The Election of Federal Judges by the People.

When the constitution of the United States was adopted at Philadelphia, the masses were uneducated and the men in official positions under the state governments were as a rule chosen by influence of the educated and wealthy few. A representative democracy was an experiment, and there was a frankly expressed fear of committing power to the masses. In only one state was the governor at that time elected by the people, and in none were the judges so chosen. In all there were property qualifications either for the electors of the state senate or of both houses, or for the members themselves of the general assembly, and in some in all these particulars.

This state of things was naturally reflected in the federal constitution, which still, after the lapse of nearly a century and a quarter, and the demonstrated capacity of the people for self-government, presents in the full blaze of the twentieth century the distrust of popular government which, before its trial, was natural in the men of the eighteenth century. The unnatural thing is, not its adoption in 1787, but the retention, unchanged, of the non-elective features of the constitution in 1904. The federal constitution, framed according to the ideas then prevailing gave to the people the selection of only one-sixth of the government—the members of the lower house of congress. The choice of the elective and the judiciary, and of the other half of the legislative department, was carefully placed beyond their reach. The senate was made elective at second hand by the state legislatures. The president was intended to be elected at third-hand by electors chosen by the state legislatures and the judiciary at fourth-hand by the appointment of the executive so chosen; and to place the judges farther beyond the possibility or responsibility to the people or influence by that popular opinion which is the foundation-stone of a free government, the tenure was for life.

A more complete denial of popular control of the new government could not have been devised. Hamilton would have preferred a hereditary executive. That would not have been as efficient for his purposes as an appointive life judiciary, for we know that the hereditary executive in England has not dared to exercise the veto-power since the revolution of 1688, more than two centuries. But by reason of the power which the judiciary soon bestowed upon themselves, by construction, of declaring any statute unconstitutional, the judges have set aside acts of congress at will. Thus the legal tender act, the financial policy of the government, was invalidated by one court and then validated by another, when the personnel of the court had been increased for that purpose. Thus also ten years since the income tax, which had been held constitutional by the court for a hundred years and after being at first again so held, was by a sudden change of vote by one judge held unconstitutional, nullified and set aside. The result was that one hundred million dollars of annual taxes were transferred from those most able to bear them and placed upon those least able to bear them, necessarily forcing the retention of the high tariff, which is a tax uopn consumption and therefore a tax upon the many. In the ten years which have elapsed since the income tax, passed by both houses of congress and approved by the president, was thus set aside, this change of front by this one judge has cost the toilers, the producers of this country, one thousand million dollars! Had the court been elective, men not biased in favor of colossal wealth would have filled more seats upon the bench, and if there had been such decision, long ere this, under the tenure of a term of years new incumbents would have been chosen, who, returning to the former line of decisions, would have upheld the right of congress to control the financial policy of the government in accordance with the will of the people of this day and age, and not according to the shifting views which the court has imputed to language used by the majority of the fifty-five men who met in Philadelphia in 1787. Such methods of controlling the policy of a government are no whit more tolerable than the conduct of the augurs of old who gave the permission for peace or war, for battle or other public movements, by declaring from the flight of birds, the inspection of the entrails of fowls, or other equally wise devices, that the omens were lucky or unlucky—the rules of such divination being in their own breasts and the augurs being always privately informed as to the wishes of those in power.

In England one-third of the revenue is derived from the superfluities of the very wealthy, by the levy of a graduated income tax. The same system is in force in all other civilized countries. In not one of them would the hereditary monarch venture to veto or declare null such a tax. In this country alone the people, speaking through their congress and with the approval of the executive, can not put in force a single measure of any nature whatever with assurance that it shall meet with the approval of the courts; and its failure to receive such approval is fatal for, unlike the veto of the executive, the unanimous vote of congress (and the income tax was very near receiving such approval) can not avail against it.

Such vast power can not safely be deposited in the hands of any body of men without supervision or control by any other authority whatever. If the president errs, his mandate expires in four years, and his party as well as himself is accountable to the people at the ballot box for his stewardship. If members of congress err, they too must account to their constituents. But the judiciary hold for life, and though popular sentiment should change the entire personnel of the other two great departments of government, a whole generation must pass away before the people could get control of the judiciary, which possesses an irresponsible and unrestricted veto upon the action of the other departments—irresponsible because impeachment has become impossible, and if it were possible it could not be invoked as to erroneous decisions, unless corruption were shown.

