ADDRESS

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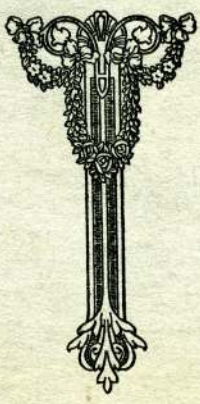
DOUGLAS W. BROWN
President of West Virginia Bar Association

——on——

"The Proposal to Give Congress the Power to Nullify the Constitution"



Delivered at Huntington, West Virginia,
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ADDRESS

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DOUGLAS W. BROWN, PRESIDENT OF WEST VIRGINIA BAR ASSOCIATION.

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"The Proposal to Give Congress the Power to Nullify the Constitution"

Gentlemen of the West Virginia Bar Association:

My subject is:

"THE PROPOSAL TO GIVE CONGRESS THE POWER TO NULLIFY THE CONSTITUTION."

I fully realize that I cannot hope to do more than to place in concrete form, something of that which has been expressed by others.

The subject has been chosen because of the sincere belief that it is one involving a doctrine "subversive of our representative government, the liberties of the people, and the guaranties of the bill of rights, which have been won in the long upward struggle of the human race, have been fought for upon fields of battle, and sanctified by the blood of martyrs"; and that under the constitution of this association it becomes the duty of its president to discuss a question in which the public has so grave an interest.

A retrospect, seemingly of but yesterday, and we see the world bathed in the blood of a war which left in its immediate wake turbulence, disorder and suffering unparalleled in the history of mankind. None the less deadly is the warfare which has followed—that waged by an army of men of obscured vision, active in propaganda professedly aimed at the destruction of the present order. We have been brought to the realization, as someone has expressed it, that while we had saved the world from the Prussians we must yet save the world from itself; that while the world had been made safe for democracy, the task remained to make democracy safe for the world.

These enemies of humanity the world over, sense a common spirit, and have the common purpose to discredit, disorganize and break down the institutions upon which society must depend for its orderly continuity. No tradition handed down to us by the fathers of the Republic, and no landmark by which the administration of government has been guided, receives their respect or adherence.

The most dangerous and insidious of all arguments involved in this propaganda is based upon the alleged usurpation of established judicial functions as a power wrested from the people, and that the rule of the people can only be restored by taking from the courts the power to enforce constitutional safeguards.

In June of the present year, a Senator of the United States, speaking before the annual convention of the American Federation of Labor, after stating that the Supreme Court had usurped power not conferred upon it by the Constitution, proposed this change by constitutional amendment:

> "(1) That no inferior federal judge shall set aside a law of Congress on the ground that it is unconstitutional.
>
> (2) If the Supreme Court assumes to decide any law of Congress unconstitutional, or by interpretation undertakes to assert a public policy at variance with the statutory declaration of Congress, which alone under our system is authorized to determine the public policies of government—Congress may, by re-enacting the law, nullify the action of the court."

It is an ominous sign of the times that a convention of American citizens, acting as the representatives of a numerous class of our people, enthusiastically applauded this attack by Senator LaFollette upon those institutions under which this Republic has grown to be the moral and political leader of the world—an attack made by one who, in the days when patriotic Americans were devoting every energy to the service of country, was found sympathizing in public utterance and effort with its enemies.

Let me say in passing that the Bar of West Virginia may well take pride in the fact that because the splendid record of constitutional law enforcement and maintenance of order made by a distinguished member of this Association extended to periods of industrial troubles, Senator LaFollette in this same attack upon the Federal Judiciary termed him a "petty tyrant" and "arrogant despot".

In that address it was further said:

> "I fully recognize the fact that the power which the courts now exercise to declare statutes of Congress unconstitutional, is a usurped power without warrant in the Constitution, and it is absolutely certain the Con-

stitution would never have been adopted had the men at that time believed that the courts they were providing for would assume the powers now exercised by our federal judges. Every student of history knows that to be true."

In the outset of the consideration of this alleged usurpation of power the fact is to be borne in mind that the courts have never claimed the power, and have never undertaken to pronounce an abstract opinion upon constitutionality of any description; the asserted right and its exercise being confined to pending controversies wherein a right is set up under an act of Congress, or of the Legislature of a state; and that it is only when the question is free from any reasonable doubt that the courts have held acts of the legislative power violative of the fundamental law.

