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BULLETIN

*The* COLLEGE *of*  
WILLIAM *and* MARY  
*in* VIRGINIA



*Our Changing Constitution*

JAMES M. BECK

*Member of House of Representatives*

FIRST LECTURE ON THE  
CUTLER FOUNDATION

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## THE CUTLER LECTURES

*Established at the College of William and Mary  
in Virginia by James Goold Cutler  
of Rochester, N. Y.*

The late James Goold Cutler of Rochester, New York, in making his generous gift to the endowment of the Marshall-Wythe School of Government and Citizenship in the College of William and Mary provided, among other things, that one lecture should be given at the College in each calendar year by some person "who is an outstanding authority on the Constitution of the United States." Mr. Cutler wisely said that it appeared to him that the most useful contribution he could make to promote the making of democracy safe for the world (to invert President Wilson's aphorism) was to promote serious consideration by as many people as possible of certain points fundamental and therefore vital to the permanency of constitutional government in the United States. Mr. Cutler declared as a basic proposition that our political system breaks down, when and where it fails, because of the lack of sound education of the people for whom and by whom it was intended to be carried on.

Mr. Cutler was one of the few eminently successful business men who took time from his busy life to study constitutional government. As a result of his study, he recognized with unusual clearness the magnitude of our debt to the makers, interpreters and defenders of the Constitution of the United States.

He was deeply interested in the College of William and Mary because he was a student of history and knew what great contributions were made to the cause of constitutional government by men who taught and studied here—Wythe and Randolph, Jefferson and Marshall, Monroe and Tyler, and a host of others who made this country great. He, therefore, thought it peculiarly fitting to endow a chair of government here and to provide for a popular “lecture each year by some outstanding authority on the Constitution of the United States.”

The first lecturer in the course was Honorable James M. Beck, former Solicitor General of the United States, and now a member of Congress from the City of Philadelphia. Perhaps no man in recent years has written and spoken more effectively on the Constitution of the United States. His books, entitled “The Constitution of the United States,” 1922, and “The Vanishing Rights of the States,” 1926, have attracted widespread attention.

JNO. GARLAND POLLARD,  
*Dean of the Marshall-Wythe School of  
Government and Citizenship of the  
College of William and Mary.*





## OUR CHANGING CONSTITUTION\*

*Mr. President, Ladies and Gentlemen:*

It is a great, but undeserved, honor to inaugurate this series of lectures under a Foundation which this venerable college owes to the enlightened patriotism of the late James Goold Cutler. The founder made a happy selection, for where could a series of lectures upon the Constitution of the United States be held with more propriety than in the historic town, where, under the auspices of that great old preceptor, Chancellor Wythe, Thomas Jefferson and John Marshall laid the foundations of their unequalled careers as jurists and statesmen?

Contemporary novelists have held up to ridicule the small town, and "Main Street" has passed into a by-word, but, if it were not irrelevant to my theme, it would be a satisfaction to defend the small town against the great city, as the nursery of great men. Athens, Bethlehem, Stratford, Philadelphia and Williamsburg—all little towns in their golden period—gave to the world more than their share of the few supremely great immortals.

In inaugurating this series of lectures, which,

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\*An Address delivered at the College of William and Mary under the Auspices of the James Goold Cutler Foundation, on November 18, 1927, by James M. Beck, formerly Solicitor General of the United States.

under the terms of the Foundation, must relate to the Constitution of the United States and which we may hope will continue as long as the Constitution itself endures, it seemed to me appropriate that the first lecture should deal with the nature of the Constitution as a living instrument of government, and this suggests the narrower question as to whether the Constitution is like the North Star, "of whose true-fix'd and resting quality, there is no fellow in the firmament," or whether the Constitution is ever-changing to meet the necessities of a changing time and a changing people.

The popular conception, undoubtedly, is that excepting only as it is formally amended, the Constitution is a fixed quantity, a static force, the same yesterday, today and, presumably, forever. To it has been imputed the immutability of the Ten Commandments, as though its letters, like the Decalogue, were graven in imperishable stone. It has been likened to Gibraltar, against which the winds and waves have beaten for centuries in vain, and John Marshall found in it the realization of that "government of laws and not of men," which was first written into the Massachusetts Constitution of 1780 as the great objective of free government. The fact is that a "government of laws and not of men," in the literal sense, finds little justification in the hard realities of life, and it may be questioned whether such a theory of government would be even desirable. An organism, which develops by evolutionary growth, is better than an unchanging stone.

There is some force in Jefferson's belief that the Constitution was made "for the living and not for the dead." Had the Constitution been a rigid document and insusceptible of change, except through the formal processes of amendment, it would have died still-born. When the Constitution was put into force, that wise and genial philosopher, Franklin, said:

"Our Constitution is in actual operation; everything appears to promise it will last, but in this world nothing is certain but death and taxes."

Consciously or unconsciously, he was a disciple of Jeremy Bentham and believed that governments and forms of governments are but means to an end and that their justification is in their practical utility. The greatest of Teachers once said that the Sabbath was made for man, and not man for the Sabbath.

The two greatest personalities of the Convention likewise regarded the forms of government as less important than the force behind them. Writing on February 7, 1788, to his friend and comrade in arms, the Marquis de Lafayette, Washington said that the new government would be in no danger of degenerating into a monarchy, obligarchy or aristocracy, or any other form of despotism, "so long as there shall remain any virtue in the body of the people." He then continued:

"I would not be understood, my dear Marquis, to speak of consequences which may be produced in

the revolution of ages by corruption of morals, profligacy of manners, or listlessness in the preservation of the natural and unalienable rights of mankind, nor of the successful usurpations, that may be established at such an unpropitious juncture upon the ruins of liberty, however providently guarded and secured; as these are contingencies against which no human prudence can effectually provide."

When Franklin, on the last day of the Convention, implored—some say with tears in his eyes—the reluctant delegates to sign the great compact, he thus gave utterance to the same truth:

"There is no form of government but what may be a blessing to the people if well administered for a course of years, and can only end in despotism, as other forms have done before it, when the people shall become so corrupted as to need despotic government, being incapable of any other."

The truth was never more effectively expressed than by the founder of Pennsylvania, who said:

"Governments, like clocks, go from the motion men give them and, as governments are made and moved by men, so by men they are ruined, too. Therefore, governments rather depend upon men than men upon governments."

Similarly, the great English statesman, Canning, once spoke of the "idle supposition that it is the harness and not the horses that draw the chariot along."

In considering the Constitution we should avoid that pietistic attitude that regards it as having a

sanction other than that of reason and utility and which accepts it as a divinely inspired revelation, which it were impiety to question in any respect. Such, surely, was not the attitude of the men who framed it. As one of their number, Robert Morris, said:

“This paper has been the subject of infinite investigation, disputation and declamation. While some have boasted it as a work from Heaven, others have given it a less righteous origin. I have many reasons to believe that it is the work of plain, honest men, and such, I think, it will appear.”

This sacerdotal view of the Constitution largely reflects the influence of the bar, to whom naturally the people look for their conceptions of the Constitution. The bar was originally the child of the Church and has never wholly escaped from the spirit of sacerdotalism. Lawyers were originally ecclesiastics and at a time when the subtlety of the scholiast most prevailed. We lawyers are too apt to regard the doctrines of the law as final truths, having their sanction in some judicial ipse dixit or political document. Religion, which rests its justification in supernatural revelation, may well believe in final and indisputable truths, but human laws, whether they are ordinary statutes or fundamental constitutions, have no such authority. Law is only the reasoned adjustment of human relations. As these human relations are forever changing, sometimes with kaleidoscopic swiftness, it follows that the institutions of the law can never be static. Even if legal conceptions could

be accepted as final truths yet it is impossible to define them in the imperfect medium of language with any finality, for the very meaning of words changes from generation to generation and, thus, in the matter of law, the definition too often survives the rule.

This sacerdotal conception of law has led to much foolish expression about the sanctity of laws, whether they be wise or unwise, and we forget the elemental fact that we cannot ask people to respect a law that is intrinsically not worthy of respect. The vague conception of jurists, which we call "natural law," and sometimes the "higher law," means little more than the inherent right of men to protest against laws which are against "common right and reason."

The law, I repeat, is but the reasoned adjustment of human relations. It has no inherent sanctity and its validity, at least in the forum of conscience, depends upon its reasonableness. Hence, it is a good sign when men protest against an unreasonable law. "New occasions teach new duties; time makes ancient good uncouth," and the very essence of the democratic spirit is not merely to adopt new laws when occasions require them, but to repeal old laws when experience has demonstrated either their impracticability or injustice. Let us never forget the historic basis of the American Commonwealth, for the people of Virginia, and later the people of the United Colonies, all revolted against unjust laws, which had the highest sanction, from a constitutional standpoint, in the mandate of a legally omnipotent Parliament.

All this is not said to lessen in any respect the deep regard that every American should have for the wise provisions of a Constitution, which, after 138 years of experience, has been found so beneficial to the American people. On the contrary, my purpose is rather to indicate that the strength of the Constitution is in its capacity for progressive development. The framers were wise in what they provided, but they were wise to the point of inspiration in what they left unprovided. Nothing was further from their pretensions than to provide an immutable rule for all time. They not only made express provision for formal amendment, but in their enumeration of objectives, rather than in their close definition of powers, they made possible the growth of the Constitution through usage, political habits, judicial interpretation and, when necessary, formal amendment. They were not foolish enough to anticipate the changes of the future, or measure its demands. All they tried to do was to provide, first, the machinery of motion, and, secondly, the chart for the voyage, and what they tried to do, and did accomplish with unparalleled success, was to direct the course of the Ship of State as it sailed onward over the illimitable ocean of time. In other words, the Constitution was not a dock, to which the Ship of State was securely fastened, nor was it even an anchor to keep the ship from motion. It was rather a rudder, which should guide the course, and a motive power, which should drive the Ship of State onward. Had it been otherwise, its life would

have been a short one, for the advancement of the most changing and progressive people in the world could never have been "cribbed, cabined and confined" within any hard and unyielding formula.

Expressions from the opinion of the Supreme Court could be cited which both affirm and disaffirm this idea of a changing Constitution, but the differences between them are more metaphysical than real. While it has been said by the Supreme Court that the meaning of the Constitution "does not alter" and that "what it meant when adopted it means now," yet this is only true in a qualified sense, for no one can read the interpretations of the Constitution by the Supreme Court, now reported in two hundred and seventy-two volumes, without being confronted by the fact that, in a thousand respects, meanings have been attributed to the literal provisions of the Constitution, of which its framers could not possibly have dreamed.

In one of the greatest of his opinions, *McCulloch vs. Maryland*, Chief Justice Marshall recognized the inevitable changes, which the adaption of the Constitution to new conditions necessarily brings about. He said:

"This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should in all future times execute its powers would have been to change entirely the character of the instrument and to give it the properties of a legal code. It would have been an unwise attempt to



provide by immutable rules for exigencies, which, if foreseen at all, must have been seen dimly and can best be provided for as they occur."

The suggestion that the Constitution is as changeless as the laws of the Medes and Persians may be refuted by the single fact that the democratic genius of our people refused from the beginning to elect a President in the cumbrous form prescribed in the Constitution and, while the letter still remains as a form and the electoral colleges still survive, the electors, instead of selecting themselves the President, merely record the choice of their constituents. This is almost as binding as though it were written into the Constitution. An elector, theoretically, could make another choice, but, under our constitutional system, as developed by usage, it would be, except under extraordinary circumstances, the betrayal of a public trust.

The proof that ours is a changing Constitution can be attested by a fact, which few intelligent students of our history would deny, that, if the framers of the Constitution were to revisit the "glimpses of the moon," and now study their handiwork as it has been developed since 1787, they would in many respects fail to recognize the product of their labors. Take, for example, the commerce clause of the Constitution, economically the most potential of all. As understood by the Fathers: it was only intended to regulate the ships, which in our coastwise or foreign trade, transported products from state to state. It has now developed into an infinitely complex system,

under which the Federal Government regulates agencies of which the Fathers never dreamed and regulates them in every detail, however minute.

Indeed, an unchanging Constitution would be an impossibility, for Plato uttered a great truth more than two thousand years ago, that a Constitution must correspond with what he called the "ethos" of the people, meaning thereby not merely the spirit of the people, but the aggregate of their habits, conventions and ideas. These obviously change from generation to generation. If there be any conflict between the Constitution and the spirit of the people, it is not the will of the people that is broken, but the Constitution. Therefore, to insure vitality there must be a reasonable correspondence between the Constitution, as interpreted, and the spirit of the people. Of this, undoubtedly, the most conspicuous example is the profound modification in the representative principle which was the basis of the Constitution. The framers believed in all sincerity—and, theoretically, they were right—that the limit of democracy is the selection of representatives, who would exercise their own judgment in a judicial spirit for the common good. Nothing was further from their purpose than any direct decision by the people of public policies, but this view did not accord with the democratic genius of the people, as George Mason of Virginia and Benjamin Franklin of Pennsylvania clearly pointed out in the Constitutional Convention. At least from 1800, when Mr. Jefferson came into power, until the present time the

working theory of our government is that in some way the representative must first determine the will of his constituents and then put it into effect, however unwise. We may quarrel with such a theory, for to it is largely due the deterioration of leadership without which a nation cannot be great, but it is none the less a fact with which we must reckon.

It must be recognized, moreover, that the Constitution was not the origin of the American Commonwealth and that our nation did not begin with its adoption. The American Commonwealth began with the landing of the first English settlers upon the coasts of Virginia, and this Commonwealth, even though it lacked organic existence, had its habits, customs and institutions, which no Constitution could supersede and of which the Constitution was intended to be only a partial expression.

These unwritten institutions of the American people are also a part of our constitutional system, in the broader sense of the word. They are analogous to the unwritten constitution of England, which is none the less potent because it is unwritten, and these institutions, as those of England, are ever-changing in character and scope, and the interpretation of the Constitution, whether by usage, habit or judicial interpretation, slowly changes with them.

All this need not be regretted, for nothing that has vitality is at rest. Stagnancy is death and when the people of the United States cease to deliberate upon the meaning of the great Compact and, what is more, when they cease to adapt it, either by

popular usage or judicial interpretation, to the ever-changing needs of the most progressive people in the history of the world, then it will cease to be.

Moreover, the Constitution, great and admirable as it was, could not be unaffected by the profound changes which have taken place in the world since it was formulated. These changes, of little more than a century, have more profoundly changed the conditions of human life than all the changes that took place in the world from the beginning of the Christian era. The Convention was held at a time when the world was passing from a pastoral, agricultural form of life, which had prevailed for untold thousands of years, to a highly industrial civilization, which has its own problems and institutions, and to meet these the Constitution must, of necessity, be adapted if it is to live.

It would be interesting, if time permitted, to discuss these changes by usage, which are for practical purposes almost as effective as if written into the Constitution itself. A few illustrations must suffice.

Take, as one example, the nature of the Presidential office. First, as to its duration. The prohibition of a third term is no part of the written Constitution. It is unsusceptible of judicial enforcement and is not a provision in the proper sense of the word. No one can question the legal eligibility of a President to have as many terms as the people care to elect him. None the less, in the English sense of the word "Constitution," the Third Term tradition has hitherto been a very potent force in limiting the

service of a President to two terms. One of the most striking and portentous phenomena of our time is the altered position of the President in our constitutional system. The Constitution was built upon the English conception since 1689 of a great Council of the Realm, in whom ultimate legislative power was vested. The President was merely to execute the policies which Congress, as the peculiar representative of the will of the people, would require. This, however, did not accord with the subconscious spirit of the American people. Their religion is efficiency. They believe in concentrating power and holding as few men responsible as possible. One has only to view our industrial organization to see the reality of this fact.

Due to this genius for efficiency and to the development of the party system, the office of President has long since become more similar to that of a constitutional monarch than to that of a mere executive servant of the people. In the practical working of our government, the President does not accept from Congress the policies that he is to execute, but it becomes his political duty to compel Congress to execute the policies for which he accepts responsibility to the people. When a Congress is in sympathy with a President, he, as the real leader of his party, prescribes the program, and unless it be plainly unwise, his party in Congress is required to carry the President's policies into effect. Such was not the purpose of the Constitution, but such has become its practical workings through the in-

fluence of the people and the usages of politics. Again, the over-shadowing power of the President has been developed through his power to remove officials, a power not expressly conferred by the Constitution but a necessary incident, as I successfully argued in the Supreme Court, to the executive power.

Thus I could multiply instances of the adaptation of the theories of the Constitution to the genius of the American people and to the necessities of practical government. I will, however, cite only one other and an even more striking illustration. The theory of the Constitution was to keep the three departments as independent and as separate from each other as possible. This was the principle of Montesquieu. The framers, however, finding this quite impossible, attempted to respect the principle, so far as possible, but in the actual workings of our government the interdependence of the departments and the interblending of their functions have proceeded with ever-accelerating speed.

Is there, then, nothing in the Constitution that remains unaltered? Have we built our government upon shifting sands?

To this last question an emphatic negative can be given. The foundation of our government is as a rock and, like a house built upon a rock, it has stood and will stand, please God, for centuries to come, but the superstructure is the result of progressive interpretation and adaptation. If the framers would have difficulty in recognizing some

portions of the superstructure, they would find the foundation much as they—the Master Builders—constructed it.

In distinguishing between the temporary and the permanent, we must bear in mind the three-fold aspect of the Constitution. The first I may call its contractual character. It is a solemn compact between thirteen states, to which great partnership thirty-five other states—some the creation of yesterday—have now been admitted. While in a broader institutional sense the Constitution was the creation of the American people, thereby meaning the people of the nascent American commonwealth, yet organically, it is the creation of states, which surrendered a part of their sovereignty to create a common governmental agency for certain objectives, to which the states, individually, could not effectively contribute. We are still the United States and not a unified state, and the solemn covenants that were entered into in the Constitution between the states, as to the nature of the government which they created, cannot be broken without a gross breach of faith.

Take, for example, the equality of the sovereign states in the Senate. From a democratic point of view, it is indefensible. The population of Pennsylvania is the equivalent of the aggregate population of sixteen states, which could readily be named and yet these sixteen states exercise sixteen times the power in the Senate that the historic commonwealth of Pennsylvania does.

Only subordinate to that, if I may be permitted an excursion into contemporary controversy, is the undoubted right of each state to select its own representatives in the Senate and not have the representatives of other states select those representatives for it. It is true that the Senators from a state must have certain qualifications prescribed by the Constitution, but, otherwise, the forty-seven states are theoretically powerless to dictate to one state who the representatives of the latter shall be. In the old days of sectional strife, Mississippi might have grave objection to the selection by Massachusetts of Charles Sumner as its Senator, and Massachusetts, in its turn, might have equally grave doubts about the selection of Jefferson Davis by Mississippi, but the right of each state to select its own Senator was a basic condition upon which the Federal Government was formed. In my opinion, the Senate has no right whatever to determine the moral or intellectual qualifications of a Senator. Otherwise, a sovereign State would only nominate its representatives in the Senate and the Senators from other states would have the final right of selection. Such a doctrine would have made the framers rub their eyes in amazement. The right to equality in the Senate and the right of each state to choose its Senator is not anything that usage or judicial interpretation can alter—it is a matter of solemn obligation and, as such, is unalterable. The basic conditions, upon which the states were willing to create a



Federal Government, are unchangeable without a gross breach of faith.

Again, it must be remembered that the Constitution consists of something more than the mechanics of government. It contains certain fundamental verities of liberty, which limit the grant of power and which, because they have their sanction in the moral conscience of mankind and are based upon considerations of eternal morality, are unchangeable. All nations have had a conception of what they sometimes called "natural law" and at other times the "higher law," by which they meant these fundamental verities of human freedom. Cicero spoke of a Higher Law, "which was never written and which we are never taught; which we never learn by reading, but which was drawn by Nature herself." Sophocles makes his Antigone speak of "those unwritten, unfailing mandates, which are not of today or yesterday, but ever live and no one knows their birth-tide."

Some of these fundamental decencies of government are expressly written into the Constitution. Such, for example, is the declaration that property shall not be taken by the Government for public use without just compensation.

But the full interpretation of many does not rest upon the letter of the Constitution, but upon the enlightened conscience of mankind. Take, for example, the declaration that a man shall not be "deprived of life, liberty or property without due process of law." What is "due process of law"? The

expression is a vague one. It is the English equivalent of the old Latin maxim in Magna Charta that the rights of freemen should not be taken away except in accordance "with the law of the land." That law was largely a matter of unwritten customs, which constituted the political conscience of the English people.

Due process of law simply means that there are certain fundamental conceptions of public morality and fair dealing, which are implied without being expressed. For example, that a man should not be condemned without a hearing, or that a man should not sit as judge in his own cause. These moral limitations upon the powers of government are as binding as if formally written into the Constitution and are as immutable as the laws of morality. Property rights embodied in the great Commandment, "Thou shalt not steal," do not derive their sanction from any words graven in stone, or written on parchment, but from a fundamental and eternal conception of morality, and this is so, even if the Soviet Government has paid little attention to any such conception of morality.

Between these contractual obligations, which inhere in the compact of the Union, and the fundamental conceptions of morality, which justly limit the powers of any government, the Constitution contains many mechanical details of government, which naturally must be adapted from time to time by usage, practical administration or judicial interpretation to the changed conditions of life in the

Twentieth Century. As previously stated, our whole conception of commerce has been amplified a thousand-fold since the Constitution was adopted, and many other illustrations could be cited.

I have already trespassed far too long upon your time, but I cannot conclude without very briefly applying these observations to what was once the greatest question in American politics and what is still a vital question, although it excites at the moment very little interest. I refer to what was formerly called "centralization." Nothing more strikingly illustrates the profound changes in our constitutional ideas, due to the ethos of the people than this question of centralization. When the Constitution was adopted, the states had a very real consciousness of their own sovereignty. The consciousness of national unity was a very slow growth. The reluctance with which the states granted any measure of power to the central government and the fact that the Constitution was literally wrung from the states by the sheer necessity of social conditions, illustrate this fact. The success of the national government and the immense moral influence of George Washington slowly developed the idea of a powerful union. These causes, however, were insignificant as compared with the changes which were brought about through the influences of mechanical invention. The Union is held together today, not so much by the Constitution, as by the shining pathways of steel, over which our railroads run, and the innumerable

wires, which, like antennae, co-ordinate the energies of the American people.

To these must now be added one of the most potent unifying forces of all, namely, the radio. While the press served as a consolidating influence yet the influence of a newspaper was limited to the zone of its circulation. Today, however, any responsible leader of thought may on occasion speak to twenty millions of people. Thus, both time and space have been annihilated, and the people have been irresistibly drawn into the consciousness of a central government, which far over-shadows the consciousness of the states. This has caused a profound change in the ethos of the people in this respect and our institutions have become so unified that the old struggle against centralization has largely passed away. Each of the old political parties, when in power, vie with the other in consolidating the Union by multiplying the bureaucratic agencies by means of which many matters hitherto within the power of the states are now controlled from Washington. To the extent that this is the result of economic forces it is irresistible, even if not always desirable, but to the extent that it is the result of the greed for power, which grows by what it feeds upon, it is a grave peril. The problem of the future is to hold this centripetal tendency measurably in check, for it is as true today as when the Constitution was adopted that our government will not always continue, if the planetary system of the states be absorbed in the central sun of the Federal Government. Our nation

is too vast in area and our people too numerous to be governed altogether from Washington. The safety of the Union depends upon the preservation of the rights of the states, and the difficulty is to preserve these rights when the elemental forces of steel, electricity and now the radio continue to weld the country into a powerful unity and to reduce the political consciousness of the states almost to that of subordinate police provinces.

When the centennial of the Constitution was celebrated in 1887, Charles Francis Adams, the lineal descendant of a federal and a Whig President, made this statement:

“Steam and electricity have in these days converted each thoughtful Hamiltonian into a believer of the constitutional theories of Jefferson. Today everything centralizes itself. Gravitation is the law. The centripetal forces, unaided by government, working only through scientific sinews and nerves of steam and steel and lightning, this centripetal force is nearly overcoming all centrifugal action. The ultimate result can by thoughtful men no longer be ignored. Jefferson is right and Hamilton is wrong.”

I do not agree with Mr. Adams. It seems to me more accurate to say that neither Jefferson nor Hamilton was wholly right or wrong. They represented opposite poles of political thought and yet each was necessary to the development of America. To Hamilton we owe the development of the Constitution through administrative organization, and to Jefferson we owe an equal development by demo-

cratic idealism. Between these extremists, who represented the positive and negative forces of the electric current, was John Marshall, and it was he who found the Constitution "a skeleton and clothed it with flesh and blood." He held the tremendous issues of state and national sovereignty in the even scales of justice and today his great opinions are the living oracles of the Constitution.

The problem of the future will be to preserve the just equipoise, which the Constitution vainly sought to maintain between the power of the central government and the power of the states. Otherwise, the Federal Government will become of such overshadowing importance that, in the remote future, there may be a counter-check of a powerful move towards disintegration.

We are still a young country. In my youth I might well have known a distinguished lawyer of Philadelphia, then over 90 years of age, who saw Washington and Franklin conversing in front of Independence Hall during the sessions of the Constitutional Convention. This measures the brief span of our existence. Centuries are still before America and who can safely say that, if it becomes too centralized for efficient government, one day there may not be a powerful movement towards the division of the Republic into two or three republics, especially if there develop between the sections powerful economic conflicts of policy? The history of nations in an unending cycle of integration and disintegration, of consolidating and then redistri-

bating the powers of governments. Human institutions, like the globules of mercury, tend to scatter and unite. For more than a century the tendency of America has been to consolidate, but let us remember that if the movement proceed too far, the tendency to disintegrate will begin.

The best method of preventing so deplorable a result is to preserve the rights of the states in their full integrity. The ideal of every patriotic American should be "The indissoluble union of indestructible states."

And this suggests a final thought. The salvation of our form of government, in the last analysis, rests with the people, and the most discouraging sign of the times is their indifference to constitutional questions. What I have elsewhere called "constitutional morality" was never at a lower ebb. This is largely due to the over-shadowing importance and grandeur of the Federal Government. Like the central sun, it blinds our vision and, at least in popular consciousness, the states are gradually fading in importance, even as the planets cannot be seen by day because of the omnipresent rays of the sun.

At the beginning of the Republic, there were thirteen self-conscious states, which had behind them a century or more of traditions. But the union of the states is now composed of forty-eight states, many of which are but the creation of yesterday and which have no such background of tradition to stimulate the consciousness of the people. Most of them are

the creation of purely artificial boundaries and, while there is some local pride, yet they naturally regard themselves as the children of the Federal Government, whereas the historic thirteen colonies had, at least at one time, the proud consciousness that they created the Federal Union and that the Federal Union did not create them. I confess I cannot see the way to combat this changed consciousness of the American people, which is so largely due to mechanical forces which no written Constitution could overcome.

The loss of the sense of constitutional morality, without which it is difficult for any Constitution to survive, is also due to a subtler cause and one that is too little appreciated. Our very dependence upon a written Constitution and our belief in its static nature and its self-executing powers has tended to deaden the political consciousness of the American people. We live in an age of specialization, and the people, forgetful that, in the last analysis, they must save themselves, feel that a Constitution will execute itself and that the special and exclusive method of determining all constitutional questions is by resort to the courts.

