NATIONALISM AND THE JUDICIARY

This editorial concludes Mr. Roosevelt's discussion of the Judiciary. It will be followed by editorials on "Nationalism and Democracy" and "Nationalism and International Relations."—THE EDITORS.

In the Knight Sugar Case, treated in last week's Outlook, the Supreme Court decided against popular rights because against the right of the people of the United States, acting through the Government of the United States, to deal with a matter of vital concern, as to which the Constitution had clearly conferred exclusive power on the National Government. In the New York Bakeshop Case the Court decided against the principle of popular rights under the guise of deciding against the right of a State to act.

In this decision the Court by a bare majority of one upset a law regulating the hours of labor under unhygienic conditions, and they did this in the name of liberty of contract. All I have to say in this matter, all that I said last fall in my address to the Denver Legislature, has been said, in stronger language than I have used, by the Justices of the Supreme Court themselves. In the Supreme Court of the United States in October last Mr. Justice Holmes delivered the opinion of the Court on a matter affecting the laws of the State of Oklahoma, and in the course of his opinion he stated the general policy as follows:

> We must be cautious about pressing the broad words of the Fourteenth Amendment to a dryly logical extreme. Many laws which it would be vain to ask the Court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the States is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the lawmaking power. . . . It may be said in a general way that the police power extends to all the great public needs. *It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately*

necessary to the public welfare. [The italics are mine.]

In Roscoe Pound's article on "Liberty of Contract," in the "Yale Law Journal" for May, 1909, he speaks of the effort to realize true human justice through law as "the sociological movement in jurisprudence, the movement for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assume first principles, the movement for putting the human factor in the central place and relegating logic to its true position as an instrument." In his article he takes up case after case of perversion of justice through insistence by the courts on an academic instead of a real liberty of contract. When he comes to speak of this particular Bakeshop Case, he says: "In Lochner vs. New York, a bare majority of the Supreme Court of the United States took a reactionary view, as it had fairly become by this time, of a statute prescribing the hours of labor in bakeries:" and he sums up the case as follows, in comment upon the decision of Mr. Justice Peckham:

It will be seen that this opinion assumes two propositions of fact: (1) That the public has no concern in how long a baker works, because the time he works has no effect on the product of his labor; (2) that there is nothing in the trade of baking, as carried on in large cities, inimical to the health of those who are employed in it for long hours at a stretch. Here again study of the facts has shown that the Legislature was right and the Court was wrong. Actual investigation has shown that the output of shops in which the only kind of men who can be had to work for unreasonable hours under unsanitary conditions are employed is not at all what the public ought to eat, and that long hours in shops of the sort are distinctly injurious to health. But the decisive objection to the position of the majority is put by Mr. Justice Holmes in a few sentences that deserve to become classical: "This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agree with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that *my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . A constitution is not intended to embody a particular economic theory*, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire. It is made for people of fundamentally differing views*, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."

Sir Frederick Pollock, the great English lawyer, commented on the case as follows: "How can the Supreme Court at Washington have conclusive judicial knowledge of the conditions affecting bakeries in New York? If it has not such knowledge as matter of fact, can it be matter of law that no conditions can reasonably be supposed to exist which would make such an enactment Constitutional?" In concluding his article, Mr. Pound writes as follows:

What, then, is the hope for future labor legislation? On the whole, one must say that it is bright. Not only do the cases last noted afford many means for escape from the line of decisions first considered, but there are indications that the courts are ready to seek such escape. The opinion of Mr. Justice Day in McLean vs. Arkansas especially is fraught with promise of a return on the part of the Federal Supreme Court to its sounder views prior to the Lochner and Adair cases. Even the Court of Appeals of New York has recently approved this significant remark: "Under a judicial system which has for centuries magnified the sacredness of individual rights, there is much less danger of doing injustice to the individual than there is in overlooking the obligations of those in authority to organized society." Possibly the decisions first considered, or some of them, were not without good effect. Doubtless much of the earlier legislation was crude and some of it was premature. But, on the other hand, those decisions wrought an injury to the courts and to the public regard for law, and for Constitutional law in particular, far beyond any incidental good. An acute and well-informed observer said recently: "From my own experience, I should say, perhaps, that the one symptom among workingmen which most definitely indicates a class feeling is a growing distrust of the integrity of the courts, the belief that the present judge has been a corporation attorney, that his sympathies and experience and his whole view of life are on the corporation side." The attitude of many of our courts on the subject of liberty of contract is so certain to be misapprehended, is so out of the range of ordinary understanding, the decisions themselves are so academic and so artificial in their reasoning, that they cannot fail to engender such feelings. Thus, those decisions do an injury beyond the failure of a few acts. These acts can be replaced as legislatures learn how to comply with the

letter of the decisions and to evade the spirit of them. But the lost respect for courts and law cannot be replaced. The evil of those cases will live after them in impaired authority of the courts long after the decisions themselves are forgotten.