A few years ago Chief Justice Clark, of the Supreme Court of North Carolina, aroused the interest of the American Bar when, speaking of the constitutional convention of 1787, he said in a public address:

"Even in such a convention thus composed, thus secluded from the influence of public opinion, the persistent effort to grant judges such power was repeatedly and overwhelmingly denied."

It is fortunate that there has been preserved and handed down to us a journal kept by Mr. Madison, of the debates of the constitutional convention.

In that journal there appear certain facts material to the question under consideration, to which, even at the risk of being tedious, I invite your attention.

The convention met on May 14th, 1787. On the 29th day of May, Edmund Randolph laid before the convention his plan of a federal constitution, as the foundation upon which the framework of the government of a new nation might safely rest. This plan was embodied in a series of resolutions.

The eighth resolution presented by him reads as follows:

"That the Executive and a convenient number of National Judiciary ought to compose a Council of Revision, with authority to examine every Act of the National Legislature before it shall operate, and every

act of a particular Legislature before a negative thereon shall be final; and the dissent of the said Council shall amount to a rejection unless the Act of the National Legislature be again passed, etc."

This is the resolution to which Senator LaFollette and Justice Clark each refer as having been defeated.

On June 4th the first clause of the quoted resolution presented by Mr. Randolph, was taken up for consideration by the convention, and upon the question of the creation of such a Council we find the following entry in Mr. Madison's journal:

"Mr. Gerry doubts whether the Judiciary ought to form a part of it, as they will have a sufficient check against encroachment of their own department by their exposition of the laws which involved a power of deciding on their constitutionality."

The convention, upon motion of Mr. Gerry, then postponed the further consideration of this resolution. At a later hour upon the same day Mr. Gerry presented a motion giving the executive alone, without the Judiciary, a revisionary control of all laws enacted by Congress unless overruled by a two-thirds of each house. This motion was defeated by a vote of eight to two. It was then moved by Mr. Wilson of Pennsylvania, that the resolution be amended by inserting after the words "National Executive" the phrase "a convenient number of the National Judiciary". The objection made by Mr. Hamilton to the introduction of such an amendment at that time, was sustained.

On June 5th the resolution of Mr. Randolph relating to the creation of a Judiciary, was again before the convention, and it was agreed that the judges should hold office during good behavior and receive punctually at stated times, a fixed compensation for their services. The consideration of the remaining clauses of the resolution was then postponed until the following day.

On June 6th Mr. Wilson moved to re-consider the vote, excluding the Judiciary from a share in the revision of the laws and to add after the words "National Executive" the words "With a convenient number of the National Judiciary". This motion was seconded by Mr. Madison and was then taken up for discussion by the convention. It was defeated by a vote of eight to three.

The question of creating a Revisionary Council was not again taken up by the convention until July 21st, when Mr. Wilson moved that the Supreme National Judiciary should be associated with the Executive in revisionary power. In presenting this motion to the convention it was said by Mr. Wilson:

> "The Judiciary ought to have an opportunity to remonstrate against projected encroachment upon the people as well as on themselves. It has been said that judges as expositors of the law would have the opportunity of defending their constitutional rights. There was weight in this observation; but this power of the judges did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet may not be so unconstitutional as to justify the judges in refusing to give them effect."

Luther Martin of Maryland, then a leader of the American Bar, speaking against the motion, said:

> "A knowledge of mankind and of legislative force cannot be presumed to belong in a higher degree to the judges than to the Legislature. And as to the constitutionality of laws, that point will come before the judges in their official character. In this character they have a negative on the laws. Join them with the Executive in the revision and they will have a double negative."

In answer to the objection of Mr. Martin it was said by Mr. Mason, of Virginia.

> "It has been said that if the judges were joined in this check on laws they would have a double negative since in their expository capacity of judges, they would have one negative. We would reply that in this capacity they could impede, in one case only, the operation of laws. They could declare an unconstitutional law void."

