to think it a bad or unwise law. Thus construed, the statement is sound and is the accepted rule laid down with little or no variation by our Courts, National and State.

The duty of interpretation can only arise in a judicial proceeding when words of doubtful meaning are used, or the structure of the law is ungrammatical or the meaning confused. Neither constitutions nor statutes can escape scrutiny for the purpose of ascertaining their meaning and the intent of the lawmaker. No function can be less subject to the accusation of usurpation than that of endeavoring to carry out a law according to the intent and purpose of the lawmaking department of government.

In this indisputable function of interpreting and construing applicable constitutional or statutory law to the case in hand there lurks, however, an immeasurable power, which is all the more dangerous to the public welfare because under its cover it is possible for a bad or ignorant judge to defeat the legislative purpose. There are doubtless instances where, through ignorance and mistake, a legislative purpose has been misconstrued, and doubtless there are rare instances where judges have conceived it within the scope of the interpreting function to so shape and mould a statute, or even a constitutional provision, as to minimize the effect of a law deemed unwise, as to render it harmless or capable of subserving some genuine public good. That there is a large and intelligent body of public opinion which regards this trimming down or modifying function as quite within the scope of the judicial power and which looks to the Courts with confidence for relief against what they regard as bad and dangerous legislation must be confessed by all who have observed the public press. This is another mani-

festation of the decay of respect for the limitations imposed by our fundamental law and of the yearning for a government of men rather than a government of laws. If we have outgrown the institutions which have made us the greatest people of the earth, let us change them by direct rather than by indirect means. If our Constitution is too rigid and the restraints upon the legislative power too great, let us amend the Constitution. The theory that the law is only a means to an end is truth. But who is to alter, modify or annul a constitutionally valid law? The executive, who has no function but to execute the law as he finds it; the judge, who has no lawmaking power and whose single duty is to apply the law as he finds it to an existing case? The best means of securing the alteration or repeal of a vicious law is to enforce it.

Any such contention is totally subversive of our institutions and involves a willingness to accept a government of men rather than a government of laws. Neither a Constitution nor a statute is to be treated by either the executive or the judiciary as if it were a "nose of wax," to be twisted and moulded according to the fancy of the occasion. It is against this most dangerous notion of judicial power that I most earnestly protest. There is nothing in the past history of either the National or State judiciary which gives sanction to any such abuse of power or supports an expectation that the function of interpreting will be tortured into an exercise of legislative power. The rules of construction are plain and simple of application. They are in substance identical, whether the instrument for interpretation be a statute or a contract. The Courts possess neither the power of taxation nor that of the sword. They are dependent upon the legislative power for their existence and upon the executive for the force needful to enforce their judgments. Set in the place of an arbiter between the branches among which the functions of government have been parcelled, they constitute the balance-wheel in our unique and splendid governmental system. They are the guardians of the fundamental law which conducts and controls the otherwise uncontrollable legislative power. Their dominating authority is moral. They will continue to retain the authority necessary to their free action so long only as they shall respect their own limitations, scrupulously avoiding the exercise of powers which they have not and fearlessly exercising those

which they have. But this duty of keeping within the limits of the organic law is one which does not rest upon the judicial branch with any greater force than it rests upon the co-ordinate departments of government. The lawmaker no less than the judge exercises his office under the same solemn obligation to support and uphold the limitations of the organic law. Why shall that oath rest more lightly upon one than the other? In the forum of conscience may the legislator say, as he too often does, "I will not consider that side of the matter—that I will turn over to the Courts." Yet, as we all know, this is not an unusual attitude for a legislator who finds questionable legislation desirable if valid. This is not honest, nor is it expedient.

An important rule of constitutional construction is that legislation shall not be annulled for antagonism to the organic law unless its invalidity is clear. This has its genesis, first, in a proper respect for the Legislature, and, second, upon an assumption that the legislator has himself acted under the obligation of the same oath which forbids his assent to any law which contravenes the Constitution.

The forces which from opposite poles are endeavoring to break down the restraints which safeguard us against the despotic power of an uncontrollable legislative or executive power are not the progressive, but the retrogressive element of our people. The mightiest advance against despotism was made when our fathers devised and put into operation a government of law for a government of men. We read in Holy Writ of one of the prophets who in his despair went a day's journey into the wilderness and laid himself down under a juniper-tree and prayed, "Now, O Lord, take away my life, for I am not better than my fathers." Let us rather rejoice that in standing by the institutions which have for more than a century made us the most law-abiding people of the earth, that we are walking in the footsteps of our fathers when we maintain in letter and spirit that division of the great functions of government which the men of Massachusetts, and the men of Virginia and the men of Maryland declared with Montesquieu to be the best security for a government of laws and the only safeguard against a return to a government of men.

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