This is especially perceptible in our legislative bodies. Time was when Congress felt that it had the primary duty of determining whether proposed laws were within its constitutional power. Many of the greatest debates upon the meaning of the Constitution took place in the halls of Congress and not in court rooms. The controversy over the power to



create a United States Bank, and later, the power to make internal improvements, and later the validity of the Missouri Compromise, were questions which Congress had no disposition to shift to the judiciary, but which they preferred in the first instance to decide for themselves. This is as it should be, for every member of Congress takes an oath, as a Judge, to support and maintain the Constitution of the United States.

In recent years there has been no disposition to argue the constitutional phase of any proposed law in Congress. Such a debate would be regarded as a loss of public time, as the question must ultimately be determined by the Supreme Court. Laws are frequently passed of very doubtful constitutionality and their validity left to the processes of litigation. This might be a satisfactory division of governmental work if the Supreme Court had unrestricted and plenary power to disregard a constitutional statute or executive act, but such is not the fact. Many laws are politically anti-constitutional without being juridically unconstitutional. Even in cases where the judiciary can determine the validity of a law, it yet holds that all doubts must be resolved in favor of the legislation, and that only a clear and almost indisputable repugnance to the Constitution will justify a decision adverse to its validity. In this way, many laws, which Congress regarded as of doubtful constitutionality when they passed them and which the court itself regards of doubtful constitutionality, are yet enforced on the ground that their repugnancy

to the Constitution is not clear beyond a reasonable doubt.

Through this breach in the dike, a flood of legislation wholly inconsistent with the spirit, and at times inconsistent with the letter, of the Constitution, constantly passes, and, being thus accepted as law, the Constitution itself is slowly weakened.

In a recent book, I likened this wearing away of constitutional guarantees to the erosion of a beach by the ocean. I venture to quote the metaphor that I then used:

“The encroaching waves each day ebb and flow. At high tide there is less beach and at low tide more. At times the beach will be devoured by the ocean, when a tempest has lashed it into a fury, and then the waters will become as placid as a mountain lake, and the shore will seem to have triumphed in this age-old struggle between land and water.

“The owner of the upland is often deceived by the belief that the fluctuations of the battle generally leave the shore line intact, but when he considers the results of years, and not of months, he will realize that the shore has gradually lost in the struggle and that slowly, but steadily, the ocean is eating into the land.”

Therefore, I plead for an awakened conscience on the part of our legislators and the people themselves in the matter of constitutional morality. They should primarily determine these grave issues of constitutionality for themselves. Unless they do so, they are in grave danger of losing the benefits of the wisest instrument of statecraft that the wit of man has yet devised. “Eternal vigilance is the price of liberty.”









BULLETIN

*The* COLLEGE *of*  
WILLIAM *and* MARY  
*in* VIRGINIA



The Constitution and Prohibition  
Enforcement

GEORGE W. WICKERSHAM

SECOND LECTURE ON THE  
CUTLER FOUNDATION





*The* COLLEGE *of*  
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## THE CUTLER LECTURES

*Established at the College of William and Mary  
in Virginia by James Goold Cutler  
of Rochester, N. Y.*

The late James Goold Cutler, of Rochester, New York, in making his generous gift to the endowment of the Marshall-Wythe School of Government and Citizenship in the College of William and Mary provided, among other things, that one lecture should be given at the College in each calendar year by some person "who is an outstanding authority on the Constitution of the United States." Mr. Cutler wisely said that it appeared to him that the most useful contribution he could make to promote the making of democracy safe for the world (to invert President Wilson's aphorism) was to promote serious consideration by as many people as possible of certain points fundamental and therefore vital to the permanency of constitutional government in the United States. Mr. Cutler declared as a basic proposition that our political system breaks down, when and where it fails, because of the lack of sound education of the people for whom and by whom it was intended to be carried on.

Mr. Cutler was one of the few eminently successful business men who took time from his

busy life to study constitutional government. As a result of his study, he recognized with unusual clearness the magnitude of our debt to the makers, interpreters and defenders of the Constitution of the United States.

He was deeply interested in the College of William and Mary because he was a student of history and knew what great contributions were made to the cause of constitutional government by men who taught and studied here—Wythe and Randolph, Jefferson and Marshall, Monroe and Tyler, and a host of others who made this country great. He, therefore, thought it peculiarly fitting to endow a chair of government here and to provide for a popular “lecture each year by some outstanding authority on the Constitution of the United States.”

The second lecturer in the course was Honorable George W. Wickersham, former Attorney-General of the United States, and now Chairman of the National Commission on Law Observance and Enforcement.

JNO. GARLAND POLLARD,  
*Dean of the Marshall-Wythe School of  
Government and Citizenship of the  
College of William and Mary.*



## THE CONSTITUTION AND PROHIBITION ENFORCEMENT\*

The Constitution of the United States is one of those extremely rare products of statesmanship, the excellence of which has not been impaired by the vicissitudes of changing times, the criticism of scholars, or the resentment of political factions. The idea that it was struck off at a heat by the momentary inspiration of a man or a group of men, to which Mr. Gladstone, in an outburst of admiration, gave expression, has not stood the test of historical analysis. But the far-reaching wisdom of the framers has been emphasized by proof that the Constitution was a development of well known principles of English Government, modified and adapted to the requirements of the newly enfranchised American nation. The Constitutional Convention built a structure adapted to the needs of centuries, upon the deep and sure foundations of those principles of English liberty which had been achieved in six hundred years of struggle. None of its provisions ran counter to the funda-

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\*An address delivered at the College of William and Mary under the auspices of the James Goold Cutler Foundation, on May 7, 1929, by George W. Wickersham, former Attorney-General of the United States.

mental political principles of any considerable number of the American people. It is true that "in order to form a more perfect union," the Federal Government was endowed with powers greater than some of the leading statesmen of the time thought wise or safe for the preservation of individual liberty. But the feebleness of the government of the Confederation had brought the country into such chaotic condition that the great majority of the people were quite ready to accept a central government strong enough to secure peace and justice at home and to command respect abroad. The fact is, that the Constitution was the product of the aristocracy of the American Democracy: not necessarily the aristocracy of birth or wealth, but the aristocracy of brains and character. It was framed by educated men, very largely lawyers, but all men who had studied deeply the history of governments in the past, and who were capable of deducing sound conclusions from the experience of other nations. The highest statesmanship consists in the ability to accurately read past history and apply its lessons to the advancement of the interests of one's own country, and in the avoidance of those mistakes which in the past have brought misfortune upon governments and the peoples dependent upon them.

To make a strong government, and at the same time to preserve the liberty of the individual citizen, and not so greatly to restrict the sovereignty of the States as to destroy local self-government, was the essential problem before the Convention of 1787. How wisely and how successfully they wrought, is demonstrated by the history of the one hundred and forty years succeeding the adoption of the Constitution.

In the framing of the Constitution the position and powers of the Judiciary were recognized to be of paramount importance. Under the Confederation, there were no separate national courts. As a matter of fact, there was no nation. The absence of courts of the Confederation constituted, perhaps, its greatest weakness. In the Constitution of 1787, framed in order to form a more perfect union and to establish justice, this deficiency in the existing government was necessarily to be dealt with, and by the Third Article, it was declared:

“The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”

The second section of the same Article specifically declared:

“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Consti-

tution, the Laws of the United States, and Treaties made, or which shall be made, under their authority;—to Cases affecting Ambassadors, other public Ministers and Consuls;—to all cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”

Chancellor Kent in his Commentaries, observes:

“The propriety and fitness of these judicial powers seem to result, as a necessary consequence, from the union of these states in one national government, and they may be considered as requisite to its existence. The judicial power in every government must be coextensive with the power of legislation . . . Were there no power to interpret, pronounce, and execute the law, the government would either perish through its own imbecility, as was the case with the articles of confederation, or other powers must be assumed by the legislative body, to the destruction of liberty.”<sup>(1)</sup>

The same section 2 of Article III provides that in all cases affecting ambassadors, other public

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(1) 1 Kent, Lecture 14. (Ninth Ed. p. 322.)



ministers and consuls and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make. Paragraph 3 then provides as follows:

“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.”

Probably nothing in the whole debates over the Constitution, says Mr. Charles Warren in a recent work <sup>(2)</sup>

“is more astonishing than the slight discussion reported by Madison as given to the Judiciary Article of the report of the Committee of Detail of August 6th. It is probable, however, that Madison considerably condensed his notes on this point owing to the technicalities of the subject.”

While Madison has not reported very much discussion over this subject, yet in the debates over the ratification of the Constitution in the

(2) “The Making of the Constitution.”

conventions of the various States, a great deal was said concerning the necessity of establishing independent courts, as contrasted with the expediency of vesting the Federal judicial power in State tribunals, subject only to the right of review in the Supreme Court of the United States. Mr. Hamilton dealt with the subject at length in at least four numbers of *The Federalist* (Nos. 78, 79, 80, 81). It would be inappropriate and wholly unnecessary here to review the succinct and convincing arguments employed by Hamilton in those papers, in showing the necessity for the establishment of independent courts of justice for the interpretation of legislative acts deriving their authority from, or purporting to infringe upon, powers conferred upon the Federal government or denied to the State governments by the Constitution.

“The interpretation of the laws is the proper and peculiar province of the courts,” he says. “A 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 an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or in other words, the Constitution ought to be preferred to a statute, the intention

of the people to the intention of their agents.”  
(No. 78.)

The argument in support of the exercise of the powers of the Federal judiciary to hold invalid an unconstitutional law has never been more succinctly, forcibly and satisfactorily put than in these words.

The necessity for the establishment of one court of supreme and final jurisdiction in the determination of questions arising under the Constitution, was conceded by almost all concerned in framing or discussing the Constitution, and scarcely ever has been disputed. Differences of opinion always have existed as to the provisions vesting the judicial power of the United States “in such inferior courts as the Congress may from time to time ordain and establish.” Hamilton said this power

“is evidently calculated to obviate the necessity of having recourse to the Supreme Court in every case of Federal cognizance. It is intended to enable the national government to institute or *authorize* in each State or district of the United States a tribunal competent to the determination of matters of national jurisdiction within its terms.” (*Federalist*, No. 81.)

He even thought there were substantial reasons against conferring Federal power upon the existing courts of the several States, for, he said:

“The most discerning can foresee how far the prevalence of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes; while every man may discover that courts constituted like those of some of the States would be improper channels of the judicial authority of the Union.”

The inevitable diversity of opinion in the different States would require an unrestrained course of appeals to the Supreme Court, which, even in 1787, Mr. Hamilton saw would be a source of public and private inconvenience, and which, in 1929, would be a sheer impossibility, for it would break down any single court with the sheer weight of business. Moreover, the character of the Federal judicial power, comprehending, as it does under the Constitution, controversies between citizens of different States and between citizens of a State and foreign citizens or subjects, peculiarly requires exercise by a tribunal independent of local influences.

The First Congress under the Constitution assembled at Philadelphia on March 4, 1789, although a quorum of both Houses was not present until April 6th. President Washington was sworn in to office on April 30th, and thereupon the new government proceeded to function.<sup>(3)</sup>

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(3) Story on Const., Sec. 278.

One of the first duties to which the Congress addressed itself was the preparation of a Judiciary Act. Mr. Charles Warren, the historian of the Supreme Court, a few years ago published an interesting article in the *Harvard Law Review*, entitled "New Light on the History of the Federal Judiciary Act of 1789"<sup>(4)</sup>. No adequate account of this famous legislation, Mr. Warren says, had ever been written, and Ellsworth's latest able and careful biographer said in 1905 that "no complete history of the bill can now be written." Mr. Warren, however, found among the archives of the United States not only the original draft of the Judiciary Act as it was introduced into the Senate, but also the original amendments to the draft bills submitted during the Committee and Senate debates, and a copy of the bill as it passed the Senate and went to the House. Those documents throw a new and constructive light upon the history of the measure, which dispels, among other things, the tradition that the bill was drafted by Oliver Ellsworth and not materially changed during its passage into law. Mr. Warren says it is clear now that very important, and, in some instances, vital changes were made in the bill before it became law. He states the fact to be that the final form of the

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(4) 37 Harv. Law Rev., p. 49.

Act and its subsequent history cannot be properly understood unless it is realized that it was a compromise measure, so framed as to secure the votes of those who, while willing to see the experiment of the Federal Constitution tried, were insistent that the Federal courts should be given the minimum powers and jurisdiction.

“Its provisions completely satisfied no one, although they pleased the anti-Federalists more than the Federalists.”

Compromise as it was, it remained almost unchanged for nearly a century. But Mr. Warren points out that the Judiciary Act was not only a compromise, but its final form was closely tied up with, and largely depended upon, the fate of the various amendments to the Judiciary Article of the Constitution, which were being debated in Congress during the discussion over the Judiciary Act. It is a matter of familiar knowledge that objection was made in many of the States to the absence from the new Constitution of a Bill of Rights, and that ratification of the Constitution was only secured by the promise of its friends to lend their influence and their best efforts to the immediate adoption of amendments to the Constitution which would supply this defect. It was particularly objected that the judicial power was not subject to reasonable restraint; that trial by jury in criminal

cases was not adequately secured, and was not at all required in civil cases.

Consideration of these proposed amendments proceeded in the First Congress at the same time that the Committee was drafting the Judiciary Act. After a long debate, the Senate voted to establish Federal District Courts, and after a struggle over the jurisdiction with which they were to be invested, the jurisdiction as specified in the bill was agreed to. The bill was laid aside in the House of Representatives, pending the discussion over the proposed amendments to the Constitution. There had been serious apprehension among many of the delegates to the various State Conventions lest the new Federal government should not only invade the jurisdiction of States, but that unless restrained by positive provisions in the fundamental law, it would encroach upon the very rights of the citizen to secure which the War of Independence had been successfully waged. Patrick Henry, in Virginia, Mr. Holmes, in Massachusetts, and many other delegates in those and other States complained of the inadequacy of the Third Article of the Constitution to fully ensure all the privileges of the citizen guaranteed by the great charters of English liberty—Magna Charta, the Bill of Rights and the Habeas Corpus Act. Mr. Henry declared:

“My mind will not be quieted till I see something substantial come forth in the shape of a bill of rights.” (3 Eliot’s Debates, 462.)

His apprehensions were shared by many others. These objections did not prevent the adoption of the Constitution, but, as Judge Story says:

“They produced such a strong effect upon the public mind, that Congress, immediately after their first meeting, proposed certain amendments, embracing all the suggestions which appeared of most force; and these amendments were ratified by the several States, and are now become a part of the Constitution.”<sup>(5)</sup>

Not until those amendments were passed by the House, was the consideration of the Judiciary Bill again taken up. As a result of the discussions in both Houses, the Judiciary Bill in its final form was signed by the President on September 24, 1789, and on the same day, the Senate and the House finally agreed on the form of twelve Amendments to the Constitution to be submitted to the States. Those amendments, of which ten subsequently were agreed to by the requisite number of States, included two of importance in their bearing upon the question here under discussion. The Fifth Amendment reads as follows:

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(5) 1 Story on Const., 5th Ed., Sec. 1782.



“Article V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.”

The Sixth Article is as follows:

“Article VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.”

The Judiciary Act provided for a Supreme Court composed of a Chief Justice and five Associate Justices. It divided the United States into thirteen districts, and provided for the establishment in each of those districts of a District Court, consisting of one Judge, to

reside in the District for which he is appointed, and the allocation of those districts among three Circuits, in each of which was established a Circuit Court, to be holden by two Justices of the Supreme Court and the District Judge of such District, two of whom should constitute a quorum. The jurisdiction of the District Courts was prescribed in the ninth section as follows:

“That the District Courts shall have, exclusively of the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted; and shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States.

And shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States. And shall also have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. And shall also have jurisdiction exclusively of the courts of the several States, of all suits against consuls or vice-consuls, except for offenses above the description aforesaid. And the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.”<sup>(6)</sup>

Section 11 defined the jurisdiction of the Circuit Courts. They were given original cognizance, concurrent with the courts of the several States,

“of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State. And shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where

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<sup>(6)</sup> 1 Stats. at L. 77.

this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein . . . ”

The Circuit Courts were also given appellate jurisdiction from the District Courts, under regulations and restrictions in the Act provided.

The unlimited power vested in Congress by Section 1 of Article III, to establish inferior courts, has been exercised only to a limited degree. The Judiciary Act of 1789, as we have seen, established District and Circuit Courts. The Circuit Courts established by the Act of February 13, 1801, followed by the appointment of the so-called “midnight Judges” by President John Adams, were promptly legislated out of existence when the Jeffersonian Administration came into power, on March 8, 1802. Although there was some modification in the Circuit Courts as established by the Judiciary Act of 1789, no radical change was made in the system of Federal Courts created by the Judiciary Act of 1789, until the establishment of the Circuit Courts of Appeal by the Act of March 3, 1891.

The Court of Claims, created by the Act of February 24, 1855 (10 Stat. 612), in the true sense of the term, is not a court. It passes upon claims against the government, but its judgments

are only advisory, and rest for their execution upon the will of Congress in its appropriation acts. But, as Chief Justice Taney said, in the opinion he prepared for the case of *Gordon v. United States* (117 U. S. 697, 702):

“The award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it.”

The Court of Private Land Claims, established by the Act of March 3, 1891 (26 Stat. 854) falls within the same category. Neither of them can properly be called “inferior courts of the United States” within the meaning of Article III of the Constitution.

The Court of Customs Appeals, created by the Tariff Act of August 5, 1909, has also been held to be merely a legislative court (*Ex Parte Bakelite Corporation*, U. S. Supreme Court, May 20, 1929), though its status has again been thrown into doubt by the recent enactment of Congress (March 2, 1929, No. 914) giving it jurisdiction in patent cases.

The Commerce Court, established by the Act of June 18, 1910, was abolished by the Act of October 22, 1913 (38 Stat. 219). The Board of General Appraisers, under the Tariff Acts, has in recent times been called a court, and now is



designated by legislation the Customs Court,<sup>(7)</sup> but the decision in the Bakelite case treats it as another legislative court.

The District Courts of the United States remain the only courts of first instance in criminal matters. From an early day it has been settled that the only crimes of which the Federal courts have jurisdiction are those created by Acts of Congress, and consequently the only acts which Congress may make punishable as crimes, are those within the legislative powers conferred upon Congress by the Constitution. With the adoption of the Eighteenth Amendment, on January 29, 1919, followed by the enactment of the Prohibition Enforcement Law, October 28, 1919, a totally new volume of criminal jurisdiction has developed upon these Courts. The Amendment, in succinct but comprehensive terms, prohibited, after one year from the ratification of the Article,

“the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes.”

The Prohibition Enforcement Law put in legislative form meticulous prohibitions against

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(7) Frankfurter and Landis, “The Business of the Supreme Court.”

manifold acts which might come within the intent, if not the express language of the Amendment, and created a wide range of offenses, many of which are of a character that in almost all of the States, would be dealt with in courts of limited and inferior jurisdiction, but which, under the Federal system, have served to clog the dockets of the district courts, and cause infinite delay in the enforcement of civil remedies in those tribunals.

Prior to the enactment of the so-called Jones Law, on March 2, 1929, many of the prohibited acts were declared to be misdemeanors and punishable with fines of from \$500.00 to \$1,000.00 and by imprisonment for from thirty days to twelve months.

The Fifth Amendment declares that no person shall be held to answer for an infamous crime unless on a presentment or indictment of a grand jury. In a general way, any act punishable by law as being forbidden by statute, or injurious to public welfare, is denominated a crime, but commonly the word is used only with respect to grave offenses. Blackstone says:<sup>(8)</sup>

“A crime or misdemeanor is an act committed or omitted, in violation of a public law either forbidding or commanding it. This general definition comprehends both crimes and mis-

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(8) IV Commentaries. Ch. 1, p. 5.

demeanors, which, properly speaking, are mere synonymous terms; though, in common usage, the word 'crimes' is made to denote such offenses as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler names of 'misdemeanors' only."

By the United States Code (Criminal Code and Criminal Procedure), Title 18, Part 2, Section 541, all offenses which may be punished by death or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors. It is well settled that all felonies, as thus defined, are infamous crimes, for which no person shall be held to answer unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger. It is said to be equally well settled that misdemeanors punishable by fine or by terms of imprisonment not exceeding one year, unless there should be coupled with the punishment or imprisonment some specific provision making the particular misdemeanor infamous, are not infamous crimes within the purview of the Fifth Amendment, and may be prosecuted by information.<sup>(9)</sup> So it has been

<sup>(9)</sup> *Falconi v. United States*, 280 Fed. 766.



held that prosecution for the first offense of selling liquor, which by Section 29 of the National Prohibition Act is punishable by imprisonment not exceeding six months, without provision for sentence at hard labor, and which, therefore, is a statutory misdemeanor, under the Criminal Code, may be by information, and need not be by indictment.<sup>(10)</sup>

The Court in the last cited case appears to make the test that if the offense is not a felony by the statute and can be punished only by imprisonment for *twelve* months or less, without hard labor, it is a misdemeanor and not an infamous crime, and may be prosecuted by information without indictment.

The convenience of prosecution by information is especially obvious in those communities where the Grand Jury meets at rare intervals, say quarterly or even semi-annually. As a commentator on the recent legislation says:

“The only way by which the court calendars have been kept reasonably clear of trials for liquor law violations has been by avoiding jury trial, as a result of defendants pleading guilty.”

Rarely, says the writer, does an accused person plead guilty unless he has something to gain by the plea. The accused violator of the

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<sup>(10)</sup> *Cleveland v. Mattingly* (Court of Appeals, D. C.), 287 Fed. 948; certiorari denied, 262 U. S. 744.

National Prohibition Act has something to gain. He dickers and fences with the prosecuting attorney. He will plead guilty provided the punishment is only a fine of such and such an amount. The attorney agrees.<sup>(11)</sup>

By the Act of March 2, 1929, known as the Jones Act, supplementing the National Prohibition Act, it is provided:

“Sec. 1. That wherever a penalty or penalties are prescribed in a criminal prosecution by the National Prohibition Act, as amended and supplemented, for the illegal manufacture, sale, transportation, importation, or exportation of intoxicating liquor, as defined by section 1, Title II, of the National Prohibition Act, the penalty imposed for each such offense shall be a fine of not to exceed \$10,000 or imprisonment not to exceed five years, or both: . . . ”

“Sec. 2. This Act shall not repeal nor eliminate any minimum penalty for the first or any subsequent offense now provided by the said National Prohibition Act.”

Section 29 of the National Prohibition Act provides:

“Any person who manufactures or sells liquor in violation of this Chapter, shall for the first offense be fined not more than \$1,000, or imprisoned not exceeding six months.”

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(11) The Jones-Stalker Law, by Goodwin Cooke, American Bar Association Journal, May, 1929, page 276.

This establishes a *maximum*, but not a *minimum* penalty for a first offense and therefore is not saved by Section 29 of the Prohibition Act.

There are a number of offenses specified in the Prohibition Law which are denominated misdemeanors and punishable by a fine of not more than \$1,000, or imprisonment for not more than one year, or both.<sup>(12)</sup> Whether or not misdemeanors punishable by imprisonment for twelve months and by a fine of \$1,000 as a minimum, would be considered misdemeanors, which may be prosecuted by information only, is perhaps doubtful. The decisions upholding prosecution by information uniformly deal with "petty misdemeanors," "petty offenses"; "smaller faults or omissions of less consequence."

A more serious question arises with respect to the right of trial by jury, secured by Article III, Section 2, Clause 3, of the Constitution, in the prosecution of all crimes, except in case of impeachment, supplemented by the provisions of the Sixth Amendment that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed. That the framers

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<sup>(12)</sup> See Supplemental Act, November 23, 1921, Sec. 6; National Prohibition Act, Sec. 24; Same, Title 3, Sec. 15, Sec. 20.

of the Constitution meant to limit the right of trial by jury in the Sixth Amendment to those persons who are subject to indictment or presentment in the Fifth, was declared by the Supreme Court in the case of *Ex parte Milligan*, 4 Wall. 2, 123. On the other hand, as had been pointed out by the Supreme Court in another case:<sup>(13)</sup>

“According to many adjudged cases, arising under constitutions which declare, generally, that the right of trial by jury shall remain inviolate, there are certain minor or petty offenses that may be proceeded against summarily, and without a jury; and, in respect to other offenses, the constitutional requirement is satisfied if the right to a trial by jury in an appellate court is accorded to the accused.”

There seems to be an abundance of authority on the point that in England, it has been the constant course of legislation for centuries past, to confer summary jurisdiction upon justices of the peace for the trial and conviction of minor statutory offenses, and the same has been the practice in Pennsylvania, New Jersey, Vermont, Georgia and other States.<sup>(13a)</sup>

The same principle was asserted by the Supreme Court of the United States in the case of *Schick v. United States*,<sup>(14)</sup> in sustaining a

<sup>(13)</sup> *Callan v. Wilson*, 127 U. S., 540, 552.

<sup>(14)</sup> 195 U. S. 65.

<sup>(13a)</sup> *Callan v. Wilson*, 127 U. S. 540, 552, 553.

conviction for the violation of the provisions of the Oleomargarine Law, punishable by a penalty of \$50 fine, for each offense, which was tried on information and by a court, upon waiver of a jury trial by the parties. The Court held that so simple a penalty for violating a revenue statute, indicated only a petty offense, and not one necessarily involving any moral delinquency. Mr. Justice Brewer, writing the opinion of the Court, said:

“The truth is, the nature of the offense and the amount of punishment prescribed rather than its place in the statutes determine whether it is to be classed among serious or petty offenses, whether among crimes or misdemeanors. . . . In such a case there is no constitutional requirement of a jury.”

The Court held that the body of the Constitution does not include a petty offense of the character described. It must be read in the light of the common law. The Convention, in framing Article III of the Constitution, employed the language, “the trial of *all crimes*,” instead of, as originally drafted, “the trial of *all criminal offenses*,” shall be by jury. There is no public policy which forbids the waiver of a jury in the trial of petty offenses, because there was no constitutional or statutory provision or public policy which required a jury in the trial of

petty offenses. Here the penalty was very light. All of the Court but Harlan, J., agreed to the judgment.

In the case of the *United States v. Praeger*,<sup>(15)</sup> District Judge Maxey, in Texas, held that where the punishment provided by Congress for the act under consideration was a fine of not more than \$500 or imprisonment not to exceed six months, or both, at the discretion of the Court, the parties had the right, under the authority of *Schick v. United States*,<sup>(16)</sup> by written stipulation, to waive a jury.

In *Frank v. United States*,<sup>(17)</sup> a violation of a section of the Food and Drug Act, which provided for no imprisonment, but merely a fine not exceeding \$200, was held to be a petty offense, which did not require trial by jury.

In *Coates v. United States*,<sup>(18)</sup> defendant was indicted for a violation of the National Prohibition Act on five counts: (1) for the unlawful possession of intoxicating liquors; (2) the unlawful possession of property designated for the manufacture of such liquor; (3) the actual manufacture; (4) the sale; (5) the maintenance of a nuisance where intoxicating liquor was being manufactured, kept, bottled and sold. He was convicted on the first, second, third and

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<sup>(15)</sup> 149 Fed. 474.

