ADAMS BROOKS

THE THEORY OF SOCIAL REVOLUTIONS

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Содержание

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PREFATORY NOTE

The first chapter of the following book was published, in substantially its present form, in the *Atlantic Monthly* for April, 1913. I have to thank the editor for his courtesy in assenting to my wish to reprint. The other chapters have not appeared before. I desire also to express my obligations to my learned friend, Dr. M.M. Bigelow, who, most kindly, at my request, read chapters two and three, which deal with the constitutional law, and gave me the benefit of his most valuable criticism.

Further than this I have but one word to add. I have written in support of no political movement, nor for any ephemeral purpose. I have written only to express a deep conviction which is the result of more than twenty years of study, and reflection upon this subject.

BROOKS ADAMS.

QUINCY, MASSACHUSETTS, May 17, 1913.

CHAPTER I
THE COLLAPSE OF CAPITALISTIC GOVERNMENT

Civilization, I apprehend, is nearly synonymous with order. However much we may differ touching such matters as the distribution of property, the domestic relations, the law of inheritance and the like, most of us, I should suppose, would agree that without order civilization, as we understand it, cannot exist. Now, although the optimist contends that, since man cannot foresee the future, worry about the future is futile, and that everything, in the best possible of worlds, is inevitably for the best, I think it clear that within recent years an uneasy suspicion has come into being that the principle of authority has been dangerously impaired, and that the social system, if it is to cohere, must be reorganized. So far as my observation has extended, such intuitions are usually not without an adequate cause, and if there be reason for anxiety anywhere, it surely should be in the United States, with its unwieldy bulk, its heterogeneous population, and its complex government. Therefore, I submit, that an hour may not be quite wasted which is passed in considering some of the recent phenomena which have appeared about us, in order to ascertain if they can be grouped together in any comprehensible relation.

About a century ago, after, the American and French Revolutions and the Napoleonic wars, the present industrial era opened, and brought with it a new governing class, as every considerable change in human environment must bring with it a governing class to give it expression. Perhaps, for lack of a recognized name, I may describe this class as the industrial capitalistic class, composed in the main of administrators and bankers. As nothing in the universe is stationary, ruling classes have their rise, culmination, and decline, and I conjecture that this class attained to its acme of popularity and power, at least in America, toward the close of the third quarter of the nineteenth century. I draw this inference from the fact that in the next quarter resistance to capitalistic methods began to take shape in such legislation as the Interstate Commerce Law and the Sherman Act, and almost at the opening of the present century a progressively rigorous opposition found for its mouthpiece the President of the Union himself. History may not be a very practical study, but it teaches some useful lessons, one of which is that nothing is accidental, and that if men move in a given direction, they do so in obedience to an impulsion as automatic as is the impulsion of gravitation. Therefore, if Mr. Roosevelt became, what his adversaries are pleased to call, an agitator, his agitation had a cause which is as deserving of study as is the path of a cyclone. This problem has long interested me, and I harbor no doubt not only that the equilibrium of society is very rapidly shifting, but that Mr. Roosevelt has, half-automatically, been stimulated by the instability about him to seek for a new centre of social gravity. In plain English, I infer that he has concluded that industrialism has induced conditions which can no longer be controlled by the old capitalistic methods, and that the country must be brought to a level of administrative efficiency competent to deal with the strains and stresses of the twentieth century, just as, a hundred and twenty-five years ago, the country was brought to an administrative level competent for that age, by the adoption of the Constitution. Acting on these premises, as I conjecture, whether consciously worked out or not, Mr. Roosevelt's next step was to begin the readjustment; but, I infer, that on attempting any correlated measures of reform, Mr. Roosevelt found progress impossible, because of the obstruction of the courts. Hence his instinct led him to try to overleap that obstruction, and he suggested, without, I suspect, examining the problem very deeply, that the people should assume the right of "recalling" judicial decisions made in causes which involved the nullifying of legislation. What would have happened had Mr. Roosevelt been given the opportunity to thoroughly formulate his ideas, even in the midst of an election, can never be known, for it chanced that he was forced to deal with subjects as vast and complex as ever vexed a statesman or a jurist, under difficulties at least equal to the difficulties of the task itself. If the modern mind has developed

one characteristic more markedly than another, it is an impatience with prolonged demands on its attention, especially if the subject be tedious. No one could imagine that the New York press of to-day would print the disquisitions which Hamilton wrote in 1788 in support of the Constitution, or that, if it did, any one would read them, least of all the lawyers; and yet Mr. Roosevelt's audience was emotional and discursive even for a modern American audience. Hence, if he attempted to lead at all, he had little choice but to adopt, or at least discuss, every nostrum for reaching an immediate millennium which happened to be uppermost; although, at the same time, he had to defend himself against an attack compared with which any criticism to which Hamilton may have been subjected resembled a caress. The result has been that the Progressive movement, bearing Mr. Roosevelt with it, has degenerated into a disintegrating rather than a constructive energy, which is, I suspect, likely to become a danger to every one interested in the maintenance of order, not to say in the stability of property. Mr. Roosevelt is admittedly a strong and determined man whose instinct is arbitrary, and yet, if my analysis be sound, we see him, at the supreme moment of his life, diverted from his chosen path toward centralization of power, and projected into an environment of, apparently, for the most part, philanthropists and women, who could hardly conceivably form a party fit to aid him in establishing a vigorous, consolidated, administrative system. He must have found the pressure toward disintegration resistless, and if we consider this most significant phenomenon, in connection with an abundance of similar phenomena, in other countries, which indicate social incoherence, we can hardly resist a growing apprehension touching the future. Nor is that apprehension allayed if, to reassure ourselves, we turn to history, for there we find on every side long series of precedents more ominous still.

Were all other evidence lacking, the inference that radical changes are at hand might be deduced from the past. In the experience of the English-speaking race, about once in every three generations a social convulsion has occurred; and probably such catastrophes must continue to occur in order that laws and institutions may be adapted to physical growth. Human society is a living organism, working mechanically, like any other organism. It has members, a circulation, a nervous system, and a sort of skin or envelope, consisting of its laws and institutions. This skin, or envelope, however, does not expand automatically, as it would had Providence intended humanity to be peaceful, but is only fitted to new conditions by those painful and conscious efforts which we call revolutions. Usually these revolutions are warlike, but sometimes they are benign, as was the revolution over which General Washington, our first great "Progressive," presided, when the rotting Confederation, under his guidance, was converted into a relatively excellent administrative system by the adoption of the Constitution.

