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*U.S. House of Representatives*

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## SHALL CONSTITUTIONAL GOVERNMENT ENDURE?

By SAMUEL B. PETTENGILL\*

This meeting of the bench and bar of Indiana takes place during the one hundred and fiftieth anniversary year of the framing of the Constitution of the United States. If for no other reason than to record the passage of these eventful years, it seems a proper subject for discussion to ask whether the kind of government under which five generations of Americans have lived and prospered will continue to endure. The passage of time, however, does not alone make the question pertinent. The pressure of current events thrusts it upon our attention as perhaps the paramount problem of our times.

It is peculiarly of interest to lawyers and notably have they responded to it now and in years gone by. For many years the American bar and State and local bar associations have sponsored essays and orations by high school and college boys and girls on the American Constitution. It may have seemed a thankless task at the time, but who can estimate the part played by these young Americans, now grown to manhood, in the stirring defense of the Court and Constitution made these recent months?

The American bar, through its support given to uniform State laws, reciprocal State legislation, and interstate compacts, such as the petroleum compact supported by my good friend, Congressman William P. Cole, has not only partly checked the mad rush to Washington but has clearly pointed a workable alternative to the solution of many problems which transcend State lines without the surrender of local autonomy or the erection of a gigantic bureaucracy to smother the energies of a free people.

Let me spend just a moment with this matter of interstate compacts. In 1934 the Thomas-Disney bill was introduced

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\*Address of Hon. Samuel B. Pettengill, Member of Congress, at the Annual Meeting of the Indiana State Bar Association, July 9, 1937

in Congress and referred to my committee. It would have effected the complete regimentation of the petroleum industry, giving an official in Washington the power, assuming its constitutionality, to fix the daily production of petroleum of every oil well in America. Although the Senate committee acted favorably on the bill our committee did not and, instead, gave our encouragement to the formation of the petroleum interstate compact which is essentially a treaty among the seven or eight states which entered into it. Under that compact, without any federal legislation except the necessary Congressional approval required by the Constitution, the problem of over-production and waste of a great national resource has been very satisfactorily solved. The other day I noticed that the states of Vermont, New Hampshire, Massachusetts and Connecticut have entered into an interstate compact in respect to flood control in the Connecticut River watershed. Other compacts respecting maximum hours and minimum wages are under serious discussion. All of these point the way toward the solution of many problems requiring action by more than one state, without the centralizing of all power in Washington.

These and similar efforts must go on and be doubled and redoubled. The assault upon constitutional government and constitutional morality, though momentarily checked, has done immeasurable damage. It will be renewed by every subversive force that has fattened upon the distress of the depression, as well as forces from beyond the seas.

Lawyers, and the clients of lawyers, are under the necessity of defending constitutional government, States' rights, and free enterprise, their handmaiden, not only by argument and public debate, not only by refusing to vote for any candidate to public office on any ticket who will not pledge himself to their defense, but by the greatly difficult task of making the American system of free government and free enterprise work to the constantly greater happiness of the American masses, without whose support it cannot and will not function at all.

American industry has been built on the competitive struggle

for the consumer's dollar by offering most and best for least. That has brought radios, automobiles and thousands of other items within the reach of the masses.

If our system is to escape state control, whether fascism or communism, this competitive struggle must go on. Business men who engage in monopolistic and price fixing practices are the worst enemies of the system of which they have been the chief beneficiaries.

Lawyers, as the advisers of business management, and as members of boards of directors, and as the preponderant influence in legislative halls, are in a position to urge the constant extension to the masses of the benefits of our science and invention. In the last round up it is sound economics and not legalisms which will save our form of government.

In this defense deeds will count more than words. If the American system comes to mean to the millions the ticker tape of Wall Street and the economic philosophy of Harlan County, Ky., it is on the way out.

