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CONGRESS AND THE CONSTITUTION

By HON. IRVINE L. LENROOT*

Mr. Toastmaster, ladies and gentlemen, when I chose the subject of this address I hoped to be able to make such preparation as would enable me to present a careful review of the historical side of the subject to form the basis for some observations upon congressional government generally and pending proposals enlarging the powers of Congress to construe and, in effect, amend the Constitution. I regret that my official duties have been such that I have been unable to deal with the subject in the manner I had planned, and I must, therefore, content myself with a more general survey.

With the Constitutional Convention, its debates, its conflicting elements, and the necessary resulting compromises in the framing of the Constitution you are all familiar. But inasmuch as we to-day so often hear it urged by those who charge that we are drifting away from democracy and toward aristocracy, that we turn back to the ideals and purposes of the founders of our Government, it may not be amiss to dwell for a few moments upon the character of the men composing the Constitutional Convention, and some of the purposes they had in mind in agreeing to certain provisions of the Constitution.

There were fifty-five members entitled to seats in the convention. Of these, only about twenty took a prominent part in its deliberations. But of these twenty, it may be truly said, "There were giants in those days." Strange as it may seem, there were the same contending elements of differing political theory that we have to-day—one distrustful of democracy as well as monarchy, the other having confidence that there could be no such thing as an excess of democracy in government.

As we look back through the years and read the history of that convention, we are impressed that although we like to pride ourselves that we have progressed greatly since then—and we have—that greater trust is now reposed in the people than was then thought wise, yet I do not believe it possible to have a convention to-day where the delegates would be men of such learn-

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ing, of such ability, and patriotic purpose as were those men of 1787.

Distrustful of too much democracy, yet they reversed all political theories of their day in that they established sovereignty in neither the executive nor legislative departments of government, but in the people themselves. They had studied other governments in which sovereignty was in the King, or becoming more democratic, in the parliament or legislative assembly. But, in establishing our government, sovereignty was placed with the people. The Constitution and the executive, the legislative, and the judicial departments were but creatures of their will. They then proceeded to clothe their creatures with certain grants of powers, but to insure that such grants would not be abused set up a system of checks and balances familiar to us all. Of Congress, the House of Representatives was to be the popular body, representing more directly the will of the people, with frequent elections, while the Senate was designed to be the more conservative body, guarding property rights from encroachment by the popular will and representing the State governments as distinguished from the people within the States. When I hear some of our radical friends plead for a return to the government and ideals of the fathers, I wonder if they have any knowledge of what some of those ideals were.

The composition of the Senate, elected by State legislatures, as originally established in the Constitution, was determined upon motion of Mr. Dickinson in the constitutional convention, and Mr. Madison in reporting the debate tells us "Mr. Dickinson had two reasons for his motion: First, because the sense of the States would be better collected through their governments than immediately from the people at large; secondly, because he wished the Senate to consist of the most distinguished characters, distinguished for their rank in life and their weight of property and bearing as strong a likeness to the British House of Lords as possible, and he thought such characters more likely to be selected by the State legislatures than by any other mode." The motion was adopted. General Pinckney, another member, proposed "that no salary be allowed Senators, giving as his reason that as that branch was meant to represent the wealth of the country it ought to be composed of persons of wealth, and if no allowance was made the wealthy alone would undertake the service." His proposal

was not adopted, but I have quoted him to show the conception the framers of the Constitution had of the Senate, and how we have departed from it in placing greater trust in the people. Many members of the convention expressed distrust of the people, and the word "demagogue" was used almost as frequently in the debates then as it is in the press to-day. Elbridge Gerry, one of the prominent members, said: "The evils we experience flow from the excess of democracy. The people do not want virtue, but are the dupes of pretended patriots. In Massachusetts it had been fully confirmed by experience that they are daily misled into the most baneful measures and opinions by the false reports circulated by designing men." There is opinion of the same sort to-day in certain quarters, which confirms the saying "There is nothing new under the sun." But as there is an exception to every rule, the framers of the Constitution did have a new conception.

A written Constitution, made by the people, restraining not only their servants created by it, but restraining the people themselves from violating its terms so long as it was in force. Too much praise cannot be given the men who framed the Constitution. It was not a perfect instrument, compromises were made, and defects may be shown, but they launched upon the world a system of government that has stood the test of 136 years, of four wars with foreign nations, and one domestic rebellion. It has passed the experimental stage, and if we and our children shall be true to our obligations of citizenship, it will live as its founders hoped, but hardly dared believe, through the ages.