I have quoted at length from this law writer, just as I have quoted at length from other lawyers and from judges, because the representatives of the great capitalistic classes in the press and at the bar have persuaded many good men that in some way I have made improper, or at least revolutionary, attacks upon the Supreme Court. Whether or not I am to be condemned for taking the stand I did is of very small consequence; if it were of consequence, I should be quite content to rest my case on the utterances of the Supreme Court justices and other judges and eminent lawyers above quoted. But the thing that is vitally important is that the people of the United States and the courts should be in proper relation. The people must heartily respect the courts and must realize that ordinarily the court knows more than the people can know of any given case, and must normally without question acquiesce in every judicial decision. Moreover, all public men and publicists must refrain from criticism of the courts unless it is not only true but rendered absolutely necessary by the circumstances of the case. On the other hand, the courts in their turn must understand that in a real and not a conventional or perfunctory or academic sense they are the servants of the people and responsible to the people.

Proposals have been made to secure by the use of the recall, or in other fashion, a more direct popular control of the Federal judiciary. The need that there should be some such control is of course recognized by the existence of the right of impeachment, a right, however, which neither can nor ought to be applied save in the rarest cases. As conservative States as New York and Massachusetts have provided for removing judges on address by a sufficient majority of the two houses of the Legislature, and the right has never been abused; the provision in the New York Constitution was put in by the conservative Constitutional Convention in which Messrs. Choate and Root were the leaders.

In certain States the proposal has been made to require all Federal judges to be elected for short terms. I do not agree with this proposal. Neither do I believe in the recall—using the word in the ordinary sense—as applied to our Federal judges. I do not wish to see steps taken which would hurt the usefulness and dignity of our fine National judiciary. The introduction in principle of the methods for removing judges which are provided in the Constitutions of New York and Massachusetts would, I believe, work well. If this is objected to, then the only alternative is that there shall be full and free and effective criticism of the court whenever the court acts on some great question of policy and principle, as to which the people have a right to decide, and where their decision, and not that of their servants, must ultimately stand. In the Knight Sugar Case, for instance, it is not only the right but the duty of all far-sighted citizens to say that the decision amounted to a partial nullification of one of the most important objects which the Constitution was designed to forward. In the New York Bakeshop Case it is our duty to say that it is for the people of a State to decide whether they intend to be true to the school of political economy of the eighteenth-century individualistic philosophers or whether they intend to act on the principles set forth in such books (to mention two among many) as those by Professor Ross on "Social Control" and by Father Ryan on "A Living Wage." We who on the whole accept the principles set forth in books like these may be right, or we may be wrong, and judges may agree or disagree with us; but if we make up a decisive and permanent majority of the State or Nation, we have a right to try the experiment of putting the principles into practice. I believe with all my heart in the duty of moderation, in the duty of self-restraint and self-mastery, on the part of the people. I feel that when the people are corrupted it is far worse than when any Legislature is corrupted; and I feel that we owe it to ourselves to see that our representatives in executive, in legislative, and, above all, in judicial offices, receive high honor, and that the utmost respect is paid to them when they act conscientiously and fearlessly. It is immensely to

the popular interest that the judge shall pay heed to his conscience, first of all, and shall show personal independence, no less than broad and generous sympathy with popular needs and wishes. But I also feel that in our country, when a great question of policy arises, and when, not by snap judgment, not by any trick, not in response to any sudden emotion, but as the evident expression of permanent popular will, the people have determined what a given policy is, it should be carried into effect. The men who denounce the free and fair criticism of the judiciary, the frank expression of popular opinion, necessary to produce this result, are themselves doing all in their power to render necessary the adoption of some more direct method of popular control.

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