Taken for all in all, I conceive General Washington to have been the greatest man of the eighteenth century, but to me his greatness chiefly consists in that balance of mind which enabled him to recognize when an old order had passed away, and to perceive how a new order could be best introduced. Joseph Story was ten years old in 1789 when the Constitution was adopted; his earliest impressions, therefore, were of the Confederation, and I know no better description of the interval just subsequent to the peace of 1783, than is contained in a few lines in his dissenting opinion in the Charles River Bridge Case–

"In order to entertain a just view of this subject, we must go back to that period of general bankruptcy, and distress and difficulty (1785).... The union of the States was crumbling into ruins, under the old Confederation. Agriculture, manufactures, and commerce were at their lowest ebb. There was infinite danger to all the States from local interests and jealousies, and from the apparent impossibility of a much longer adherence to that shadow of a government, the Continental Congress. And even four years afterwards, when every evil had been greatly aggravated, and civil war was added

to other calamities, the Constitution of the United States was all but shipwrecked in passing through the state conventions."[1]

This crisis, according to my computation, was the normal one of the third generation. Between 1688 and 1765 the British Empire had physically outgrown its legal envelope, and the consequence was a revolution. The thirteen American colonies, which formed the western section of the imperial mass, split from the core and drifted into chaos, beyond the constraint of existing law. Washington was, in his way, a large capitalist, but he was much more. He was not only a wealthy planter, but he was an engineer, a traveller, to an extent a manufacturer, a politician, and a soldier, and he saw that, as a conservative, he must be "Progressive" and raise the law to a power high enough to constrain all these thirteen refractory units. For Washington understood that peace does not consist in talking platitudes at conferences, but in organizing a sovereignty strong enough to coerce its subjects.

The problem of constructing such a sovereignty was the problem which Washington solved, temporarily at least, without violence. He prevailed not only because of an intelligence and elevation of character which enabled him to comprehend, and to persuade others, that, to attain a common end, all must make sacrifices, but also because he was supported by a body of the most remarkable men whom America has ever produced. Men who, though doubtless in a numerical minority, taking the country as a whole, by sheer weight of ability and energy, achieved their purpose.

Yet even Washington and his adherents could not alter the limitations of the human mind. He could postpone, but he could not avert, the impact of conflicting social forces. In 1789 he compromised, but he did not determine the question of sovereignty. He eluded an impending conflict by introducing courts as political arbitrators, and the expedient worked more or less well until the tension reached a certain point. Then it broke down, and the question of sovereignty had to be settled in America, as elsewhere, on the field of battle. It was not decided until Appomattox. But the function of the courts in American life is a subject which I shall consider hereafter.

If the invention of gunpowder and printing in the fourteenth and fifteenth centuries presaged the Reformation of the sixteenth, and if the Industrial Revolution of the eighteenth was the forerunner of political revolutions throughout the Western World, we may well, after the mechanical and economic cataclysm of the nineteenth, cease wondering that twentieth-century society should be radical.

Never since man first walked erect have his relations toward nature been so changed, within the same space of time, as they have been since Washington was elected President and the Parisian mob stormed the Bastille. Washington found the task of a readjustment heavy enough, but the civilization he knew was simple. When Washington lived, the fund of energy at man's disposal had not very sensibly augmented since the fall of Rome. In the eighteenth, as in the fourth century, engineers had at command only animal power, and a little wind and water power, to which had been added, at the end of the Middle Ages, a low explosive. There was nothing in the daily life of his age which made the legal and administrative principles which had sufficed for Justinian insufficient for him. Twentieth-century society rests on a basis not different so much in degree, as in kind, from all that has gone before. Through applied science infinite forces have been domesticated, and the action of these infinite forces upon finite minds has been to create a tension, together with a social acceleration and concentration, not only unparalleled, but, apparently, without limit. Meanwhile our laws and institutions have remained, in substance, constant. I doubt if we have developed a single important administrative principle which would be novel to Napoleon, were he to live again, and I am quite sure that we have no legal principle younger than Justinian.

As a result, society has been squeezed, as it were, from its rigid eighteenth-century legal shell, and has passed into a fourth dimension of space, where it performs its most important functions beyond the cognizance of the law, which remains in a space of but three dimensions. Washington encountered a somewhat analogous problem when dealing with the thirteen petty independent states,

[1] Charles River Bridge *v.* Warren Bridge, II Peters, 608, 609.

which had escaped from England; but his problem was relatively rudimentary. Taking the theory of sovereignty as it stood, he had only to apply it to communities. It was mainly a question of concentrating a sufficient amount of energy to enforce order in sovereign social units. The whole social detail remained unchanged. Our conditions would seem to imply a very considerable extension and specialization of the principle of sovereignty, together with a commensurate increment of energy, but unfortunately the twentieth-century American problem is still further complicated by the character of the envelope in which this highly volatilized society is theoretically contained. To attain his object, Washington introduced a written organic law, which of all things is the most inflexible. No other modern nation has to consider such an impediment.

Moneyed capital I take to be stored human energy, as a coal measure is stored solar energy; and moneyed capital, under the stress of modern life, has developed at once extreme fluidity, and an equivalent compressibility. Thus a small number of men can control it in enormous masses, and so it comes to pass that, in a community like the United States, a few men, or even, in certain emergencies, a single man, may become clothed with various of the attributes of sovereignty. Sovereign powers are powers so important that the community, in its corporate capacity, has, as society has centralized, usually found it necessary to monopolize them more or less absolutely, since their possession by private persons causes revolt. These powers, when vested in some official, as, for example, a king or emperor, have been held by him, in all Western countries at least, as a trust to be used for the common welfare. A breach of that trust has commonly been punished by deposition or death. It was upon a charge of breach of trust that Charles I, among other sovereigns, was tried and executed. In short, the relation of sovereign and subject has been based either upon consent and mutual obligation, or upon submission to a divine command; but, in either case, upon recognition of responsibility. Only the relation of master and slave implies the status of sovereign power vested in an unaccountable superior. Nevertheless, it is in a relation somewhat analogous to the latter, that the modern capitalist has been placed toward his fellow citizens, by the advances in applied science. An example or two will explain my meaning.

