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THE CHIEF JUSTICE OF THE UNITED STATES*

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"What, sir," asked Horace Binney, "is the Supreme Court of the United States?" "It is the august representative of the wisdom and justice and conscience of this whole people, in the exposition of their constitution and laws. It is the peaceful and venerable arbitrator between the citizens in all questions touching the extent and sway of Constitutional power. It is the great moral substitute for force in controversies between the People, the States and the Union."

"In not one serious study of American political life," said Theodore Roosevelt, at a dinner of the Bar in honor of Judge Harlan in 1902, "will it be possible to omit the immense part played by the Supreme Court in the creation . . . of the great policies, through and by means of which the country has moved on to her present position. . . ."

To Harold J, Laski, "the Supreme Court of the United States is not merely a tribunal where the controversies of men are resolved; it is also a legislature in which the life of a Nation is given form and color."

In the opinion of the Washington *News*, the Supreme Court has "become a super-congress. It is much more than a court passing on legal technicalities. It is a policy-forming and law-making body, which is not representative of, nor responsible to the people."

Domination of Legal Thinking

The opening paragraphs of the preface to "The Business of the Supreme Court" takes cognizance of the extraordinary degree to which the United States is subject to the domination of legal thinking. It is there pointed out that "Every act of government, every law passed by Congress, every treaty ratified by the Senate, every executive order issued by the President, is tested by legal considerations, and may be subjected to the hazards of litigation.

"Other nations, too, have a written constitution. But no other country in the world leaves to the Judiciary the powers which it exercises over us. The little village of Euclid, Ohio, enacts a zoning

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ordinance; the Supreme Court has to pass upon it. The United States makes a treaty with Germany concluding the Great War; not until the Supreme Court has spoken in a case nominally between two individuals do we know the limits and meaning of the treaty."

When a question of judicial reform arises in Great Britain, a commission explores the situation, having as its guide what wisdom and experience suggests. But with us there is yet another consideration: Can we do it under our constitutional system?

And thus it is that "most of the problems of modern society, whether of industry, agriculture or finance, or racial interaction, or the eternal conflict between liberty and authority, are sooner or later legal problems for solution by our courts, and, ultimately, by the Supreme Court of the United States."

Political Significance of Court

The essential political significance of that Court's share in the operation of the Union can hardly be overestimated. "Of this truth the history of the Federal Judiciary system brings a striking proof. Under Marshall's guidance the Supreme Court was one of the chief promoters of the Federalist philosophy. The exercise of the powers entrusted to the Judiciary by Congress profoundly influence the balance of forces in the unabated contest between States and National government, as well as in the conflict between divergent economic interests."

The story of these momentous political and economic issues lies concealed in the opinions and orders of the court, "the dry bones of very vital social, political and economic contests."

The Syllogism

The syllogism plays a minor part in the formulation of the rules by which men are governed. "General propositions," observed Mr. Justice Holmes in the course of his dissent in *Lochner v. New York*, 198 U. S. 45, 74, "do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise." For instance to again use the language of Justice Holmes, "The felt necessities of the times, the prevailing moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen. . . ."

A study of the passionate devotion to states' rights with its counterpart of opposition to the Federal Judiciary, whether North or

South, will reveal that it is based not so much on dogmatic, political theories and beliefs, as upon the particular economic, political or social question involved.

To Washington, the Supreme Court "must be considered as the keystone of our political fabric," and so we are not surprised to find the Chief Justice must be not only a great lawyer, a great statesman, a great executive, but as well a great administrator and leader.

Many eminent names were presented to him in connection with the appointment of the first Chief Justice. On April 21, 1789, James Wilson wrote to Washington: "I commit myself to your Excellency without reserve and inform you that my aim rises to the important office of Chief Justice of the United States." Arthur Lee, in a letter of May 31, 1789, applied to Washington for appointment as one of the justices: "It is," writes Lee, "not without apprehension of presuming too much on the favor you have always shown me that I offer you my services as a Judge of the Supreme Court which is establishing."