That it has so lived, however, is due not alone to the framers, but more especially to John Marshall. Had it not been for his master mind I am afraid that the United States of America would have held now only a place in history, a Government that was but is no more. There were two things essential to the perpetuity of the Constitution, an authoritative construction of its provisions, independent of the legislative and executive departments of the Government, and also a liberal construction of the powers granted. Without these the Constitution of 1787 could not long endure. With them, together with the power of amendment provided for in the instrument itself, there is no reason why it should not live and serve as long as human beings shall inhabit the earth. The first essential was the establishment of the power of judicial re-

view over the acts of Congress. This was definitely settled by the great opinion of Marshall in *Marbury against Madison*.

Never was his reasoning more conclusive, never was his logic more penetrating. I shall only take time to quote one paragraph from the opinion. He says, "The powers of the legislature are defined and limited, and that those limits may not be mistaken or forgotten the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed. It is a proposition too plain to be contested that the Constitution controls any legislative act repugnant to it, or that the legislature may alter the Constitution by an ordinary act." His reasoning is conclusive. Unless the Constitution be held superior to an act of Congress, the Constitution becomes a mere scrap of paper, an instrument "more honored in the breach than the observance." Marshall, however, does not go into the actual intent of the framers of the Constitution with reference to the power of judicial review of acts of Congress. He is content to read the intent from the instrument itself. But it has been argued in the past, and is being argued to-day, in attacks upon the court, that it has usurped the power of the legislature, and that the framers of the Constitution never intended that the Supreme Court should exercise any such power. In support of this they quote from a speech of Mr. Mercer, a delegate in the Convention. But it is difficult to believe in the intellectual honesty of these men. One would naturally assume that anyone attempting to publicly discuss this question would have read all of the debate found in the reports upon the subject, but if he had he could never make such claim. As a matter of fact, twenty members of the convention, and they were the most prominent members, at various times expressed themselves as being of the opinion that the judiciary would have the power of review over legislative acts, and there were only three members who expressed themselves as being opposed to such power being lodged in the courts. One of the three was Mr. Mercer, but none of the three expressed an opinion that the power was not granted by the Constitution, only that it ought not to be.

I now wish to discuss very briefly what would have happened had the court held that it did not have the power of judicial review. The result would have been the destruction of the Constitution. To illustrate, a protective tariff would have been constitutional when the party favoring it was in control of Congress, it would have been unconstitutional when the opposition had control. Likewise as to internal improvements undertaken by the Government; and I might give several other illustrations where one party insisted that a policy of the other was contrary to the Constitution. But this is not all. But for the restraining influence upon Congress, who can tell what rights would have been impaired or destroyed in obedience to party bosses and representatives of special privilege upon the one hand, and the passing emotions of the people, led by unscrupulous demagogues, upon the other?

But, it is said, are not Senators and Representatives as patriotic and as conscientious as judges? I wish I could answer in the affirmative. I wish I could say that legislators have a most scrupulous and tender regard for the Constitution and would not go beyond the limitations placed upon them by it. I regret that I can not so answer. If I did one would only need to refer to the *Congressional Record* to confound me.

But to return to my subject. The doctrine of Marbury against Madison has long since been accepted by all political parties and the people generally. It would be interesting to follow the subject from the Marbury to the Dred Scott case, but time will not permit. It need only be said that the followers of Jefferson, the strict constructionists, did not fully accept it until after the decision of Chief Justice Taney in the Dred Scott case, when the platform of the Democratic Party in 1860 declared—

Resolved, That the Democratic Party will abide by the decision of the Supreme Court of the United States on questions of constitutional law.

Again illustrating the truth of the old maxim, "It depends on whose ox is gored." Here the followers of Jefferson and Jackson, who had strenuously opposed the doctrine of the Marbury case, accepted it when a vitally important decision was made which was to their interest, and likewise the Republicans supporting the doctrine of Marshall and Hamilton for the first time began to question it. Happily the doctrine is now accepted by

everyone, and no one proposes to change it except by amendment of the Constitution itself.