Later on I hope to take a moment to prove that the American system does not mean these things. They are but the dirty froth and scum of the current. I mention them now only to prove that the present defenders of the Court and Constitution are not unaware of the passing of the frontier, the coming of the machine age, the presence of slums and depressed areas, even the occurrence of dust storms and floods. We recognize all these things yet hold the greatest hope of their lasting solution lies within the heart of the American Constitution and not in the alien concept of personal government.

We know the growth of science and industry makes the line an ever-changing one between "that degree of liberty without which law is tyranny and that degree of law without which liberty becomes license." Nevertheless, we know equally well that the State is at best a child of necessity and at worst an instrument of tyranny. And those of us who are still faithful to time-tried truth are willing to meet the rehabilitated Hamilton and confront him with Jefferson's flaming and deathless

words, "a wise and frugal government, which shall prevent men from injuring one another, but leave them otherwise free to follow their own pursuits of industry and employment."

When the Constitution was signed September 17, 1787, Governor Morris said:

"The whole human race will be affected by the proceedings of this Convention."

Never was prophecy better justified by time. For down to 1917, when Russia established the "dictatorship of the proletariat" in place of the dictatorship of the Romanoffs, a period of 130 years, there was scarcely a movement on this planet that was not toward democracy and freedom from concentrated authority. Our Constitution became the model of the world. In the States of our Union, in the countries of Latin America, in the Provinces of Canada, in New Zealand, in Australia, in South Africa, in Europe and elsewhere, not less than 400 written constitutions were patterned by freedom-loving men upon the basic concepts of our own Magna Carta: 1. The distribution rather than the concentration of power; and, 2, that the individual, because created by God, and in His image, has dignities and rights as a human soul which are beyond the powers of princes or the might of majorities.

But in 1917 the tide turned. From that time to this hour, except for the short-lived German Republic, there has scarcely been a movement on this planet that has not been away from democracy toward the concentration of power and in favor of the doctrine that the individual has no rights which the State is bound to respect. Nineteen democratic governments have fallen since 1918.

Across the Atlantic the lamp of liberty has gone out in three-fourths of Europe. The swing toward the center daily gathers momentum. New barbarians march on ancient Romes and, in the name of "security," place Caesar's blood-rusted crown upon the fevered heads of those who call themselves the "saviors of the people."

Within a short distance of the place where the prisoner of Chillon once appealed "from tyranny to God," machine guns and concentration camps do the debating when political argu-

ments arise. And while the blood purge of June, 1934, was on, a new messiah shouts, "During these 24 hours I am the supreme court."

Democracy abroad and here is proclaimed a "rotten corpse"; liberalism is spat upon; the authority of religion is spurned; the sanctity of private contract and public treaty is held for naught; the temple of international law, painfully built during five centuries of time, is overthrown, and all those immemorial decencies between man and the state—trial by jury, the independence of the courts, habeas corpus, the civil above the military power, freedom of petition, of election, of speech, of press, of assembly, of worship, of the education of one's children, government by law and not by men, government which derives its "just powers" from the "consent of the governed," the restraint against spoliation and confiscation, the assurance that if a man may sow he may also reap, the driving force (other than the lash of the slave) which makes wealth to accumulate and the arts and sciences to flourish—all these precious things are tossed into the sewer as the synthetic parade follows the modern imperator, who rattles his crimsoned sword and scans dark horizons for more worlds to conquer.

Here in America worshippers of the state (not the States) grow in number. Bearing a banner with that strange device "Special privileges for all," they come to Washington seeking alms. Members of church, labor, business, youth, and women's organizations are sponsoring the surrender of human destiny to politicians idealized as demigods.

Against this background the present conflict over the Supreme Court is but an incident. Gettysburg, Verdun, Saratoga were each the turning point of a great struggle, but they were not the struggle itself.

The world-wide struggle today is constitutional government against majority government; deliberation against mass emotion; the distribution of power against its concentration; State's rights against Federal empire; free enterprise against governmentally owned or regulated monopoly; democracy

against fascism or communism; the human soul against the totalitarian state.