Washington was unable to comply with these requests, but John Rutledge was more successful. In a letter of June 12, 1795, we find him writing to Washington: "Finding that Mr. Jay is elected Governor of New York and presuming that he will accept the office, I take the liberty of intimating to you *privately* that, if he shall, I have no objection to take the place which he holds. . . ."

In tendering the appointment of the first Chief Justiceship to John Jay, Washington writes: "It is with singular pleasure that I address you as Chief Justice of the Supreme Court of the United States for which office your commission is enclosed." John Jay was commissioned, "Chief Justice of the Supreme Court of the United States." Charles Evans Hughes is commissioned "Chief Justice of the United States." Rutledge, Ellsworth, Marshall, Taney, Chase and Waite were commissioned under the title "Chief Justice of the Supreme Court of the United States." Fuller was commissioned as "Chief Justice of the United States." The Constitution mentions the office only once: In Article One, Section Three, relative to impeachments in which it is provided—"When the President of the United States is tried, the Chief Justice shall preside." The first official use of the term "Chief Justice of the United States" occurs in the Act of July 13, 1866. However, in other acts and as late as the Act of March 3, 1911, the reference is to "The Chief Justice of the Supreme Court of the United States."

It is a far-cry from February 1, 1790—the day of the organization of the Court in the Royal Exchange at the foot of Broad Street, New York—to February 24, 1930—the day Charles Evans Hughes, in the Capitol at Washington, took his seat as the Eleventh Chief Justice of the United States.

In 1790 the Judges were attired in "party-colored" robes, maybe of black and red, while in 1930 we see them garbed in somber black. Contrasting the elegance of these robes with the solemn black of today, an incident in the career of Mark Twain is recalled. When he went up to Oxford to receive the degree of Doctor of Literature, he attended dinner at one of the colleges where, through mistaken information, he wore black evening dress when he should have worn his scarlet gown. "When I arrived," Clemens tells us, "the place was just a conflagration—a kind of human prairie fire. I looked as out of place as a Presbyterian in hell."

The commission of Mr. Justice Hughes recites: "With the advice and consent of the Senate." The question put by the Vice-President was "Shall the Senate advise and consent to the nomination?" And upon the announcement of the result—yeas 52, nays 26, the record shows: "The Senate advises and consents to the nomination of Charles Evans Hughes to be Chief Justice of the United States." There was, in truth, no "advice" not even an opportunity to advise, since the resignation of Mr. Taft and the appointment of Mr. Hughes were, to all intents and purposes, simultaneous, and the "consent" was only after a manner of speaking.

The opposition to Mr. Hughes was put upon two grounds: That he had resigned from the Court to be a candidate for President and that his economic views were in accord with those who in business and industry occupy the seats of the mighty. The objection based on his economic views was given emphasis and point by a decision of the Supreme Court handed down in the Baltimore Street Car Fare case on January 6, 1930, where the Court had before it the task of fixing the value of property of the Street Car Company for the purposes of determining its rate of fare. It is an interesting and informative circumstance that the use made of the decision in this case by the opposing Senators was, in the main, beside the mark, being based upon a misconception of what was actually decided.

In reality the Baltimore Street Car case is not particularly pertinent. It was seized upon in the Senate to adorn a tale with a cur-