Mr. Gorham, in speaking to the resolution, said:

> "As judges, they are not to be presumed to possess any peculiar knowledge of the mere policy of public measures. Nor can it be necessary as a security for their constitutional rights."

Mr. Strong, in opposition to the resolution, expressed this view:

> "The power of making ought to be kept distinct from that of expounding the law. No maxim was better established."

It was said by Mr. Rutledge that,

> "The judges never ought to give their opinion on a law until it comes before them."

Mr. Wilson's motion was defeated by a vote of four to three.

The question was not again taken up by the convention until August 15th, at which time Mr. Madison moved the adoption of the following amendment to Article VI, Section 13:

> "Every bill which shall have passed the two houses of Congress shall, before it becomes a law, be severally presented to the President of the United States and to the judges of the Supreme Court, for the revision of each. If, upon such revision they shall approve it, they shall respectively signify their approval by signing it. But if, upon such revision, it shall appear improper to either or both, to be passed into a law, it shall be returned with the objections against it, to the house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider the bill; but if, after such re-consideration, two-thirds of that house when either the President or majority of judges shall object, or three-fourths wherein both shall object, shall agree to pass it, it shall, together with the objections, be sent to the other house by which it shall be likewise considered. And if approved by two-thirds or three-fourths of the other house, as the case may be, it shall become a law."

Mr. Pinckney of South Carolina, in stating his objections to the amendment, said:

> "It will involve them (the judges) in parties, and give a previous tincture to their opinion."

The amendment offered by Mr. Madison was defeated by a vote of eight to three.

These are the facts forming the basis of statements to the effect that the power of the Federal Judiciary to declare an Act of Congress unconstitutional was denied by the constitutional convention. It is apparent from such facts,

(a) That the Randolph resolution contemplated a council comprised of the Executive, together with a number of federal judges, which council should exercise a revisionary power over laws passed by Congress, and by the legislatures of the several states—a power of an entirely different purport from that exercised by a court in a pending controversy, in holding a law invalid, because in excess of the limits of the powers conferred upon the National Legislature or within those prohibited by the constitution of a state.

(b) That so far from the convention at any time denying the power of the Federal Judiciary to declare an act of Congress unconstitutional, the arguments upon the question distinctly assume the power of the courts in their judicial, as distinguished from their proposed legislative capacity, to hold a law void for unconstitutionality.

The principle that an act of the legislative power contrary to the law under which a legislative body is organized is invalid, was familiar to the American people at the time the Constitution was adopted. Before the Revolution the validity of an act could be tested in two ways—by an appeal to the King in Council to set aside an act of a colonial legislature, or by an appeal from the decision of a Colonial Court.

In a note to the case of Marbury v. Madison, contained in Evan's "Cases American Constitutional Law", the following facts appear:

After the grant of the Virginia charter of 1612, the legislatures of the colonies were restricted to the enactment of laws not inconsistent with those of England, and it was necessarily implied that their enactment should conform to all the terms of the charters under which they acted. In all English colonies it was required that the enactments of the colonial legislature be submitted to the crown by which they could be "disallowed".

On July 4, 1660, there was appointed a committee of the Privy Council for the consideration of "petitions, propositions, memorials and other addresses respecting the plantations". In 1697 this committee was succeeded by one commonly known as

the Board of Trade, which until it was dissolved in 1782 was the chief instrument of the Privy Council for dealing with all matters relating to the legislation of the colonies. This Board passed not only upon the expediency of the enactment but also upon the power of the legislature to enact the measure in question. On the ground that they conflicted with the colonial charter, or with the laws of England, acts of the colonial legislatures were disallowed from Virginia in 1677, from Rhode Island in 1704, from Connecticut in 1705, from North Carolina in 1747, from Pennsylvania in 1760, from New Hampshire in 1764, and from Massachusetts in 1772. In all 8563 acts of the colonies which later formed the United States were submitted to the Privy Council, of which 469 were disallowed, a large proportion of them upon the ground of lack of authority on the part of the legislature to enact them. In addition to appeals to the Privy Council from the enactments of colonial legislatures there were also many appeals from the decisions of colonial courts.