<sup>(16)</sup> 195 U. S. 65.

<sup>(17)</sup> 192 Fed. 864 (C. C. A. 6th Circ.)

<sup>(18)</sup> 290 Fed. 134 (C. C. A. 4th Circ.)

fifth counts. It was held by the Circuit Court of Appeals for the Fourth Circuit that these offenses were crimes which could only be tried by a jury, and that the defendants could not waive a jury. Citing *Thompson v. Utah*, 170 U. S. 343.

In *Callan v. Wilson*, 127 U. S. 540, the Court said that there are offenses which are not crimes, and in them a jury may be dispensed with by consent. They are of the kind which the common law classes as petty, as well from the prevailing consequences which conviction of them would entail upon the one committing them, as from the lack of any substantial moral blame—worthiness necessarily implied in their commission.

The question then becomes one of relativity, depending upon the seriousness of the charge. A prosecution for a first offense under Section 29 of the National Prohibition Act could probably be initiated by information, and tried without a jury. Certainly a jury might be waived in such a case. But for any other offense under the Act, including second offenses under Section 29, it is quite clear that the prosecution must be by indictment, and trial must be by a jury.

Trial by jury, the Supreme Court has held, is not simply trial by a jury of twelve men before an officer vested with authority to cause them

to be summoned and impanelled, to administer oaths to them and to the officer in charge, and to enter judgment and issue execution on their verdict,

“but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence.”<sup>(19)</sup>

Mr. Justice Gray, in writing the opinion in this case, cited an earlier decision where the Court said:

“Trial by jury in the courts of the United States is a trial presided over by a judge, with authority, not only to rule upon objections to evidence, and to instruct the jury upon the law, but also, when in his judgment the due administration of justice requires it, to aid the jury by explaining and commenting upon the testimony, and even giving them his opinion on questions of fact, provided only he submits those questions to their determination.” (*U. S. v. Philadelphia & Reading R. Co.*, 123 U. S., 113, 114.)

The fact that the guarantee of trial by jury secured by the Constitution of the United States necessarily implies, not only that the facts shall be determined by a jury of twelve men, but that

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<sup>(19)</sup> *Capitol Traction Co. v. Hof*, 174 U. S. 1, 13.



the trial must be conducted by a judge, with authority, in his discretion, whenever he thinks it necessary to assist the jury in arriving at a just conclusion, to comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts, is not always realized in discussions about trial by jury. It is a part of the guaranty of justice to the citizen, but it is also an obstacle in the way of establishing an inferior Federal Court of Criminal Justice, such as exists in many States, for the trial of even serious misdemeanors by the Court without a jury.

Moreover, the judicial power of the United States can be exercised only by the Supreme Court, or an inferior court established under the terms of the Constitution, and this implies that the Court must be presided over by a judge appointed in conformity with that instrument. Section 1 of Article III of the Constitution provides:

“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”

In view of these provisions, the Supreme Court has held that justices of the peace in the Dis-

trict of Columbia are not judges of inferior courts of the United States, as they are not appointed to that office during good behavior; and that trial by a jury before a justice of the peace, having been unknown in England or America before the Declaration of Independence, was not within the contemplation of Congress in proposing, or the people in ratifying, the Seventh Amendment to the Constitution. Therefore, it may be taken as settled that no prosecution of any violation of an act of Congress, including the National Prohibition Act, for any offense more serious than a minor misdemeanor, could be tried without a jury, or could be tried in any tribunal which cannot be characterized as an inferior court of the United States, within the meaning of the Constitution construed as above mentioned.

These limitations constitute serious obstacles to the establishment of a Federal court of inferior criminal jurisdiction for the disposition of violations of the National Prohibition Act. Not only do the restrictions as to trial by jury and as to indictment interfere, but the provision requiring trials to be held in the State where the crime shall have been committed, probably would make necessary such an extensive multiplication of courts as to amount to a practical embargo upon dealing with minor offenses

under the existing Prohibition Laws in any other way than through the existing District Courts.

The policy of the Jones Act, which seeks to compel observance of the Prohibition Law by extremely rigorous penalties, probably will defeat itself through the consequences which it entails in requiring prosecution by indictment, and not by information, and trial by jury for almost all violations. This will mean one of two things: either a very large increase in the number of Federal Judges, or the continued embarrassment of civil litigants in the delays caused by the swelling tide of criminal indictments and trials under the Prohibition Act. In the Jones Act itself there was interjected a proviso which can be effective only as friendly counsel to the judiciary. It reads as follows:

“That it is the intent of Congress that the court, in imposing sentence hereunder, should discriminate between casual or slight violations and habitual sales of intoxicating liquor, or attempts to commercialize violations of the law.”

Far more effective than such a counsel of perfection to the judiciary would it be, if Congress should discriminate in its legislation by providing specifically for the punishment of “casual or slight violations” of the law, by denominating them as misdemeanors or petty

offenses, and affixing to such offenses penalties which would not raise them above the grade of petty misdemeanors which may be prosecuted by information, and tried by a court without a jury. This would result in a more speedy and effective enforcement of the law upon all except those engaged in "habitual sales of intoxicating liquor or attempts to commercialize violations of the law." The latter being serious offenses against the social body, in violation of the Constitution and statute law, may be dealt with as other serious offenses are, by indictment and trial by jury.

Such a policy as that recommended was actually adopted by Congress in the District of Columbia Prohibition Law of March 3, 1917, which prohibited any person from directly or indirectly, in the District of Columbia, manufacturing or importing for sale or gift, selling, offering for sale, keeping for sale, trafficking in, etc., etc., any alcoholic or other prohibited liquors, for beverage purposes, and made any persons who should violate the provisions of the Act guilty of a misdemeanor, and upon conviction thereof, subject to be fined not less than \$300 nor more than \$1,000 and to be imprisoned in the District jail or work-house for a period of not less than thirty days or more than one year, for each offense. Other offenses against different pro-

visions of the Act were denominated misdemeanors and made punishable by fines of not less than \$50 nor more than \$300, or imprisonment in the jail or workhouse of the District for not more than six months (Sec. 3); and in various sections, offenses against provisions in the Act are declared to be misdemeanors punishable by fines in amounts of \$50, \$100, \$300 and \$500, as the case might be, and imprisonment in the District jail or workhouse for terms, in no instance exceeding twelve months, and in many instances being limited to from thirty days to six months. The Act was obviously drawn with a view to providing for its enforcement through punishment before a local magistrate by small fines or limited terms of imprisonment in the District jail or workhouse.

The theory of the later legislation developed through the opposition to the enforcement of the law which has been encountered since its enactment, has been to increase penalties until they have reached almost the same importance as those attributed to the most infamous crimes. It is yet to be demonstrated that respect for this law or for law in general shall be achieved by such policy.

Lord Bryce, in the *American Commonwealth*, says:

“The American Constitution is no exception

to the rule that everything which has power to win the obedience and respect of men must have its roots deep in the past, and that the more slowly every institution has grown so much the more enduring is it likely to prove.”<sup>(20)</sup>

The results of efforts to compel observance of particular laws by the imposition of extreme penalties, generally have proved unsatisfactory and it would seem probable that with respect to a law concerning which there is as much difference of opinion as the Prohibition Law, the existing legislative policy probably will not realize the objects of its enactment. A legislative scheme of small penalties, easily enforced, which would not leave it merely to the discretion of a judge in imposing sentence to discriminate between casual or slight violations and habitual sales of liquor, and attempts to commercialize violations of the law, while at the same time empowering him to impose penalties of an extremely rigorous character for the more serious category of offenses, would be far more effective in bringing about general observance of the prohibitory provisions. The history of the law is replete with failure to compel respect and compliance by excessive penalties. Not the possibility of severe punishment, but swift and sure penalty for violation compels obedience to law.

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(20) I Am. Com. p. 29.











BULLETIN

*The* COLLEGE *of*  
WILLIAM *and* MARY  
*in* VIRGINIA



The Constitution and Foreign Relations

JOHN HOLLADAY LATANÉ

Johns Hopkins University

THIRD LECTURE ON THE  
CUTLER FOUNDATION



*The* COLLEGE of  
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## THE CUTLER LECTURES

*Established at the College of William and Mary  
in Virginia by James Goold Cutler  
of Rochester, N. Y.*

The late James Goold Cutler of Rochester, New York, in making his generous gift to the endowment of the Marshall-Wythe School of Government and Citizenship in the College of William and Mary provided, among other things, that one lecture should be given at the College in each calendar year by some person "who is an outstanding authority on the Constitution of the United States." Mr. Cutler wisely said that it appeared to him that the most useful contribution he could make to promote the making of democracy safe for the world (to invert President Wilson's aphorism) was to promote serious consideration by as many people as possible of certain points fundamental and therefore vital to the permanency of constitutional government in the United States. Mr. Cutler declared as a basic proposition that our political system breaks down, when and where it fails, because of the lack of sound education of the people for whom and by whom it was intended to be carried on.

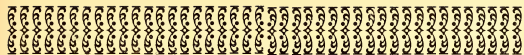
Mr. Cutler was one of the few eminently successful business men who took time from his busy life to study constitutional government. As a

result of his study, he recognized with unusual clearness the magnitude of our debt to the makers, interpreters and defenders of the Constitution of the United States.

He was deeply interested in the College of William and Mary because he was a student of history and knew what great contributions were made to the cause of constitutional government by men who taught and studied here—Wythe and Randolph, Jefferson and Marshall, Monroe and Tyler, and a host of others who made this country great. He, therefore, thought it peculiarly fitting to endow a chair of government here and to provide for a popular “lecture each year by some outstanding authority on the Constitution of the United States.”

The third lecturer in the course was Dr. John Holladay Latané, member of the staff of the Walter Hines Page School of International Relations of the Johns Hopkins University.





# THE CONSTITUTION AND FOREIGN RELATIONS

JOHN HOLLADAY LATANÉ

Member of the Staff of the Walter Hines Page School of  
International Relations of the Johns Hopkins  
University

In the first lecture on this foundation the Hon. James M. Beck described the Constitution of the United States as "a living instrument of government" which is "ever changing to meet the necessities of a changing time and a changing people." Of no part of the Constitution is this statement truer than of the rather meagre clauses containing the grants of power over foreign relations. These grants, designed to meet the needs of a small isolated republic which proposed to stay at home and mind its own business, have been enlarged by interpretation to cover the activities of a great world power.

The framers of the Constitution wisely decided that the conduct of foreign relations was a federal function and delegated it to the central government. They also decided that it was an executive function and confided it to the President, subject to certain checks in accordance with the general theory of checks and balances which underlies

our constitutional system. The main check upon the President is the requirement that he must obtain the consent of two-thirds of the senators present before ratifying a treaty. This provision was adopted, as I shall show, to meet a special situation, and is at the present time a serious obstacle to the proper functioning of the United States in the role it is called upon to play in world politics. The great expansion of executive power and the efforts of the Senate to exercise control over foreign policy through the exercise of its veto power over treaties are the subjects which I propose to develop in the course of this lecture.

In a federal government, such as ours, the control of foreign relations is a delegated power and must be exercised within constitutional limits. It is not regarded as an inherent attribute of sovereignty, as in most unitary or highly centralized states. In all states having written constitutions, whether federal or unitary, the foreign relations power is subject to limitations of some sort. Such limitations are usually greater in federal than in unitary states, and they are usually greater in federations formed by the union of pre-existing states, such as ours, than in federal states created more or less artificially for the purpose of decentralizing administration, such as certain of the South American republics. In most federations the control of foreign affairs

is intrusted to the central government and denied to the states, though in some instances, such as Germany and Switzerland, the member states retain the right to make treaties, practically limited, it would seem, to the regulation of frontier matters. The members of the German Reich retain the further right of legation, that is, they may send and receive foreign ministers.

In the Constitution of the United States the control of foreign relations is delegated to the federal government and denied to the states. The grant of this power is not found in any one section of the Constitution and when the scattered sections expressly delegating it are collected the power does not seem altogether adequate, but under the doctrine of implied powers the grants of the foreign relations power have proved to be quite extensive and on the whole sufficient.

Postponing for the moment the powers given to the President and Senate, we find that article I, section 8, gives Congress the power to regulate commerce with foreign nations; to define and punish piracies and felonies committed on the high seas, and offences against the law of nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to maintain and make rules for the government of the army and navy; and to legislate on the subject of immigration and naturalization.

Article I, section 10, declares that, "No State shall enter into any Treaty, Alliance, or Confederation; grant letters of marque and reprisal;" lay duties on imports or exports, without the consent of Congress; and finally, "No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign Power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

One of the strangest omissions in the Constitution, in view of the subsequent course of American expansion, was the failure to authorize the acquisition of new territory. Article IV, section 3, provides that,

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.

It is evident, I think, that in adopting this section the members of the convention had in mind the thirteen original states and the Northwest Territory. President Jefferson, as a strict constructionist, hesitated to annex the vast Louisiana

territory without a special constitutional amendment, but he was urged by Livingston and Monroe to hasten the ratification of the purchase treaty lest Napoleon should change his mind. So Jefferson sacrificed his constitutional scruples on the altar of expediency. It remained for his great political antagonist John Marshall to find constitutional justification for this and other annexations under the doctrine of implied powers. In a case involving the validity of the annexation of Florida, Chief Justice Marshall declared:

The Constitution confers absolutely on the government of the Union the powers of making war, and of making treaties; consequently the government possesses the power of acquiring territory either by conquest or by treaty.

If the government has the power to acquire territory by conquest or by treaty, it would appear to have the power to cede territory as the result of an unsuccessful war. Fortunately such a contingency has never arisen. The question has, however, been discussed on several occasions, notably in connection with the Webster-Ashburton Treaty, which settled the Maine-New Brunswick boundary dispute by a compromise giving Great Britain territory claimed by the state of Maine. During the negotiations the Maine and Massachusetts legislatures passed resolutions declaring that no power was delegated to the na-

tional government to cede territory within a state without its consent. Webster wrote to the governor of Maine:

Although I entertain not the slightest doubt of the power of the government to settle this question by compromise as well as in any other way, I suppose it will not be prudent to stir in the direction of compromise without the consent of Maine.

On the promise of Webster to pay to Maine and Massachusetts the sum of \$150,000 each, plus an equal division of "the disputed territory fund" which Great Britain was to hand over to the United States, the commissioners of Maine and Massachusetts agreed to accept the compromise and their senators voted in favor of the ratification of the treaty. The peculiar feature of the transaction was that the agreement to make these payments was incorporated in the fifth article of the treaty with Great Britain. Lord Ashburton at first objected to this stipulation as a matter with which his government had no concern, but when Webster explained that this was the only way to insure the votes of those states in the Senate for ratification he withdrew his objection. Webster later referred to these payments as bribes to secure ratification.

If the United States should ever be so unfortunate as to be compelled to cede part of the

territory of a state as the result of a military defeat, it is hardly conceivable that the Supreme Court would declare the treaty making the cession unconstitutional. It would probably regard it as a political act not subject to judicial review.

The annexation of territory by joint resolution of the two Houses of Congress is an illustration of how the Constitution may be stretched by interpretation. The first case was that of Texas. Unable to secure the necessary two-thirds vote in the Senate for the ratification of a treaty of annexation, President Tyler resorted to a joint resolution, which requires only a majority vote, the justification for such a method being that Texas was to be admitted as a State and that Congress had the power to admit new states to the Union. Half a century later when the Senate refused to ratify a treaty providing for the annexation of the Hawaiian Islands, the problem was again solved by joint resolution based on the Texas precedent. It was a false analogy, however, for there was no intention of admitting the Hawaiian Islands to statehood.

When we come to consider the President's powers over foreign relations we find the express grants in the Constitution very meagre. Article II, section 2, makes him the commander-in-chief of the army and navy. The same section provides that

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law.

Section 3 contains the very important clause: "he shall receive ambassadors and other public ministers." This gives him the sole right to recognize new governments or new states, or to withhold recognition.

The President's very extensive powers in the conduct of foreign relations are, however, not derived from specific grants, but from the fact that he is vested with the executive power and that he is the only channel of communication between the United States and foreign nations. The Constitution simply declares that, "The executive power shall be vested in a President of the United States of America." It does not undertake to define the extent of this power, though it does place limits upon it in certain cases, as in the making of treaties. Early in Washington's administration the question was raised as to the scope of the President's powers in foreign relations and Jefferson as Secretary of



State was called upon to prepare an opinion. This he did with great care and his conclusion was as follows :

The transaction of business with foreign nations is executive altogether. It belongs, then, to the head of that department, except as to such portions of it as are especially submitted to the Senate. Exceptions are to be construed strictly.

In this opinion Jefferson referred to the Senate as the only check on the executive in the conduct of foreign relations, but it should not be overlooked that the House of Representatives has always claimed a share in the treaty-making power in cases where a treaty requires a money appropriation for its execution. The Constitution gives Congress the exclusive power to appropriate money. Does a treaty, constitutionally negotiated and ratified, which involves a money payment, constitute an absolute obligation? Our answers to this question have not always been consistent. When the French Chamber of Deputies failed to appropriate money for the payments due under the treaty of 1831 in settlement of the famous "Spoliation Claims," Secretary of State Livingston presented the case to the French government in the following rather emphatic language :

The government of the United States presumes

that whenever a treaty has been concluded and ratified by the acknowledged authorities competent for that purpose, an obligation is thereby imposed upon each and every department of the government to carry it into complete effect, according to its terms, and that on the performance of this obligation consists the due observance of good faith among nations.

President Jackson pushed this case to the point of an actual rupture of diplomatic relations with France, but Great Britain acted as mediator and the French Chamber finally voted the appropriation.

President Jackson and Secretary Livingston on this occasion took the international point of view. The House of Representatives, however, has upon more than one occasion insisted on its constitutional rights. In 1796 and again in 1871 it resolved that :

When a treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend for its execution as to such stipulations on a law or laws to be passed by Congress; and it is in the constitutional right and duty of the House of Representatives in all such cases to deliberate on the expediency or in expediency of carrying such treaty into effect and to determine and act thereon, as in their judgment may be most conducive to the public good.

Treaties which require for their execution legislative action on the part of the member states of a federation are sometimes signed subject to such action, in which case they are understood to be mere recommendations. For instance, in the treaty of peace of 1783 with England it was agreed that Congress should earnestly recommend to the legislatures of the respective states the restoration of the confiscated estates of Tories. Although the American commissioners warned the British commissioners that the states would probably not carry out this recommendation, the British government later alleged the failure of the states to make restitution to the Tories as one of the reasons for not carrying out some of its treaty obligations.

The Labor Organization of the League of Nations deals with subjects that lie outside the range of federal powers and within the competence of local legislation. Foreseeing the difficulties that might arise the framers of the Treaty of Versailles expressly provided that,

In the case of a federal state whose power to enter into conventions on labor matters is subject to limitations, its government may treat a draft convention as a recommendation only.

As a matter of practice conventions drafted under the auspices of the Labor Organization

which require legislative action are not signed by the delegates, but are submitted to the states participating as recommendations. The fact that labor legislation is a matter of state control in the United States has caused the Labor Organization of the League to be very unfavorably regarded in this country.

Treaties limiting the size of navies, such as those adopted by the Washington Conference and the London Naval Conference, might be considered to deprive Congress of its discretionary right "to provide and maintain a navy," but even if the House of Representatives should pass an appropriation exceeding the treaty stipulations, it is hardly conceivable that such a measure should pass the Senate which ratified the treaty or escape the veto of the President who negotiated it. It is of course possible that a Senate whose personnel has changed and a subsequent President might agree to disregard such a treaty, but this is unlikely because such treaties are limited to a relatively brief term of years.

The President, who is the sole channel of communication between the United States and foreign nations and whose powers in this connection are so great, has a dual responsibility. He is subject, on the one hand, to the limitations of the national constitution from which he derives his powers, and, on the other hand, as the rep-

representative of the nation before the world, he must recognize his international responsibilities and act in accordance with the standards of international law. It is difficult at times to reconcile these two points of view. International law is recognized by the Constitution in the clause giving Congress the power "to define and punish piracies and felonies committed on the high seas, and *offences against the Law of Nations*," and our courts, following the precedents of the English courts, have always recognized international law as a part of the law of the land. As a member of the family or community of nations we are bound by the law of nations, although we have not yet accepted membership in the League of Nations. Of course if Congress should pass a law in direct conflict with a rule of international law our courts and the executive would have to follow the act of Congress, but John Marshall at an early period announced the principle, which the Supreme Court has time and again reiterated, that, "an act of Congress should never be construed to violate the law of nations if any other possible construction remains." If Congress deliberately intends to violate a rule of international law or a treaty obligation the country must stand the consequences if the injured nation is strong enough to resent it.

During the hundred and forty-odd years that

have elapsed since the Constitution was adopted the control of foreign affairs has become more and more centered in the hands of the President. The principal check upon his authority is the veto power of the Senate in the making of treaties, which with the important role now played by the United States in world politics has become a subject of heated controversy. Many treaties of a formal character go through the Senate without serious discussion or opposition, but on a vital question of foreign policy it is usually impossible for the President to command the constitutional two-thirds vote necessary for ratification. He is thus seriously handicapped in the carrying out of his policies. As a result of the long term of service senators can and frequently do ignore public opinion. For instance, it seems evident that for some time the great majority of the American people have wanted to see the United States take its place in the World Court, and yet notwithstanding this fact and the earnest recommendations of two Presidents, whose party had a large majority in the Senate, that body has quibbled over technical points of minor significance and refused to lend the great moral support of the United States to one of the most hopeful agencies for the promotion of world peace.

Had the framers of the Constitution required merely a majority vote of the Senate for ratifica-

tion, or a majority of both the Senate and the House, propositions which were considered by the convention, the President would have a sporting chance to carry out his policies. The two-thirds requirement was adopted to meet a particular situation. In 1785 John Jay, who was Secretary for Foreign Affairs, had asked the Congress of the Confederation for authority to suspend for a term of years, in return for commercial concessions from Spain, the right of citizens of the United States to navigate the Mississippi River. The eastern and middle states voted for Jay's proposal, while the delegates from the southern states voted solidly against it. The right to navigate the Mississippi River to the Gulf was a matter of vital concern to the people of the south and west, and the vote of the eastern and middle states to abandon it, even temporarily, created great indignation. Fortunately Jay was unable to come to terms with Spain even on the basis proposed.

When the question of control of the treaty-making power came up in the federal convention two years later the Mississippi question figured in the debate and in order to guard against the possible sacrifice of territory or rights in the southwest the southern members insisted that no treaty should be ratified without the consent of two-thirds of the members of the Senate present.

The World War and the peace negotiations at Paris raised no more difficult or fundamental question than that of the control of foreign relations under representative or democratic forms of government. The problem was not confined to the United States, although there the spectacular fight between the President and the Senate attracted world-wide attention and had disastrous results. To the great majority of Americans the issue was new, because in only two cases had the Senate ever before discussed a treaty in open session. The senatorial opposition to the Treaty of Versailles was, therefore, attributed to the alleged autocratic methods and personal peculiarities of President Wilson. The public did not know that the Senate's jealousy of the executive in the field of foreign relations was as old as the government itself, that upon one occasion President Washington went to the Senate with the project of a treaty in his hands for the purpose of seeking the constitutional "advice and consent" of that body, that the Senate referred his communication to a committee and declined to discuss it in his presence, and that as he left the chamber he muttered in audible tones that "he would be damned if he ever went there again."

Anyone who imagines that the contest between the President and the Senate for the control of



foreign policy began with the administration of Woodrow Wilson would do well to read John Hay's letters. The contest reached an acute stage during Roosevelt's first administration over the compulsory arbitration treaties negotiated by Hay, which were amended by the Senate so as to require the submission of each case to the Senate for approval. Roosevelt considered this as a nullification of the compulsory feature and refused to ratify the treaties as amended. The Senate had been aroused by Roosevelt's negotiations with the Dominican Republic, of which they disapproved. When the treaty providing for the appointment by the President of a receiver of Dominican customs failed to receive the consent of the Senate, Roosevelt ignored that body and carried out his policy of financial supervision under a *modus vivendi* until the Senate finally acquiesced and ratified the treaty in amended form. During the discussion over the arbitration treaties Secretary Hay expressed his opinion of the Senate in caustic letters to his friends. He declared that thirty-four per cent of the Senate would "always be found on the blackguard side of every question" that came before them, and that he did not believe that another important treaty would ever be ratified by that body. He also said: "A treaty entering the Senate is like a bull going into the arena:

no one can say just how or when the final blow will fall—but one thing is certain—it will never leave the arena alive.”

President Cleveland once referred in characteristic phraseology to “the customary disfigurement which treaties undergo at the hands of the United States Senate.” In fact it has long been a habit of the Senate to amend treaties or attach reservations to them, frequently for no other apparent reason than to assert the authority of that body or to create the impression that the executive has bungled matters and that better results would have been obtained had the Senate been consulted or had a share in the negotiation.

Since the Spanish War the Senate has gone a long way toward securing the right to be represented in the negotiation of important treaties in addition to its right of advice and consent in the question of ratification. At the close of the Spanish War President McKinley appointed a commission of five members, three of whom were senators, to negotiate a treaty of peace. The senators were William P. Frye, president *pro tem* of the Senate, Cushman K. Davis, chairman of the foreign relations committee, both Republicans, and George Gray, the leading Democratic member of the committee. This was regarded as a shrewd but questionable innovation on the part of President McKinley. It undoubtedly

enabled him to secure the consent of the Senate to ratification, but the appointment of senators as negotiators called forth protests and criticisms. Senator Hoar maintained that the participation of members of the Senate in the negotiation of a treaty would prevent impartial consideration of that treaty when it came up for ratification.

In selecting commissioners for the peace conference at Paris President Wilson did not follow President McKinley's example, and much of the opposition to the Treaty of Versailles was due to the fact that the President did not take Senator Lodge or any of his colleagues to Paris. President Harding reverted to the McKinley precedent and appointed Senator Lodge, chairman of the foreign relations committee, and Senator Underwood, the Democratic leader of the Senate, as members of the delegation to the Washington Conference of 1922; and President Hoover appointed Senator Reed, Republican, and Senator Robinson, the Democratic leader, as delegates to the London Naval Conference of 1930. Both treaties were promptly ratified.

The Senate advanced another claim in connection with the London Naval Treaty. It demanded that all the correspondence leading up to the treaty be laid before it. Secretary Stimson replied that all essential information had

been transmitted, but that it would seriously embarrass our relations with other powers to make public all notes and cablegrams that had been exchanged. President Hoover refused, therefore, to comply with the request of the Senate. Senator Reed did not help the situation by assuring his colleagues that as a delegate he had examined all the correspondence and could vouch that it was all right. This raised the question as to whether one senator was entitled to more information than his colleagues. If the Senate should establish as a principle the right to have all correspondence relating to a treaty before giving its consent to ratification, it would gain nothing, for our diplomats would soon learn not to commit to writing anything relating to a private or confidential conversation, in which case the texts of treaties would be submitted with even less information than the Senate now gets.