rent event. Back of this case and its result was the consciousness of the constantly growing tendency of the Court to hold legislation invalid under the due process and equal protection clauses of the Fourteenth Amendment. The statistics I am about to give you are taken from an article by Mr. Ray A. Brown in 42 *Harvard Law Review* 866. From 1868 to 1912, the Court held against the legislation in a fraction more than six per cent of such cases; from 1913 to 1920, in a bit more than seven per cent of such cases; while from 1920 to 1926, the percentage increased to twenty-eight. Looked at from the standpoint of the votes of the individual judges in each case, the percentage up to 1921 was ninety favorable, while from 1921 to 1926, the adverse vote had grown to thirty-one per cent. As emphasizing the "Persuasive evidence of the part that the personal element plays. . . ." Mr. Brown compares the vote of the different members of the Court in a certain class of cases. Mr. Justice Brewer, in twenty-one years of service on the bench, participated in 46 cases involving the conflict between individual rights and the police power. In 19 of these cases, or approximately forty-one per cent, he held legislation unconstitutional because of illegal infringement upon individual interests. Mr. Justice Peckham's record is similar. Out of 41 police power cases he denied validity to the statutes in 16 instances, an average of thirty-nine per cent. The contrast is striking between the record of these two judges and that of Mr. Justice Holmes, who, during more than a quarter of century of service on the bench, has participated in nearly all the important cases of the kind to which reference is being made. Fulfilling his declared principle of judicial deference to the legislative will, he has sustained legislation in 190 of the 212 cases which he has considered, an average of disallowance of only ten per cent. Mr. Justice MacReynolds and Mr. Justice Brandeis came upon the bench at nearly the same time. Mr. Justice MacReynolds has refused his sanction to legislation in thirty per cent of the cases in which his vote is of record. Mr. Justice Brandeis in less than fifteen per cent.

In legislation involving the interest of particular classes the prejudices and sympathies of the Judges are still more apparent. In the cases concerning legislation intended to better the condition of labor the votes of those Justices above mentioned shows this remarkable divergence: Brewer, sustaining legislation, 3, rejecting legislation 6; Peckham, sustaining 3, rejecting 6; Holmes, sustaining 4,

rejecting 1; MacReynolds, sustaining 15, rejecting 12; Brandeis, sustaining 18, rejecting, none.

This record of Mr. Justice Brandeis calls to mind the fierce and unrelenting fight made upon his confirmation when he was appointed in 1916 by President Wilson. The class, which to the objecting Senators, was responsible for the selection of Mr. Hughes were the leaders in the fight against Mr. Brandeis. The basis of their objection in a large part was with respect to his economic views, that he was liberal, if not radical. I have often wondered just what, if anything, passed between Mr. Justice Brandeis and Chief Justice Taft after he came on the bench, because it is of record that Chief Justice Taft, along with other outstanding lawyers of the United States, joined in a written protest against the selection and confirmation of Mr. Brandeis. Mr. Justice Brandeis is not, in truth, as he was painted in this contest, and no more is Mr. Justice Hughes. It can be safely said that one is a liberal and the other conservative, each sincere in his views.

The opposition to Mr. Hughes and the opposition to Mr. Brandeis is but confirmation of Mr. Madison's notion that economics lies at the base of law. We find him saying in the *Federalist:*

"Those who hold, and those who are without property, have ever formed distinct interests in society. Those who are creditors and those who are debtors follow under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, with many lesser interests, grow up of necessity in civilized nations, and divide themselves into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of the modern legislation."

And he could very well have added "and of the courts, especially the Supreme Court of the United States."

The significance and far-reaching consequences of the economic views of the Judge and the importance and dignity of the position of the Chief Justice of the United States were noted in the speech of Mr. Borah who opened the debate in opposition to the confirmation of Mr. Hughes. From that speech I take two excerpts:

"In many respects the Chief Justiceship of the United States Supreme Court is far more important than is the Presidency of the United States. The influence which Marshall exerted, the influence which Taney exerted upon this Government and the powers of government far exceed any influence which has ever been exerted by any

President in that particular regard. It is no ordinary matter to place a man in the Chief Justiceship of the Supreme Court of the United States, a court which with its wide sweep of jurisdiction encompasses almost every question which can be of concern to the people of the United States."

"We are entering upon an era when the greatest undecided question before us is that of determining the relationship of these vast corporate interests to the millions of people in the United States who must pay them toll year by year. Could there be any more profound question, touching the interest of every man, woman, and child in the United States for years and years to come, than the question of how much the oil people, power people, the gas people, the transportation people, and all others dealing with those questions shall charge the people of the United States for their commodities and services? The decision which Mr. Marshall rendered in the McCulloch case affected for all time the governmental questions of the United States; but the question of what shall be the relationship of our people to those who have gathered up our natural resources and who are in control of the means by which we reach the natural resources of the United States, when it is finally determined will affect more directly, more pointedly the whole people of the United States than any other decision that has ever been rendered by the Supreme Court of the United States."