If constitutional government passes out of our own American life, the way of its going will apparently be by one or all of these steps:

1. The surrender by Congress of its legislative powers to executive bureaus, including the "power of the purse."
2. The assumption by the Executive of judicial power.
3. The atrophy of State and local governments and the transfer of their powers to Washington; and
4. The gradual and continuous encroachment by "men with badges" upon rights of the individual heretofore deemed inalienable to any government.

All this will be accompanied by a deterioration in the moral fiber of our people whereby they become the sycophants of favor and the idolators of the clenched fist and the jutting jaw. Thus will our constitutional Republic be changed to a Federal empire, and our indestrubtible Union of sovereign States become a destructible conglomerate of disloyal satrapies quarreling over the division of Federal pap and the shifting of the burden of Federal taxes. Why do I say "destructible"? Because, among other reasons, it is not likely that a central power can long impose its single will over our vast territory and diverse industries, as witness the Hartford convention of 1815, the South Carolina resolution of 1832, the Civil War of 1861, the prohibition era of the 1920's, and the wage and hour differentials of N. R. A. days.

The self-abolition of Congress has been going on for a long time, partly through the stern necessities of the case, as for example, the Interstate Commerce Commission, partly through its being overburdened with problems beyond its time or strength, and partly through the indifference of the public to its constitutional functions.

But it is only in recent years that the Supreme Court has found it necessary to call the attention of the Nation sharply to delegation of legislative power "run riot." I quote from Justice Hughes in the "hot oil" case, the John the Baptist of

N. R. A. decisions (*Panama Refining Co. v. Ryan*, 293 U. S. 388, at p. 421), on January 7, 1935 :

"The Constitution has never been regarded as denying to the Congress necessary resources of flexibility and practicality which will enable it to perform its function in laying down policies and established standards. \* \* \* But \* \* \* the recognition \* \* \* of such provisions \* \* \* cannot be altered to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained \* \* \*."

Granting the possibility although not the assurance of a greater efficiency in the concentration of power, our fathers nevertheless had been taught by sad experience that the danger of the abuse of concentrated power overbalanced its theoretical good. They had heard it said that a benevolent despotism was the most perfect of all governments, but they knew that it was the benevolence and not the despotism that won the applause. When the former vanished the latter found favor only with its favorites.

The feeling of our fathers in this matter was admirably expressed by that great liberal, Justice Brandeis, in one of his powerful opinions when he said that the separation of power in the Constitution was not to promote efficiency, "not to avoid friction," but "by means of the inevitable friction incident to the distribution of governmental power, to save the people from autocracy."

It was the price to be paid for liberty. Our fathers were too wise to believe that they could secure the blessings of liberty for nothing.

It was our fate to wait until the sesquicentennial of the writing of the Constitution before we heard for the first time in America from any responsible source the doctrine of the three-horse team. In all kindness it must be said that no concept more alien to American tradition has even been introduced into the public thought of the Nation. It has been characterized by the Senate Judiciary Committee as "an utterly dangerous abandonment of constitutional principles," a "plan to force judicial interpretation of the Constitution that violates every sacred tradition of American democracy."



This idea of a three-horse team was advanced in an ill-considered moment by a gentleman who has rendered gallant public service on many occasions, for which his countrymen are justly appreciative. Nevertheless, millions of his well-wishers are profoundly concerned at this attempt to substitute majority or personal government for constitutional government. They think this is more power than a good man should want or a bad man should have. Good intentions are to them poor substitutes for sound thinking on constitutional issues.

When the Quebec bridge was under construction it twice collapsed, with great loss of life and property. The good intentions of the engineers were not questioned, but no one doubted that the fall of the bridge was the fault of their judgment.

This thought has never been better expressed than by Thomas Jefferson, when he said:

"It would be a dangerous delusion if our confidence in the men of our choice should silence our fears for the safety of our rights. Confidence is everywhere the parent of despotism. Free government is founded on jealousy, not on confidence. It is jealousy and not confidence which prescribes limited constitutions to bind down those whom we are obliged to trust with power. Our Constitution has accordingly fixed the limits to which (and no further) our confidence will go. In questions of power, then, let no more be heard of confidence in men, but bind them down from mischief by the chains of the Constitution."