In rejecting the Treaty of Versailles the Senate won what is likely to prove a fruitless victory. That body, so jealous of its rights, already appears to have been short-circuited. It has kept us out of the League of Nations, but it has not kept us out of European politics. The executive has already found a way of dispensing with its "advice and consent" by handling delicate and important matters "unofficially." In order to win in 1920 the Republican party indiscrimi-

nately repudiated the great achievements of Woodrow Wilson and proclaimed so loudly a return to the isolation of the "founding fathers" that when they assumed the responsibilities of office they found themselves hampered at every turn by the reactionary views which they had disseminated among the people. Secretary Hughes extricated himself from this situation to some extent by the device of sending "observers" to European conferences and soon built up a system of "unofficial diplomacy." His part in the adjustment of the reparations question was "unofficial," though none the less effective. Upon several occasions he set forth the advantages of this sort of irregular co-operation with Europe over membership in the League of Nations. In an address before the New York State Republican convention in 1924 he said that if Congress had been asked to authorize executive action in conferences such as had been taking place in Europe from time to time, "the Congress itself most probably would reserve the authority to give instructions, and you can well imagine what the debate would be and what the instructions would be."

Just after the London Conference of 1924, which gave effect to the Dawes Report, Secretary Hughes, who had visited London, Paris, and Berlin in the effort to put the Dawes plan

through, said before the Society of Pilgrims in London:

Without wishing to say anything controversial on this occasion, I may give it as my conviction that had we attempted to make America's contribution to the recent plan of adjustment a governmental matter, we should have been involved in a hopeless debate, and there would have been no adequate action. We should have been beset with demands, objections, instructions.

However effective this method of procedure may be, it is anything but democratic. It is in line with secret, not open, diplomacy.

Wilson and Lloyd George both undertook to bring foreign relations under democratic control. It is not yet possible to determine how far they succeeded. Notwithstanding the ridicule heaped upon the expression "open covenants openly arrived at," it cannot be denied that a new order of diplomacy was introduced by the World War. The main difference between the old diplomacy and the new is frequently said to be the difference between the transaction of business by professional diplomats in the privacy of chancelleries and the drafting of agreements at public conferences in the full glare of publicity. This difference is more superficial than real, for experience has shown that unless the way has been carefully

prepared in advance for such conferences, little is accomplished. What is actually done is usually agreed on beforehand and only the results announced in plenary sessions. This was true of the Paris Conference, where all important questions were determined in private by the Big Four.

The same general method of procedure was followed by the Washington Conference of 1922 and the recent London Naval Conference. Indeed it is difficult to see what other procedure could be followed. Nevertheless the international conference serves to focus public attention on important questions about which the public knows little and formulates issues for submission to the final verdict of public opinion. Furthermore it is impossible for the agreements reached at a conference to be kept secret. As a matter of fact all secret compacts have been invalidated by the Covenant of the League, so that open diplomacy has made great gains. With the modern machinery of communication and the various agencies of publicity that now exist it is inconceivable that the old order should return or that public opinion should ever cease to be the force that it has become in international affairs.

The policy of European governments with respect to the publication of foreign office archives

and current information has been revolutionized as a result of the World War. Documents which under the old regime would have been kept secret for a generation or more are now available in print. Strange to say, this demand for publicity in international affairs has so far met with little response in the United States. Professor Manley Hudson's report submitted to the Conference of Teachers of International Law in April, 1928, shows that our government supplies less information to the public on current international affairs than that of any of the great powers. Mr. Hughes, in commenting on the report, remarked facetiously that a delay of eleven years in the publication of the last volume of "Foreign Relations" tended to take the edge off of criticism.

The requirement of the two-thirds vote in the ratification of treaties, which gives the veto power to thirty-four per cent of the senators present, is a serious handicap on the executive. In order to overcome it successive Presidents have developed to an amazing extent the discretionary powers of the executive under the general doctrine that the conduct of foreign relations is an executive prerogative. The fact that the President is the sole channel of communication with foreign nations gives him, of course, a great advantage in the development of his powers. It



enables him to take the initiative in formulating foreign policies, and it is worthy of comment that all of our distinctive foreign policies have been formulated and announced by Presidents. The Senate obstructs, but it does not initiate.

The President, as already stated, has an unlimited discretion in the recognition of new governments and new states. In the negotiation of treaties and in the transaction of other important business he may use special agents, of uncertain diplomatic status, who are appointed and sent abroad without the consent of the Senate. President Wilson's employment of Colonel House as his personal representative in Europe before and during the World War was not an innovation, though it was the most conspicuous instance of the kind. H. M. Wriston, in his recent book, *Executive Agents in American Foreign Relations*, shows that Colonel House had over four hundred predecessors, that all of our Presidents had made use of special agents appointed without the advice and consent of the Senate. Such temporary use of special agents does not constitute appointment to office within the meaning of the Constitution, because the courts have held that an office carries with it the idea of permanency and must be created by law. Such agents have frequently been given the rank of minister or ambassador, but this does not make them ministers

or ambassadors within the meaning of the clause of the Constitution requiring the advice and consent of the Senate. Thus when President Wilson sent Mr. Root at the head of a special mission to Russia he gave him the rank of ambassador, but did not submit his name to the Senate, for the appointment was temporary and did not create an office.

Presidents have frequently made agreements with other nations of the nature of treaties, but, under the disguise of some other term, such as protocol or *modus vivendi*, have put them into effect without the consent of the Senate.

Although Congress is given the power to declare war, the President has developed the power to make war. The war-making power which the President has gradually taken to himself is derived, according to Professor Corwin (*The President's Control of Foreign Relations*, p. 206), largely from two sources:

First, from the coalescence which took place at the time of the Civil War between the President's agency in the enforcement of laws and his power as commander-in-chief of the army and navy; secondly, from our proximity to weak disorderly neighbors, who demand rough handling occasionally but are rarely worth a real war.

The right of the President to land marines or

other armed forces on foreign soil for the purpose of protecting the lives and property of American citizens, to which Professor Corwin has reference in the passage just quoted, is fortified by a long line of precedents dating back to an early period of our history. There are nearly a hundred cases in which marines have been actually landed on foreign soil in various parts of the world and many more cases in which they have been dispatched to the scene of disorders but not actually landed. In most of the cases in which marines have been landed the local government was in abeyance or unable to afford protection, but in recent years the marines have occasionally been used for political purposes, that is, to support a government or faction to which the President had extended recognition. Such was the case in President Coolidge's intervention in Nicaragua. Marines were landed at the request of Diaz who had been recognized by the United States and they waged war against Sandino and his forces. It was war *de facto*, but not war *de jure*, because it was not waged against a recognized government and therefore did not require a declaration of war by Congress. The same was true of the Archangel expedition against the Bolshevist regime in Russia, in which the United States participated. There was heavy fighting, but no war in the constitutional or international sense be-

cause the Bolshevist government had not been recognized.

There is no constitutional check upon the discretionary power of the President in such matters, but the power should be exercised cautiously and subject to political scrutiny. It would be perfectly possible for the President to withdraw recognition from the existing government of a Caribbean or Central American state, recognize some claimant to executive power who would be a mere puppet in the hands of the Department of State, and with the consent of the government thus set up land marines for the nominal protection of the lives and property of foreigners, and crush the opposition. Such a course would be unwarranted political intervention and not mere interposition for the protection of foreign lives and property. Mr. Hughes undertook at the Havana Conference to draw this distinction between intervention and interposition, but the distinction is difficult to maintain in practice. It is always possible to allege danger to the lives and property of American citizens as an excuse for landing marines and the President may go a step further and back the faction which he considers more favorable to the enterprises of Americans and therefore more likely to afford them protection.

The use of armed forces for the protection of American citizens and their interests abroad has

not been confined to Latin America. The most striking instance of the President's assumption of the war-making power was President McKinley's dispatch of troops to China at the time of the Boxer uprising. Without any authorization from Congress he ordered over fifteen thousand troops to China. Between five and six thousand of these arrived in time to participate in the expedition to Peking for the relief of the legations. In co-operation with British, French, Russian, and Japanese contingents they stormed the walled city of Tientsin and fought their way to Peking.

The Chinese government was forced to concede the demands of the powers, which included a large indemnity and the guarantee of improved relations, both commercial and political, with foreigners. These and other demands were embodied in the Protocol of 1901. Strange to say, this treaty, although published in the official collection of the treaties of the United States and still in force, was never submitted to the Senate for its approval. The only explanation I have ever heard advanced for the failure of the President to secure the advice and consent of the Senate to this treaty is that while it imposed obligations on China, it imposed none on the United States.

In his first annual message to Congress, in

December, 1929, President Hoover stated that we still had 1600 marines in Nicaragua, 700 in Haiti, and 2605 in China. These are the latest official figures I have seen.

It will thus be seen that the President has almost unlimited discretionary powers in the general conduct of foreign relations. He may not, however, bind the nation to definite obligations and responsibilities without the consent of the Senate, and the Senate is exceedingly jealous of the President's powers and not immediately responsive to public opinion. How to democratize the Senate, or overcome in some other way the handicap which the two-thirds requirement places on the President, is a problem for which no practical solution has so far been proposed. The Senate is not likely to consent to a constitutional amendment which would in any way weaken its veto power. It has not been possible within the limits of this lecture to discuss the highly technical question as to whether the treaty-making power, when constitutionally exercised by the President and Senate, is subject to constitutional limitations. In view of the fact that there are no express limitations and that the Supreme Court has never declared a treaty unconstitutional, the view is sometimes advanced that the requirement of a two-thirds vote for ratification is the only safeguard against the

abuse of the treaty-making power and therefore should never be dispensed with. To those of us who wish to see the United States play a dignified role in world affairs and assume the responsibilities that its position as a world power naturally involves, the present situation is highly unsatisfactory. The speeches made in the Senate in recent years in opposition to presidential foreign policies have too often been appeals not to the intelligence of fellow senators or to the public at large, but to the prejudices of particular constituencies. This is one of the inevitable results of considering treaties in open session.

The United States already holds the balance of world power in its hands and is actively participating in world politics, however much the government may attempt to conceal that fact from the public. But can we continue indefinitely to claim a voice in world affairs unless we are willing to assume our share of responsibility for the maintenance of world peace? The Senate is insistent enough on our rights, but very indifferent to our responsibilities. Can the nations of Europe, for instance, afford to make any material reduction in armaments, naval or military, until they know whether we will permit them to punish an aggressor, or whether under the plea of neutral rights we will continue to trade with a nation which has violated its in-

ternational obligations? To this question we have given no answer, because no treaty providing in advance for such a contingency would stand any chance of being ratified by the Senate. The Senate moves slowly, but in the long run it is responsive to public opinion. Hence the only solution of the problem presented in this lecture would seem to be the development of a well informed intelligent public opinion on international questions. This cannot come to pass until the Department of State adopts a more democratic policy in the matter of publicity. A great many of the criticisms of the executive in questions of foreign policy are due to lack of full information. If we believe in democracy and in popular education, we can look forward as we gain experience to a more harmonious adjustment of the control of foreign relations.







BULLETIN

*The* COLLEGE *of*  
WILLIAM *and* MARY  
*in* VIRGINIA



The Appointing and Removal Powers of the President Under the Constitution of the United States

GUY DESPARD GOFF

Member United States Senate,  
March 4th, 1925—March 3rd, 1931

FOURTH LECTURE ON THE  
CUTLER FOUNDATION



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## THE CUTLER LECTURES

*Established at the College of William and Mary  
in Virginia by James Goold Cutler  
of Rochester, N. Y.*

The late James Goold Cutler of Rochester, New York, in making his generous gift to the endowment of the Marshall-Wythe School of Government and Citizenship in the College of William and Mary provided, among other things, that one lecture should be given at the College in each calendar year by some person "who is an outstanding authority on the Constitution of the United States." Mr. Cutler wisely said that it appeared to him that the most useful contribution he could make to promote the making of democracy safe for the world (to invert President Wilson's aphorism) was to promote serious consideration by as many people as possible of certain points fundamental and therefore vital to the permanency of constitutional government in the United States. Mr. Cutler declared as a basic proposition that our political system breaks down, when and where it fails, because of the lack of sound education of the people for whom and by whom it was intended to be carried on.


Mr. Cutler was one of the few eminently successful business men who took time from his busy life to study constitutional government. As a

result of his study, he recognized with unusual clearness the magnitude of our debt to the makers, interpreters and defenders of the Constitution of the United States.

He was deeply interested in the College of William and Mary because he was a student of history and knew what great contributions were made to the cause of constitutional government by men who taught and studied here—Wythe and Randolph, Jefferson and Marshall, Monroe and Tyler, and a host of others who made this country great. He, therefore, thought it peculiarly fitting to endow a chair of government here and to provide for a popular “lecture each year by some outstanding authority on the Constitution of the United States.”

The fourth lecturer in the course was Senator Guy Despard Goff, former member of the U. S. Senate from West Virginia.





# THE APPOINTING AND REMOVAL POWERS OF THE PRESIDENT UNDER THE CONSTITUTION OF THE UNITED STATES

GUY DESPARD GOFF

Member U. S. Senate from West Virginia

March 4th, 1925—March 3rd, 1931

It is a privilege as rare as it is inspiring to discuss in these halls of learning the Constitution of the United States. It was amid these surroundings that many of the master minds responsible for the adoption of this immortal instrument were trained in the ways of human discipline and guided toward mental and moral progress. They had faith in God and, with the ability to perceive, they besought counsel and advice in every step forward. They realized that loyalty, service and enterprise must be infused into all human activities if liberty, order, prosperity and happiness were to be eternal. Governments "of the people, for the people, and by the people" are not created; they are the creatures of Constitutions, and they grow out of the past. Constitutions "whose just powers are derived from the consent of the governed" are not struck off in a single convention; they are the acts of the

people, and they are the slow deliberate work of the ages. They are the means by which "a sovereign nation of many sovereign states" expresses itself and is exercised. The fabric of human institutions is a texture that can be woven only in the loom of time. Thought is the most potent and active force in all the world. As Carlisle has so graphically phrased it: "Man carries under his hat a private theatre wherein a greater drama is acted than is ever performed on the mimic stage, beginning and ending in eternity." In short, all the great accomplishments in mortal endeavor are simply the offsprings of great and divine ideas. They are the intellectual vision of those who can see, with accuracy and safety, beyond the outposts of experience. It has been truly said that:

While the defense of the Constitution in Pennsylvania and Massachusetts was able, and in New York most brilliant, that the attack upon it in the Virginia convention was nowhere equaled in argument or discussion, or approached in power, scholarship, learning, and impressive dignity. That the Virginia contest, with its gifted and accomplished statesmen, was the only real debate over the whole Constitution. It far surpassed in reasoning, argument, and oratory the discussion in the Federal convention itself.

Yes, from the tongue of Henry, the pen of Jefferson, the sword of Washington, and the brain of Marshall, whose natal day we now observe with pride and reverence, has come constitutional liberty, the palladium of all the civil, political, and religious rights of Mankind. Yes, these Fathers, and they will live forever, above all fame, tell us to love, respect, obey, support and defend this charter against all attacks. They were great because they could serve and they have never been excelled in learning, ability or patriotic power.

I borrow from that most able address by Judge Alton B. Parker, delivered here January 14, 1922, the following expressive reflections and most accurate meditations:

Virginia was in that day the greatest of the states. She had one-fifth of the population of all the States and at least one-fifth of the wealth. Moreover, only 18 years before her House of Burgesses had passed an act prohibiting slavery, which failed to become a law only because of King George's direction to the colonial governor to withhold his signature from the enactment, which was obeyed. The letter of protest to the King from the House of Burgesses was a brilliant paper, which at the same time bore a sad prophecy of that which later happened. I quote a single sentence from it: "We are sensible that some of Your Majesty's subjects in

Great Britain may reap emoluments from this sort of traffic; but when we consider that it greatly retards the settlement of the colonies with more useful inhabitants, and may in time have the most destructive influence, we presume to hope that the interest of a few will be disregarded when placed in competition with the security and happiness of such numbers of Your Majesty's dutiful and loyal subjects."

That letter in its entirety should be known to all men that they may realize that slavery in the great State of Virginia did not meet with the approval of her patriotic people when, with magnificent hope, they conceived and consented to those immortal principles which preserve and sustain our liberties, but was due to the King and the profiteers of that day, who were not at all different from the profiteers at any subsequent period.

Thomas Jefferson, as it has been proudly observed, wrote the Declaration of Independence, and when first presented it contained a stinging indictment of the King for enforcing slavery upon this country. The convention did not accept this indictment and it was the only change of any moment made in that famous document. Jefferson later became the governor of Virginia, minister to France, Vice-President of the United States, and President for two

terms. George Washington, another of Virginia's sons, had been commander-in-chief of our armies. His great ability, his matchless skill and valor, demanded—yes, made necessary—his selection as chairman of the Philadelphia convention. He was not a member of the Virginia convention chosen to pass upon the Constitution, for it was his act, in common with his associates, which was considered by that assembly. But his striking influence was there, for he had not hesitated to make it known how vital it was that the new national government should be ratified as “a perfect union” by the several states. The people trusted him, because they believed he always understood them. They knew he stood “for those principles of freedom, equality, justice and humanity for which American patriots sacrificed their lives for their country.” In the meeting at Philadelphia, with the heart to conceive, and the understanding to direct and execute—he was the Soul of America. And at a crucial crisis in the proceedings, he arose, and in tones of suppressed emotion, reflecting the courage, the hope and the obedience of Virginia, said:

It is too probable that no plan we propose will be adopted; perhaps another dreadful conflict is to be sustained. If to please the people we offer what we ourselves disapprove, how can

we afterward defend our work? Let us raise a standard to which the wise and the honest can repair. The event is in the hands of God.

And so it was, because out of that conference, the attempt and the combined wisdom of the many there came "a democracy in a republic," "one and inseparable," with centuries of Anglo-Saxon law and liberty behind it, the largest and the best scheme of popular free government that the world has yet seen tried—the Constitution of the United States—the Supreme law of the land.

The Constitution of the United States in the words of Judge Story: "Was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the wants of which were locked in the inscrutable purposes of Providence." The instrument in its broad general scope did in fact reflect the wisdom, a moderation and a patience that was as providential as it has proved beneficial to the advancement of mankind. It did, with the consent of the people, divide this government into three separate and distinct departments: The legislative, the executive, and the judicial. The object sought was security through the equipoise of restraining checks and mutual balances. And then of necessity, it vested absolute and unrestricted power in each

that there might be in such a division an impregnable safeguard for life, liberty and the pursuit of happiness for ourselves and our posterity. It wisely provided that each department should be independent of the decrees and the edicts of the other, and that each should be given a free and untrammelled hand in their respective fields, if they were, with obedience and respect for authority, to perform the duties and discharge the obligations committed to them by the people. It intended by such divisions to strengthen our institutions and stimulate our patriotism. Fortunately for the Constitution and the people, the Supreme Court of the United States, discussing this subject through the great John Marshall, said:

The powers of the legislature are defined and limited, and that these limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing if these limits may at any time be passed by those intended to be restrained. The distinction between a government with limited and unlimited powers is abolished if these limits do not confine the persons on whom they are imposed. It is a proposition too plain to be contested that the Constitution controls any legislative act repugnant to it, or that the legislature may alter the Constitution by any ordinary act.

Obviously, such reasoning is conclusive in its finality. If the Constitution is not superior to an Act of Congress, it becomes a mere scrap of paper—an instrument “more honored in the breach than in its observance.”

Actual sovereignty resides in the people as the source of all political power; and they can alter or change completely at any time the government to which they have entrusted only certain express and necessarily implied powers. But such powers as are given to the government as a fiduciary body are named in the Constitution, and such powers as are not there delegated either expressly or by implication are reserved to the people, and can be exercised by them only or upon further grant from them. The appointing and the removal power under the Constitution will now be considered legislatively as the Congress has construed it; executively as the Presidents have maintained it; and judicially as the courts have interpreted and enforced it. It is well always to bear in mind that the Federal government has no inherent powers, but only those derived from the Constitution as expressly delegated or granted by necessary implication. And that all powers not thus granted are reserved to the States or to the people.

In Section 2, clause 2, of Art. 2 of the Consti-



tution, the President of the United States as the sole vestee of any and all executive power was authorized to nominate and, by and with the advice and consent of the Senate, to appoint ambassadors, public ministers, consuls, judges of the Supreme Court, and all other officers of the United States whose appointments were not expressly provided for; and the President was further empowered to commission all such officers of the United States. The President's powers are in no sense statutory. They are constitutional, such as they are, as will clearly appear in the discussion to follow: In the grant of legislative power, the Constitution in Art. I, Sec. 1, provides: "All legislative power herein granted shall be vested in a Congress of the United States which shall consist of a Senate and a House of Representatives"; and nowhere is there a suggestion, express or implied, in any of the powers so granted, of a power to remove. In the grant of Executive power, it should be recalled that it is to the President, and not to an Executive department. It is provided in Art. II, Sec. 1, "That the Executive power shall be vested in a President of the United States of America." And in Art. II, Section 3, it is also provided: That the President "shall take care that the laws be faithfully executed, and shall commission all the officers of the United States."

At the first session of the first Congress, in 1789, the question directly arose whether the appointing power should include the removing power, or whether such power should be in the executive by and with the advice and consent of the Senate. Mr. Madison and his supporters contended most reasonably and logically, that the power of removal should be in the President alone, and that since he was expressly responsible under the Constitution for the faithful execution of the laws, he should not be interfered with or embarrassed by any other branch of the government. It was then said, to quote the language used,

Vest this power in the Senate jointly with the President and you abolish at once that great principle of unity and responsibility in the executive department which was intended for the security of liberty and the public good. If the President should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest will depend, as they ought, on the President, and the President on the community.

It is sufficient to say that at the very beginning of our government it was clearly and distinctly established:

1st—That the appointing power includes the removing power.

2nd—That both of these powers belong to the President, the Senate having simply a negative on appointments.

3rd—And that where the tenure of office has not been provided for by the Constitution, the office is held at the pleasure of the appointing power.

The Supreme Court of the United States whenever called upon to decide this question, has repeatedly approved these conclusions; and many of our Presidents in their various contentions with the legislative branch have insistently upheld and maintained this view. It has been unequivocally shown that the people in making these respective delegations, intended to intrust their interests and general welfare to these different agencies and that they fully realized and appreciated that to make each independent of the other and strictly responsible for the execution of each and every act fairly within the scope and aim of their respective fields was the only way the rights, the liberty and the freedom of the people could be secured and protected. That the executive and the legislative departments have not always been free from contention and strife in their interpretations of where the power of removal resides is

clearly reflected in an examination of their respective differences and decisions.

In 1833 President Jackson directed his Secretary of the Treasury, William J. Duane, to deposit all government funds in specified State banks instead of the Bank of the United States. Duane evaded such instructions, whereupon President Jackson dismissed him. A heated controversy arose in Congress relative to presidential removals, and in the Senate a resolution was passed censuring the President for removing the deposits from the United States Bank, and declaring he had exceeded his constitutional authority.

In 1835 John C. Calhoun, who was opposed to giving the President the power of appointment and removal of public officers, introduced a bill to reduce the Executive patronage. A very impressive debate ensued between Mr. Webster and Charles Francis Adams, resulting in favor of Mr. Adams, who insisted that the power of removal belonged to the President because it is inseparably connected with the power of appointment.

On August 12, 1867, President Johnson suspended Mr. Stanton, his Secretary of War, and immediately appointed General Grant to succeed him. This action so embittered the Senate that it led directly to impeachment proceedings

against him. In the course of the trial, the removal power was thoroughly reviewed. On May 26, 1868, the vote on the impeachment was taken and resulted in Johnson's acquittal by a vote of guilty 35, not guilty 19—only one vote short of conviction.

President Grant in his first message strenuously opposed the Congress having anything to do with the power of removal. He said: "It could not have been the intention of the framers of the Constitution when providing that appointments made by the President should receive the consent of the Senate, that the latter should have the power to retain in office persons placed there against the will of the President. The law is inconsistent with a faithful and efficient administration of the government. What faith can an executive put in officials forced upon him, and those, too, whom he has suspended for reason?"

In the winter of 1885-86, an acrimonious controversy arose between President Cleveland and the Senate. Upon his accession to the Presidency, Mr. Cleveland was besieged by such an army of office seekers that 643 office-holders under the preceding administration were removed and a like number appointed. These recess appointments were sent to the Senate within 30 days after its opening in December, 1885.

One of these recess nominations was the district attorneyship for the southern district of Alabama. President Cleveland removed the incumbent and appointed his successor July 17, 1885. The Judiciary Committee, December 26, 1885, requested the transmission of all papers and information in the possession of the Attorney General, regarding the nomination and "the suspension and proposed removal from office" of the former incumbent. The Attorney General partially complied but refused to transmit any papers relative to the removal of the prior incumbent, stating that he was directed by the President to say "that it was not considered that the public interest will be promoted by a compliance." The Judiciary Committee then asserted that the Senate possessed such a right and recommended a resolution wherein the Attorney General was censured and it further declared it to be the duty of the Senate "to refuse its advice and consent to proposed removals of officers" when papers relating to them "are withheld by the Executive or any head of a department." This issue was met by the President in his defiance of the Senate. He took the stand that all presidential removals were unencumbered by any restriction of the Senate, and that all papers in connection with Executive appointments and removals were the

property of the Executive and not subject to inspection by the Senate.

The Senate showed its hostility toward President Cleveland in its prolonged delay in confirming Mr. Lamar as Associate Justice of the Supreme Court and also Melville W. Fuller as Chief Justice of the Supreme Court, as well as several other important appointments.

President Wilson, on June 4, 1920, vetoed the budget and accounting bill. He disapproved of section 303 which provided, in part, that the Comptroller General and the Assistant Comptroller General "may be removed at any time by concurrent resolution of Congress." The President based his disapproval on the grounds, first, that the power of appointment of officers of the United States carried with it as an incident the power to remove, and that Congress was without any constitutional power whatsoever to limit the appointing power and its incidental power of removal derived from the Constitution; and, second, that Congress has no constitutional power to remove an officer of the United States from office by a concurrent resolution. When the bill finally became law it provided that the Comptroller General was to be removable only by joint resolution of Congress. Just before his retirement, President Wilson experienced great difficulty in securing

the consent of the Senate to his nominations, numbering more than 10,000.

President Harding, likewise, encountered the ire of the Senate by removing 28 officials of the Bureau of Engraving and Printing, including the director of the Bureau. The Senate, however, took no action, except to bring pressure upon the President for the reinstatement of certain of these officials.

President Coolidge, in one of his messages to Congress, in response to a resolution of the Senate that it was the sense of that body that the President should immediately request the resignation of the then Secretary of the Navy, replied:

No official recognition can be given to the Senate resolution relative to their opinion concerning members of the Cabinet or other officers under Executive control. \* \* \* The dismissal of an officer of the Government, such as involved in this case, other than by impeachment, is exclusively an Executive function. I regard this as a vital principle of our Government.