Senator Glass based his objection to Mr. Hughes, "on his lack of sensibility." "In theory and in expectation," said the Senator, "a person appointed and confirmed to the highest court in this land should serve for his lifetime, or until he is himself convinced that he has reached that point of service and that age in life when he finds himself disqualified for the position. That is why the Supreme Court judges have life tenure, and it has always seemed to me an exhibition of the severest indifference to that theory and that consideration for any justice of the Supreme Court of the United States to contemplate for a moment discarding the ermine and coming down from his exalted station to participate selfishly in the turmoils and disputes of partisan politics. I believe this whole country felt a shock, as it was grievously distressed when Mr. Justice Hughes resigned his place on the Supreme Court bench to be a candidate for President of the United States."

To Senator Dill, "the views of Mr. Hughes on economic questions are just as important as his legal ability."

To an editorial writer of the *Baltimore Sun* economic views take precedence over legal competence. Elaborating this conception that editorial proceeds:

"There are those who argue that the practice of the law is by its nature such that its devotees are merely expert pleaders, to make the best possible case for the side by which they are retained, and that they are so subtly geared that when elevated to the bench their past partisanship fades entirely out of their memory. That may be true, so far as the law is concerned, but the United States Supreme Court, by its own will, has moved its activities into the larger orbit of determining social and economic policies, and then imparting to them the force of law. It has, in other words, brought itself to the place where legal competence is only one—and perhaps not the most important—test of fitness for service in that court. This accounts for the strange phenomenon taking place in the Senate, where the fitness of an admittedly great lawyer for what the copybooks say is the greatest legal post in the Nation is being debated, and rightly, as an economic and social issue."

Undoubtedly, the opposition to Mr. Hughes in the Senate which started in a perfunctory and feeble way and gained very considerable momentum "is one of the most significant developments in the political life of this Nation for many years."

The *Washington News* so viewed it:

"Hughes is the outstanding example of a jurist who advocates private corporate interests at the expense of the public interest. To persons still holding to the myth that a justice's private opinions are of no consequence in this connection because his job is merely to pass as an expert upon technicalities of the law, the Senate opposition to Hughes may seem unjust and beside the point. But, in fact, the court in major cases has long since become a policy-forming body. When social and economic issues are involved, the justices tend to vote their personal opinions as do members of Congress in passing laws. . . . The curious and dangerous aspect of this long development of Supreme Court supremacy as a virtual lawmaking body is that it has occurred without public awareness."

"We have lost the early American independence which held no political institution above the critical judgment of sovereign citizens. . . . The Senate debate on the Hughes nomination is significant because it breaks through this hush-hush and ah-ah atmosphere surrounding the court, daring to examine that political and very human institution for what it is worth."

It is quite apparent that the writer of this editorial was not familiar with the Lincoln day address of Mr. Justice Brewer, in which is found this paragraph:

"It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary,

the life and character of its Justices should be the objects of constant watchfulness by all, and its judgments subject to the fiercest criticism. The time is past in the history of the world when any living man or body of men can be set on a pedestal and decorated with a halo. True, criticisms may be like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all. The moving waters are full of life and health; only in the still waters is stagnation and death."

There has been no loss of "early American independence which held no political institution above the critical judgment of sovereign citizens." What has happened is what always happens; that during periods of prosperity the voice of criticism is not heard; it has not disappeared, it has merely been submerged beneath the strident voice that worships at the shrine of Things.

In a sense there is nothing new about the issue which was being debated. Senator Vandenberg pointed out:

"It is the same attack upon a system of divided powers of government that we have had in the United States for 140 years. . . . It is simply a new form of an old phenomenon. The Government was only ten years old when objection to certain branches of the Federal judiciary on the part of the political authorities then in control of the Government resulted at that early date in reprisals, in an effort to repeal the laws that established the circuit courts of the United States. This was simply the beginning of a continuous, serial effort to force the judgment of the legislature upon the judiciary and to break the judiciary upon the wheel of Congress. Persistently it has come to hazardous expression in the efforts to take from the Supreme Court the right to pass upon the constitutionality of the Acts of Congress."