So much for the power of judicial review. The second essential for the permanency of the Constitution and our form of government was the doctrine of implied powers or liberal construction. Without this construction Congress would have been placed in a strait-jacket, utterly unable to function in such a way as to serve the people. Nevertheless, the contest between the strict and the liberal or loose constructionists went on for years and is still at times in evidence. Jefferson and Madison were the great exponents of strict and Marshall and Hamilton of liberal construction. I can not take the time to review this subject at length, but Jefferson, when confronted with the results of the application of his own doctrine, failed to practice what he had preached. The Louisiana Purchase conducted by him was the first important application in a concrete case of liberal construction. Under no circumstances could a strict construction of the Constitution have permitted the Louisiana Purchase, and yet to-day it stands as one of the monuments to Jefferson's greatness. It is only fair to say that he asked Congress to propose an amendment to the Constitution ratifying the Louisiana Purchase, but it was not done, and Jefferson himself never afterwards claimed that his act was a violation of the Constitution.

For many years strict, as against liberal, construction was a party issue, the Democratic Party taking the side of strict construction and the Whig and Republican Parties the liberal side. To-day the issue is practically dead. As least, it is not a matter of party alignment. In a general way it may be said the party in power to-day is for liberal construction, but when out of power takes the other view.

To conclude this phase of the subject, I do not think it can be denied that the great instrument framed in 1787 at Philadelphia would not have endured to this day had it not been for the establishment of the doctrine of judicial review and of liberal construction of the Constitution.

I now wish to devote a few minutes to a discussion of the exercise of the power of judicial review.

There have been only a few instances where its exercise has had an important bearing upon the life of the Nation. Its greatest value has been the restraining influence upon Congress to keep

within the limits of the Constitution and the liberal construction of the document itself.

There have been some cases, however, where the court held acts of Congress invalid which were so important, and the decisions of the court were so contrary to the interests of the Nation that they did not long prevail.

I cannot take time to more than recall the cases to your minds and what happened with respect to them. The *Legal Tender* case is one of the most important. Has the Congress of the United States power to make bills of credit a legal tender? was the question. It came before the court in the case of *Hepburn against Griswold*, and the legal tender act of 1862 was held unconstitutional; but a vacancy occurred in the court through the resignation of Justice Grier, and by act of April 10, 1869, Congress increased the number of members of the court by one, so President Grant had two appointments to make. Both of his appointees were of the opinion the act was constitutional, and the case again came before the court in *Parker against Davis*. The decision in *Hepburn against Griswold* was overruled and the act was held valid.

I think this is the only important case where an important constitutional question was settled by changing the complexion of the court. The decision in the *Dred Scott* case was overruled at the point of the sword, and the fourteenth and fifteenth amendments resulted.

The action of the court in holding invalid the income tax law of 1894, together with its action holding invalid the child labor law of 1916, can not, it seems to me, be successfully defended. But the Constitution was amended and income taxes are now levied under the express sanction of the Constitution, and the Constitution will soon be amended to permit the prohibition by Congress of child labor.

That the court is subject to just criticism in some of its decisions in construing the police power of the States, I believe is true, but that is a subject which I have not the time to discuss to-night nor you the patience to listen to. I wish to restrict my observations to Congress and the Constitution and the attitude of the court with respect to the same.

I may suggest, however, that members of the Supreme Court continue to be human beings after their appointment. While

theirs is the last word of authority upon the Constitution, they are not infallible as men, and the Constitution itself provides a way by which their mistakes may be corrected. The only practical question is whether the method provided to amend the Constitution is too difficult. I am frank to say that I think it is. I believe that as to certain matters affecting fundamental rights of men, rights that are based upon principles that can not change with time or circumstance, because they are the foundation stones of civilization itself, that there should be no relaxation of the difficulty of amendment. But as to matters of policy of government, I believe we might safely provide that amendments touching those matters when proposed by Congress and ratified by direct vote of the people in two-thirds of the States, instead of three-fourths, should become valid amendments to the Constitution.

There is, however, an insidious propaganda to destroy the power of the Supreme Court to pass upon the validity of acts of Congress, and to make of Congress the supreme judge of its own acts. It is proposed that if the Supreme Court shall hold an act of Congress unconstitutional it shall again be considered by Congress, and if passed by a two-thirds vote of each House it shall become a law, notwithstanding the action of the Supreme Court.