At the last session of the 71st Congress, there was under consideration a question involving the application of this great and far-reaching constitutional principle. The President of the United States sought, as he was required to do under Article 2, Sec. 2 of the Constitution of



the United States, the advice and consent of the Senate in the appointment of five members to what is known as the Federal Power Commission. Such nominations were sent to the Senate and after a thorough and exhaustive consideration the men so nominated were on the 19th and 20th of December, 1930, confirmed by the Senate in open Executive Session and the President, being duly notified of such action proceeded on Monday, December 22nd, to issue commissions to such nominees, three of whom on the same day forthwith duly qualified as such appointees by taking the oath of office, after first consulting with the Secretary of State as to whether it was permissible and proper for them so to do. The Power Commission so denominated was appointed under the Act of June 23rd, 1930. It was provided in section 3 of that law that the existing old Federal Power Commission should continue to function until the date of the reorganization of the new commission and that when three of such commissioners should qualify under the law that the new Commission should be deemed reorganized. After three of the commissioners had qualified as stated on the 22nd of December, 1930, the Chairman of such Commission was instructed to issue a notice to all the Civil Service employees of the old Commission that

their services automatically terminated with the going out of existence on the 22nd of December, 1930, of the old Commission under which they had been employed. Such a notice was duly given and it is important to note that this interpretation of the legal effect of such reorganization was set forth in the report the Committee on Interstate Commerce filed April 11, 1930, in which the Chairman formally stated, in reporting the Bill as an emergency matter, that it was the sense of the Committee that a competent and full time staff should be organized and that it should be permanently under the control of the new Commission to the end that certain disabilities should be eliminated under which the old Commission, consisting of the Secretaries of War, the Interior, and the Department of Agriculture, had been forced to assume and carry. The old existing staff had disagreed on matters of policy and in advancing separate and dissenting views had impaired their official efficiency. The entire Commission of five, having duly qualified, on the second of January, 1931, however, resolved that each and every employee of the old Commission should without exception be invited to file their applications for reappointment and that all such old employees as were not reappointed should be given, if lawful, a reasonable leave of absence with pay. This

action on the part of the Commission did not meet with the approval of certain members of the Senate, and a motion to reconsider their confirmations was made and the President was requested to return such nominations to the Senate that it might reconsider its consent and approval heretofore duly given. These steps were taken under a rule of the Senate known as Senate Rule 38. Paragraph 3 of said rule provides that when a nomination is confirmed, any Senator voting in the majority may move for a reconsideration on the same day on which the vote was taken or on either of the next two days of actual executive session of the Senate; and that if a notification of the confirmation has been sent to the President before the expiration of the time within which such a motion to reconsider may be made, such motion to reconsider shall be accompanied by a motion to request the President to return such notification to the Senate.

The reason underlying the request that the President return such notification to the Senate is that if the Senate does not have such documents before it as a record, it is without jurisdiction to proceed. This was determined by the Senate in 1830 in the Hill case. In paragraph 4 of rule 38, it is expressly stated as follows:

Nominations confirmed or rejected by the Senate shall not be returned by the Secretary to the President until the expiration of the time limited for making a motion to reconsider the same or while a motion to reconsider is pending, unless otherwise ordered by the Senate.

It is important to note, as the record of the Senate discloses, that when these five nominees were confirmed on and prior to December 20, 1930, the Vice-President and the President *pro tempore* of the Senate announced in each instance: "The nomination is confirmed and the President will be notified." The Secretary of the Senate, as the record discloses, duly notified the President and the Commissions were issued on Monday, December 22nd, 1930, and three of the duly confirmed nominees, as stated, qualified by taking the oath of office under their respective commissions. It is proper to state that the Congress, at this time, adjourned for the holidays and did not reconvene until the fifth day of January, 1931. And on the fifth day of January, 1931, a motion to reconsider was duly made, which was more than two weeks from and after the 22nd of December, 1930, when three of the commissioners had duly qualified. The President refused to return the notifications of the nominations, stating among other things the following:

I am advised that these appointments were constitutionally made, with the consent of the Senate, formally communicated to me, and that the return of the documents by me and reconsideration by the Senate would be ineffective to disturb the appointees in their offices. I cannot admit the power in the Senate to encroach upon the Executive functions by removal of a duly appointed executive officer under the guise of reconsideration of his nomination. I regret that I must refuse to accede to the requests.

In the controversy, thus precipitated, it was uniformly insisted by such Senators as endorsed the motion that the reorganization of the new Commission did not automatically eliminate certain staff members of the old Commission; and it was just as insistently answered that the language in section 3 of the Act had the effect of completely disorganizing the old Commission upon such date as three of the newly appointed commissioners duly qualified. It was further expressly provided that no regulations, actions, investigations or other proceedings taken by the old Commission should be affected by the reorganization here provided. That is, the reorganization should not be considered as in any way affecting or disturbing any existing rules, procedure, process, research or any consummated right giving rise to a present enjoy-

ment, even though it be of a defeasible character. The applicable language in section 3 is: "The Commission shall be deemed to be reorganized upon such date as three of the commissioners appointed as provided in such section have taken office, and no such commissioner shall be paid salary for any period prior to such date." That is, the old Commission functioned until the new Commission organized. Then the old organization ceased to exist by act and operation of law. The new Commission did not put anyone out of office. They passed out mechanically, automatically, as the new Commission "came in." Yet, regardless of how these certain staff officers were removed, whether by act and operation of law or by the affirmative action of the new commissioners, the fact that they were removed was and is the sole motive prompting the motion to reconsider the nominations. However, it should be borne in mind that the Senate records do not disclose any resolution or affirmative action by the new commissioners removing any of these men.

Paragraph 3 of rule 38 provides:

When a nomination is confirmed or rejected, any Senator voting in the majority may move for a reconsideration on the same day on which the vote was taken, or on either of the next two days of actual executive session of the Senate;

but if a notification of the confirmation or rejection of a nomination shall have been sent to the President before the expiration of the time within which a motion to reconsider may be made, the motion to reconsider shall be accompanied by a motion to request the President to return such notification to the Senate. Any motion to reconsider the vote on a nomination may be laid on the table without prejudice to the nomination, and shall be a final disposition of such motion.

It is important to observe that none of these men constituting the "executive staff" could have been legally removed unless the new Commission was duly organized. If it were not, because the President had prematurely appointed and commissioned it, then were not all of its acts the merest nullities, and did not the old Commission obviously still continue with its executive staff intact? However, by holding the new Commission responsible for such removals, since the motion to reconsider of necessity admits the due reorganization of the new Commission and the validity of its assumed acts, does not the situation therefore resolve itself as follows: The Senate determines it will reconsider and recall its consent to the appointment of these commissioners because it disapproves of their conduct subsequent to their due qualification as officials of the government.

That is, in a word, reconsideration by the Senate under rule 38 is the Constitutional synonym of removal as that power is exercised by the Executive.

When the nominations were voted upon and the Vice-President at the close of each vote then and there forthwith directed and ordered in open executive session, and in the hearing of the Senate that the President should be notified of the action so taken, namely, that the nominations had been confirmed, the Senate was in exactly this position: It had advised and consented to the nominations and the President had been duly notified as expressly ordered and no objection was made to such notification. The question therefore is squarely presented: Can the Senate with knowledge sit silently and idly by and permit the making of a statement which clearly involves its consent to a situation palpably inconsistent with its right subsequently to move to reconsider. By consenting and agreeing to the President being so notified, did it not waive its right to invoke the provisions of rule 38? That is, did not the Senate by such intelligent silence estop itself to move to reconsider the confirmation of these commissioners? The argument is seriously advanced that the Senate could only waive its authority under paragraph 3 of rule 38 by an affirmative



vote to that effect. This argument is advanced in reply to the assertion that when the Vice-President announced in effect: The Senate has confirmed the nominations and the President will be notified, that it undoubtedly agreed that since it had discharged its constitutional duty by advising and consenting to the nominations, there was no reason why the executive should not proceed to execute and fully perform his executive functions in the premises. It is difficult to appreciate how the Senate could have waived the rule, if it is subject to waiver, more directly, explicitly and intentionally than it did by sitting silently by in the hearing of the general statement such as the Vice-President made and offering no protest or objection whatsoever.

Those who favor the motion to reconsider contend most strenuously: That there are two rules: First, the one in Paragraph 3 of rule 38, which relates to motions to reconsider; and second, the provision in Paragraph 4 of the same rule which provides: That the Secretary of the Senate shall not return a confirmed or rejected nomination to the President within the time limited for a motion to reconsider, or while such motion is pending, unless otherwise ordered by the Senate. The argument is then made, that a return, with the knowledge and consent

of the Senate, of any confirmed nomination by the Secretary of the Senate acting under the directions of the Vice-President given in open Executive Session is a waiver merely of the time limit, and not of the right to reconsider. And it is then of necessity contended, that the Senate having knowingly surrendered all jurisdiction, that the President is charged with constructive notice that it yet reserves the power to entertain a motion to reconsider everything it has thought, said and done. Such is the contention, even admitting that the nomination involves an emergency appointment. Yes, it is seriously insisted that the only way the Senate could waive its authority to move to reconsider would be by an affirmative or unanimous vote. This would mean, in the construction of this rule, that the Senate must have its action construed by a motion or clarifying resolution. Obviously, this contention involves and embraces such an absurdity as to refute its premise and disprove its conclusion. It is a *reductio ad absurdum*.

The situation admits reasonably of this analysis. The President nominated the five commissioners. The Senate advised and consented to their appointment. The Vice-President thereupon immediately in open Executive Session, two-thirds of the Senate being present, ordered

that the President be notified of the action so taken, and that in effect all matters in any way appertaining to such nominations be returned to him as the Chief Executive. Thereupon, the President, possessing the final executive authority, and being required to commission such appointees, waives his *locus penitentiae*, the power to withhold the commissions evidencing the appointments, signs and seals them and duly vests by delivery to such appointees the offices to which the Senate had confirmed them. And such appointees having duly qualified, how could they be separated from their offices except by being removed or impeached? Most obviously they could not be ousted by a legislative motion which under the Constitution cannot divest a fixed right. Such a motion would involve and interfere with the faithful execution of the laws over which the President has supreme and unrestricted jurisdiction and authority under Section 3, Art. II of the Constitution.

Therefore, the question again recurs, why should rule 38 provide in Paragraph 4 that the Senate can order that the President be notified of its advice and consent to a nomination, but if within two executive session days thereafter a motion to reconsider should be made, that the President must be requested in such motion to return the nomination papers that the Senate

may have jurisdiction to proceed? Did the Senate in adopting rule 38 purpose the doing legislatively an unnecessary and futile act? If the Senate did not intend to waive the motion to reconsider, when it clearly provided that it would lose jurisdiction of the subject matter, if it ordered the nominations returned to the President with its advice and consent, then why did it expressly provide for such a waiver in Paragraph 4 of this very important rule? If it had omitted the words, "unless otherwise ordered by the Senate" then all doubt would have been removed and all confusion avoided. These words mean, if they mean anything, that when the Senate views its connection with a nomination as *functus officio* and so agrees and orders that the President be notified, that it has openly and intentionally waived all further right and control over the subject matter. But it is argued that paragraphs 3 and 4 must be read together and that so considered they admit of the following construction: That even after the Senate has expressly and directly notified the President that it has advised and consented to a nomination and surrendered jurisdiction thereof by ordering the return of the documents relating thereto, that it can then, regardless of such action and the rights of the executive demand a return of the nomination and recon-

sider and revoke its action because of something done by the nominee if he has qualified as a duly nominated, confirmed, appointed and commissioned official. In a word, such a step essentially involves the power of removal, and if this is the meaning, application and intent of the rule as so construed, its constitutionality becomes at once a matter of serious consideration.

The President, after receiving such direct and formal notice, may have duly executed the appointment as he clearly did do in the instant matter, and as he was constitutionally authorized so to do. If, however, the President, after he has commissioned the nominee, should return the papers containing the name of the nominee to the Senate, and it being once again reinvested with jurisdiction of the subject matter, should recall its advice and consent by virtue of the motion to reconsider, it would clearly invade the executive field and by a process similar to impeachment exercise the removal power which resides solely in the President of the United States. Such action would be contrary to the meaning and intent of the Constitution, and not within the performance of any power, express or implied, conferred by the Constitution on the legislative branch. That the legislature does not possess such a right has been recently

decided by the Supreme Court of the United States in *Myers v. U. S.*, 272 U. S., pp. 52-295. There, after clearly holding that each of the three departments of the government are separate and distinct and not interdependent, the court, speaking through Chief Justice Taft, delivered a most exhaustive opinion involving the direct issue, whether the Executive without the approval of the Legislative could remove a Postmaster of the first class. The opinion consisted of 71 pages and discussed minutely every phase of the question. It is impregnable in its logic, and irresistible in its convictions. It defies destruction, because it is based on truth and reason. The Chief Justice displayed a profound knowledge of the principles of our government and recognized that the Constitution is a rigid document which can be modified only by such processes as it ordains. He made among others the following pertinent references and comments:

The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. This view has since been repeatedly affirmed by this Court. As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in

the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he can not continue to be responsible. Fisher Ames, 1 Annals of Congress, 474. It was urged that the natural meaning of the term "executive power" granted the President included the appointment and removal of executive subordinates. If such appointments and removals were not an exercise of the executive power, what were they? They certainly were not the exercise of legislative or judicial power in government as usually understood.

The history of the clause by which the Senate was given a check upon the President's power of appointment makes it clear that it was not prompted by any desire to limit removals. As already pointed out, the important purpose of those who brought about the restriction was to lodge in the Senate, where the small States had equal representation with the larger States, power to prevent the President from making too many appointments from the larger States.

A veto by the Senate—a part of the legislative branch of the Government—upon removals is a much greater limitation upon the executive branch and a much more serious blending of the legislative with the executive than a rejection of

a proposed appointment. It is not to be implied. The rejection of a nominee of the President for a particular office does not greatly embarrass him in the conscientious discharge of his high duties in the selection of those who are to aid him, because the President usually has an ample field from which to select for office, according to his preference, competent and capable men. The Senate has full power to reject newly proposed appointees whenever the President shall remove the incumbents. Such a check enables the Senate to prevent the filling of offices with bad or incompetent men or with those against whom there is tenable objection.

The power to prevent the removal of an officer who has served under the President is different from the authority to consent to or reject his appointment. When a nomination is made, it may be presumed that the Senate is, or may become, as well advised as to the fitness of the nominee as the President, but in the nature of things the defects in ability or intelligence or loyalty in the administration of the laws of one who has served as an officer under the President, are facts as to which the President, or his trusted subordinates, must be better informed than the Senate, and the power to remove him may, therefore, be regarded as confined, for very sound and practical reasons, to the governmental authority which has administrative control. The power of removal is incident to the power of appointment, and when the grant of the executive power is enforced by the express mandate to take care that the



laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal.

The attitude of Presidents on this subject has been unchanged and uniform to the present day whenever an issue has clearly been raised.

In March, 1886, President Cleveland, in discussing the requests which the Senate had made for his reasons for removing officials, and the assumption that the Senate had the right to pass upon those removals and thus to limit the power of the President, said:

“I believe the power to remove or suspend such officials is vested in the President alone by the Constitution, which in express terms provides that ‘The executive power shall be vested in a President of the United States of America,’ and that ‘he shall take care that the laws be faithfully executed.’

“The Senate belongs to the legislative branch of the Government. When the Constitution by express provision super-added to its legislative duties the right to advise and consent to appointments to office and to sit as a court of impeachment, it conferred upon that body all the control and regulation of Executive action supposed to be necessary for the safety of the people; and this express and special grant of such extraordinary powers, not in any way related to or growing out of general Senatorial duties, and in itself a departure from the general plan of our Government, should be held, under

a familiar maxim of construction, to exclude every other right of interference with Executive functions.”

In a message withholding his approval of an act which he thought infringed upon the Executive power of removal, President Wilson said (on the 4th of June, 1920):

“It has, I think, always been the accepted construction of the Constitution that the power to appoint officers of this kind carries with it as an incident the power to remove. I am convinced that the Congress is without constitutional power to limit the appointing power and its incident the power of removal, derived from the Constitution.”

Mr. Boudinot, of New Jersey, said upon the same point (in the debate in the First Congress):

“The supreme Executive officer against his assistant; and the Senate are to sit as judges to determine whether sufficient cause of removal exists. Does not this set the Senate over the head of the President? But suppose they shall decide in favor of the officer, what a situation is the President then in, surrounded by officers with whom, by his situation, he is compelled to act, but in whom he can have no confidence, reversing the privilege given him by the Constitution, to prevent his having officers imposed upon him who do not meet his approbation?”

Mr. Sedgwick, of Massachusetts, asked the question (in the same debate):

“Shall a man under these circumstances be saddled upon the President, who has been appointed for no other purpose but to aid the President in performing certain duties? Shall he be continued, I ask again, against the will of the President? If he is, where is the responsibility? Are you to look for it in the President, who has no control over the officer, no power to remove him if he acts unfeelingly or unfaithfully? Without you make him responsible, you weaken and destroy the strength and beauty of your system.”

What then, are the elements that enter into our decision of this case? We have first a construction of the Constitution made by a Congress which was to provide by legislation for the organization of the Government in accord with the Constitution which had just then been adopted, and in which there were, as representatives and senators, a considerable number of those who had been members of the Convention that framed the Constitution and presented it for ratification. It was the Congress that launched the Government. It was the Congress that rounded out the Constitution itself by the proposing of the first ten amendments which had in effect been promised to the people as a consideration for the ratification. It was the Congress in which Mr. Madison, one of the first in the framing of the Constitution, led also in the organization of the Government under it. It was a Congress whose constitutional decisions have always been regarded,

as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument. This construction was followed by the legislative department and the executive department continuously for seventy-three years, and this although the matter, in the heat of political differences between the Executive and the Senate in President Jackson's time, was the subject of bitter controversy, as we have seen. This Court has repeatedly laid down the principles that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions.

The Court's decision also embodied the further very applicable observations, that

\* \* \* He must place in each member of his official family and his chief executive subordinates implicit faith. The moment that he loses confidence in the intelligence, ability, judgment, or loyalty of any one of them he must have the power to remove him without delay. To require him to file charges and submit them to the consideration of the Senate might make impossible that unity and co-ordination in executive administration essential to effective action. \* \* \* Finding such officers to be negligent and inefficient, the President should have power to remove them. \* \* \* The imperative reasons requiring an unrestricted power to remove the

most important of his subordinates \* \* \* must, therefore, control the interpretation of the Constitution as to all appointed by him.

While this court has studiously avoided deciding the issue until it was presented in such a way that it could not be avoided, in the reference it has made to the history of a statutory construction not inconsistent with the legislative decision of 1789, it has indicated a trend of view that we should not and cannot ignore. When on the merits we find our conclusion strongly favoring the view which prevailed in the First Congress, we have no hesitation in holding that conclusion to be correct; and it therefore follows that the tenure of office act of 1867, insofar as it attempted to prevent the President from removing executive officers who had been appointed by him and with the advice and consent of the Senate, was invalid, and that subsequent legislation of the same effect was equally so. For the reasons given we must therefore hold that the provision of the law of 1876 by which the unrestricted power of removal of first-class postmasters is denied to the President is in violation of the Constitution and invalid.

In view of this decision, appealing as it does to the reason and conscience of the judicial mind, the President has the exclusive power of removing any and all officers whom he has appointed by and with the advice and the consent of the Senate. He has this power, not only

because it is incidental to the power of appointment, but also because of his constitutional duty to see that the laws are faithfully executed. He has this power because our institutions are founded on justice, and justice involves and requires the prompt, equal, and uniform enforcement of the law. To hold otherwise would be to deny what is implicit in our fundamental law and make it impossible, in case of political or other differences with Congress, for the President "to take care that the laws be faithfully executed." If he cannot direct the way or select and control the instruments, how can he enforce the laws or be justly held responsible for not adhering to his covenant if he must meet the additional and possibly unyielding resistance and obstruction of an unfriendly Senate. To divide responsibility is practically to destroy it. Our forefathers so concluded when they made the President solely responsible for the faithful execution of every edict, decree or order, whether it be legislative, judicial, or executive.

This issue between the executive and the Senate is now in the courts awaiting judicial determination. It is destined to take its place as one of the milestone decisions in our constitutional history. If it should be decided favorably to the contention of the Senate, it would

materially add to its power and control over federal appointments. If the contention of the President is upheld, then there will be no change from the established practice except to confirm it and make it freer, greater and stronger.

The temporary political atmosphere surrounding a question of this magnitude and importance should not weigh at all in its ultimate consideration and determination. The fact that political exigencies were present and possibly influenced to a marked degree the position which the Senate took, will be and must be omitted hereafter from any constitutional consideration of this controversy. That which was done, whether wise or unwise, whether animated by politics or not, has made necessary an important expression by the judicial branch of our government.

Therefore, since these commissioners were nominated and appointed and duly commissioned with the consent of the Senate and with the full approval of the President, their nominations cannot now be reconsidered by the United States Senate in order that its advice and its consent may be withdrawn—without invading and exercising the power of removal which is exclusively an executive function. The President cannot under the Constitution surrender this fundamental power to the legislative

department. He can not as President allow the Senate to have possession again of these nominations regardless of what action it may determine to take. The Senate cannot in the performance of any of its granted rights employ and use a power that belongs distinctively and exclusively to either the executive or the judiciary. Every department of this government must be kept separate and distinct in all cases in which they are not interdependent, and it is the duty of each so to construe and interpret the Constitution to the end that the departmental integrity of our government shall always continue and be preserved, as one of the abiding virtues of universal liberty.

Obviously the provisions of rule 38 which permit such a motion after a nominee has been duly confirmed and appointed, as evidenced by a commission duly delivered, is in violation of the Constitution and invalid. In conclusion, to use again the language of the Supreme Court, it should not be forgotten:

The Constitution is a written instrument. As such its meaning does not alter, and what it meant when adopted, it means now. Being a grant of powers to a government, its language is general, and as changes come in our social and political life, it embraces within its grasp all new conditions which are within the scope



of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable.

Yes, the Constitution has not outlived its usefulness. Its protecting and watchful care was never more needed than today. It represents to us our history, our tradition, and our race. It rests on the will of the people. It is dictated by common sense and obeyed by universal consent. It is the duty of every citizen to withstand every assault upon it, from whatever source the assault may come. It is the rock upon which our government is builded, let him beware who would seek to shatter it.













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VOL. XXVII—No. 5

AUGUST, 1933

BULLETIN

*The* COLLEGE *of*  
WILLIAM *and* MARY  
*in* VIRGINIA



The Federal Constitution and  
Its Application, 1789 to 1933

WILLIAM E. DODD

Professor of History, University of Chicago

FIFTH LECTURE ON THE  
CUTLER FOUNDATION

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Entered at the Post Office at Williamsburg as second-class matter.  
Issued January, February, April, June, August, November





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## THE FEDERAL CONSTITUTION AND ITS APPLICATION, 1789-1933

### I.

SINCE the acknowledgment of American independence there have been three great crises. The first of these came after the peace of 1783 when the total returns from exports were less each year than the interest on the debts incurred in the revolutionary struggle. The only means of solving what seemed to be an insoluble problem was the adoption of a Federal constitution which might guarantee cooperation and even control over the unruly States. That crisis was ended, as all the world knows, in the series of compromises drafted in Philadelphia in the summer of 1787 and adopted in 1788. The second crisis came in the winter of 1860-61 when the lower southern states seceded from a Union which all the thirteen old, and nearly all the new, states had agreed at one time or another to be voluntary. The economic rights of the planters as well as those of the planter states were in jeopardy in 1860. Secession seemed to be the remedy. But if secession meant the permanent closure of the Mississippi to the vast region above the mouth of the Ohio, there was apt to be war. Likewise if secession meant the loss to the North of the

commerce of all the tobacco, cotton and sugar states, there was apt to be resistance if not war induced by the industrial states. The then President concluded too early, as he later allowed, that war, initiated on the part of a Union which had no right to coerce a state, was the only solution; and the second great American crisis took the form of civil conflict.

The third dilemma is now upon us. It is the reckoning day of all the industrial countries of the world, a crisis that grips everybody from the plains of Saxony to the hills of Minnesota; and war offers no solution. It is an economic tangle which involves all the winnings of modern civilization, a situation which, if not handled as courageously as that of 1787-88, is apt to move us all backward toward the primitive life in which our forebears lived two hundred years ago. Perhaps a closer scrutiny of the ways men worked out the first impasse, an honest review of the blunders of war and reconstruction, and an analysis of the present economic revolution may suggest moves and attitudes that might help the country out of the dilemma which covers the earth.

## II.

To make the matter clear it must be recognized that all constitutions and treaties are but

compromises involving interests, prejudices and social purposes of the parties concerned. There is nothing about a constitution or a treaty more sacred than the rights and interests of the people concerned; and any concerted effort on the part of any group operating under a great social compact to take advantage of its partners and thwart the purposes of the agreement is hardly less reprehensible than an open crime. Men must be honorable if they would avoid catastrophe. In view of this obvious truism let us state briefly the purpose and the spirit of the Federal constitution and the plain understandings of its great authors as well as its patriotic opponents.

There was a situation in 1785-87 which led men to covert practices. The preliminary conferences to the general convention of 1787 were themselves contrary to the spirit and the clauses of the old Confederation. And if the state legislatures had been asked in the winter of 1786-87 to grant plenary powers to the delegations that gathered in Philadelphia the next May, these powers would surely have been denied. The convention was authorized to amend the constitution of the Confederation. Instead it wrote a new fundamental law and, upon the prestige of the men who thus transcended their powers, the states were asked to

scrap the old law and substitute an entirely new system. The stern necessity of the hour was their excuse.

The next constitution involved three points which have significance for those of us who think of possible ways out of an even more exasperating complex—more exasperating because the unemployed could then go to the wilderness and live off the beasts, the fowls and the fishes, and because American men had not then lost their sense of personal dignity and the needful faith in one's ability to support one's self. The first of the great compromises agreed upon in Philadelphia was a balance of the states and sections in such a way that no group was supposed to be able to overbear another; that is, the Federal power extended to the point of cooperation but not to coercion. The second item of the agreement was that commercial arrangements might be fixed in the congress upon a majority vote, but such arrangements must not be allowed to become repetitions of the old British mercantile system (1660, 1663 and 1673) which had been a major cause of two revolutions, 1688 and 1776. In the hope of giving the agricultural states some guarantee of this, three-fifths of the Negroes in the South were to be counted in the allotment of representatives. Even more was allowed: the Caro-

linas and Georgia might import slaves for twenty years and thus add to the social power of that region. Any intimation of a tariff like that of 1828 would have defeated the whole scheme. With states remaining sovereign and the commercial instinct duly curbed, there remained a third item in the agreement: powers not actually granted to the Federal combination could never be assumed and made operative in law.