That is the deep significance of constitutional government. Under it the people rule and are the source of all power. But they rule, as it were, on second thought, not on the impulse of the moment. The Constitution represents the needs of the decade or the century, not the exigencies of an emergency. It is the deliberate, sober second thought of mankind, designed to check the snap judgments of mass emotion. It is the "stop, look, and listen" signpost erected by the past to prevent disaster to the present and the future.

Constitutional government and the three-horse team cannot coexist on American soil. They are mutually exclusive and antagonistic. Implicit in the idea of the three-horse team is

that the third horse shall be controlled by the other two. Without that implication it would have no worshippers, and with it we would have no Constitution.

“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?”

Such was John Marshall’s unanswerable answer to the doctrine of the three-horse team.

But let us go back to the beginning. Of the 55 men in the Constitutional Convention, nearly half had fought under their then presiding officer as the former Commander-in-Chief of the Armies of the Revolution. Eight had actually signed the Declaration of Independence, in which one of the articles of indictment was their their King had “made judges dependent upon his will alone for their tenure of office and the amount and payment of their salaries.”

Our fathers had had all they wanted of the doctrine of the three-horse team. They determined to unhitch it. They made the Federal judiciary independent of the Executive and the National Legislature. They not only made it independent, but they vested in it the entire judicial power of the new Nation they were creating. No jot or tittle of that judicial power did they vest in any other Federal official whomsoever.

But they went further. Not only did they not make the third horse “dependent on the will” of the other two horses, but gave the third horse the duty and the power to keep the first and second horses within the limitations laid down by the master of all three horses, the people of the United States. They created a Court, in the words of No. 78 of the Federalist papers, “whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.” They knew, as again stated in the Federalist, quoting from Montesquieu, that “there is no liberty if the power of judging be not separated from the legislative and executive powers.”

The Constitution of the United States is the complete negation of the doctrine of the three-horse team. Where either begins the other ends. As Dorothy Thompson pointed out in her testimony before the Senate committee, the Supreme Court is essentially the instrument of the state, the Nation

as a whole, and not of the Government, which is the temporary majority running the machinery of the State. The Supreme Court is not designed as a political arm of the majority, but to see that the will of the majority is exercised by the other branches consistent with the constitutional rights of the minority, the individual and the sovereign States.

These are the doctrines of 150 years ago. Have they lost their significance today? On the contrary they are more important now than ever. With the Government constantly exercising more powers in an increasingly complex economic structure; with those powers lodged in the hand of a hydra-headed and irresponsible bureaucracy; with mass emotion playing an increasing and constantly more direct part in the forming of public opinion through the magic of the radio, the propaganda of the movie tone and the boxcar headline; with legislative bodies turning out an increasing mass of ill-considered laws because they are asked to do what is humanly impossible to do well, the need for absolute independence in our judges is far more acute than it was 150 years ago when, in many cases, except for paying taxes, one might live his whole life without coming in contact with the other branches of the Government and so needing the protection of a free court.

To paraphrase Madame Rolland, "O liberalism, what crimes are committed in thy name!" Nothing is more curious than the effort to portray the attack on the Court as a "liberal" movement and its defenders as "reactionaries." On the contrary it is the attack that is a Tory, a reactionary movement. The distribution of power is not a Tory doctrine. An independent court to prevent the abuse of power is not a Tory doctrine. On the contrary they are articles from the very creed of liberalism. They were written by the liberals of 1776 and 1787. They are liberal doctrines today. If they are saved, they will be saved by the same kind of men who created them.

The true liberals today, whether Republicans or Democrats, are those who are fighting to preserve the mechanism of government by which alone liberty can be defended. There is no instance in the world's history where the concentration

of power, financial or political, in the hands of one man, or of a few men, has long contributed to the happiness of mankind. There are many wolves going around today in the fleeces of sheep.