It is said, however, that the British Parliament was supreme. This may be conceded and the argument met by the fact that the Parliament was bound by no written constitution.

It is, however, true that the Revolutionary Fathers did not accept the doctrine of the omnipotence of Parliament. Coke had said in Dr. Bonham's case that "an act of Parliament against common right and reason would be adjudged void".

In a pamphlet widely circulated throughout the colonies, James Otis had said:

> "If the reasons that can be given against an act, are such as to plainly demonstrate that it is against national equity, the executive courts will adjudge it void. It may be questioned by some, though I make no doubt of it whether they are not obliged by their oaths to adjudge it void."

Before the constitutional convention met, the right of the courts to determine the validity of acts of the legislative power had been involved in cases in at least five states. In one of those cases (Commonwealth v. Caton, Virginia, 1782), Chancellor Wythe had said:

> "If the whole legislature, an event to be deprecated, should attempt to overlap the bounds prescribed to them by the people, I, in administering the public justice of

> the country, will meet the united powers at my seat in this tribunal; and pointing to the Constitution will say to them, 'Here is the limit of your authority, and hither shall you go but no farther.' "

Prof. Beard of Columbia, (Beard, "The Supreme Court and the Constitution"), as the result of a careful study of the biographies of members of the convention, reached the conclusion that of the fifty-five members of the convention at least one-third took no active part in its proceedings, and that of the remaining thirty-nine members there were twenty-five who were the dominating element of the convention, and that of these twenty-five, seventeen thereof expressed their belief in the power and right of the Federal Judiciary to pass upon and determine the constitutionality of an Act of Congress.

Mr. Smith, in his Spirit of American Government says:

> "In view of the fact that it was maintained by the leading men of the convention that this power could and should be exercised by the Federal Judiciary, it is but reasonable to suppose that the majority of that body wished to confer it."

It was said by Mr. Cox, in a review of the Judicial Power:

> "In conclusion it is contended that the foregoing shows that it is correct to say that the framers actually intended that the United States Supreme Court should be competent in all litigation before it to decide upon the question of the constitutionality of the United States laws, and to hold the same void when unconstitutional."

I shall not undertake to review with you all that was said before the conventions which were called in the several states for the purpose of ratifying or rejecting the Federal Constitution, but it is proper that a few of such statements should be noticed.

In the South Carolina convention, Mr. Pinckney, discussing the powers and duties conferred by the Constitution upon the Supreme Court, said:

> "It would be their duty not only to decide all national questions which should arise within the Union but to control and keep the state judicials within their proper limits whenever they shall attempt to interfere with its powers."

Oliver Ellsworth, who had been a member of the constitutional convention, and who afterwards became Chief Justice of the Supreme Court, stated to the Connecticut convention:

> "This constitution defines the extent of the powers of the general government. If the general Legislature should at any time over-step her limits the Judicial Department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial powers and the National judges who, to secure their impartiality are to be made independent, will declare it to be void."

James Wilson, a member of the constitutional convention, stated to the Pennsylvania convention:

> "If a law should be made inconsistent with those powers vested by this instrument, in Congress, the judges, as a consequence of their independence and the particular powers of government being defined, will declare such law to be null and void for the power of the constitution predominates. Anything, therefore, that shall be enacted by Congress contrary thereto will not have the force of law."

Luther Martin, in an address before the Maryland convention, said:

> "These courts and these only, shall have the right to decide upon the laws of the United States and all questions arising upon their construction, and in a judicial manner to carry those laws into execution."

The greatest exponent of the power of the Judiciary to declare an act of Congress violative of the provisions of the Constitution, was Alexander Hamilton, whose views as expressed in "The Federalist" were given wide publicity throughout the country:

> "No legislative act, therefore, contrary to the Constitution, can be valid. To deny this will be to affirm that the deputy is greater than his principal, that the servant is above his master, that the representatives of the people are superior to the people themselves, that

men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid. * * * * * * The interpretation of the laws is a proper and peculiar province of the courts. The Constitution is, in fact, and must be regarded by the judges, as a fundamental law. It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be any irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; in other words, the Constitution ought to be preferred to the statutes; the intentions of the people to the intention of their agents."

"Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislatures declared in its statutes stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental law rather than by those which are not fundamental."

Viewing the question from the standpoint of the debates in the constitutional convention and the situation existing at the time of the ratification of the Constitution, we cannot escape the conclusions:

(a) That the leaders of the constitutional convention not only favored granting to the Federal Judiciary power to declare an Act of Congress unconstitutional, but believed that such power was vested by the Constitution in the Judiciary.

(b) That at the conventions called by the respective states their members were aware that the power to declare a law of Congress invalid was vested in the Federal Judiciary, and with such knowledge they ratified and adopted the Constitution.

Immediately upon the adoption of the Federal Constitution, the Federal Judiciary Act was passed by the First Congress, expressly providing for the review in the Supreme Court of the United States of the judgments of inferior Federal Courts, as well as for the review of cases where the validity of state statutes or any exercise of state authority should be drawn in question,

on the ground of repugnance to the Constitution, treaties or laws of the United States, and the decision should be in favor of their validity.

This act was drawn by Oliver Ellsworth, himself a member of the Federal Convention. The First Congress thereby confirmed the theory of the Constitution that the repugnance of a statute to its provisions was a judicial question, the determination of which belongs to the courts.

In his address Senator LaFollette further states:

> "There is, therefore, no sanction in the written constitution for the power which the courts now assert."

It is elementary that by the terms of the constitution the governmental power is divided into co-ordinate branches—executive, legislative and judicial—each as a check upon and balance to the others—a system incorporated in the framework of that instrument, as the result of the study of the political philosophy of the ages, reinforced by one hundred and fifty years of actual experience in colonial democratic government.

The Congress can enact no law except within the limitations prescribed by Article I. Article II likewise prescribes and limits the power of the executive.

Article III of the Constitution vests the judicial power of the United States in the Supreme Court and such inferior courts as Congress may from time to time establish, and provision is made for the independence of that Judiciary. The judicial power is defined as extending to all cases arising under the Constitution, the laws of the United States and all treaties made, or which shall be made under their authority, and to certain other matters thereby enumerated.

By this article the matters coming within the scope of the power of the Federal Judiciary are limited, but as to such matters it is obvious that it was intended that the courts exercise usual judicial functions, including the interpretation of the laws of the United States and the construction of clauses of the Constitution.

The power of this co-ordinate and independent branch of the government is provided to extend to all cases arising under the Constitution. Certainly no case could arise under the Con-

stitution unless that instrument be *law* binding upon the courts, and it cannot be maintained, to employ the language of Chief Justice Marshall "that a case arising under the Constitution should be decided without examining the instrument under which it arises".

Article VI of the Constitution provides:

> "This Constitution and the laws of the United States which shall be made in pursuance thereof, and the treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

The duty of the state courts to enforce the Federal Constitution is, therefore, clearly expressed. The power as to them is not an implied one. The obvious object was to impress upon judges of state courts the supremacy of the Federal Constitution and laws made in pursuance thereof over the State Constitution and laws. It is equally clear that by the specification of state judges it was not intended that the Federal Judiciary might, in the discharge of their duties, ignore the Constitution which by its next succeeding sentence they are required to take an oath to support.

So we find by Article VI the supreme law of the land is constituted alone of

(a) The constitution,
(b) The laws *made in pursuance thereof,* and
(c) Treaties made under the authority of the United States.

An act of Congress not made in pursuance to the Constitution, but violative of its provisions, is no part of the supreme law, as thus defined by the express language of the Constitution; and when in an adversary case a court, exercising the judicial power vested by Article III of the Constitution, is confronted with a provision of that instrument upon the one hand and an Act of Congress violative thereof upon the other hand, the Constitution alone becomes the supreme law, and the obvious duty of the court is to enforce that law.

In such a case it matters not that the power to declare an Act of Congress unconstitutional was never conferred upon the

Federal Judiciary in express language, for the power results by necessary implication from the very nature of the judicial function—the deciding of adversary cases according to *law*. Otherwise the Constitution would become impotent. In the language of Marshall it would result that "written constitutions are absurd attempts to limit a power (legislative) in its nature illimitable."

