MAJORITY RULE AND THE JUDICIARY: AN EXAMINATION OF CURRENT PROPOSALS FOR CONSTITUTIONAL CHANGE AFFECTING THE RELATION OF COURTS TO LEGISLATION

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Majority Rule and the Judiciary: An Examination of Current Proposals for Constitutional Change Affecting the Relation of Courts to Legislation by William L. Ransom

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AN EXAMINATION OF CURRENT PROPOSALS FOR CONSTITUTIONAL CHANGE AFFECTING THE RELATION OF COURTS TO LEGISLATION

BY

WILLIAM L. RANSOM

OF THE NEW YORK BAR

WITH AN INTRODUCTION BY

THEODORE ROOSEVELT

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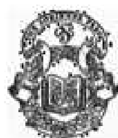

TO THE LAMENTED

WILLIAM HENRY MOODY

WHOSE BRIEF SPAN OF SERVICE
IN THE SUPREME COURT OF THE UNITED STATES, ENDED BY MOST UNTIMELY
DISABILITY AND DEATH, GAVE PROMISE OF A PUBLIC USEFULNESS
ENTITLING HIS NAME TO RANK WITH THAT OF JOHN MARSHALL AS EXPONENT OF A
VIRILE AND PROGRESSIVE INTERPRETATION OF THE CONSTITUTION
WHOSE "UNCHANGING PROVISIONS" HE CONCEIVED THEREBY TO BE "ADAPTABLE
TO THE INFINITE VARIETY OF THE
CHANGING CONDITIONS OF OUR NATIONAL LIFE"

PREFACE

THE attitude of some State courts toward what is generically spoken of as "welfare" or "regulative" legislation has led, chiefly in those States, to several proposals of constitutional change affecting the relation of courts to legislation. The people have been most reluctant to admit that either their constitutions or any instrumentality of government created by their constitutions should bar them permanently from any pathway of progress and justice which is pointed out by the experience, and called for by the conscience, of this and other civilized nations. The electorate has to no small degree lost patience with public men and political parties, who, like Dr. Nicholas Murray Butler at the New York Republican State Convention at Rochester in April, 1912, "urge" that a Workingmen's Compensation Law be enacted in this State, but suggest no way and support no plan for bringing that about, especially when so zealous a ten-word advocacy of such legislation is preceded and followed by a thousand-word plea for the resolute maintenance, evidently "without amendment,"[1]

[1] "It is said the constitution was made in the eighteenth century by men who lived under conditions long since passed away. Therefore, the constitution is outgrown. It must be adjusted, the phrase

of the very "constitutional guaranties" which the highest court of the State had but recently construed [1] forever to prevent *any* legislation based upon the essential principle underlying a Workingmen's Compensation Act!

The constructive proposals which have been made are entitled to be explained and considered upon their merits. Examination may show them —some or all—to be unsuitable or unwise; but they may not be brushed aside as "the ravings of Bedlam" [2] or as the proposals of "political patent-medicine men who are ignorant of ordinary laws of political and social growth." [3] The fact is, of course, that to no small degree these suggestions of organic change, as well as the legislation for which it is sought by them to clear the way, have been formulated or perfected in the seminaries of American universities and colleges, and that their advocacy has largely been led by members of the faculties of such institutions, whom Dr. Butler and his "Rochester platform" would doubtless hesitate to condemn more specifically.

now runs, to human rights. . . . The fact is that in the history of mankind some things, after long toil and tribulation are settled once for all. They neither invite nor permit amendment or improvement."

[1] Ives *v.* South Buffalo Ry. Co., 201 New York Reports, page 271.

[2] "The Supreme Issue of 1912:" Address of Dr. Nicholas Murray Butler as temporary chairman of the Republican State Convention at Rochester, N. Y., April 9, 1912; published in the *New York Tribune*, April 10, 1912.

[3] *Ibid.*

A great many things are being said about these proposals which no one can seriously mean and most persons will be glad soon to forget. That is probably because their discussion has been projected into a political campaign. Ambition is a strong stimulus to superlatives—about the other fellow and "his" "issues," especially if he comes from some other part of the country. The atmosphere of political discussion makes it easy for men to figure it all out that some one is about to "lay the axe at the foot of the tree of well-ordered freedom," when in fact no "axe" in sight menaces anything more than the "foot of the tree" of their own ambitions and the fancied interests of some of their friends. The discovery that some one—on the other ticket, in primary or election—was about to "lay the axe" to something cherished by the electorate, has been a frantic feature of every national political campaign whose "literature" it has been possible to trace.

The truth of the matter is, of course, that no considerable number of our people are contemplating any step which would *in fact* "destroy" or "threaten" the essential "independence" and "integrity" of our courts or the "stability" and "soundness" of their administration of impartial justice. If there is any branch of the government about which the American people have been gen-