With these elements in the complex situation duly guarded, the new constitution was hastened to the states about the middle of September, 1787. It was a momentous issue. George Mason, Washington's neighbor and co-worker through the revolutionary struggle, took his seat for Fairfax county in the assembly in Richmond in October and prevented a premature discussion of the new constitution in order that the matter might go before the people of Virginia without prejudice next March. He wrote Washington every week. Edmund Randolph, governor of the state, published a pamphlet which advised against adoption without serious amendment. Patrick Henry restrained himself that autumn with great difficulty. In Pennsylvania Benjamin Franklin, next to Washington the greatest influence in the success of the Revolution and then governor of the Quaker state,

opposed adoption without amendment; and the people of Pennsylvania were more apt to follow their greatest philosopher than any other leader whatsoever. In New York George Clinton, by far the most popular of the chiefs of that state, agreed with Mason and Franklin. All these men had rendered such high services in years past that no one might discount their motives. Mason was in no sense a self-seeker; Franklin was in the last phase of his long life, and George Clinton, while more of a politician than the others, was far more than a demagogue. Virginia, Pennsylvania, and New York: If either of them failed to adopt, the Union was almost certain to fail. Moreover these were states with growing, expanding and democratic populations. About half the people of the country lived within their borders.

What Mason feared in the new constitution was the likelihood that the commercial states would re-enact the system which the English had tried to enforce since 1660—high tariffs on imports and domestic market privileges that would subject the agricultural states to unjust direct and indirect taxation. The master of Gunston Hall was equally fearful that the Federal courts would overrule state laws and approve the usurpation of powers by the Federal government not granted in the constitution.



The idea of a great industrial belt with huge cities, absorbing the marginal savings of the country as London had done for England and the junkers, agricultural and industrial, were to to for Germany, was to him a nullification of the very purposes of the Revolution. A Federal government dominated by a privileged group would be a new British empire erected on the soil of democracy. Moreover, he was very fearful of the consequences of the constitutional privilege of importing slaves the next twenty years. Like Jefferson and Franklin, he wished to abolish the institution, even though he owned two hundred Negroes. A wide-spreading democracy with independent economic and social centres all over the country was the one hope of the future for him; a balanced economic system was the essential fact in American life. What the founders of the United States sought was a vast union composed of free, self-directing individuals. Nor had they arrived at this conclusion through personal or group interests. George Mason was one of the first thinkers of the time, entirely conversant with the history of the long English struggle for a more just social order. And Benjamin Franklin was of the same mind and immensely popular all over the world. Edmund Randolph, still the governor of Vir-

ginia, and George Clinton, not to be overlooked, were also in accord with this philosophy.

On the other side was George Washington who in 1765 broke with his patron, Thomas Lord Fairfax, and his near neighbor, George William Fairfax, the most powerful men in the Northern Neck of Virginia at that time, and showed Patrick Henry and Richard Bland how to defeat the Stamp Act. He and Mason, as I have indicated, worked together till the adjournment of the Federal convention. At that time the master of Mount Vernon and the one great military figure in the country, grown doubtful of the democracy he had saved, took the view that adoption of the work of the convention immediately and without serious amendment was the only alternative to anarchy. He was the only man in the South whose popularity was equal to a great conflict with Mason and Henry; he was the only man who could rival Franklin in the Middle States. He first grew nervous, then suspicious. When the eighteen members of the Pennsylvania legislature broke the quorum of their assembly (September, 1787) rather than issue a call for a constitutional convention and offered a series of amendments on which they would cooperate, Washington wrote that Mason had probably counselled the revolt. When the Virginia legislature instructed

Governor Randolph to communicate with Governor Clinton in order that those states might cooperate to secure desired amendments, the communication was pigeon-holed, and Washington was informed of the significant fact—secret change of Randolph's attitude. Mason was left in ignorance of the changed position of the governor. When the master of Gunston Hall returned to his home there were reports that his efforts in the recent session to prevent plural voting of townspeople on neighboring freeholds and his attitude on amendments to the new constitution had made him very unpopular, above all in the little city of Alexandria where Washington's influence was supreme. It was said that he would be mobbed if he appeared in the town. He accepted the challenge and spoke there before a large audience, arguing his case as only a great and disinterested leader could argue. Not a hand was lifted against him.

It was clear that the long friendship between the master of Gunston Hall and the master of Mount Vernon, representatives of Northern Neck families whose chiefs had worked and fought together a hundred and twenty years, was broken. It was a near-tragedy. Both men were great planters and great slaveholders; and both of them were profoundly concerned with the fate and destiny of the country they

had done so much to create. The older of them hoped and worked now for better guarantees of democracy; the younger thought less of democracy and labored incessantly for a great consolidated state. In the hope of counteracting rumors Mason wrote Washington that winter; no reply has been printed in their published works. Later Mason called in person at Mount Vernon; there is no mention in Washington's *diary* or letters of such a visit or a return courtesy. Both great men declined to run in Fairfax county for the Virginia constitutional convention; but Mason was elected without recorded effort on his part from Stafford county and Washington made invidious mention of the fact and of the rumor that Mason might easily have been elected for two other counties. Mason and Henry and Thomas Jefferson, then far away in Paris, wished the new constitution to be adopted but only on condition of its radical improvement; Washington, young James Madison and John Marshall fought for adoption with or without guarantees, so there was no delay. It was an honest conflict of the best men of a great day and a great state; and the decision of Virginia meant the success or failure of adoption in the country. Few greater issues in modern history have been determined on the basis of more honest convictions.

When the convention met in Richmond the opposition in the state was increasing, although the Federalists were able to elect David Robertson, an avowed partisan, reporter of the debates. The battle of the giants began. The vital differences as to the social purposes of the constitution sharpened. Madison and Marshall sneered at the thought of Federal coercion of states; they declared that no Federal court would ever dare to usurp powers over state courts; and there could be no danger of a new mercantile system under which the wide agricultural regions of the South and West would be exploited. Washington was known to stand behind the brilliant young leaders of nationalism. But Mason and Henry fought to the last for the ideals of 1776 and (the Morrises and James Wilson, of Philadelphia, having defeated Franklin's candidacy for a seat in the Pennsylvania convention) turned to Clinton of New York for cooperation. They failed to delay adoption; but they secured agreement to a series of limiting amendments. It was only upon a margin of five votes that the great document was accepted in Virginia, only upon the solemn understanding that the spirit of the law as well as the law itself would prevail—that is, no section would be countenanced in attempts to monopolize economic power for sectional or class

purposes. Governor Randolph had delayed messages from New York till the decision had been made and he had otherwise maneuvered against his former friends. As Mason went home in sorrowful doubts as to the future of democracy in America he wrote to a friend that Randolph was but another "Benedict Arnold."

The friendship between Gunston Hall and Mount Vernon was broken forever. Since Washington replied to no letters and returned no visits, Mason did not appear to say farewell and God-speed to his life-long co-worker when he set out sadly in April, 1789, to take up the reins of the great new American government whose principles were still thought to be those of 1776 and whose influence was spreading over Europe like an irresistible prairie fire with Washington's and Mason's friend, Thomas Paine, preaching the new gospel in pamphlets that sold by the hundred thousand, including always the Virginia bill of rights—an American *Magna Carta*.

### III.

The honest and able general of the American Revolution with a new congress before him and clever cabinet around him, including Jefferson, Hamilton, and the dubious Randolph, turned his mind to the more difficult task of directing

the course of politics over the widest area on which democracy had ever been applied. Neither Mason nor Henry could be induced to take seats in the senate; Willie Jones of North Carolina, the most powerful man south of Virginia, would never take office under the new regime; Franklin was then upon his deathbed in the city of "Brotherly Love"; and old Sam Adams looked on from Boston wondering whether the new power setting up in New York, April 1789, was to be more coercive in economic matters than old England had been under the ministry of Lord North. The fifty-eight year old Washington, like William III of England, tried to work the young idealistic Jefferson and the still younger and imperialistic Alexander Hamilton in the same team. On the other side of the Atlantic, where the American fate had been decided in Franklin's French treaty of 1778 and again brought into doubt in the unwelcome treaty of 1783, the revolution moved in rapid strides toward violent extremes. The names of Washington, Franklin, Jefferson and Paine were more compelling amongst common men than the names of kings or prime ministers had been in a hundred years. The eyes of the world were upon the little group that sat in New York the summer and autumn of 1789.

LaFayette sent the new President the key to the Bastille!

The first trade act of the new regime was true to the great compromise. Its terms did not conduce to monopoly, as had been the case in most other tariffs till this day, but every section labored for its share of possible spoils. The eight percent customs duty would yield a yearly income half as great as the interest on the hundred millions of war debt, state and Federal. Would direct taxes be paid by the citizens of states who could not bear their local burdens and by farmers who could not then sell their crops either in English or French markets? The prospect was not unlike that of 1765—if heavy direct taxes fell upon all, what better lot than that which Bute and Townshend had decreed? Neither the optimist, Jefferson, nor the mercantilist, Hamilton, saw a clear way to success; and without success the constitution would fail, like the League of Nations of our day.

A year had not passed before semi-famine in France and the fears of war in other European countries had pulled down the bars against imports into Europe. In two years the volume of exports quadrupled and in four years the modest tax on imports yielded an income eight times as great as had been expected. All



Europe was at war and so long as Europe warred the United States flourished beyond the imagination of the most optimistic. It was the opportunity of history—one of the chapters of accident which have so profoundly affected human affairs. Under a constitution of the most delicate balances, and adopted with the most solemn guarantees against all sectional or class advantage, the application of the first tariff was delayed so that merchants of all the middle and eastern cities might take their enormous orders out of the warehouses before customs fell due—considerable fortunes thus given by governmental decree to scores of mercantile folk. The debts of all the states were added to the Federal debt and in the process many and flagrant injustices were openly allowed, with secret runners carrying the news of future action to prospective beneficiaries—other fortunes given to preferred folk. All the written evidences of the Revolutionary debt, then collected at low prices in a few hands, were redeemed at face value. Virginia had paid the largest part of her debt out of her own meagre funds at twenty-five cents on the dollar. Her people received no consideration from any of the above named moves. The continental currency was redeemed at one cent on the dollar. And finally the Secretary of the Treasury, boast-

ing that a national debt was a national blessing, set up the First National Bank. In this way order was brought out of the old chaos and American money was better than British sterling. It was a great era. Enormous incomes from unexpected exports; departments of the Federal system worked like departments of the British government; a bank of the United States functioned like the Bank of England; and terrible wars all over Europe gave the markets which sustained the system. Washington could hardly avoid boasting of the unexpected prosperity which looked out from every farm and every hamlet in the new nation. Gouverneur Morris intrigued in Paris against the French revolutionists to whom he had been sent as minister; Robert Morris speculated in bonds and stocks, lands and buildings; and John Marshall pressed a great lawsuit (himself a party to it) to compel the state of Virginia to return the vast Fairfax acres to English claimants, exiled tories of the Revolution. Could Virginia be compelled to take lands away from the soldiers who were making their homes on lands they had won on the battlefield? Was the treaty of 1783 to be made valid, a treaty as unpopular in young America as the Versailles treaty in Germany?

There were many reasons for a patriotic President to pause in 1792. Had the consti-

tution been violated? There was no clause to cover a National Bank. A citizen of South Carolina sued the state of Georgia for the face value of a paper bill and the Georgia supreme court denied the suit. Would the Federal Supreme Court go to the aid of the South Carolinian against a sovereign state? There was the solemn treaty with France of 1778 under which American independence had been won. That treaty required the United States to lend all possible aid to Frenchmen warring against England. Would Washington observe the terms of a treaty which the constitution had made a part of the supreme law of the land? Hamilton, aided as few statesmen have ever been aided by adventitious circumstances, claimed all the advantages of implied powers and all the benefits of an amazing foreign trade, set up a wondrous speculation which enriched tens of thousands of deserving and undeserving men; and the First National Bank set the example of sharp practices and fortune-giving which has operated in national banking till this day. But the fame of "the greatest Secretary of the Treasury in history" covered all, and financiers, as well as others innocent of history, cite the success of that day as proof of the bankers' right to profiteer. The spirit of 1776 was gone. A group of privileged individuals

was beginning in the name of the new constitution what the three or four score men about Charles II had done under the mercantile policy of England; the Earl of Shaftesbury, Sir George Carteret, the two Berkeleys, and their kind, were not unlike Alexander Hamilton, the Morris and John Marshall.

In middle Pennsylvania, on the banks of the Ohio, in Kentucky, Tennessee, and over most of the South men named their towns Paris, Versailles, Bordeaux, and the like. In New England where men had formerly hated Britain with unparalleled animosity, the British were admired and the French allies hated; the South still hated Britain and admired the French. Washington said that democratic New England had turned aristocratic and the aristocratic South had gone wild with democracy. Would the great compromise last? When in 1793 the French Minister, Genêt, asked the privilege of doing in American ports what Franklin and Paul Jones had done in French waters, Washington answered in the negative—violating the spirit and the terms of the treaty of 1778; and there was an outcry unmatched since April, 1775. The popularity of the President was eclipsed. A fame unmatched in modern history went under a cloud and there remained till the hand of death restored it six years later. The great

general who had broken the British empire with the aid of France now gave assistance to British imperialists in their twenty-year war to break revolutionary France. The tide of democracy in Europe and America was stopped: Napoleon put a master's hand on France; and the young United States of America enacted alien and sedition laws in harmony with English reactionary policy and contrary to the spirit of both Federal and State constitutions. Jefferson had gone into retirement and Madison abandoned his great friend in the Executive Mansion. The young American democracy was ashamed of the radical creed of 1776.

#### IV.

Thirty years passed. There was another privileged group rising in the lower South. The New England inventor, Eli Whitney, had shown cotton planters how to profit from a new agriculture beyond anything that Hamilton had imagined from his mercantile and financial operations. English and American Christian ministers were showing the poor heathen everywhere that they were naked and that they ought to put on cheap, gay cotton clothes. Cotton in the lower South quickly came to be what tobacco had been to ancient Virginia, arbiter of war and peace. George Mason, who had warned against

slavery, was silent in the family vault at Gunston Hall, and his great neighbor lay in a similar vault at Mount Vernon. Their contradictory fears and their warnings were no longer effective. Thomas Jefferson, an old man at Monticello, again urged the gradual abolition of slavery in Virginia, which must have meant abolition in Kentucky and Tennessee and a definite limitation of the rising Cotton Kingdom. After his decease in 1826, his grandson fought the same fight until death silenced him. George Mason, Thomas Jefferson and Thomas Jefferson Randolph were about to become discredited figures. In the ambitious lower South there stood the ardent and able John C. Calhoun. He spoke the language of planter privilege and rallied a vast region from eastern North Carolina to western Louisiana to his side. In Boston there was the marvelous Webster, son of New England privilege but recently engaged in threats of breaking Washington's Union. He was as ready, if not as clever, as Calhoun to bend the national constitution to cover the interests of his set and section. Were the solemn promises of Madison and Marshall, supported by Washington, in the Virginia convention of 1788 ever to be applied? Was there no obligation to observe the spirit of compromise, remove the menace of privileged groups and make the con-

stitution cover the purposes for which it had been written?

When the decisive moment came, once more in Richmond, there gathered a hundred men and leaders, the ablest body of Americans that had sat down together since 1787. Madison was there. Marshall, who had lost his great Fairfax law suit because of Madison, was also there. They did not love each other. James Monroe, last of the "Virginia dynasty," presided. Littleton Tazewell was pointed out as the man whom President Jackson had snubbed. Abel P. Upshur, who talked the language of Darwin, represented Accomac county. Philip Doddridge, a close friend of John Quincy Adams, spoke for the Wheeling district and William O. Gordon of Albemarle stood strong for the Jeffersonian demand that slavery be gradually abandoned. Only once or twice in American history has there been a convention so important in determining the fate of the United States. If the Mason-Jefferson ideal of the American constitution were revived, the Virginians would ally with the middle west and block the mercantile system which Webster, Pennsylvania, and the second United States bank represented and which was about to assume more of the character of a great monopoly than that against which Washington had gone to war in 1776. Thus the wide-flung

Cotton Kingdom, with its world market, warred against a new industrial realm which must rule the Union and dominate the domestic market. Virginia would decide.

As the decisive day approached, all the country looking on, Robert Taylor of Norfolk, advocate of the Jefferson policy, was compelled to resign; the misguided people of Norfolk demanded it. James Monroe, instructed by Loudoun county to vote for the same programme, recanted in a strange speech about the French revolution and retired from the convention; and curiously enough, having aided the cause of Calhoun in Richmond he journeyed to Washington to aid Jackson in discrediting the South Carolinian! Abel P. Upshur made the ablest speech of the whole convention for a privileged social order, on the ground that history proved that the law of the survival of the fittest must prevail; the slaveholders were the fittest—Hamilton's "rich, wise and good" people. To abandon the decree of history was to wander in a social wilderness. The editor of the Richmond *Enquirer* yielded his life-long advocacy of the gospel of Monticello and thus prevented the establishment of a rival party journal in Richmond. James Madison, worn with age and tired of bitter controversies, agreed with John Marshall as he had done in 1788, and



caused the verdict to fall on the side of the cotton planters. It was the last great decision but one in Virginia history and the greatest of Virginians made the choice. Within two years the departed sage of Monticello was denounced as a mere dreamer and Thomas Jefferson Randolph fought his last fight for gradual abolition. A new gospel was submitted for that of the Declaration of Independence. It was the work of the learned Thomas R. Dew who declared with Upshur that men must ever be governed by the privileged few, that slave-holding was the basis upon which the noblest social structure of all time was being erected. A carefully organized and stratified society would fix every man in his place and poverty itself would cease. The former cooperation between the farseeing leaders of the Old Dominion and the rising Middle West was definitely broken. The region that was to produce in two decades two of the greatest advocates of the Jeffersonian system, Abraham Lincoln and Stephen A. Douglas, must seek allies in the unsympathetic commercial-industrial East. The votes of the Ohio-Illinois country would soon be numerous enough to grant the industrialists of the East a greater navigation and industrial system than any other country had ever endeavored to fix upon the masses of its people.

Andrew Jackson fought blindly his great battle with Nicholas Biddle, a second if less clever Alexander Hamilton, and at the end of a temporary, speculative recovery from the drastic depression which had followed the fall of Napoleon, broke the power of centralized, exploitive financiering. With the collapse of the Second National Bank, depression, evident in the low commodity prices from 1818 to 1846, seized again the financial-industrial minorities; and bankruptcies, defaults, state repudiations from Mississippi to Michigan and from Illinois to Pennsylvania put scores of thousands out of employment and started again the migrations from East to West and from the older South to the contested plains of Texas. The political-economic map of the country was kaleidoscopic. No one could say whether the 1788 objectives of Mason and Franklin or the promises of Washington, Marshall and Madison would finally prevail. In the lower South somewhat more than two million white folk, with "mudsills" of near two million slaves underneath their economic structure, demanded the privilege of governing the fifteen million people who composed the rest of the Union, and they urged anew the privilege of importing blacks from Africa. Ten thousand a year were smuggled into the cotton states; and the greater the number of imported Negroes,

the greater the number of representatives of the region in the national congress. As the beneficiaries of slave importations raised their heads higher and more proudly in national assemblies, the beneficiaries of the growing industrial monopoly of the East demanded the concession of higher and higher tariffs in the hope of reaping greater and greater rewards from the American market. The two groups were coming to the mastery of their parts of the Union and one day the masses of forgotten men in the West would be compelled unwillingly to take sides and fight a bitter war to escape the consequences of a break-up of the Union. Thus the constitution was about to be captured a second time by one of the two minority groups whose leaders knew exactly what they wated.

The issues merged into the inevitable conflict of 1860 when, after six years of bitter controversy, the old conservative Democratic Party, founded by Jefferson but controlled by the leaders of the lower South, broke into segments and gave the new Republican party a plurality of the popular, and a majority of the electoral votes. Forty per cent of the electorate thus set up the new regime; about twenty per cent of the same electorate talked secession as a remedy for their prospective ills. Abraham Lincoln knew little of that past of his country so necessary to

any statesman; but he was an able, honest leader of the rising Northwest, with seven and a half million white people unwilling to be governed by four million white people of the South. The Republicans called themselves the heirs of Jefferson. The successors of Calhoun were really the followers of Hamilton, a wealthy minority with trained leaders. Without awaiting the inauguration of Lincoln and the conferences and compromises that must have followed, South Carolina seceded from the Union, as she had a right to do, and sent a committee to Washington to settle outstanding claims. She would take over her forts and appeal to the cotton, sugar and tobacco communities to join her in setting up an ideal nation, based on the philosophy of Upshur, Dew and Calhoun. It was to be the best government in the world. The masters of plantations and the philosophers, whom the plantations produced, were to speak for and guide the masses of white men and both own and discipline the four million blacks, so much in need of discipline and control. Mason and Franklin and Jefferson had lost in the South. Would they win at last in the North?

Abraham Lincoln thought of the constitution more in the terms of Mason, Franklin and Jefferson than his unnatural allies, William H. Seward, Thurlow Weed and Simon Cameron, of the

industrial East. Never was a President of the Union in so difficult a position. Heeding more the words of Lyman Trumbull, Benjamin F. Wade and Zachary Chandler, all ignorant of the great traditions and the toilsome work of 1776-1789, he made a hasty decision when he heard of South Carolina's unwise act, and gave warning to the Senate of the United States that no compromise whatsoever should be made, a decision which overwhelmed him with sorrow during the two years that followed. Elected on a margin of three per cent of the votes of his own section, he boldly declared against all compromise as if all constitutional governments were not compromises. On April 6, 1861, when Jefferson Davis, a hesitant secessionist, was at the head of a confederacy of lower Southern States, Lincoln renewed the decision of the preceding December, although only two members of his three-factioned cabinet supported him in this second assertion of a kind of unionism the constitution did not sustain. Half aware of the story of modern times, which showed how many and terrible are the risks of war, he plunged the masses of people, nine-tenths of whom were opposed to the coercion of one section by another, into the bloodiest conflict then known to modern history. But having gone so far on behalf of his western ideal

of national unity, he had no other course to pursue.

All the world knows the outcome; but not even historians know or appreciate the narrow margins or the fatal compromises on which victory turned. In the summer of 1862, the imminence of English recognition of the South was so clear that Lincoln freed all the slaves where he had no power to free them in the hope of satisfying Richard Cobden and his allies and at the same time embarrassing the enemy. It meant the abolition of two or more billions of southern property, in the event of victory—a performance which Lincoln and every member of congress, but one, had declared unconstitutional in July, 1861. It delayed and defeated, however, the policy of the pro-southern English; and without the application of this “war-power” the Union would almost certainly have been lost. The next and an even greater decision came in the creation of a third national banking system. The most popular act of the whole Jackson era had been the destruction of the Second National Bank; and nothing was more unpopular in Lincoln’s region in 1863 than the idea of a new national bank. But Federal bonds sold at such a discount in 1863 that Horace Greeley and Jay Cooke could urge men to buy them and make forty per cent net when

the war ended and their holdings were paid in gold. Bankers everywhere doubted the ability of Lincoln to win the war. Their interest in the cause was won, however, in the establishment of the third national banking system—a scheme which enabled men with margins of profit to organize banks in every city, purchase United States bonds at a heavy discount and then issue bank notes up to ninety per cent of their face value. Everywhere men doubled and quadrupled their capital the next three or four years. Financiers, American and European, thereafter lent a hearty support to the “greatest democrat of the age.” Within ten years the bankers procured hostile legislation against state banks and gradually organized themselves into an association which was able in the decades that followed to guide the savings of every section into the vaults of New York banks. Nor was there any strict governmental supervision of a system in which the surpluses of the whole Union were so deeply involved. The financiers had at last acquired a position in the Federal economy which far surpassed that of Nicholas Biddle and equalled that of the slaveholders in 1860; a great oligarchy without effective governmental supervision—government once more of the “rich, the wise and the good.” Within ten years nine-tenths of the United States bonds

that Jay Cooke had sold to the masses throughout the Middle States and the West were safely lodged in the hands of men living in three Eastern cities: Boston, New York and Philadelphia. In like manner other securities found their places in the same vaults, and men who studied the art of speculation played a game which neither the Montagues nor even John Law of Great Britain ever imagined possible.

The year which followed the enactment of the third national banking law, congress passed a tariff which practically destroyed foreign competition in the sale of commonly used goods. The measure was so extreme that Lincoln declared that he signed the bill only on condition that repeal should follow the close of hostilities. The British navigation policy of the 17th century was completely matched. The constitution which George Mason had urged was obsolete. Nothing illustrates this better than the accompanying act which laid a heavy duty on southern exports, specifically forbidden in the document of 1787. As a sort of concession to the Government, the industrialists agreed in the tariff of 1864 to allow a sales tax on their output and a mild income tax on their swelling fortunes; there were two or three thousand war-made millionaires. Lincoln was assassinated a few days after Lee surrendered and there



was little prospect of repealing the tariff of 1864. In 1868, the sales tax was abandoned while high tariff duties remained or were increased. And within four more years men simply ceased to pay their income taxes. Before 1880 the financiers and the industrialists were fairly united in a common national policy. As time passed all the greater industrial units were so associated that they either broke down domestic competition or were able so to control prices and markets as to compel minor competitors to take orders from their greater fellows. With the bulk of the national savings in three eastern cities and the controlling agencies of industry next-door neighbors to the bankers, there was a privileged interest too powerful for any President to oppose.

The last great element in the picture was the railroads. In war-time their managers had reaped great fortunes like their banker and industrial brethren. During or at the end of the war, the Government granted hundreds of millions of acres of the public lands to railway builders without retaining public control of their distribution. The lands were sold at a profit to immigrants or to easterners crowded by depressions off their ancient homesteads. In 1874 the great trunk lines organized an association at Saratoga which was designed

to give them a semi-mastery of transportation like that of the wool and the steel and the banking chiefs. As time passed the rising lords of the railways focussed the termini of all their roads in eastern cities. Cotton and pork and tobacco sold to Liverpool and London had to be shipped first to New York. And what tended to fix the rising monopoly of Manhattan was the building always of bigger and better ships—vessels of so deep a draught that they could not enter southern ports. The railway managers were making the public and corporate canals, and even the Mississippi River, useless. Industry, finance, transportation and shipping had won the war; its chieftains, unhindered with anything but futile popular outcries on the plains of the West and helpless wailing in the South, were the masters of a destiny undreamed of in any age. One needs but recall Commodore Vanderbilt who borrowed a hundred million dollars at a clip in London, Jay Gould who stole a railroad which tied New York to Chicago, and Andrew Carnegie whose iron and steel stock deals astounded the men of his generation. The Union was saved; but there remained hardly a vestige of the constitution for which men fought so strenuously in 1788 and died by the hundred thousand in 1863-65. Five or six years after Lincoln's death, Chief Justice Chase reversed

a former decision and declared the greenbacks, which he had issued in 1862 to save the Union, unconstitutional. The bankers had demanded it. Although the volume of business doubled and sometimes quadrupled every ten years, the amount of money in circulation remained stationary or actually decreased.