High among sovereign powers has always ranked the ownership and administration of highways. And it is evident why this should have been so. Movement is life, and the stoppage of movement is death, and the movement of every people flows along its highways. An invader has only to cut the communications of the invaded to paralyze him, as he would paralyze an animal by cutting his arteries or tendons. Accordingly, in all ages and in all lands, down to the nineteenth century, nations even partially centralized have, in their corporate capacity, owned and cared for their highways, either directly or through accountable agents. And they have paid for them by direct taxes, like the Romans, or by tolls levied upon traffic, as many mediaeval governments preferred to do. Either method answers its purpose, provided the government recognizes its responsibility; and no government ever recognized this responsibility more fully than did the autocratic government of ancient Rome. So the absolute régime of eighteenth-century France recognized this responsibility when Louis XVI undertook to remedy the abuse of unequal taxation, for the maintenance of the highways, by abolishing the corvée.

Toward the middle of the nineteenth century, the application, by science, of steam to locomotion, made railways a favorite speculation. Forthwith, private capital acquired these highways, and because of the inelasticity of the old law, treated them as ordinary chattels, to be administered for the profit of the owner exclusively. It is true that railway companies posed as public agents when demanding the power to take private property; but when it came to charging for use of their ways, they claimed to be only private carriers, authorized to bargain as they pleased. Indeed, it grew to be considered a mark of efficient railroad management to extract the largest revenue possible from the people, along the lines of least resistance; that is, by taxing most heavily those individuals and localities which could least resist. And the claim by the railroads that they might do this as a matter

of right was long upheld by the courts,[2] nor have the judges even yet, after a generation of revolt and of legislation, altogether abandoned this doctrine.

The courts–reluctantly, it is true, and principally at the instigation of the railways themselves, who found the practice unprofitable-have latterly discountenanced discrimination as to persons, but they still uphold discrimination as to localities.[3] Now, among abuses of sovereign power, this is one of the most galling, for of all taxes the transportation tax is perhaps that which is most searching, most insidious, and, when misused, most destructive. The price paid for transportation is not so essential to the public welfare as its equality; for neither persons nor localities can prosper when the necessaries of life cost them more than they cost their competitors. In towns, no cup of water can be drunk, no crust of bread eaten, no garment worn, which has not paid the transportation tax, and the farmer's crops must rot upon his land, if other farmers pay enough less than he to exclude him from markets toward which they all stand in a position otherwise equal. Yet this formidable power has been usurped by private persons who have used it purely selfishly, as no legitimate sovereign could have used it, and by persons who have indignantly denounced all attempts to hold them accountable, as an infringement of their constitutional rights. Obviously, capital cannot assume the position of an irresponsible sovereign, living in a sphere beyond the domain of law, without inviting the fate which has awaited all sovereigns who have denied or abused their trust.

The operation of the New York Clearing-House is another example of the acquisition of sovereign power by irresponsible private persons. Primarily, of course, a clearing-house is an innocent institution occupied with adjusting balances between banks, and has no relation to the volume of the currency. Furthermore, among all highly centralized nations, the regulation of the currency is one of the most jealously guarded of the prerogatives of sovereignty, because all values hinge upon the relation which the volume of the currency bears to the volume of trade. Yet, as everybody knows, in moments of financial panic, the handful of financiers who, directly or indirectly, govern the Clearing-House, have it in their power either to expand or to contract the currency, by issuing or by withdrawing Clearing-House certificates, more effectually perhaps than if they controlled the Treasury of the United States. Nor does this power, vast as it is, at all represent the supremacy which a few bankers enjoy over values, because of their facilities for manipulating the currency and, with the currency, credit; facilities, which are used or abused entirely beyond the reach of the law.

Bankers, at their conventions and through the press, are wont to denounce the American monetary system, and without doubt all that they say, and much more that they do not say, is true; and yet I should suppose that there could be little doubt that American financiers might, after the panic of 1893, and before the administration of Mr. Taft, have obtained from Congress, at most sessions, very reasonable legislation, had they first agreed upon the reforms they demanded, and, secondly, manifested their readiness, as a condition precedent to such reforms, to submit to effective government supervision in those departments of their business which relate to the inflation or depression of values. They have shown little inclination to submit to restraint in these particulars, nor, perhaps, is their reluctance surprising, for the possession by a very small favored class of the unquestioned privilege, whether actually used or not, at recurring intervals, of subjecting the debtor class to such pressure as the creditor may think necessary, in order to force the debtor to surrender his property to the creditor at the creditor's price, is a wonder beside which Aladdin's lamp burns dim.

As I have already remarked, I apprehend that sovereignty is a variable quantity of administrative energy, which, in civilizations which we call advancing, tends to accumulate with a rapidity proportionate to the acceleration of movement. That is to say, the community, as it consolidates, finds it essential to its safety to withdraw, more or less completely, from individuals, and to monopolize,

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[2] Fitchburg R.R. *v*. Gage, 12 Gray 393, and innumerable cases following it.

[3] See the decisions of the Commerce Court on the Long and Short-Haul Clause. Atchison, T.&S.F. By. *v*. United States, 191 Federal Rep. 856.

more or less strictly, itself, a great variety of functions. At one stage of civilization the head of the family administers justice, maintains an armed force for war or police, wages war, makes treaties of peace, coins money, and, not infrequently, wears a crown, usually of a form to indicate his importance in a hierarchy. At a later stage of civilization, companies of traders play a great part. Such aggregations of private and irresponsible adventurers have invaded and conquered empires, founded colonies, and administered justice to millions of human beings. In our own time, we have seen the assumption of many of the functions of these and similar private companies by the sovereign. We have seen the East India Company absorbed by the British Parliament; we have seen the railways, and the telephone and the telegraph companies, taken into possession, very generally, by the most progressive governments of the world; and now we have come to the necessity of dealing with the domestic-trade monopoly, because trade has fallen into monopoly through the centralization of capital in a constantly contracting circle of ownership.