Undoubtedly, some of the Senators, and with them some of the newspapers agree, would like "to force the judgment of the legislature upon the judiciary and to break the judiciary upon the wheel of Congress." Beyond the shadow of a doubt, there is a body of opinion in the Senate and outside the Senate which has for its goal "to take from the Supreme Court the right to pass upon the constitutionality of the acts of Congress."

For all such I invoke, in a political sense, the penalty that came into existence in Rome in the fifth century as a deterrent upon the overwhelming flood of "new laws." Gibbons tells us that the evangels of the "new" had created a condition "more intolerable than the vices of the city," to correct which it was necessary to declare that

he who proposed a new law should stand "forth in the assembly of the people with a cord around his neck, and if the new law was rejected, the innovator was instantly strangled."

But the Senate debate cannot be thus dismissed. It has a deeper and more permanent meaning, a significance apart from froth and fool notions. There lies at the base of the provision for the "advice and consent" of the Senate upon judicial appointments a reason, which present day conditions have in no degree lessened, but rather emphasized. The judicial process, especially now, is such that more is involved than character and legal lore and training. When one of the important subjects of litigation deals with what tolls the people shall pay in the course of the activities of everyday life, the people have an interest in the selection of the judge and it is only through the Senate that they may be heard, and when protection is needed, receive it. Quite apart from one's agreement or disagreement with the Senate opposition to Mr. Hughes, the open-minded man cannot escape the significance and outreach of that opposition.

It is in keeping with, it is a part of the "social mindedness" of the twentieth century. On the political side it is evidenced by the action of the Board of Directors of the Anti-Saloon League, ratified by its national convention in January last. From an outline of its future policy I quote:

"More than ever before the object of the Anti-Saloon League and that of every social welfare agency requires the same type of men in public life, and the same open, frank representations as to the qualifications of those seeking public office. Very definitely in this day the line is being drawn between those candidates for positions of public trusts who are social minded and those who represent selfish interests seeking special privilege. Consequently, more than ever before, we must give attention to the question of social mindedness in the weighing of records and attitudes of political candidates."

This attitude of the public mind was by the Senate very definitely carried over into the judicial field and sought to be applied to the selection of Judges of the Supreme Court. Its meaning is that legal thought and popular thought need and must have closer companionship; that the people have come to know that the chambers of the Supreme Court are not vacuum chambers; that judges are not anointed high priests, but are men with like passions and prejudices with them.

Mr. Hughes is the eleventh in line of succession. It is the second time that a Justice of the Supreme Court, who resigned to accept or bid for another office, was thereafter appointed Chief Justice. Mr. Rutledge, after service as an Associate Justice, and resignation to accept the Chief Justiceship of the Supreme Court of his State, was offered the position of Chief Justice of the United States, and served for about six months. But when his nomination came before the Senate he was not confirmed, the ostensible reason was his mental condition. The real reason was a speech in opposition to the Jay Treaty. While the fact of Rutledge leaving the Supreme Court bench to accept another office may not have had any direct bearing, it is hard to escape the conclusion that it was in mind, for the prevailing opinion was that once a Supreme Court Judge always that and nothing else.

Timothy Pickering wrote, in connection with the Independence of the Judiciary, on May 19, 1828:

"Perhaps it might be expedient to render this as perfect as any human institution can be, to declare, an amendment to the Constitution that a Justice of the Supreme Court of the United States should be forever precluded from every other office and placed under the general government; either by the appointment of the Executive, from Congress, or the election of the people."

The rejection of Rutledge supplies us with one of the "ifs" of history. And a tremendous "if" it is. But for his speech in opposition to the Jay Treaty, he would undoubtedly have been confirmed, and as his death did not occur until the year 1800, the Chief Justiceship, if held by him, would have become vacant at a time when it is extremely unlikely that President Adams would have appointed John Marshall as his successor. Thus, upon the event of one chance speech regarding a British Treaty, hinged the future course of American constitutional law.