To announce that those who are fighting to preserve the independence of the courts from political control are reactionaries, is to proclaim that King George the Third was a liberal and the Revolutionary War was fought and won by Tories.

Make no mistake. The dominance of courts by the political arm of government is a backward step. It takes mankind farther back than those conditions which caused the Pilgrim and the Cavalier to seek asylum from oppression three centuries ago. In most of Europe today there is more of cruelty, sadism, savagery, oppression, race, class and religious hatred, terror, torture, and tyranny, a shorter frontier of freedom and a greater expanse of autocracy than before the French Revolution. Indeed, General Smuts, of South Africa, has stated that there is less of personal liberty in the world today than there was 2,000 years ago.

Consider Germany. That is a one-man government in a great nation today after its people surrendered their bill of rights of the Weimar Constitution under the plea of national crisis and emergency. Children taken from their fathers and mothers; labor forbidden to strike; the control of morals taken over from the churches by the state; only one political party tolerated; the independence of the courts destroyed, no German judge daring to dispense justice against the will of the boss, the radio seized by the state; and the newspapers told every morning by the Minister of Enlightenment and Propaganda what they shall print and what they shall not print. In four years they have gone this far.

Do we want to go down this road here in America? Do we want to even turn down this road?

That is Germany today. Is her long struggle for freedom lost forever, or will there be new revolutions like those of 1848, which gave us Carl Schurz and Pulitzer and many

another, who came to America to escape in their lifetime what is the fate of their descendants of today?

The last Hohenzollern said "Me *and* God", the first Hitler says "Me *or* God."

That is Germany without a constitution or independent courts. How much better off is it now than the Germany under the Hohenzollerns?

It is worse off. One hundred and fifty years ago in a suburb of Berlin a miller ran his mill. He was no doubt a poor and humble man. One day Frederick the Great told him he would have to move his mill. The miller replied, "Sire, there are judges in Berlin." That is one of the great stories of Germany. It could not be told today. Today the miller, the butcher, the baker, and the candlestick maker have no rights which the state is bound to respect.

This is not progress. This is not liberalism. It is reaction.

When an American citizen goes into an American courtroom and files his bill of complaint against his own government, city, county, State, or Nation, and asserts to the judge upon the bench that either the legislature or the executive are attempting to deprive him of rights guaranteed to him by a Constitution written by his forebears—when he stands there and makes such a claim, you are witnessing a miracle of government. Centuries of struggle, mountains of treasure, and oceans of blood alone made it possible.

Strange it is that the citizen dares to make such a claim; strange that lawyers dare to represent him; strange that he can use the State to summon his own witnesses; but the miracle of it all is that as he stands there he has not the slightest doubt that he is going to receive a fair trial before an honest judge whose salary is paid by the other party to the suit. That is one of the greatest dramas in all history.

"All we know of freedom, all we use or know  
 This our fathers bought for us long and long ago;  
 Ancient right, unnoticed as the breath we draw  
 Leave to live by no man's leave, underneath the law;  
 Lance, and torch, and tumult, steel and gray, goose wing  
 Wrenched them inch, and ell, and all, slowly from the King."

"Ancient rights unnoticed as the breath we draw." That is the trouble today. We have enjoyed these rights so long, our free courts have protected these rights so well, that we take them for granted. "What we obtain too cheap, we esteem too lightly." Such were the words of old Tom Paine which Washington ordered read to the soldiers of the Revolution. We have expected our courts to save us, now we must save the courts.

I am not a blind worshiper of the courts. I often followed Brandeis and Holmes in their famous dissents. And my heart sank when I sat in the Supreme Court chamber a year ago and heard the judgment in the New York minimum-wage case. But it is not necessary to prove that the Supreme Court has done a perfect job. All that is necessary is to ask, Who could do a better job?

For myself, I will continue to take my chance as a lawyer and a citizen with an honest judge, who makes his own mistakes, in preference to a dishonest judge who permits a politician to dictate his decisions. I would prefer an occasional mistake to a perpetual distrust.