The new masters of the new United States hardly knew what they were doing; members of congress and representatives of the dynamic industrial life like John Sherman or Zachary Chandler, master of the Republican party, played the game with a fair degree of safety, because the westerners could always be stirred to a bitter hatred of the South and southerners always replied by voting "solid." A greater and an equally effective influence was the current of things in Europe. There Otto von Bismarck fought three successful wars in six years and united the broken fragments of historic Germany and set the new Germany upon its industrial course. Western farmers reaped the advantages which wars always yield American agriculture and billions of dollars worth of farm products went to the then free European markets. But these wars and changing conditions coupled with the painful process of paying the cost of the Civil War, and aided by Jay Cooke, master manipulator of railway securities,

brought on the panic of 1873. Europe and the United States were in dire straits. But the English steamboats and the American railroads carried hundreds of thousands of distressed Europeans to the United States where the free farmsteads of the West attracted millions of unemployed folk each decade. The European savings of the immigrants, spent in transportation fares, in the building of cottages on the frontier and the purchase of implements started the wheels of industry going again after each "cycle." The hordes of Irishmen, always leaving the neighborhood of the hated English, settled in the industrial areas, worked at low wages and pushed the said wheels a little faster. It was the curious action and reaction of Europe that helped Americans recover from the effects of their titanic struggle of 1861-65. While European wars, American free lands and marvelous railways performed these functions, new and better machines hastened the process. Europeans had abandoned their old mercantile policies and accepted something like Adam Smith's free trade programme. Their markets were open to American products. American farmers, therefore, shipped wheat and beef, tobacco and cotton, in enormous quantities each year. The McCormick binder, the drill, the mower and other improved implements

enabled the newcomers, the poor New Englanders in their western habitats and the older Middle West agriculturists to drive English and German peasant farmers off their lands and into mills or compel them to emigrate. It was one of the evolutions like that which took place on the Italian peninsula while the Roman republic was rising. Hordes of small, individualistic, liberty-loving proprietors were spread over the vast plains of the upper Mississippi and Missouri valleys. But these men hardly knew the motor forces of the society of which they were parts; they gave little thought to constitutions and traditions which lay behind them. They were, therefore, the industrious victims of the economic system operating always from the industrial-financial East and drawing off automatically the annual earnings in business profits or accumulated local bank deposits. The governments of states made efforts to conserve the rights of their citizens; but the United States and its courts steadily supported the interests of the privileged groups which had taken the place in national affairs that slaveholders had occupied under the old Federal constitution. Consciously and unconsciously the process went on.

But Grover Cleveland, an honest if ill-informed leader of enormous personal power,

broke into the picture. He thought to change the drift by reductions of the tariffs. He did not understand the loud western demand for a more flexible currency; he never for a moment associated in his statescraft public lands, immigration, railway concentrations and the export of huge masses of cheap farm-products. He thought in terms of individualism and even states rights, both invalidated by the civil war. There were three hotly contested national campaigns: 1884, 1888 and 1892—one of the long and balanced crises of American history. In each of these Cleveland fought blindly for a better system and a more decent treatment of the “reconstructed” South. While he led these campaigns and won what was called the landslide of 1892, he fell, unawares, into the hands or under the influence of “high finance” in New York City. J. Lynde Stetson, chief counsel of the house of Morgan, was his most trusted legal associate. The victory of the masses and the mighty protest against the tariff injustices turned out to be futile. When the long era of declining agricultural prices, 1866 to 1893, had reached the point where wheat and corn were burnt in place of coal, and the frontiersmen could no longer retreat from the scenes of their ruin to fresh lands without cost, there was something of desperation; there was threat of revolution

in the land of the free. Cleveland chose his cabinet from old-stage conservatives and made Richard Olney attorney general at a moment when the first anti-trust law was about to be applied; and Olney applied it to striking laborers instead of nation-wide industrial conspiracies. The Pullman strike and its settlement, like the paper money and free silver issues, showed that the Democratic chiefs, who, like Arthur Pou Gorman, talking states rights and tariffs for revenue, were as ignorant of the history they were making as the Republicans had been in 1870-76 when they drove all the eminent co-workers of Lincoln out of their party. Great financiers and insurance officials took pains to contribute to the chests of both political parties; and both parties were not unmindful of the sources of promising gifts.

## V.

In this age of disloyalty to the ideals of 1776, there appeared the famous young William J. Bryan of Nebraska, himself as ignorant of the history and tradition of his country as Cleveland had been in 1884. But he was deeply concerned with the interests of the masses and a would-be follower of Thomas Jefferson. It was a time of as great distress as that which followed the Napoleonic wars. There were farmers' alli-

ances, knights of labor, protest meetings and armies of unemployed, although few men put up the plea that it was the business of the public to feed and clothe them. In 1892 Bryan won a seat in the national house of representatives from a Nebraska district, strongly Republican. In the house he made the most effective speeches of the decade against the "iniquitous" tariff which laid heavy duties on imports and compelled the country to maintain vast industrial and financial trusts. Two years later he broke with the Democratic administration when he espoused the cause of silver coinage at the ratio of sixteen to one with gold. He visited the states and cities of the restless West and South; he held conferences on party policy; and he made overtures to the rising Populist leaders. When the Democratic national convention was about to meet in Chicago, there had already been a "bolt" from the Republican convention which had sat in St. Louis and nominated William McKinley, author of the tariff which had produced the revolt of 1892 and ally of privileged business; Mark Hanna was his manager and connecting link with the East. Cleveland endeavored to control his party and worked even with his bitter enemy, David B. Hill, Governor of New York, to that end. Members of his cabinet did all that politicians could do to stay the tide of



criticism. Bryan was ruthlessly pushed aside in the Nebraska Democratic Convention by the agents of J. Sterling Morton, member of the Cleveland cabinet, and not allowed to go as a delegate of his state to the Democratic National Convention in Chicago, the tone of which he had already done so much to fix. But Bryan appeared there, nevertheless, as the chief of a contesting group. It was widely known that the aged Lyman Trumbull, one of the few socially-minded political leaders of Illinois and revered as an intimate of Lincoln in his senatorial days, supported the young Nebraskan. When the test came, the convention listened to Bryan's protest and his criticism of the social philosophy of the day. It was the cross-of-gold-and-crown-of-thorns speech, unequalled in American political conventions. The result was the seating of the Bryan delegates from Nebraska and the almost unanimous nomination of the thirty-six year old leader. An unparalleled campaign against the privileged economic heirs of the Union victory in 1865 followed. But for the expenditure of unprecedented sums and the artificial Palmer-and-Buckner ticket put up by men who "knew exactly what they wanted," namely, a small split from the Democratic ticket in strategic states, like Nebraska and Indiana, the orator of the Platte would have

been seated in the White House in March, 1897; and American history must have taken a different economic turn, a turn away from the industrial goal at which the country arrived in October, 1929. There had not been an equally important campaign since 1864; and to give the people a different turn of thought, Hanna, if not McKinley, welcomed the chance of war with Spain—war, patriotism, colonies; the United States was re-entering the complex of world politics, as an imperialist power.

The McKinley cabinet was in harmony with the social drift of preceding decades. The gold standard was maintained; the tariff was raised once more; Bryan himself helped annex the Philippines and, in spite of this, waged a campaign against imperialism in 1901. The gentle, easy-going, half educated McKinley held his own, only to be assassinated in September, 1901, just after he had repudiated his life-long protective tariff creed; and the stormy petrel, Theodore Roosevelt, entered the White House and waged a campaign of publicity against "big business" that was bad, while he apologized for "big business" that was good. The oil and the pork monopolists were denounced; but the steel trust, the most anti-social of all, was defended. It was the age of the "muck-rackers," and the country became intensely

aware of the drift toward economic ruin. However, nothing was done nationally till ex-President Roosevelt, angered at the conduct of William H. Taft, his own nominee for the Presidency, split the Republican party into halves in Chicago in June, 1912. With two Republican candidates in the field, Woodrow Wilson, energetic pedagogue, moved straight toward Sixteenth Street and Pennsylvania Avenue.

Wilson was the first highly educated man and acknowledged thinker who had sat in the President's chair since John Quincy Adams, 1829; he was aware of the economic dangers ahead. He had, however, received only forty-one per cent of the popular vote. His cabinet was not composed of highly trained men, though first and last two masterful leaders of more than ordinary abilities sat on one side or the other of his official table. There was a return to the semi-free trade policy of 1846; the masterful association of national bankers, unhindered in their exploitive operations since their beginnings in 1863, was compelled to accept some governmental control under the Federal Reserve System of 1913; and there was some effort to apply the trust regulation ordered in the law of 1890. It was an acknowledgment that the country had not been administered in harmony with the

spirit under which the constitution had been adopted. The nation that had succeeded the old Union in 1865 was now an articulated society, not unlike the old South, but the majority of men were unwilling to accept order and subordination. The new society in which the new masters held seats on the directorates of great trusts, great banks and even greater railroads was an under-cover aristocracy. Next to the President of the country, these industrial-financial men offered the social patterns of the time. When J. P. Morgan anchored his yacht in the Thames, even the King of England took notice. Andrew Carnegie had free access to the Kaiser in Berlin; and the Popes were not so near the throne of Heaven itself that they would not grant a friendly audience when an American magnate appeared in the Holy City. Wilson was the first President in half a century who did not swing the doors of the Executive Mansion wide open when a Harriman or a Hill halted his car or carriage at the Executive gate. Next to the really great were the chiefs of organized labor, able to fix the hours of urban toil as the steel trust fixed the prices of its output. While they were not "in society," they were socially important; they were natural products of industrial monopoly. Below these were the masses of urban folk moving inevitably toward

proletarianism like their predecessors in ancient Rome, and the then greater masses of farmers and tenants making their painful way back to the peasantry of their mediaeval forebears. The American nation, though not willing to acknowledge the fact, was moving rapidly toward the European status from which its founders had run away. Under the constitution which Lincoln thought he had saved, the people of the Wilson era were moving toward social goals which only a minority of the Hamilton party would have tolerated in 1789. The three million farmer-folk who had started the western world on the road of revolution had grown to a hundred million, whose leaders had worked their constitutions, state, and national and city, into the most conservative frames of government in the western world.

Wilson had hardly started his scheme of restoration when the imminence of war in Europe gave notice that modern states are intimately connected. He sent the silent Edward M. House to Berlin to persuade men that war was no longer a solution to economic problems. The gentle Texan, author of a twentieth century *Utopia* which at that moment enraged senators and industrialists in his own country, found Germany domineered by a combination of agricultural junkers, not unlike the southern

slaveholders of 1860, and industrial financial overlords, economic cousins to the masters of the United States. At the top of the structure sat the militarists ready to give the signal for war upon the drop of the right hat. For an hour the Texan argued with Kaiser Wilhelm II; he argued in vain and sadly took his train for Paris where society was more democratic but where all agreed that Berlin held the initiative. There was little chance of a peace association of the greater powers. In London, there was a regime dominated by what was then called a "wild radical" from Wales, the irresistible David Lloyd-George, who meant to re-distribute the great estates of England among the tenants and landless poor of the country. But even the most democratic country of the time looked to Berlin. In two weeks the secret emissary of Woodrow Wilson set foot on American soil at Boston and learned from the newspapers that Europe was aflame with war—and such a war as the world had not known since Napoleon I.

The leaders of the reactionary forces in the United States had hardly begun their campaign to thwart and break the schoolmaster in Washington before they found that tariff reforms and financial subordination were but bagatelles in a world at daggers drawn and ready to buy at

top-prices all the foodstuffs of the West and all the ammunition of the East, and to borrow all the millions the Americans could possibly spare at high rates of interest. Great business leaders hastened to London and Paris to reap fortunes which eclipsed the greatest fortunes of the Civil War. The President proclaimed an absolute neutrality; but German, English, and French propagandists came in troupes to argue the Americans into the belief that each of the parties to the great war represented the cause of civilization. The leaders of that part of the United States closest to Europe in economic interest slowly took the English side; the leaders of the old South veered more slowly in the same direction; while the great Middle West preached an isolation which a Henry Clay would have scorned a hundred years before. Curious fact: the owner of a great newspaper syndicate felt himself personally unwelcome in London and the owners of the greatest mid-Western paper thought themselves in similar status with the English, and there were millions of Irish and German readers of their grievance stories. Wilson came first to think of himself as the logical arbiter of the mighty contest, though his personal sympathies were mildly pro-British. He did not lose the campaign of 1914 on the old tariff issue, as had been expected. Nor did he

win enough support to take the initiative in a war-mad world. Two years more, and there was the coveted national re-election which he won on the slogan: "He kept us out of war." But to all discerning minds, the United States must as certainly intervene to prevent a German domination of modern economic life as England had intervened to save Europe from the mastery of Napoleon. But that would be a great advance upon the position of 1898. Would the intervention advance the American principles of 1776? Would it prove to be another intense struggle for the exploitation of weaker peoples?

After more than one vain effort to bring the Germans to a world peace table, the United States entered the struggle, expecting that the mere weight of her moral influence and economic power would determine the outcome. Before the end of 1917, it was clear the Germans would sweep into Paris and set up guns at Calais that would drive every ship off the narrow sea if the whole weight of the Government in Washington were not cast into the scales. Ex-President Taft warned that a million men must go across the ocean; Wilson replied: "Why not five millions?" In a few months enthusiastic Germans were crossing the ocean to fight the soldiers of the Fatherland and equal numbers of Irishmen were on the western front helping



their age-long enemies from England. Perhaps both Germans and Irish prayed for the defeat of their own allies. It was only another form of the entanglements of modern life. But the weight of the industrial United States cast into the scales against the so-called Central Powers brought victory in 1918 to the belligerent Georges Clemenceau, war lord of France, and the vociferous Lloyd-George, crying: "The Kaiser must be hanged in London." It was not a peace without victory; and Wilson must sit in person or by means of representatives at the final peace table, not as an arbiter as between balanced powers, but as one of a group bent upon obtaining all the possible fruits of victory. The reconstruction of broken Europe would be a repetition of the reconstruction of the broken South in 1866. But it was a new thing in American history for spokesmen of the United States to pass upon the fortunes of Europe and even the Far East. It was the end of the second era which had begun in 1865. National isolation and hypernational policies, both economic and political, were obsolete. There was an opportunity to the new United States with its industrial and financial power surpassing that of all the warring powers of Europe—the opportunity of a popular and "disinterested friend" deeply concerned in the fortunes of mankind in general,

as Americans had always professed to be. That opportunity consisted in the grant to the President of an unquestioned mandate as he departed for the Paris conference. With such a mandate the world might have been made "safe for democracy" and the reconstruction of Europe might have proceeded without the usual injustices and hatreds. The seizure of the great opportunity depended on the ability of the leaders, rather than the masses, to realize that a new world and a new United States were in the making. The day of privilege and exploitation was about to close; but the beneficiaries of privilege and exploitation could not read the signs of the time. One has but to read the proceedings of the American Chamber of Commerce in December, 1918, to see this.

The allied governments owed the United States about eleven billion dollars and the peoples and corporations of the same countries owed American banks and corporations hundreds of millions more. If the Germans paid the allies the damages their armies had done as the French had been compelled to do in 1871, all their profits for half a century would be pre-empted. Nor was this all: the Government of the United States owed its people twenty-five billions while the governments of all the warring powers owed their peoples sums surpassing the

total movable wealth of their countries prior to August, 1914. The world had been in many serious economic plights. It had never been so completely bankrupt at any preceding moment in history. These were facts that informed men in the United States ought to have understood. They should have shown men everywhere that there could no longer be economic isolation, constitutions and national prices to the contrary notwithstanding. But as the congressional election of 1918 approached, it was plain that the opposition to the great schoolmaster was coralling with solid blocs the natural race groups deeply angered at a President for whom they had voted because he had kept them out of a war and yet had sent their sons to fight on the western front. The Germans, the Irish, and many thousands of Negroes, carried North to work during the critical years 1917-18, voted against the mandate needed if Germany, Ireland, and even the Negroes were to be made secure in the new world peace. It was the usual case of men voting their past grievances and losing their present objectives. The election gave the older tariff and financial masters a new (perhaps their last) control in Washington; and Wilson went to Paris without a mandate. Every other representative in the conference

had his country behind him. All the world knows the treaty that followed.

It was the revival of the hypernationalisms which had developed from the work of Cavour, Lincoln and Bismarck; and every great nation seized what advantage it could, although Poland and the little Balkan countries did obtain doubtful guarantees of such independence as they might maintain in a world still acting in the ancient spirit of war. The one hope of the future in 1920 consisted in the chance that leaders like Taft and Root would join Wilson and put the United States into the new association of nations permitted by the Treaty of Versailles, an association not unlike that which Washington had worked out in 1788. The scores of rival, jealous peoples of the modern world must unite in some economic co-operation if debts were ever to be paid and good will among recent enemies restored. The United States was the greatest creditor of all. Its industrial-financial structure was the greatest of all and the temper of its people was the least bitter. If the future was to be secure, Washington leaders would of necessity have to point the way. The perverted constitution of Mason, Franklin, and Jefferson would have to be stretched to cover the welfare of mankind, or the United States would lose its leadership, its lawful debts, and many

billions tied into its capital structure. It was time for a world Washington. Could there be such a leader?

The opportunity for party advantage was too great. Although Taft, Hughes, Hoover and a score of other eminent chiefs endeavored to swing the Republicans into a forward-looking position, the years which followed the election of 1920 were years of hopeless backward-looking, of exaggerated nationalism, false appeals to the teachings of the "fathers of 1788." Never has the history of a country been more misunderstood or dangerously interpreted. For twelve years, the driving word was distrust of other peoples; and distrust begets distrust.

A President even more ignorant than the most ignorant of his predecessors held office for a while; and the record of his neglect, if not corruption, surpasses the record of any preceding leader of the country. Another and a little better informed chief came to office in 1923 and was reelected in 1924; but no enlightened leadership followed. The enforcement of the Federal Reserve Banking Law was relaxed. The warnings of declining commodity prices of the period were ignored. Immigration from other lands was as good as prohibited; and the tariff act of 1922 reduced the exports of industry when the home market approached saturation.

Isolation, political and economic, was the slogan; yet everybody called for the prompt payment of the eleven billions of allied war debt *in gold*. It was a legal obligation, as the obligation of young America to pay the impossible debt of 1783 had been legal and binding. The allies resorted to borrowing in the United States in order to pay; and the Germans likewise borrowed from the same sources to enable them to pay the allies. Since European industry might not sell its output to advantage in the United States, its chiefs borrowed money from American banks to enable them to sell in Latin-American markets in competition with the United States. At the same time the Administrations of Harding and Coolidge loudly asserted their right to dominate Latin-America, and thus added to the small advantages of European industry and the unpopularity of the "monster of the North." Secretary of State Hughes frankly told the assembled Latin-Americans in Havana in 1926 that the Monroe Doctrine, hated everywhere south of the Rio Grande, was a purely United States affair and was to be applied exactly as the Government in Washington saw fit: purely "unilateral." It was the Austrian attitude of 1914 toward the Balkan States.

Thus, instead of moving into new paths as Washington had done in 1787-88 and Lincoln

had repeated in 1861, the leaders of the United States faced backward from 1921 to 1929, ignoring the most obvious economic and social facts. There were no more free lands; and moreover, if the dispossessed farmers of the era had known of free lands, they would not have accepted them. For three decades the schools and colleges had taught their young, both by precept and by example, that life in the city was the only life worth living. There were everywhere great University departments which taught hundreds of thousands the charms of industry and the art of super-salesmanship. Six hundred thousand country folk abandoned their homes for the city each year during the larger portion of this period. There were few immigrants from other countries; and what there were lingered in the cities, arousing the anger of organized labor. With no free lands and few immigrants, the native population ceased to increase as in times past. Women did not care to bear children. They disliked the drudgery of the household and so apartments, hotels and chain restaurants became the craze. Few were willing to be caught at the old-fashioned tasks; the family was a declining factor in life.

Nor were conditions in Europe better. Although ten million men had been killed and as many more disabled for life, there were appar-

ently still too many people. The unemployed crowded into the cities. Having fought valiantly in the great war, governments could hardly decline to feed and clothe them in time of peace; but the more help governments gave, the greater the demand for help. In times past the poor and unemployed of England and Germany had migrated to the United States, Canada, Australia and Argentina. Now immigrants were, as we have seen, unwelcome, nor were the unemployed of Europe willing to migrate to the far borders of civilization. They loved the lights and noises of great cities, even when they begged their daily bread. Much, if not most, of the personal self-respect of the eighteenth century had gone, disappeared in the era of industrialism. It was a curious reactionary state of mind: "All men are entitled to support from their fellows."

With the advent of Herbert Hoover as President, there was a leadership more familiar with the adventures of the mining camp and the manipulations of stock markets than with the traditions and the complications of the United States. The "great engineer" was utterly unaware of the dangers ahead of him. University professors talked of the certain disappearance of poverty; United States chambers of commerce preached the same doctrine, apparently unaware



of the fact that half the farmer folk of the nation were hardly able to earn their keep. On account of mass production methods, American industry was still able to sell certain goods in other countries; the declining home market was steadily boosted by super-salesmanship and the deceptive propaganda that machine farming would work a new era, even while tariffs were operating adversely; and to support all this, credit was everywhere granted on the easiest of terms. It is difficult to imagine the performances of the Coolidge-Hoover years. Two great utility super-organizations, one in the East, the other in the West, pulled into their control nearly all the electric power concerns of the country. A small Virginia lighting system, built by amateurs and even farmers, was paid ten times its own valuation in stocks issued by a subsidiary company of a subsidiary company of Samuel Insull, the London newsboy grown to be autocrat of Chicago. The greatest banks of the country became interested in the super-salesmanship of billions of such stocks. The Shenandoah River was to be dammed and a vast stretch of that charming region was to be covered in water in order to perfect the control of ancient Virginia by Chicago "undertakers."

The urban world having gone half-mad with movie entertainment, subsidiary concerns of the

General Electric Company of the East organized affiliates for the building and control of the movie houses and, under one cover, issued stocks to the amount of sixty-eight million dollars. These were taken at fifty dollars each by a public, unwarned by their own bank officials, state or national. Later the agent of the selling company set up a "short sale" campaign on the stock exchanges and reduced their fifty-dollar shares to seventy-five cents each. The public lost about sixty millions. The very eminent and humane chief of these operations thought himself, as others also thought, fit successor to George Washington; great business leaders hailed him as a master magician of high integrity. Anything might be done in New York. Since Chicago and other plains cities had built themselves skyscrapers like those of the McKinley-Roosevelt days, the masters of Manhattan now dynamited vast foundations in their solid rock subsoil and erected business structures thirty, fifty, and a hundred stories high—offices, movie houses, and radio cities to meet the demands of half a hundred years to come. Everything had to be on Manhattan Island and everybody in the United States must see the vast complex or die in provincial ignorance. The subways, the surface lines and the overheads, not to mention the thousands of

cabs, carried vast masses of people at unprecedented speed in and out of the city every day. To finance these buildings, transportation lines and racketeering politicians, the country was taxed through the sales of enormous bond and stock issues, payable ten, twenty and fifty years hence. Nearly everybody fell for these speculations, and most people thought themselves unfortunate if they could not live in some elaborate house or apartment in New York or some other "modern city." It was the Coolidge-Hoover age and the Empire State Building was its monument—today standing half empty and begging sightseers to spend their half dollars just to take a ride in the elevators. And what New York did, Richmond or Kansas City, with vast stretches of land all about them, must do. There had never been such an era; and nearly all Americans shouted: "Great is the age of passing poverty."

And parallel to this was the unhindered accumulation of nearly all the earnings of the country in a few centres. The comptroller of the currency paid less attention than ever before to the limiting clauses of the Federal Reserve Act. Banks set up affiliates to do what they might not do in their own names. Associations of banks sent agents to Germany in 1926 to lend hundreds of millions, even billions of

credit, at high rates and on poor security; and then co-operated in the boosting of the sales of these German bonds to their clients at a profit. A somewhat different loaning system was applied to Latin-American countries. But whether bankrupt Europe or doubtful Spanish America wished huge loans, the means were found to meet the wish and the government officials failed under the constitutions of 1787 and 1865 to warn the people against putting their savings into the great hopper. Perhaps ten billions in addition to the eleven billions due the Government were thus disposed of for slips of paper without proper guarantees of their value. It was the proceeds of these loans that enabled poor foreigners to pay for American automobiles, typewriters and other machines—a false appearance of prosperity soon to become obvious to all.

And while the new and amazing performances of electric magicians, skyscraper builders and foreign credit lenders operated day and night to manipulate the bewildered masses, the older concerns of the country fell into line. General Motors poured more and more stocks onto the market; the railroads, never quite free of watering their securities, added immensely to their obligations; and steel companies, cement manufacturers and even rural bankers gladly tied themselves into the dangerous structure. Nicho-

las Biddle had never imagined such gullibility of his public. Nor might one safely criticize or warn. If one said railroad securities were one-third water or that the electric power holding companies were due for a fall, the great officials of semi-sacred insurance organizations would cry: "Bolshevism." Thus the hundred billions of worthless stocks must continue to float, lest the reserve investments of the country be called into question. It was a case of certain wreck if the process went on, of vast disaster if it stopped.

One of the candidates for the nomination to the Presidency in 1932 wrote in a letter as yet unpublished: "The time has come for business men to take over the constitution and apply it. We must be governed from the top and all other elements of American life must be subordinated and fitted into the picture, otherwise there is chaos." Nor was the suggestion so far from the fact. Five hundred men received a million dollars a year income and from the Morgan revelations one may surmise that a thousand others received similar incomes but failed to report them for taxation. Bethlehem Steel directors voted themselves bonuses of a million dollars each for their fine management and North Carolina tobacco manufacturers were hardly less liberal with themselves.

Nor was the structure badly fitted together. United States Steel products sold all over the country at the same prices, twice as high as in 1914. A drill, a mower or an automobile was everywhere the same thing and agents were commanded to sell so many a year or lose their jobs—the price always the same. And if farmers and country folk could not pay, they were allowed to advance ten dollars, receive the article and then pay regularly the next two or three years when the car or binder might be well-nigh worthless. High-power salesmanship. But while all prices of stabilized industrial goods in the United States were fixed by industrial committees or single autocrats like Henry Ford, the rest of the world might have the same article at lower rates. The so-called Webb law of 1918 allowed American manufacturers to fix prices abroad low or high in order, like the German cartel system of 1914, to break down competition. The great home structure rested secure upon the protected home market. At the same time it set itself the task of lending money abroad in order that foreigners might buy American raw materials and compete with their own industrialists. It was a marvelous development of the democracy set up in 1787.

## VI.

Such was the artificial world of 1929 tottering under the accumulative grievances of the American people and the angry-minded states of Europe, hardly able to see that the Treaty of Versailles, good or bad, was a world economic-military constitution, not unlike that of 1783 or 1763. If the structure of the Coolidge-Hoover prosperity were to stand, the League of Nations must be made the centre piece of the hated treaty and there must be an imaginative leadership not unlike that which wove together the thirteen jealous and quarrelsome American states of 1787. There must be some solution of the tariff problems growing more acute every year; and emigration from overcrowded countries must be accommodated somewhere in a vastly undeveloped world. In the United States the drift to the cities must be deflected to less developed regions like the old South or far Southwest. If there were no longer free lands, there was cheap land. The world must get together, not to make ready for another war in which all would be lost; but to keep the peace. The great day for that had been in 1920. But having failed then, there was a possibility in 1929.