In the state governments the conditions existing in 1787 have long since been changed. In all the states the governors and the members of the general assemblies have long since been made elective by manhood suffrage. In all the forty-five states, save four (Delaware, Massachusetts, New Hampshire and Rhode Island), the judges hold for a term of years, and in three of these they are removable (as in England) upon a majority vote of the legislature, thus preserving a supervision of their conduct which is utterly lacking as to the federal judiciary. In Rhode Island the judges were thus dropped summarily, once, when they had held an act of the legislature invalid. In thirty-three states the judges are elected by the people, in five states by the legislature and in seven states they are appointed by the governor with the consent of the senate. Even in England the judges hold once subject to removal upon the vote of a bare majority in parliament—though there the judges have never asserted any power to set aside an act of parliament. There the will of the people, when expressed through their representatives in parliament, is final. The king can not veto it, and no judge has ever dreamed he had power to set it aside. Professor Bryce overlooked these essential differences in avowing his preference for a life-tenure, appointive judiciary in this country.

A greater power, however, is claimed and has been often asserted by the judges in this country. Subject to no supervision or revisal from any source, it is absolute power. If the federal judges were elective, and for a term of years, as state judges have become, there would be the corrective force of public opinion, which could select judges at the expiration of such term more considerate of the policy in public matters which is approved by the statutes enacted; while in all private litigation elective judges would be altogether as efficient as if appointed for life.

Given by the constitution of 1787 the choice of only one-sixth of the government—the lower house of congress—the people soon forced the transfer of the choice of presidential electors to their arbitrament and then by common consent the electors were made mere figure-heads, compelled to vote for the candidate for president whose name is placed at the head of the ballot on which the electors are voted for. Legally each elector is free to vote for whom he pleases, but no elector has ever dared violate the implied order given him at the ballot box. Thus, without changing a letter in the constitution, the people early captured the executive department and practically vote directly for president and vice president.

For years a similar struggle has gone on to secure the election of United States senators by the people. At least four times the house of representatives has passed a bill to amend the constitution to provide for the election of senators by the people, and each time the vote was either unanimous or practically so. The measure has, however, never passed the senate, which is to a large extent filled, as the federal judiciary is, by the influence of corporate power and very often by the selection of the attorneys of those corporations. The bill to elect senators by the people has not been defeated directly, but by the chloroform process of referring the bill to some committee which shall not report it for a vote thereon in the open senate. In many states it has been sought to attain the same end by nominating the senators by a state primary or state convention, and pledging the legislative candidates to vote for such nominees. This is unsatisfactory, for the large and increasing number of newspapers which are owned or controlled by corporate wealth antagonize any method save the election by the legislature, whose limited number makes the choice of a senator by them more easy of control by dextrous manipulation.

But by far the more serious defect and danger in the constitution is the appointment of judges for life, subject to confirmation by the senate. So far as corporate wealth can exert influence, either upon the president or the senate, no judge can take his seat upon the federal bench without the approval of allied plutocracy. It is not charged that such judges are corruptly influenced. But they go upon the bench knowing what influence procured their appointment, or their confirmation, and usually with a natural and perhaps unconscious bias from having spent their lives at the bar in advocacy of corporate claims. Having attempted as lawyers to persuade courts to view debated questions from the standpoint of aggregated wealth, they often end by believing sincerely in the correctness of such views, and not unnaturally put them in force when in turn they themselves ascend the bench. This trend in federal decisions has been pronounced. Then, too, incumbents of seats upon the federal circuit and district bench can not be oblivious to the influence which procures promotion; and how fatal to confirmation by the plutocratic majority in the senate is the expression of any judicial views not in accordance with the "safe, sane and sound" predominance of wealth.

As far back as 1820, Mr. Jefferson had discovered the "sapping and mining," as he termed it, of the life-tenure, appointive federal judiciary, owing no gratitude to the people for their appointment and fearing no inconvenience from their conduct, however arbi-