As the Senate committee has so nobly said, "The independent expression of honest difference of opinion \* \* \* is immeasurably more important, immeasurably more sacred to the people of America, indeed, to the people of all the world, than the immediate adoption of any legislation, however beneficial."

But it is not alone through the Supreme Court that the attack on constitutional government is being waged. It is a far-flung battle line, and if we err let us err through an excess of vigilance. If the fortress of freedom is lost, it may be due not so much to the strength of the attack but to the fact that the watchers upon the rampart slept upon their post.

In his Farewell Address, Washington said, "The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism."

Against this admonition let us consider the proposed bill

to reorganize the administrative bureaus of the Federal Government. In this matter the Congress was not honored with a complete draft of the bill to be passed. As a result accurate criticism is impossible. But in broad outline the proposal called for the liquidation of the Comptroller General, the creation of two additional Cabinet departments, and the transfer and subordination of existing independent administrative commissions to the executive department under a Cabinet member with the usual power to hire and fire.

Among them are such important agencies as the Interstate Commerce Commission, the Federal Trade Commission, the United States Tariff Commission, the Federal Power Commission, the Federal Communications Commission, Securities and Exchange Commission, etc.

The fact that these agencies are now independent of Cabinet control is because the acts of Congress which created them made them so. Their independence is now to be destroyed.

No one can understand the purport of the reorganization bill unless he has read the case of Federal Trade Commissioner Humphrey, decided by an unanimous Court on the same day that *N. R. A.* was handed down. One went out, thanks to an independent Court, as an effort to delegate power; the other went out as an effort to usurp power. In the Humphrey case the effect was to destroy the independence of a commission established by Congress as its quasi-legislative arm, in the same way that the Supreme Court bill is designed to destroy the independence of the Court which refused to permit the destruction of the independence of the Commission.

There are many thoughtful observers of the present scene who regard the administrative reorganization bill as fully important as the judicial reorganization bill.

Take the Federal Communications Commission, now in charge of radio, telegraph, and telephone. This presumably is to be placed under the Postmaster General. That Commission in a thoughtless moment made one terrible blunder when it turned over thousands of telegrams to the Black

committee. That blunder is not likely to be repeated. But I leave to your imagination the enormous pressure to abuse and the hidden blackjack if the control of the radio, especially during political campaigns, is ever put in the hands of any Postmaster General—Republican or Democrat—who is, by the code of politics, the present or past head of the political machine of the party in power which wants to stay in power.

It is claimed by some that there is a "mandate from the people" to accomplish these great ends!

The reorganization bill, in short, is to cause railroads, trucks, busses, shipping, hydroelectric power, telephone, telegraph, radio, trade practices, competition, the issuance of securities and therefore credit control, and dozens of other important functions of thousands of industries "to be sickled o'er with the pale hue" of politics. All this to be contemporaneous with the civil service being at the lowest estate in a generation.

Starry-eyed worshippers of the State may believe this will wash the sins and stains of private enterprise "whiter than the snow." Realists, however, know that "where the meat hangs, there the wolves gather" and ask how long the Federal Government can hope to escape the characteristics of the big-city machines so notorious with corruption, nepotism, and profligate waste as they deal with the lesser affairs of saloon licenses, dance halls, slot machines, gambling, public works, purchase of municipal supplies, issuance of pardons and paroles, etc. Realists have heard of political lifeguards at bathing beaches who couldn't swim. And they know how Washington, D. C., the home of 117,000 Federal bureaucrats, under the complete control of the Federal Government, in murders, burglaries, automobile thefts, gambling rackets, and traffic accidents ranks with other American cities, at, or close to the top in all these categories.