Among innumerable kinds of monopolies none have been more troublesome than trade monopolies, especially those which control the price of the necessaries of life; for, so far as I know, no people, approximately free, have long endured such monopolies patiently. Nor could they well have done so without constraint by overpowering physical force, for the possession of a monopoly of a necessary of life by an individual, or by a small privileged class, is tantamount to investing a minority, contemptible alike in numbers and in physical force, with an arbitrary and unlimited power to tax the majority, not for public, but for private purposes. Therefore it has not infrequently happened that persistence in adhering to and in enforcing such monopolies has led, first, to attempts at regulation, and, these failing, to confiscation, and sometimes to the proscription of the owners. An example of such a phenomenon occurs to me which, just now, seems apposite.

In the earlier Middle Ages, before gunpowder made fortified houses untenable when attacked by the sovereign, the highways were so dangerous that trade and manufactures could only survive in walled towns. An unarmed urban population had to buy its privileges, and to pay for these a syndicate grew up in each town, which became responsible for the town ferm, or tax, and, in return, collected what part of the municipal expenses it could from the poorer inhabitants. These syndicates, called guilds, as a means of raising money, regulated trade and fixed prices, and they succeeded in fixing prices because they could prevent competition within the walls. Presently complaints became rife of guild oppression, and the courts had to entertain these complaints from the outset, to keep some semblance of order; but at length the turmoil passed beyond the reach of the courts, and Parliament intervened. Parliament not only enacted a series of statutes regulating prices in towns, but supervised guild membership, requiring trading companies to receive new members upon what Parliament considered to be reasonable terms. Nevertheless, friction continued.

With advances in science, artillery improved, and, as artillery improved, the police strengthened until the king could arrest whom he pleased. Then the country grew safe and manufactures migrated from the walled and heavily taxed towns to the cheap, open villages, and from thence undersold the guilds. As the area of competition broadened, so the guilds weakened, until, under Edward VI, being no longer able to defend themselves, they were ruthlessly and savagely plundered; and fifty years later the Court of King's Bench gravely held that a royal grant of a monopoly had always been bad at common law.[4]

Though the Court's law proved to be good, since it has stood, its history was fantastic; for the trade-guild was the offspring of trade monopoly, and a trade monopoly had for centuries been granted habitually by the feudal landlord to his tenants, and indeed was the only means by which an urban population could finance its military expenditure. Then, in due course, the Crown tried to establish its exclusive right to grant monopolies, and finally Parliament–or King, Lords, and Commons combined,

[4] Darcy *v.* Allein, 11 Rep. 84.

being the whole nation in its corporate capacity,–appropriated this monopoly of monopolies as its supreme prerogative. And with Parliament this monopoly has ever since remained.

In fine, monopolies, or competition in trade, appear to be recurrent social phases which depend upon the ratio which the mass and the fluidity of capital, or, in other words, its energy, bears to the area within which competition is possible. In the Middle Ages, when the town walls bounded that area, or when, at most, it was restricted to a few lines of communication between defensible points garrisoned by the monopolists,–as were the Staple towns of England which carried on the wool trade with the British fortified counting-houses in Flanders,–a small quantity of sluggish capital sufficed. But as police improved, and the area of competition broadened faster than capital accumulated and quickened, the competitive phase dawned, whose advent is marked by Darcy *v*. Allein, decided in the year 1600. Finally, the issue between monopoly and free trade was fought out in the American Revolution, for the measure which precipitated hostilities was the effort of England to impose her monopoly of the Eastern trade upon America. The Boston Tea Party occurred on December 16, 1773. Then came the heyday of competition with the acceptance of the theories of Adam Smith, and the political domination in England, towards 1840, of the Manchester school of political economy.

About forty years since, in America at least, the tide would appear once more to have turned. I fix the moment of flux, as I am apt to do, by a lawsuit. This suit was the Morris Run Coal Company *v.* Barclay Coal Company,[5] which is the first modern anti-monopoly litigation that I have met with in the United States. It was decided in Pennsylvania in 1871; and since 1871, while the area within which competition is possible has been kept constant by the tariff, capital has accumulated and has been concentrated and volatilized until, within this republic, substantially all prices are fixed by a vast moneyed mass. This mass, obeying what amounts to being a single volition, has its heart in Wall Street, and pervades every corner of the Union. No matter what price is in question, whether it be the price of meat, or coal, or cotton cloth, or of railway transportation, or of insurance, or of discounts, the inquirer will find the price to be, in essence, a monopoly or fixed price; and if he will follow his investigation to the end, he will also find that the first cause in the complex chain of cause and effect which created the monopoly in that mysterious energy which is enthroned on the Hudson.

The presence of monopolistic prices in trade is not always a result of conscious agreement; more frequently, perhaps, it is automatic, and is an effect of the concentration of capital in a point where competition ceases, as when all the capital engaged in a trade belongs to a single owner. Supposing ownership to be enough restricted, combination is easier and more profitable than competition; therefore combination, conscious or unconscious, supplants competition. The inference from the evidence is that, in the United States, capital has reached, or is rapidly reaching, this point of concentration; and if this be true, competition cannot be enforced by legislation. But, assuming that competition could still be enforced by law, the only effect would be to make the mass of capital more homogeneous by eliminating still further such of the weaker capitalists as have survived. Ultimately, unless indeed society is to dissolve and capital migrate elsewhere, all the present phenomena would be intensified. Nor would free trade, probably, have more than a very transitory effect. In no department of trade is competition freer than in the Atlantic passenger service, and yet in no trade is there a stricter monopoly price.

The same acceleration of the social movement which has caused this centralization of capital has caused the centralization of another form of human energy, which is its negative: labor unions organize labor as a monopoly. Labor protests against the irresponsible sovereignty of capital, as men have always protested against irresponsible sovereignty, declaring that the capitalistic social system, as it now exists, is a form of slavery. Very logically, therefore, the abler and bolder labor agitators proclaim that labor levies actual war against society, and that in that war there can be no truce until irresponsible capital has capitulated. Also, in labor's methods of warfare the same phenomena appear

[5] 68 Pa. 173.

as in the autocracy of capital. Labor attacks capitalistic society by methods beyond the purview of the law, and may, at any moment, shatter the social system; while, under our laws and institutions, society is helpless.