When Chief Justice Marshall, in 1803, delivered his masterly opinion in Marbury vs. Madison, he was familiar with the contemporary opinions of members of the convention, and the discussions before the conventions of the several states pending the adoption of the constitution. The cold, convincing logic of the great Chief Justice is unanswerable. Precedents might have been cited, for, we have seen that before that decision, the highest courts of several of the states had discussed the doctrine of the power of a court to nullify an unconstitutional act of the law-making power. Marshall did not, however, rely upon precedents, but based his decision upon the supremacy of the Constitution as law, and the nature of the judicial function. In that opinion it is said:

> "If two laws conflict with each other the courts must decide upon the operation of each. So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If then the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution and not such ordinary act must govern the case to which they both apply.
>
> Those then who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden,

such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits and declaring those limits may be passed at pleasure."

It is, of course, within the power of the sovereign people of this nation to deprive themselves, by means of constitutional amendments, of the protection thrown around their lives, liberties and property by the power of the courts to nullify an unconstitutional act of the Congress; but it is to be devoutly hoped that the American people will never take such a step.

In the consideration of the political phase of the subject we may be aided by a reference to the views expressed by those of other countries who look upon our theory of government through impartial eyes. In his "American Commonwealth," Mr. Bryce said:

"No feature in the government of the United States has awakened so much curiosity in the European mind, caused so much discussion, received so much admiration, and been more frequently misunderstood than the duties assigned to the Supreme Court and the functions which it discharges in guarding the Ark of the Constitution."

De Tocqueville in his "Democracy and America" says:

"The power of the Judiciary to declare a law invalid if it transcends the powers given by the Constitution is one of the strongest barriers ever devised against the tyrannies of political assemblies."

It is a matter of historical record that but for the assurance given, when the Constitution was pending for ratification before the legislatures of the states, that the so-called bill of rights would thereafter be adopted as amendments to the Constitution, it would never have received the sanction of a requisite number of states. The fundamental purpose of the fathers when they planted their standard upon the soil of governmental experiment, was to protect the individual citizen in the enjoyment of rights declared by the Declaration of Independence to be inalienable.

The tyrannies of the British Parliament were fresh in their minds; and they sought to forever establish upon this continent those guaranties for which they had struggled throughout the years of the Revolutionary War, and for which the Anglo-Saxon race had expended blood and treasure during the hundreds of years elapsing since the day of King John at Runnymede. They knew that the worst of all tyrannies is that of a majority; that human nature, acting in a mass under the spell of impulse and the excitement of passion, is often inconsiderate, selfish, cruel and unjust, and, as has been said, the greatest contribution made by the framers of the Constitution to the cause of human freedom consisted in the principle that no majority, however great, had a right to interfere with those original and inalienable rights included within the first ten amendments to the Constitution, which have been correctly characterized as the "summary of ages of struggle for human rights". These safeguards of our Constitution stand like a wall of adamant around the rights of the humblest individual against the assaults of wealth, of power, of greed and of numbers.

Our splendid citizenship has been developed in the assurance that each individual citizen may defy official interference with these fundamental rights; that if he deems them infringed in any particular he may resort to the courts where both sides of his case may be heard, and that his claim cannot be subjected to the ex parte determination of legislative or executive power. If, as is proposed, the legislative branch of the government may judge the extent of its own authority, the constitutional rights of the citizen may be denied without a hearing.

They who seek to undermine the power of the courts are vigorous in their criticism of decisions in which the provisions of the bill of rights have been invoked for the protection of corporate interests, wholly ignoring the many cases in which those same constitutional guaranties have been thrown as a shield around the poor and the friendless.

Between the state governments, with their rightful jealousy of their reserved powers and the federal government with the innate tendency to enlarge its power, it is imperatively necessary that there should be an arbiter. Under the Constitution the prohibitions upon the states are in substance prohibitions upon state legislatures and the powers granted or forbidden to the

federal government are in reality granted or forbidden to Congress. To give Congress power to determine a controversy between a state law-making body and itself as to which shall legislate concerning a particular subject matter, is to make Congress a judge in its own cause and to give the death blow to dual sovereignty.