Justice Brandeis once said: "Our Government does not yet grapple successfully with the duties it has assumed and should not extend its operations at least until it does." Far more important than this constant and feverish extension of



Federal control over every Tom, Dick, and Harry is to improve the administration already assumed—particularly the development of the tradition of public service. Otherwise we build bricks without straw and invite the fate that befell Rome. I turn to a historian of the Roman Empire who said:

“The system of bureaucratic despotism, elaborated finally under Diocletian and Constantine, produced a tragedy in the truest sense, such as history has seldom exhibited, in which, by an inexorable fate, the claims of fanciful omnipotence ended in a humiliating paralysis of administration, in which determined effort to remedy social evils only aggravated them until they became unbearable; in which the best intentions of the central power were, generation after generation, mocked and defeated by irresistible laws of human nature and by hopeless perfidy and corruption in the servants of the Government.”

If and when the next crash comes, it will be Washington, D. C., and not Wall Street, that will get the blame. The economic royalists will be glad that the blame has been shifted from them, but it will be a sad day for democracy!

If I were the head of a great casualty company and an enormous risk were offered me, I would not accept it unless I could reinsure it. In the same way I suggest that the hazards of the survival of democracy be redistributed back to the State, counties, and local governments. I would not permit the pressures on free government to concentrate at a single point. I would not put all my eggs or all my liberties in one basket. I would assume only the irreducible minimum of power at Washington and devote time and attention to revitalize democracy at the rim. The transfer of power to the center, the destruction of local autonomy and self-reliance, should be a matter of inescapable necessity and not of supposed convenience. It is at the twigs and the leaves that the tree grows, and it is in the distribution and not concentration of power that democracy finds its only refuge. It is a travesty on government to require the O. K. of Washington to shingle a schoolhouse.

But we have defended constitutional government long enough. It is time for a counter attack. It is time to meet

those persons and groups who would tear down the only country in the world where they and their people have been free from oppression.

What has constitutional government meant to them and to us? It has meant safety, stability, and confidence in place of uncertainty, turbulence, and turmoil. It has placed the great rights of Americans beyond the ordinary hazards of changing popular majorities. Under our Constitution, property has been free from the risk of legislative confiscation, whether the cabin in the wilderness or the corner grocery. One hundred and fifty years ago capital from abroad began to pour across the Atlantic and is still coming by the hundreds of millions to employ our men and build our canals, our railroads, our factories. As we became wealthy we invested with confidence in our own long-term bonds in preference to those of any other nation on the globe. For five generations no one has seriously thought of "selling America short."

In our elections, whichever party won, the defeated party has always gracefully accepted the result—far different than in the countries of South America and Europe. Why? Because the great rights of Americans, both human rights and property rights, have been sure, whichever party won. Freedom of worship, of speech, of the press, of family rights, of property against the legislative confiscation of political majorities, have never been at stake in our election campaigns. Consequently, we have had conditions under which wealth could accumulate.

If the present administration is entitled to a sympathetic court, is not the next administration, whatever it may be, and all administrations thereafter, equally entitled to a sympathetic court? If not, why not? The precedent once established will be a powerful instrument in the hands of all administrations yet to come. Every administration has a "mandate" from the people. And if the proponents of this bill are not to deny to all future administrations what they claim for the present administration, then the personnel of the Supreme Court, its number, its age, its decisions and the meaning of the Constitution of the United States will be at

issue in every political campaign hereafter. Nothing will be settled. Everything will depend upon the count at the ballot box.

Consider the effect of all this on the future growth and prosperity of the country. Consider the questions that will then be presented to the managers of our business and to investors. How can they then plan with confidence on the long range development of our industry and build up enterprises which may not amortize their original investment and come into a profitable period for years to come? When you substitute majority government or one-man government for constitutional government you are subjecting the future growth of this country to all these legal and legislative hazards in addition to the ordinary hazards to business itself.

Can we expect the same constantly rising standard of living in the future that we have had in the past if we destroy the CONDITIONS under which this has become the richest as well as the greatest nation in the world? This is one of the meanings of constitutional government that is so often overlooked.