Few persons, I should imagine, who reflect on these phenomena, fail to admit to themselves, whatever they may say publicly, that present social conditions are unsatisfactory, and I take the cause of the stress to be that which I have stated. We have extended the range of applied science until we daily use infinite forces, and those forces must, apparently, disrupt our society, unless we can raise the laws and institutions which hold society together to an energy and efficiency commensurate to them. How much vigor and ability would be required to accomplish such a work may be measured by the experience of Washington, who barely prevailed in his relatively simple task, surrounded by a generation of extraordinary men, and with the capitalistic class of America behind him. Without the capitalistic class he must have failed. Therefore one most momentous problem of the future is the attitude which capital can or will assume in this emergency.

That some of the more sagacious of the capitalistic class have preserved that instinct of self-preservation which was so conspicuous among men of the type of Washington, is apparent from the position taken by the management of the United States Steel Company, and by the Republican minority of the Congressional Committee which recently investigated the Steel Company; but whether such men very strongly influence the genus to which they belong is not clear. If they do not, much improvement in existing conditions can hardly be anticipated.

If capital insists upon continuing to exercise sovereign powers, without accepting responsibility as for a trust, the revolt against the existing order must probably continue, and that revolt can only be dealt with, as all servile revolts must be dealt with, by physical force. I doubt, however, if even the most ardent and optimistic of capitalists would care to speculate deeply upon the stability of any government capital might organize, which rested on the fundamental principle that the American people must be ruled by an army. On the other hand any government to be effective must be strong. It is futile to talk of keeping peace in labor disputes by compulsory arbitration, if the government has not the power to command obedience to its arbitrators' decree; but a government able to constrain a couple of hundred thousand discontented railway employees to work against their will, must differ considerably from the one we have. Nor is it possible to imagine that labor will ever yield peaceful obedience to such constraint, unless capital makes equivalent concessions,–unless, perhaps, among other things, capital consents to erect tribunals which shall offer relief to any citizen who can show himself to be oppressed by the monopolistic price. In fine, a government, to promise stability in the future, must apparently be so much more powerful than any private interest, that all men will stand equally before its tribunals; and these tribunals must be flexible enough to reach those categories of activity which now lie beyond legal jurisdiction. If it be objected that the American people are incapable of an effort so prodigious, I readily admit that this may be true, but I also contend that the objection is beside the issue. What the American people can or cannot do is a matter of opinion, but that social changes are imminent appears to be almost certain. Though these changes cannot be prevented, possibly they may, to a degree, be guided, as Washington guided the changes of 1789. To resist them perversely, as they were resisted at the Chicago Convention of 1912, can only make the catastrophe, when it comes, as overwhelming as was the consequent defeat of the Republican party.

Approached thus, that Convention of 1912 has more than a passing importance, since it would seem to indicate the ordinary phenomenon, that a declining favored class is incapable of appreciating an approaching change of environment which must alter its social status. I began with the proposition that, in any society which we now understand, civilization is equivalent to order, and the evidence of the truth of the proposition is, that amidst disorder, capital and credit, which constitute the pith of our civilization, perish first. For more than a century past, capital and credit have been absolute, or nearly so; accordingly it has not been the martial type which has enjoyed sovereignty, but the capitalistic. The warrior has been the capitalists' servant. But now, if it be true that money, in certain

crucial directions, is losing its purchasing power, it is evident that capitalists must accept a position of equality before the law under the domination of a type of man who can enforce obedience; their own obedience, as well as the obedience of others. Indeed, it might occur, even to some optimists, that capitalists would be fortunate if they could certainly obtain protection for another fifty years on terms as favorable as these. But at Chicago, capitalists declined even to consider receding to a secondary position. Rather than permit the advent of a power beyond their immediate control, they preferred to shatter the instrument by which they sustained their ascendancy. For it is clear that Roosevelt's offence in the eyes of the capitalistic class was not what he had actually done, for he had done nothing seriously to injure them. The crime they resented was the assertion of the principle of equality before the law, for equality before the law signified the end of privilege to operate beyond the range of law. If this principle which Roosevelt, in theory at least, certainly embodied, came to be rigorously enforced, capitalists perceived that private persons would be precluded from using the functions of sovereignty to enrich themselves. There lay the parting of the ways. Sooner or later almost every successive ruling class has had this dilemma in one of its innumerable forms presented to them, and few have had the genius to compromise while compromise was possible. Only a generation ago the aristocracy of the South deliberately chose a civil war rather than admit the principle that at some future day they might have to accept compensation for their slaves.

A thousand other instances of similar incapacity might be adduced, but I will content myself with this alone.

Briefly the precedents induce the inference that privileged classes seldom have the intelligence to protect themselves by adaptation when nature turns against them, and, up to the present moment, the old privileged class in the United States has shown little promise of being an exception to the rule.

Be this, however, as it may, and even assuming that the great industrial and capitalistic interests would be prepared to assist a movement toward consolidation, as their ancestors assisted Washington, I deem it far from probable that they could succeed with the large American middle class, which naturally should aid, opposed, as it seems now to be, to such a movement. Partially, doubtless, this opposition is born of fear, since the lesser folk have learned by bitter experience that the powerful have yielded to nothing save force, and therefore that their only hope is to crush those who oppress them. Doubtless, also, there is the inertia incident to long tradition, but I suspect that the resistance is rather due to a subtle and, as yet, nearly unconscious instinct, which teaches the numerical majority, who are inimical to capital, that the shortest and easiest way for them to acquire autocratic authority is to obtain an absolute mastery over those political tribunals which we call courts. Also that mastery is being by them rapidly acquired. So long as our courts retain their present functions no comprehensive administrative reform is possible, whence I conclude that the relation which our courts shall hold to politics is now the fundamental problem which the American people must solve, before any stable social equilibrium can be attained.

Theodore Roosevelt's enemies have been many and bitter. They have attacked his honesty, his sobriety, his intelligence, and his judgment, but very few of them have hitherto denied that he has a keen instinct for political strife. Only of late has this gift been doubted, but now eminent politicians question whether he did not make a capital mistake when he presented the reform of our courts of law, as expounders of the Constitution, as one of his two chief issues, in his canvass for a nomination for a third presidential term.