The thought underlying the division of governmental powers into the three co-ordinate departments is that each branch should be supreme in the field allotted to it, but should be restrained from encroachment upon the field of another. There must be some tribunal by which their respective claims may be determined or it is inevitable that there will be clashes of authority resulting in resort to arbitrary power. That tribunal of necessity is found in the constitutional courts. To the legislative and executive departments belong the affirmative duties of government—the one making, the other executing the laws. The real and efficient governmental check and balance is found in the fact that the courts exercise the negative office of restraint. They are not concerned with any conflict of their authority with that of other departments, nor is there temptation to enlarge their power. They deal only with concrete cases where the rights of litigants are to be determined. Questions of the validity or invalidity of statutes are but incidental. To hold a statute invalid involves no more enlargement of the power of the courts than does a decision upholding its constitutionality.

The argument in favor of depriving our courts of their traditional power is based upon the assumption that of the three co-ordinate branches of government, the legislative most faithfully and wisely represents the will of the people. Such a belief finds no justification in our political history. Whatever may have been the views of Jefferson in the formative days of the Republic, the prevailing flood of ill-considered legislation caused him in 1789 to write Madison:

> "The executive power in our government is not the only, perhaps not the principal object of our solicitude. The tyranny of the legislative is really the danger most to be feared."

A like thought is expressed in one of the essays in the Federalist, wherein it is said:

"The facility and the excess of law-making seems to be the disease to which our governments are most liable."

In modern times we seem to have become imbued with a desire to make laws to control and regulate every activity in life and every phase of human endeavor. The result is a never-ceasing harvest of ill-advised, inconsistent and unconstitutional legislation. There is an alarming tendency upon the part of Congress to seek a cure for all the ills to which the human flesh is heir by means of legislation upon subjects coming within the reserved police power of the states.

Political expedience and the demands of local or commercial influence, and not the limitations of the fundamental law, today control the enactment of legislation. It matters not which of these sources gives rise to the interest of the member of a legislative body in favor of a proposed measure, his prejudice in its favor is as inevitable as that of any party to law-suit, and it is not possible for him to dispassionately judge of its validity.

The issue raised by the proposal under consideration is whether the power to finally judge of the constitutionality of legislation shall be taken from tribunals comprised of men learned in the law, and conferred upon a body, many of whose members are unfitted by training or experience to pass upon questions involving the interpretation of statutes, and of fundamental and essential constitutional provisions; whether we shall exchange the disinterested judgment of an upright and independent Judiciary for the determination of legislative bodies influenced by considerations of partisan advantage, or what may be conceived to be a popular demand, however temporary and ephemeral its nature; whether the consideration of questions vitally affecting the perpetuity of our institutions and the liberties of the people shall be removed from the calm, dispassionate judgment of the judicial conference room to the hasty and capricious action of a committee room of Congress; whether settled rules of construction are to give way to haphazard action upon a pending measure; and in the final analysis whether there shall be devitalized the only law upon which the people of this nation have directly set their approval.

In relinquishing the office in this Association to which I was chosen by your kindly favor, I would that I could impress upon you the sentiment expressed by Chief Justice White at a meeting of the American Bar Association held in 1914. That great Jurist, then in the winter of a life devoted to distinguished public life, said of the American lawyer:

> "May I not be permitted to indulge a heartfelt aspiration that there may be given to him a deep and reverent purpose of faithfully discharging the duties which rest upon him to the end that our fair institutions may be preserved and transmitted to those who are to come."

The lawyer who has taken an oath to support the Constitution of his country and state must not sit supinely by disinterestedly watching the drift of human affairs, content only with his daily duties to his clients.

It is a truth often expressed, but finding added significance in the light of present-day conditions, that the maintenance of representative free government, under which this nation has grown great and powerful, must in the future, as in the past, rest upon the performance by the Bar of great public service.

The government and each of its branches depends for its existence and perpetuation upon the preservation of the sacred foundation upon which it rests. It is the high, the imperative duty of each member of this Association to zealously defend the system of jurisprudence under which our courts are the guardians of that Constitution performing the essential duty of seeing to it that its every provision "stands as a wall of granite against assaults which sweep against it as the waves of an angry sea, whether they come from within or without."