As Sir Henry Maine said: "All this beneficent prosperity reposes on the sacredness of contract and the stability of private property, the first the implement and the last the reward for success in the universal competition." That wealth has not always been equitably distributed. It is not so now. Nevertheless, in no other country, now or in the past, has the common man been served one-half so well.

Let us discuss that point in the light of the record. Compare America not with a blueprint Utopia, but with the harsh realities of the world as it is. Throughout all the ages dreamers and statesmen have striven in other lands to "remake the world." But they have never yet found an age or land devoid of greed for wealth and lust for power.

It is easy to make a diagram on a clean slate, but the world is not a clean slate. In every age and land there are the inevitable clashes of interest—capital and labor, landlord and tenant, borrower and lender, debtor and creditor, importer and exporter, buyer and seller, the producer who

wants to sell dear and the consumer who wants to buy cheap. Superimposed upon these conflicts of interest you have all the other emotions and conditions which prevent men from cooperating in working out any program, however ideal; you have ignorance, public apathy, envy, shiftlessness, crime, and religious, racial and party differences. And over and above all these you have clashing ambitions and the lust for *power* which has disrupted more programs and done far more harm than the lust for *gold*. The Napoleons and Caesars have sent far more men to their doom than the captains of industry. It is one thing to make a program. It is one thing to call signals. It is an entirely different thing to get this tough old world to carry the ball.

What is this legacy of constitutional government and free enterprise which we received from our fathers? Even with its failures and shortcomings, it is the best in the world. We have 6 percent of the world's land area and 7 percent of its people. But that 7 percent has 32 percent of the world's railway mileage, 58 percent of its telephones, 36 percent of its developed water power, 76 percent of the world's automobiles—enough so that every man, woman, and child under the flag, 130,000,000 Americans, could climb into these cars and all ride on rubber at the same instant of time, a nation on wheels, a miracle of achievement in which bureaucrats played no part. The rubber that goes into the annual production of tires would make a tire that would go around the world and 6,000 miles to spare—a rubber-tired planet, if you please! When Stalin or Hitler or Mussolini do half so much, it will be twice as much as they have done!

This little 7 percent of the world's population has 44 percent of its radios, produces 60 percent of the world's petroleum, 48 percent of its copper, 43 percent of its pig iron, 47 percent of its steel, 58 percent of its corn, 56 percent of its cotton, 25 percent of its sugar, 33 percent of its coal. Of the commodities it does not produce this little 7 percent of the world's population goes out in the world's markets and buys 50 percent of its rubber, 50 percent of its coffee, 75 percent of its silk. This 7 percent of the world's population

has 45 percent of the world's total wealth; and far more than half of all the wheels that turn on this planet, from locomotive drivers to the wheels in milady's wrist watch, turn on American soil. In the worst year of the worst depression of our history 30,000,000 out of 32,000,000 American boys and girls of school age stayed in public schools. And on the point of security for old age this little 7 percent has \$108,000,000,000 of protection on the lives of 64,000,000 Americans, more security than all the rest of the world put together.

Gentlemen, I am a friend of the system which has done these things. With all its faults, follies, and crimes, it has produced and has distributed more of the goods and comforts of living to more people over a greater territory and for a longer period of time than any other system in any other country since Adam walked out of the Garden of Eden. Neither the princes of Babylon, the pharaohs of Egypt, the emperors of Rome, the lords of feudalism, or the dictators of today ever served the common man one-half so well.

It is worth saving, ladies and gentlemen, and I summon you to its defense. As citizens I ask you to not let go unchallenged the sneers of those who would reestablish in this dear land the same old tyrannies which their fathers once crossed stormy seas to escape.

Let us not join these reactionaries of 1937. Let us pledge allegiance once more to Washington, Franklin, Madison, Jenifer, McHenry, and Carroll, and those other great liberals of 1787. Let us again set sail by the lights of the stars our fathers trusted on the greatest voyage the human spirit has ever known.

And as lawyers let us carry on our lips every hour which God spares us the words of Benjamin Hill, of Georgia: "The written Constitution is my client, and its preservation the only fee I ask."

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