After many years of study of, and reflection upon, this intricate subject I have reached the conviction that, though Mr. Roosevelt may have erred in the remedy which he has suggested, he is right in the principle which he has advanced, and in my next chapter I propose to give the evidence and explain the reasons which constrain me to believe that American society must continue to degenerate until confusion supervenes, if our courts shall remain semi-political chambers.

CHAPTER II
THE LIMITATIONS OF THE JUDICIAL FUNCTION

Taking the human race collectively, its ideal of a court of justice has been the omniscient and inexorable judgment seat of God. Individually, on the contrary, they have dearly loved favor. Hence the doctrine of the Intercession of the Saints, which many devout persons have sincerely believed could be bought by them for money. The whole development of civilization may be followed in the oscillation of any given society between these two extremes, the many always striving to so restrain the judiciary that it shall be unable to work the will of the favored few. On the whole, success in attaining to ideal justice has not been quite commensurate with the time and effort devoted to solving the problem, but, until our constitutional experiment was tried in America, I think it had been pretty generally admitted that the first prerequisite to success was that judges should be removed from political influences. For the main difficulty has been that every dominant class, as it has arisen, has done its best to use the machinery of justice for its own benefit.

No argument ever has convinced like a parable, and a very famous story in the Bible will illustrate the great truth, which is the first lesson that a primitive people learns, that unless the judge can be separated from the sovereign, and be strictly limited in the performance of his functions by a recognized code of procedure, the public, as against the dominant class, has, in substance, no civil rights. The kings of Israel were judges of last resort. Solomon earned his reputation for wisdom in the cause in which two mothers claimed the same child. They were indeed both judge and jury. Also they were prosecuting officers. Also they were sheriffs. In fine they exercised unlimited judicial power, save in so far as they were checked by the divine interference usually signified through some prophet.

Now David was, admittedly, one of the best sovereigns and judges who ever held office in Jerusalem, and, in the days of David, Nathan was the leading prophet of the dominant political party. "And it came to pass in an eveningtide, that David arose from off his bed, and walked upon the roof of the king's house: and from the roof he saw a woman washing herself; and the woman was very beautiful to look upon. And David sent and enquired after the woman. And one said, Is not this Bath-sheba, the daughter of Eliam, the wife of Uriah the Hittite? And David sent messengers, and took her; and she came in unto him, and he lay with her; … and she returned unto her house."

Uriah was serving in the army under Joab. David sent for Uriah, and told him to go home to his wife, but Uriah refused. Then David wrote a letter to Joab and dismissed Uriah, ordering him to give the letter to Joab. And David "wrote in the letter, saying, Set ye Uriah in the forefront of the hottest battle, and retire ye from him, that he may be smitten and die....

"And the men of the city went out and fought with Joab; and there fell some of the people of the servants of David; and Uriah the Hittite died also.... But the thing that David had done displeased the Lord.

"And the Lord sent Nathan unto David. And he came unto him, and said unto him, There were two men in one city; the one rich and the other poor. The rich man had exceeding many flocks and herds:

"But the poor man had nothing, save one little ewe lamb, which he had bought and nourished up: and it grew up together with him, and with his children; it did eat of his own meat and drank of his own cup, and lay in his bosom, and was unto him as a daughter.

"And there came a traveller unto the rich man, and he spared to take of his own flock, … but took the poor man's lamb, and dressed it for the man that was come to him.

"And David's anger was greatly kindled against the man; and he said to Nathan, As the Lord liveth, the man that hath done this thing shall surely die: …

"And Nathan said to David, Thou art the man. Thus saith the Lord God of Israel … Now therefore the sword shall never depart from thine house; because thou has despised me … Behold, I will raise up evil against thee out of thine own house, and I will take thy wives before thine eyes, and give them unto thy neighbor." Here, as the heading to the Twelfth Chapter of Second Book of Samuel says, "Nathan's parable of the ewe lamb causeth David to be his own judge," but the significant part of the story is that Nathan, with all his influence, could not force David to surrender his prey. David begged very hard to have his sentence remitted, but, for all that, "David sent and fetched [Bathsheba] to his house, and she became his wife, and bare him a son." Indeed, she bore him Solomon. As against David or David's important supporters men like Uriah had no civil rights that could be enforced.

Even after the judicial function is nominally severed from the executive function, so that the sovereign himself does not, like David and Solomon, personally administer justice, the same result is reached through agents, as long as the judge holds his office at the will of the chief of a political party.

To go no farther afield, every page of English history blazons this record. Long after the law had taken an almost modern shape, Alice Perrers, the mistress of Edward III, sat on the bench at Westminster and intimidated the judges into deciding for suitors who had secured her services. The chief revenue of the rival factions during the War of the Roses was derived from attainders, indictments for treason, and forfeitures, avowedly partisan. Henry VII used the Star Chamber to ruin the remnants of the feudal aristocracy. Henry VIII exterminated as vagrants the wretched monks whom he had evicted. The prosecutions under Charles I largely induced the Great Rebellion; and finally the limit of endurance was reached when Charles II made Jeffreys Chief Justice of England in order to kill those who were prominent in opposition. Charles knew what he was doing. "That man," said he of Jeffreys, "has no learning, no sense, no manners, and more impudence than ten carted street-walkers." The first object was to convict Algernon Sidney of treason. Jeffreys used simple means. Usually drunk, his court resembled the den of a wild beast. He poured forth on "plaintiffs and defendants, barristers and attorneys, witnesses and jurymen, torrents of frantic abuse, intermixed with oaths and curses." The law required proof of an *overt act* of treason. Many years before Sidney had written a philosophical treatise touching resistance by the subject to the sovereign, as a constitutional principle. But, though the fragment contained nothing more than the doctrines of Locke, Sidney had cautiously shown it to no one, and it had only been found by searching his study. Jeffreys told the jury that if they believed the book to be Sidney's book, written by him, they must convict for *scribere est agere*, to write is to commit an overt act.