If it be true that "whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the law-giver to all intents and purposes, and not the person who first wrote or spoke them," then the Chief Justice of the United States is the chief "law-giver" of present day Christendom, for he is the presiding and responsible genius of the highest judicial tribunal of the foremost and most powerful nation of the world. In his court lies the power to set at naught the expressed legislative will of more than one hun-

dred and twenty million people, and to say what they shall pay for gas, electric current, what they shall pay to ride on street cars and steam cars, and what it will cost them to have their goods and chattels hauled, and maybe whether Mr. Henderson may continue to "cuss" the chain stores.

The Supreme Court of the United States occupies a unique position in the political science of the world; in fact, it is our chief original contribution to the science of government. The Constitution of the United States and the Supreme Court of the United States are at the base of government in America. The supremacy of the nation is established by the second clause of Article Six of the Constitution. After all this is but a declaration. It must be capable of enforcement. Without the means of enforcement the purposes of the Founding Fathers would be left unfulfilled. And so the next step was the establishment of a tribunal having the power of enforcing throughout the Nation and the States the supremacy of the Constitution and the laws "made in pursuance thereof." The work of the framers was brought to completion with the adoption of Sections one and two of Article Three, in part reading:

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

As originally conceived, the mission of the court was "to confine the Federal authority to its legitimate field of operation and to control State aggression on the Federal domain." The complex character of the Government of the United States, part National and part Federal, demanded such an organ of government; the Constitution was in need of "a living voice."

The Court's essential role is to mediate between conflicting public policies in American life. In the beginnings these policies were governmental, dealing with questions of the relative and respective powers of the United States and a State, in the common territory. In the growth and development of the country the function of the court as a mediator has been enlarged. Much of its attention is now given to conflicting economic theories and practices. This shift in direction and power is revealed in a striking way in the senatorial debate upon the confirmation of Mr. Hughes.

Senator Connaly emphasized the change:

"In the early history of this country the contests in the Congress and on the hustings and in the courts were contests relating to the form of our political institutions—they were questions of power and of constitutional construction. Most of these great questions have been settled either by decisions at the ballot box or of the Supreme Court. But the questions which are going to affect vitally the people of the United States in the years to come are not questions of great political systems, are not questions of State's rights, or slavery. The great questions that now confront us are economic questions. . . ."

And now after 140 years, how does it stand with our affection for the court? Conceding that the court is neither "infallible nor invincible," let us read the words of DeTocqueville, written in 1835, and ask ourselves if they are not yet true:

"The Supreme Court is placed at the head of all known tribunals, both by the nature of its rights and the class of the justiciable parties which it controls. The peace, the prosperity and the very existence of the Union are placed in the hands of the Judges. Without their active coöperation the Constitution would be a dead letter; the executive appeals to them for protection against the encroachment of the legislative powers; the legislature demands their protection against the designs of the executive; they defend the Union against the disobedience of the States; the States from the exaggerated claims of the Union; the public interests against the interests of private citizens, and the conservative spirit of order against the innovations of an excited democracy."

With William Wirt I say:

"The people of the United States know the value of this institution too well to suffer it to be put down or trammelled in its actions by the dictates of others,"

and so I give you a toast in the words of 1801—

"The Judiciary of the United States—independent of party, independent of power, and independent of popularity. . . ."

For you to whom I speak is the next campaign of the law. It "looks to your youth and strength to improve it as good husbandmen. Remember that you are servants of the commonwealth and are devoted, not to a trade, but to a science. . . . Remember that it is your office as lawyers to give authentic form to the highest public morality of which you are capable as citizens, and that this office belongs of right, no less to the bar than to the bench."

"And what a profusion it is! . . . No doubt every calling is great when greatly pursued. But what other gives such scope to realize the spontaneous energy of one's soul? In what other does one plunge so deep in the stream of life—to share its passions, its battles, its despair, its triumphs, both as witness and as actor?"

The influence of the lawyer has not increased in proportion to the power of the people. It was the opinion of DeTocqueville that under that condition a republic could not "subsist."