Should this ever come to pass, the end of the Constitution will not be far distant. It is astonishing that this proposition should come from the source it does. It emanates from those who declare that human rights are being destroyed by the courts. They also declare that Congress is worse than the courts; that Congress is utterly reactionary, and that the Members of both Houses, with a few exceptions, are controlled by Wall Street and the predatory interests of the country. Their proposition is: "We have no confidence in Congress; it does not represent the people, but only special interests, and we propose to amend the Constitution so as to provide that whatever such a reactionary Congress may do if supported by a vote of two-thirds of its membership shall be the law of the land, notwithstanding the provisions of the Constitution of the United States." They say they are willing that the rights of free speech, the right to peacefully assemble, the right of religious freedom, of trial by jury, and all of the other rights guaranteed by the Constitution shall be placed in the hands

of a Wall Street Congress, with the power to destroy them by a two-thirds vote. To say the least, there has been a great deal of loose and hurried thinking by those favoring this proposition. As for myself, while I have a higher regard for Congress than the proponents of this amendment, I hope I shall never live to see the day when by a two-thirds vote of Congress any man may be denied the right to worship God according to the dictates of his conscience, when right of trial by jury may be denied, or any of the other rights handed down from Magna Charta and embodied in the Constitution of the United States.

While the power of judicial review is well established, it relates only to inquiring and determining whether an act of Congress or of the States is in conflict with the Constitution. The court has no power to inquire into the wisdom of acts of Congress falling within its constitutional powers. For the court to legislate is as much a violation of the Constitution as for Congress to exceed the limits of its constitutional powers. In one notable case the Supreme Court has read into a valid statute words not placed there by Congress and which Congress had repeatedly refused to place there. I refer to the Sherman Anti-trust Act as construed in the Standard Oil case. I believe that that opinion will always stand as a reflection upon that great court. It is no answer to say that in this case Congress has seen fit to accept the amendment of the statute made by the court. The fact is that the court acted not in a judicial but in a legislative capacity under every rule of legislative intent and the doctrine of *stare decisis*. However, the exercise of such power can never bring lasting injury, for Congress always has power to amend the law within its constitutional powers and declare its will in such unmistakable language that the court will be compelled to follow it.

I now pass to a very brief consideration of the eighteenth amendment and the present agitation concerning it. I shall refer only to its legal aspects wholly apart from the merits or demerits of prohibition. It is a part of the Constitution, and it is the duty of Congress and the Executive to enforce it and of every citizen to abide by its terms. It is the right of every citizen to advocate the modification or repeal of the eighteenth amendment, but no citizen has the right to ask Congress to violate its terms. There is a widespread propaganda to secure legislation from Congress

permitting the manufacture and sale of beer and light wines. That Congress could constitutionally increase the alcoholic percentage of beer to between two or three per cent is admitted. Whether it should do so is a question of policy, but to go beyond that or permit the manufacture or sale of light wines would clearly violate the Constitution. To use the language of the Supreme Court, "the eighteenth amendment is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers, and individuals within those limits, and of its own force invalidates every legislative act whether by Congress, by a State legislature, or by a Territorial assembly which authorizes or sanctions what the section prohibits."

Any attempt, therefore, to secure legislation permitting the sale of intoxicating beverages is asking Senators and Representatives to deliberately violate their oaths of office, and all to no purpose, for the court would hold any such legislation invalid.

The remedy for such ills as can be remedied is by obedience to the Constitution, securing amendments where amendments are necessary, by the appointment of judges of our courts who are not only able lawyers but men of human sympathies and outlook, living neither in the last century or the next, but in the living, throbbing world of to-day, keenly alive to the thought and aspirations of the people, and who will apply the Constitution to twentieth-century problems with twentieth-century minds.

It should never be forgotten by members of all courts, and by lawyers as well, that, to use the language of the Supreme Court in the case of South Carolina against United States, "the Constitution is a written instrument. As such its meaning does not alter, and what it meant when adopted it means now. Being a grant of powers to a government, its language is general, and as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable." And we should never forget the words of Story: "The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the wants of which were locked up in the inscrutable purposes of Providence."

The Constitution has not outlived its usefulness. Its protect-

ing care was never more needed than to-day. It is the duty of every citizen to withstand every assault upon it, whether its enemies be predatory interests seeking special privileges to the public injury or whether they be those who are opposed to any government that would safeguard and protect the rights and liberties of every citizen under its flag.

That Congress shall at all times have respect for and be governed by the Constitution is the responsibility of the voters. It is their obligation to see to it that Members of Congress, Senators and Representatives, shall be men who will legislate not for bloc or class or section but for all the people of America, who recognize that duty to country comes before duty to party, men who shall do their part to conserve all that is good in our past and strive to make to-morrow better than to-day.