A revolution followed upon this and other like convictions, as revolutions have usually followed such uses of the judicial power. In that revolution the principle of the limitation of the judicial function was recognized, and the English people seriously addressed themselves to the task of separating their courts from political influences, of protecting their judges by making their tenure and their pay permanent, and of punishing them by removal if they behaved corruptly, or with prejudice, or transcended the limits within which their duty confined them. Jeffreys had legislated when he ruled it to be the law that, to write words secretly in one's closet, is to commit an overt act of treason, and he did it to kill a man whom the king who employed him wished to destroy. This was to transcend the duty of a judge, which is to expound and not to legislate. The judge may develop a principle, he may admit evidence of a custom in order to explain the intentions of the parties to a suit, as Lord Mansfield admitted evidence of the customs of merchants, but he should not legislate. To do so, as Jeffreys did in Sidney's case, is tantamount to murder. Jeffreys never was duly punished for his crimes. He died the year after the Revolution, in the Tower, maintaining to the last that he was innocent in the sight of God and man because "all the blood he had shed fell short of the King's command."

And Jeffreys was perfectly logical and consistent in his attitude. A judiciary is either an end in itself or a means to an end. If it be designed to protect the civil rights of citizens indifferently, it must be free from pressure which will deflect it from this path, and it can only be protected from the severest possible pressure by being removed from politics, because politics is the struggle for

ascendancy of a class or a majority. If, on the other hand, the judiciary is to serve as an instrument for advancing the fortunes of a majority or a dominant class, as David used the Jewish judiciary, or as the Stuarts used the English judiciary, then the judicial power must be embodied either in a military or political leader, like David, who does the work himself, or in an agent, more or less like Jeffreys, who will obey his orders. In the colonies the subserviency of the judges to the Crown had been a standing grievance, and the result of this long and terrible experience, stretching through centuries both in Europe and America, had been to inspire Americans with a fear of intrusting power to any man or body of men. They sought to limit everything by written restrictions. Setting aside the objection that such a system is mechanically vicious because it involves excessive friction and therefore waste of energy, it is obviously futile unless the written restrictions can be enforced, and enforced in the spirit in which they are drawn. Hamilton, whose instinct for law resembled genius, saw the difficulty and pointed out in the *Federalist* that it is not a writing which can give protection, but only the intelligence and the sense of justice of the community itself.

"The truth is, that the general genius of a Government is all that can be substantially relied upon for permanent effects. Particular provisions, though not altogether useless, have far less virtue and efficiency than are commonly ascribed to them; and the want of them will never be, with men of sound discernment, a decisive objection to any plan which exhibits the leading characters of a good Government." After an experience of nearly a century and a quarter we must admit, I think, that Hamilton was right. In the United States we have carried bills of right and constitutional limitations to an extreme, and yet, I suppose that few would care to maintain that, during the nineteenth century, life and property were safer in America, or crime better dealt with, than in England, France, or Germany. The contrary, indeed, I take to be the truth, and I think one chief cause of this imperfection in the administration of justice will be found to have been the operation of the written Constitution. For, under the American system, the Constitution, or fundamental law, is expounded by judges, and this function, which, in essence, is political, has brought precisely that quality of pressure on the bench which it has been the labor of a hundred generations of our ancestors to remove. On the whole the result has been not to elevate politics, but to lower the courts toward the political level, a result which conforms to the *a priori* theory.

The abstract virtue of the written Constitution was not, however, a question in issue when Washington and his contemporaries set themselves to reorganize the Confederation. Those men had no choice but to draft some kind of a platform on which the states could agree to unite, if they were to unite peacefully at all, and accordingly they met in convention and drew the best form of agreement they could; but I more than suspect that a good many very able Federalists were quite alive to the defects in the plan which they adopted.

Hamilton was outspoken in preferring the English model, and I am not aware that Washington ever expressed a preference for the theory that, because of a written fundamental law, the court should nullify legislation. Nor is it unworthy of remark that all foreigners, after a prolonged and attentive observation of our experiment, have avoided it. Since 1789, every highly civilized Western people have readjusted their institutions at least once, yet not one has in this respect imitated us, though all have borrowed freely from the parliamentary system of England.[6]

Even our neighbor, Canada, with no adverse traditions and a population similar to ours, has been no exception to the rule. The Canadian courts indeed define the limits of provincial and federal jurisdiction as fixed under an act of Parliament, but they do not pretend to limit the exercise of power when the seat of power has been established. I take the cause of this distrust to be obvious. Although our written Constitution was successful in its primary purpose of facilitating the consolidation of the Confederation, it has not otherwise inspired confidence as a practical administrative device. Not only

[6] The relation of courts to legislation in European countries has been pretty fully considered by Brinton Coxe, in *Judicial Power and Constitutional Legislation*.

has constant judicial interference dislocated scientific legislation, but casting the judiciary into the vortex of civil faction has degraded it in the popular esteem. In fine, from the outset, the American bench, because it deals with the most fiercely contested of political issues, has been an instrument necessary to political success. Consequently, political parties have striven to control it, and therefore the bench has always had an avowed partisan bias. This avowed political or social bias has, I infer, bred among the American people the conviction that justice is not administered indifferently to all men, wherefore the bench is not respected with us as, for instance, it is in Great Britain, where law and politics are sundered. Nor has the dissatisfaction engendered by these causes been concealed. On the contrary, it has found expression through a series of famous popular leaders from Thomas Jefferson to Theodore Roosevelt.

The Constitution could hardly have been adopted or the government organized but for the personal influence of Washington, whose power lay in his genius for dealing with men. He lost no time or strength in speculation, but, taking the Constitution as the best implement at hand, he went to the work of administration by including the representatives of the antagonistic extremes in his Cabinet. He might as well have expected fire and water to mingle as Jefferson and Hamilton to harmonize. Probably he had no delusions on that head when he chose them for his ministers, and he accomplished his object. He paralyzed opposition until the new mechanism began to operate pretty regularly, but he had not an hour to spare. Soon the French Revolution heated passions so hot that long before Washington's successor was elected the United States was rent by faction.

The question which underlay all other questions, down to the Civil War, was the determination of the seat of sovereignty. Hamilton and the Federalists held it to be axiomatic that, if the federal government were to be more than a shadow, it must interpret the meaning of the instrument which created it, and, if so, that it must signify its decisions through the courts. Only in this way, they argued, could written limitations on legislative power be made effective. Only in this way could statutes which contravened the Constitution be set aside.[7]

Jefferson was abroad when Hamilton wrote *The Federalist*, but his views have since been so universally accepted as embodying the opposition to Hamilton, that they may be conveniently taken as if they had been published while the Constitution was under discussion. Substantially the same arguments were advanced by others during the actual debate, if not quite so lucidly or connectedly then, as afterward by him.

Very well, said Jefferson, in answer to Hamilton, admitting, for the moment, that the central government shall define its own powers, and that the courts shall be the organ through which the exposition shall be made, both of which propositions I vehemently deny, you have this result: The judges who will be called upon to pass upon the validity of national and state legislation will be plunged in the most heated of controversies, and in those controversies they cannot fail to be influenced by the same passions and prejudices which sway other men. In a word they must decide like legislators, though they will be exempt from the responsibility to the public which controls other legislators. Such conditions you can only meet by making the judicial tenure of office ephemeral, as all legislative tenure is ephemeral.

It is vain to pretend, continued he, in support of fixity of tenure, that the greater the pressure on the judge is likely to be, the more need there is to make him secure. This may be true of judges clothed with ordinary attributes, like English judges, for, should these try to nullify the popular will by construing away statutes, Parliament can instantly correct them, or if Parliament fail in its duty, the constituencies, at the next election, can intervene. But no one will be able to correct the American judge who may decline to recognize the law which would constrain him. Nothing can shake him save impeachment for what is tantamount to crime, or being overruled by a constitutional amendment

[7] *Federalist* No. LXXVIII.

which you have purposely made too hard to obtain to be a remedy. He is to be judge in his own case without an appeal.

Nowhere in all his long and masterly defence of the Constitution did Hamilton show so much embarrassment as here, and because, probably, he did not himself believe in his own brief. He really had faith in the English principle of an absolute parliament, restrained, if needful, by a conservative chamber, like the House of Lords, but not in the total suspension of sovereignty subject to judicial illumination. Consequently he fell back on platitudes about judicial high-mindedness, and how judges could be trusted not to allow political influences to weigh with them when deciding political questions. Pushed to its logical end, concluded he, the Jeffersonian argument would prove that there should be no judges distinct from legislatures.[8]

Now, at length, exclaimed the Jeffersonian in triumph, you admit our thesis. You propose to clothe judges with the highest legislative functions, since you give them an absolute negative on legislation, and yet you decline to impose on them the responsibility to a constituency, which constrains other legislators. Clearly you thus make them autocratic, and in the worst sense, for you permit small bodies of irresponsible men under pretence of dispensing justice, but really in a spirit of hypocrisy, to annul the will of the majority of the people, even though the right of the people to exercise their will, in the matters at issue, be clearly granted them in the Constitution.

No, rejoined Hamilton, thus driven to the wall, judges never will so abuse their trust. The duty of the judge requires him to suppress his *will*, and exercise his *judgment* only. The Constitution will be before him, and he will have only to say whether authority to legislate on a given subject is granted in that instrument. If it be, the character of the legislation must remain a matter of legislative discretion. Besides, you must repose confidence somewhere, and judges, on the whole, are more trustworthy than legislators. How can you say that, retorted the opposition, when you, better than most men, know the line of despotic legal precedents from the Ship Money down to the Writs of Assistance?

Looking back upon this initial controversy touching judicial functions under the Constitution, we can hardly suppose that Hamilton did not perceive that, in substance, Jefferson was right, and that a bench purposely constructed to pass upon political questions must be politically partisan. He knew very well that, if the Federalists prevailed in the elections, a Federalist President would only appoint magistrates who could be relied on to favor consolidation. And so the event proved. General Washington chose John Jay for the first Chief Justice, who in some important respects was more Federalist than Hamilton, while John Adams selected John Marshall, who, though one of the greatest jurists who ever lived, was hated by Jefferson with a bitter hatred, because of his political bias. As time went on matters grew worse. Before Marshall died slavery had become a burning issue, and the slave-owners controlled the appointing power. General Jackson appointed Taney to sustain the expansion of slavery, and when the anti-slavery party carried the country with Lincoln, Lincoln supplanted Taney with Chase, in order that Chase might stand by him in his struggle to destroy slavery. And as it has been, so must it always be. As long as the power to enact laws shall hinge on the complexion of benches of judges, so long will the ability to control a majority of the bench be as crucial a political necessity as the ability to control a majority in avowedly representative assemblies.

Hamilton was one of the few great jurists and administrators whom America has ever produced, and it is inconceivable that he did not understand what he was doing. He knew perfectly well that, other things being equal, the simplest administrative mechanism is the best, and he knew also that he was helping to make an extremely complicated mechanism. Not only so, but at the heart of this complexity lay the gigantic cog of the judiciary, which was obviously devised to stop movement. He must have had a reason, beyond the reason he gave, for not only insisting on clothing the judiciary with these unusual political and legislative attributes, but for giving the judiciary an unprecedented fixity of tenure. I suspect that he was actuated by some such considerations as these:

[8] *The Federalist*, No. LXXVIII.

The Federalists, having pretty good cause to suppose themselves in a popular minority, purposed to consolidate the thirteen states under a new sovereign. There were but two methods by which they could prevail; they could use force, or, to secure assent, they could propose some system of arbitration. To escape war the Federalists convened the constitutional convention, and by so doing pledged themselves to arbitration. But if their plan of consolidation were to succeed, it was plain that the arbitrator must arbitrate in their favor, for if he arbitrated as Mr. Jefferson would have wished, the United States under the Constitution would have differed little from the United States under the Confederation. The Federalists, therefore, must control the arbitrator. If the Constitution were to be adopted, Hamilton and every one else knew that Washington would be the first President, and Washington could be relied on to appoint a strong Federalist bench. Hence, whatever might happen subsequently, when the new plan first should go into operation, and when the danger from insubordination among the states would probably be most acute, the judiciary would be made to throw its weight in favor of consolidation, and against disintegration, and, if it did so, it was essential that it should be protected against anything short of a revolutionary attack.

Конец ознакомительного фрагмента.