But the new President called a congress committed to backward trends. Instead of leading its unruly members, he permitted them to

wrangle a half year about tariff advantages for individual, party and sectional interests. Instead of striking a vigorous hand into the European tangle, he trusted to the fatuous Young Plan as a cover under which Germany and France might settle their economic differences. While talking of everlasting prosperity, the solid rock foundations under New York suddenly gave way in October, 1929. When the New York stock market collapsed, the New York bankers trembled. When the New York bankers trembled the gods of the system were discredited. Anybody might criticize; and everybody indulged himself freely. The President did nothing. Congress slowly enacted a tariff which all thoughtful men knew to be both wrong and economically dangerous. The President signed the bill and hoped for prosperity, unaware that high tariffs require immigration and free lands in order to be highly effective. Prosperity was not just around the corner. All Europe fell into a worse plight than before. Little buying anywhere could be expected. Installment salesmanship collapsed at home. The banks began to fail. Some of the truth of the situation slowly seeped into business men's minds and many of them committed suicide rather than confess their sins or attempt to reconstruct their social order. In 1932 stock values had fallen about a



hundred billions; the railroads were bankrupt and begging Government to save them; the insurance authorities were uneasy day and night lest the world know how little value there was in their "immense reserves;" and there were twelve million people out of employment, gathering more and more in the cities where they demanded the right to work in a world that needed fewer workers every year, a world with a relatively decreasing population. Had George Mason or Alexander Hamilton been right in 1787?

The system had collapsed and the tendency in every section of the country was toward a more and more primitive life. If nothing were done, peasantry for farmers, like that of Europe since time immemorial, and proletarianism for the city masses, like that of ancient Rome, would be hastened. The old constitution must be made new and no constitution could be made successful without many and intimate contacts with the industrial world everywhere. To accomplish so great a change among a people taught to move in contrary directions by their politicians, their race group leaders and the schools, high and low, would be little short of miraculous; yet miracles are sometimes wrought. The object, avowed and unavowed, of the electoral campaign of 1932 was to work the miracle.

To work it, some heroic measure must be intelligently applied. The first of these is the acceptance of the fact that securities without real value behind them must be gradually written off, even when millions of innocent purchasers must suffer. Railroads, so important to a modern state, must cease to pay dividends or interests on paper values. That means four to five billions of deflation and permanent release of some hundreds of thousands of workers. Insurance companies that hold hundreds of millions of watered securities must recognize the fact and seek some way to meet the proper demands upon them—a hard conclusion which involves the fortunes of millions of people. With railroads and insurance companies and labor relations readjusted, the artificial produce and food markets of the cities must be freed from their “exaggerated overheads” under which worthless securities have been issued to the people. If competition among commission merchants and distributing agencies can not be established, then little dictatorships will have to be set up. Farmers can not function in a society which requires consumers of milk to pay ten cents a quart and leaves the producer only three cents a quart. Apples at a dollar a barrel in the orchard and ten dollars a barrel to the consumer represent an injustice almost unprece-

dented. There must be some equalization as between the masses of producers and the masses of urban consumers, else there can be little margin of returns on which the purchase of industrial goods depends. If these things be done, something like a third of the city populations will find themselves unnecessary. The most perfect labor organizations in the world can not overbear the great facts of life. These superfluous workers in the mills, in the political gangs and in the offices of magnificent skyscrapers, like their predecessors of Europe in the seventeenth and eighteenth centuries, will find places on the cheap lands of the South and West. And, like their predecessors, their success will depend upon their initiative and their courage to meet a hard situation. Unlike the governments in times past, the governments of today stand ready to lend aid. And one only needs to read the reports of the proceedings of the Banking Committee of the Senate today to see what must happen to financial and industrial leaders who have conspired together for decades to exploit the public. With these difficult domestic changes under way, an equally difficult task presses from abroad.

The billions of money due the United States, both public and private, can not be promptly repaid. The great war, due to industrial rival-

ries and historic hatreds, left a burden which can no more be lifted than the Americans of 1787 could repay in gold the millions of paper dollars which had been accepted in good faith on the word of as able and honest public men as ever served any country. The most of the world public debt simply has to be written off, like the worthless industrial securities of the United States payable in 1980. When this is done, the hostile trade barriers must be reduced, if not broken down. These barriers are due more to the teaching and example of the United States than to the influence of European statesmen. The United States must, therefore, take the lead in correcting the evil. When debts are adjudicated and trade barriers are lowered, there will remain the third and last great task, the reduction of costly armaments.

These are the greater leads on the way to the new world, the new United States operating under the reinterpreted constitution of Washington and his fellows. The minor problems may be worked out more slowly. But it must be a new world, a new attitude toward constitutions and a recognition that privileged groups always work their own ruin, if not regulated by government; and working their own ruin, they work that of their fellows in vast numbers. The United States have gone a long way since

1865, a longer way since 1787; but a vaster future is still before us and the principle of democracy is as vital today as in 1776.













VOL. XXVII—No. 4

JUNE, 1933

BULLETIN

*The* COLLEGE *of*  
WILLIAM *and* MARY  
*in* VIRGINIA



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SIXTH LECTURE ON THE  
CUTLER FOUNDATION

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Entered at the Post Office at Williamsburg as second-class matter.  
Issued January, February, April, June, August, November.



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## THE CONSTITUTION AND CURRENT ECONOMIC PROBLEMS

BY PATRICK J. HURLEY

**T**HERE is no more appropriate place for the consideration of the fundamental principles of our government than here at the College of William and Mary. The patriot sons of the Old Dominion, many of whom were schooled here, exerted an influence in the foundation of the United States government superior to that of any other group of men. Among the great Americans who were students at William and Mary were Thomas Jefferson, the "Apostle of Democracy," the disciple of States' rights and decentralization; John Marshall, the great Chief Justice who expounded the Constitution and made of it a flexible instrument which enables it to fulfill the needs of growing ideals in stability and freedom; and James Monroe, who proclaimed the Monroe Doctrine which for more than a century has been a fundamental in our nation's international relationships. The College of William and Mary is the second oldest in the United States. It was here that the chairs of law and history were first established in America. This College was the first to adopt the elective system which today prevails at all American

universities. George Wythe, a native of Virginia, a justice of the Court of Appeals, a chancellor of Virginia, a member of the Continental Congress, a signer of the Declaration of Independence, a delegate to the Constitutional Convention, was the first professor of law at William and Mary College. He was a profound student, but more than a student, he was a teacher and leader, a statesman and patriot. His instructions enabled others to render brilliant service for their fellowmen. He was able to impart to many of his pupils that clearness of mind and purity of purpose which so characterized himself. No other man has ever been the instructor of so many men whose names are among our nation's great. America will never be able to measure the full extent of the contribution made by George Wythe and William and Mary College to the fundamental principles upon which has been built that which is now called Americanism.

I have said a few words upon the College of William and Mary. May I not now turn to the State in which that College is located. The first representative government on this continent came into being with the election of the members of the House of Burgesses of Virginia in 1619, the year before the Pilgrims landed at Plymouth Rock. From that time



to the Declaration of Independence, Virginia, ably seconded by Massachusetts, was the leader in evolving in the New World the principles and the safeguards of freedom. It was a Virginian, Patrick Henry, who set the spark to the Revolution, that resulted in the establishment of the United States of America. A Virginian, Thomas Jefferson, wrote the Declaration of Independence. A Virginian, George Washington, led the colonial armies to victory and became the first President of the United States. A Virginian, James Madison, led in framing the Constitution of the United States. A Virginian, George Mason, wrote the "Fairfax Resolves" and the "Virginia Declaration of Rights," which finally became the basis for the Bill of Rights in the Constitution of many States and the United States. A Virginian, Thomas Jefferson, acquired the vast Louisiana territory for the United States. Virginians, Lewis and Clark, explored the Northwest and laid the foundation of the title of the United States to that territory. A Virginian, George Rogers Clark, conquered the Northwest territory. A Virginian, James Monroe, proclaimed the Monroe Doctrine. A Virginian, Sam Houston, liberated Texas, established a republic and finally brought Texas as a state into the Union. These facts are recounted only

to indicate that the philosophy of our government as well as the action required in the acquisition of the territory over which the government now exercises sovereignty were in large measure the achievements of the cavaliers of Virginia. These remarks upon the achievements of men who were trained at this College and of the other sons of Virginia are not intended to detract from the glorious services rendered by men of the other American Colonies in establishing and maintaining the American ideal in government, but to show the propriety of an annual discussion upon this historic ground of the Constitution of the United States.

The Constitution of the United States created a political system of self-government and laid the foundations for new relations among men. It was the culmination of the experience of a people in safeguarding the inalienable rights of individuals against the encroachments of their own government. It not only established the equality of the people before the law, it guaranteed to them equality of opportunity. It gave each individual the assurance that he could aspire to and attain that place in the community to which his character and ability entitled him. The whole system took into consideration the recognition of the inherent dig-

nity of the human being. It demanded the recognition of the eternal worth of the character of the individual. Had it stopped at this the Constitution would still have been among the most sublime documents in the world. But it went further. The wisdom that drew up the Constitution was not forgetful of the past. For more than twenty-two centuries, since the day when Socrates was compelled to take the cup of hemlock and die because he had dared to think and to boldly express his thoughts, the history of the world had been the story of a continuous battle of man for political and religious freedom. The rights of "life, liberty and the pursuit of happiness" have been secured only after long struggles. Through the ages, one by one the chains that held life and soul in bondage had been broken. Each victory had been paid for in toil and tears and blood. Now at last that the security of individual rights, freedom and justice were won, the problem was how to maintain them.

In the history of civilization democracies are not new. Athens was the finest example of citizens participating in the functions of government on a democratic basis. Athens was the jewel of Greece and Greece was the mother of art and the nurse of arms. The founders of our government were enlightened in the

statecraft of Greece. They understood the strength and the weakness of that community. They were familiar with the fundamental principles underlying the great Roman republic and fully understood from what source decay crept into the vitals of the mighty Roman Empire. They had traced the dreary and bloody record of Europe from the fall of Rome to the Renaissance. They had lived under and had revolted against the absolutism of the British Crown. They were the heirs to that indomitable spirit of freedom that permeated the Anglo-Saxon and Celtic races.

The Puritans had hardly landed in New England when they called town meetings of the citizens to discuss matters of public welfare and to pass laws for the good of the community. In the beginning while still owing allegiance to the Crown, the deliberations of the town meetings in other Colonies were on the basis of pure democracy, but the Virginia planters selected representatives to legislate for them. That method marks the beginning on this continent of a representative democracy, a republic in a democracy.

This principle of representation is one of the most vital principles of Americanism. Without it local and factional and sectional interests could never have been conciliated with the de-

sires and the ambitions and national interests of all the people. Under that system elected representatives may be compelled to carry out the will of their constituents or be turned out of office. The people through the representative system have in large measure defended themselves against the abuses that undermined the great democracies and republics of the past. The battles waged and won for liberty by Anglo-Saxon and Celt were not all on this continent. What was won in England was not to be surrendered in America. The Magna Charta, the English Habeas Corpus Act, the Bill of Rights, the Virginia Constitution, the New England Articles of Confederation, the Declaration of Independence, the Colonial Articles of Confederation, were all written in letters of unquenchable fire in the souls of the men who framed the Constitution. The new liberty had been wrung so painfully from ancient tyranny, medieval feudalism and eighteenth century autocracy, that our forefathers did not propose to deliver its control into the hands of absolutism, whether of the majority or the minority. To that end they introduced a new bulwark against autocracy by separating the executive, the legislature and the judiciary. They put into effect the bicameral system by creating two chambers of the legisla-

ture so that one chamber might serve as a check upon the other. They gave the President the veto power as a further precaution against hasty or ill considered action. After an act has passed all of these tests, if the question of its constitutionality is raised, the Supreme Court has the power to declare it inoperative if it violates the Constitution. They prescribed a procedure for changing or amending the Constitution so that the people may have full opportunity to understand the causes making a change imperative, and then it must be ratified by three-fourths of all the States. In addition to these precautions, they provided an intricate system of checks and balances throughout the government, which all together have maintained the equilibrium of constitutional government for almost a century and a half. The men who framed the Constitution were fearful of all government. They saw to it that while the Constitution made a grant of certain powers to the Federal Government, it also effected a limitation of the powers of government. They were unwilling to repose arbitrary power in any sovereign, "single or collective, abstract or concrete." It was their purpose to make certain that the people could retain the lordship over the government. Their philosophy led them to the conclusion that the

people must either govern themselves or be governed. They must be independent or subjects. They decided that the government must be the creature of the people and that it should have only such powers as the citizens may choose to delegate to it. But they also protected the government from the possibility of hasty and emotional changes. They realized that there can be little liberty unless the people can impose and maintain certain restraints on government and so limit its functions within a clearly defined sphere. For that reason they endeavored with all the wisdom and artifice at their command to protect the several States and the individual citizens against the aggressions of centralized government. They succeeded in establishing what Lincoln described as a "government of the people by the people for the people."

When the work of the Constitutional Convention had been completed, the new Constitution had to be submitted to the States for ratification. To become effective it had to be approved by at least nine of the thirteen States. Each State considered itself a complete sovereignty independent of all other States. Article VI of the Constitution provides:

"This Constitution, and the laws of the United States which shall be made

in pursuance thereof; and all 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."

So great was the apprehension in regard to the extent of the supreme power vested in the central government by Article VI, that there arose a very formidable opposition to the adoption of the Constitution. In addition to the great influence of Washington throughout the country, it required all the eloquence and logic of Hamilton and Madison to win the conventions of their respective States for ratification. There was ever present the fear that the Federal Government endowed with such great power would encroach upon the rights of the people and of the States and would eventually become the master instead of remaining the servant of the people. Those who opposed the ratification of the Constitution envisaged the possibility of a centralized government so powerful that it would completely destroy the rights of the States and of the people and result in a despotism more absolute than the one from which the Colonies had only recently freed



themselves. Hamilton was avowedly in favor of a strong central government, but even he defined rather reasonable limits upon its power. In a letter to James Duane he said: "Congress should have complete control in all that relates to war, peace, trade and finance and to the management of foreign affairs." Jefferson said:

"Let the National Government be entrusted with the defense of the nation and its foreign and federal relations; the State governments with the civil rights, laws, police and administration of what concerns the State generally; the counties with the local concerns of the counties, dividing and subdividing these republics from the great national one down through all its subordinations."

Jefferson's view was succinctly expressed by deTocqueville when he said that "local institutions constitute the strength of free nations."

It is quite generally conceded that never before in history did men conduct a more profound discussion of the principles of free government than that which took place after the submission and prior to the ratification of the Constitution. Alexander Hamilton had proposed to the Constitutional Convention the plan for a centralized government in the nature

of an aristocratic republic. His plan was rejected by the Convention. He did, however, give his wholehearted support to the Constitution in the form in which it was finally approved by the Convention. During the discussion that preceded the ratification of the Constitution there appeared a series of seventy-seven essays entitled "The Federalist." All of these were written under nom de plumes. The authors were Hamilton, Madison and Jay. These Federalist essays gave birth to American constitutional law. They took the Constitution out of the realm of arbitrary construction and brought it within the domain of judicial determination. After the ratification of the Constitution, the question immediately arose as to the construction to be placed upon certain of its provisions. The Hamiltonians favored a liberal construction and a strong central government. The Jeffersonians favored strict construction, an adherence to States' rights and strong local governments.

It has been difficult as a result of the strains of wars, the stress of rapid peace-time developments, the rigors of economic depressions, to maintain the balance between the several States and the National Government. The same questions of construction of the Constitution that became the issue between the followers of

Hamilton and Jefferson are still the chief concern of all citizens who are interested in the future of our government. Under the powers conferred upon the Federal Government by the Constitution, those under which the greatest expansions of Federal powers have taken place, consequently those which have received the greatest amount of attention by the Courts, are the powers given Congress to "regulate commerce with foreign nations, and among the several States, and with the Indian tribes," and to make "uniform laws on the subject of bankruptcies, throughout the United States," and "to coin money, regulate the value thereof \* \* \*," and "to establish postoffices and postroads." For the consideration of these subjects, we must turn from the heat of the political arena to the calm of judicial deliberations. Chief Justice John Marshall now takes the center of the stage in defining the powers of the National Government. As early as 1810, in the case of *Fletcher v. Peck*, 6 Cranch 87, speaking for the Supreme Court, Chief Justice Marshall said:

"Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the Constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment;

and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the States are obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each state.”

Today we have journalists, historians, lawyers and many others who contend that we must ignore the States and that we must turn completely from the Constitution to some form of “supreme executive” to meet the exigencies of the present situation. Recently when Congress delegated to the Chief Executive certain discretionary powers to act within limits fixed by Congress, we read in the newspapers that democracy had abdicated, that Congress had conferred legislative and dictatorial powers upon the President. These statements are incorrect. The power conferred by Congress upon the President in the last tariff bill to readjust tariff rates within certain limitations, the power recently conferred upon the President to readjust salaries and wages of government employees, to readjust veteran allowances and compensa-

tion, and effect other general economies within certain defined limits, do not confer any legislative or dictatorial powers upon the President. They do not even confer continuing executive authority. On the contrary these acts are strictly within the purview of the Constitution. They do confer certain discretionary executive authority, but the discretionary power is within limits fixed by Congress. They constitute merely executive authority to the Chief Executive to carry into effect the will of Congress and are within constitutional limits. See *Field v. Clark*, 143 U. S. 649, and subsequent decisions.

The next general ground on which much has been written recently to indicate that dictatorial power must be exercised to save the democracy is in the field of banking.

In 1819, while the Bank of the United States was yet in existence, the power to create and maintain instrumentalities in aid of the Federal Government, though in conflict with the same instrumentalities created by the State, was questioned. In the same case was the question of the right of a State to tax a Federal agency operating within the State. Chief Justice John Marshall, speaking for the Supreme Court in the case of *McCulloch v. Maryland*, 4 Wheaton 316, laid down three fundamental principles:

“First, that a power to create implies a power to preserve. Second, that a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve. Third, that where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.”

In the same case the Chief Justice further said:

“It is of the very essence of supremacy to remove all obstacles to its action within its own sphere \* \* \* .”

In the case of *Veazie Bank v. Fenno*, 8 Wallace 533, it was held that

“to the same end Congress may restrain by suitable enactments the circulation as money of any notes not issued under its authority.”

The charter of the Bank of the United States expired in 1836, and its renewal was refused by the Jackson administration. No adequate provision for a national banking system was made until the National Bank Act of 1863, which was revised in 1864. The Act of 1864 did not create a single bank with branches throughout the United States, like that of the

Bank of the United States, but provided for the creation of numerous local banks, each independent of the other and operating in a single banking system under the supervision of the United States Treasury. The Supreme Court applied the doctrine of its earlier decisions to the national banks organized under the National Bank Act of 1864.

In the controversy involving the rights and powers of the States where they conflicted with the banking policy of the United States, the Supreme Court held

“that it is not competent for State legislatures to interfere, whether with hostile or friendly intentions, with the national banks or their officers in the exercise of the powers bestowed upon them by the general government.”  
(*Easton v. Iowa*, 188 U. S. 220.)

After the enactment of the Federal Reserve Act on December 23, 1913 (Wilson administration), it was contended that the legislation constituted a direct invasion of the sovereignty of the States. It was argued that the States unquestionably controlled the laws of descent and the administration of estates of deceased persons; that the States had a right to create corporations and specify the qualifications and

the duties of all who may engage in the business of acting as trustees, executors or administrators, and that the Federal Congress is without constitutional authority to set up an institution within the State to act in conflict with the State agencies, regulations and laws on these local concerns. The Supreme Court held that Congress does have such power and that

“ \* \* \* this must be, since the State may not by legislation create a condition as to a particular business which would bring about actual or potential competition with the business of the national banks, and at the same time deny the power of Congress to meet such created condition by legislation appropriate to avoid the injury which otherwise would be suffered by the national agency.” (*First National Bank v. Union Trust Co.*, 244 U. S. 416.)

This line of decisions leads to the conclusion that acting within its constitutional authority the Congress has the power to create a federal banking system as an instrumentality of the Federal government and to eliminate any competition that may obstruct or destroy it.

The constructions placed upon the Constitution by the Supreme Court show clearly that the use of the banking and currency power is



not an invasion of States' rights. It is in no sense the exercise of dictatorial authority. The wisdom or the lack of wisdom in the methods employed in the use of the power is quite outside of this discussion. The fact is the Constitutional authority exists and it may be wisely or unwisely used.

There is also a frequent outcry that the Federal Government is destroying localism by its constant interference through the Interstate Commerce Commission with intrastate commerce and state regulations.

The Supreme Court of the United States in the case of *Houston, etc., R. Co. v. United States*, 234 U. S. 342, said of this provision:

“It is the essence of this power that where it exists it dominates.”

Whenever a unity of national action is required to insure uniformity of national commerce regulations against conflicting and discriminating state legislation, the Federal authority is supreme. In the same case the Court said:

“By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the varying exigencies that arise and to protect the national interest by

securing the freedom of interstate commercial intercourse from local control.”

In the case of *Hill v. Wallace*, 259 U. S. 44, the Supreme Court held that an Act designed to regulate the conduct of the business of boards of trade through the power of taxation was unconstitutional. But the Court held in the case of *Board of Trade v. Olsen*, 262 U. S. 1, that an Act having the same object in view not through the exercise of the power of taxation but on the ground that it was intended to remove an obstruction or interference to interstate commerce was constitutional. In the latter case the Court based its conclusion on the ground that

“it finds that by manipulation they have been a constantly recurring burden and obstruction to commerce.”

They could come under the control of Congress under the interstate commerce clause of the Constitution. In this field, too, we find the Federal Government extending its authority clearly within the limitations imposed upon it by the Constitution.

It was early realized that the Constitution has an inherent power of adapting itself to new conditions in a world that is forever changing.

In *Martin v. Hunter*, 1 Wheaton 326, decided in 1816, the Supreme Court through Justice Story declared:

“The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen that new changes and modifications of power might be indispensable to effectuate the general objects of the charter; the restrictions and specifications which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom and the public interests should require.”

The same thought is expressed in *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 9, where the Supreme Court declared:

“The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was

adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances.”

They who favor a strict construction of the Constitution have rather humorously inferred that in decisions of the nature of the foregoing, the Supreme Court has followed the election returns. The Supreme Court is an agency of the people, as well as an instrument of the Constitution, and its decisions do follow the progress and the inventions and changing economic developments, and do carry into effect the will of the people as expressed by laws enacted by Congress, as far as that may be done within the limits prescribed by the Constitution.

The foregoing decisions indicate very clearly that the field still open for expansion of Federal

authority in national economics within the limits of the Constitution is even greater than all the field now occupied.

### POLICE POWERS

In the beginning the great effort was to secure sufficient authority for the Federal Government. Today the movement is to extend Federal jurisdiction over local matters never contemplated by the powers granted the Federal Government by the Constitution. It is in this field that the Federal Government is in immediate danger of becoming over-centralized, top-heavy and dangerous alike to the future of the Constitution and freedom.

In 1914 the Supreme Court of the United States in the case of *Atlantic Coast Line Railroad Co. v. Goldsboro*, 232 U. S. 548, said that the police power of the State

“can neither be abdicated nor bargained away, and is inalienable even by express grant.”

The people, however, seem rather anxious to alienate the right of home rule. In 1918 the people—not the Constitution, not the government—the people wrote into the Constitution of the United States the Eighteenth Amendment. The purpose of the Amendment was

very laudable; it was intended to eliminate the age-old social, economic and political evils of the liquor traffic. But the Eighteenth Amendment is a police regulation written into the fundamental law of the land. Regardless of where we stand on the moral issue involved in prohibition or the method of regulating the liquor traffic, there are two things upon which we may all agree: first, that the Eighteenth Amendment has failed to accomplish the purpose for which it was enacted; and second, that it constitutes an invasion of the police powers of the States and as such is a departure from one of the principles upon which our government is founded. The people have now in their hands the question of the repeal of the Eighteenth Amendment.

Notwithstanding the experience with the Eighteenth Amendment, both the people and their leaders seem now to be rather eager to relinquish local control, home rule, States' rights and police powers if the law extending the jurisdiction of the Federal Government carries with it an appropriation to be expended locally. With the possible exception of some of its decisions construing portions of the Fourteenth Amendment, the Supreme Court has by a long line of decisions prevented the Federal Government from encroaching upon the police power or

any of the great and extensive powers not delegated to the central government by the Constitution. Those powers are still vested in the people and the States and are, or may be, exercised by them in local and State governments. Some of the State governments are as virile today as they have ever been. The finances of many of the States are in good condition and the State laws are enforced. The States having large centers of population are usually willing to transfer local responsibility to the Federal Government.

The lack of local consciousness, the failure of the individual to perform the duties of citizenship, the failure of States to enforce their own laws, have caused a paralysis of some of the local governments. During this period of failure to enforce local laws, racketeers in all lines, grafters, profiteers and usurers, who obey neither the dictates of common decency nor the laws of their States, are permitted to go unpunished except in rare instances when they are brought to bar for the infraction of the Federal income tax law, or some other Federal law not bearing directly upon the offense committed. Every racketeer could be stopped at the beginning of his career if local laws were enforced. The people can have the kind of government they desire. They can compel their elected repre-

sentatives to enforce the laws or to retire. If the laws are not enforced, it is the fault of the people, not of the government. In a government by the people the government will not function properly if the citizen does not perform the duties of citizenship. The government does not operate itself; it must be managed by the people whose creature it is. Because of the failure to enforce State laws, there is a demand throughout the country for a transfer of jurisdiction over stock exchanges and all transactions in securities from the States to the Federal Government. This extension of Federal jurisdiction is demanded under the commerce clause of the Constitution for the purpose of removing an obstruction to commerce. If such a law is enacted it will greatly increase bureaucracy and centralization. But it must be evident to every one that this increase of federal power is being demanded because of the failure of the States to enforce laws that are already upon their statute books.

Let us now consider the suggestions made by those who say that we should cease trying to perfect our present system of government and discard it for a system better adapted to the present period. They say that because of the seriousness of the present economic situation and the breakdown of local government that the



day of representative democracy has gone, and that for the efficient management of our highly technical civilization we need a "supreme executive" or some other form of centralized power. They who make the suggestions point to the basic changes in our economic life that many fairminded and intelligent people believe we must make to assure the continued happiness and progress of the nation.

It is true that a great many difficult economic questions confront the people today. The economic changes suggested are numerous. Some of these changes involve proposals to Congress to create a new system of taxation; to make all wealth bear its proportionate share of the tax burden; to improve the banking system so as to make banking safer for depositors; to provide a more regular flow of credit for industry, commerce and agriculture; to reduce the earning power of money; to permit the adjustment of the hours of labor to meet the increased power of production brought about by the invention of labor saving machinery; to regulate both production and distribution; to find new sources of revenue to provide income for the government and to supply money for public works to create employment; to reduce the cost of government; to assure a more equal distribution of the nation's wealth; to

provide a plan whereby the unemployed will be returned to work, thereby increasing consumption and creating better markets and prices for commodities; to provide a general economic plan for the future welfare of the people that will prevent a recurrence of the present distress. We will not here discuss the merits of any of these proposals. No right minded person will attempt to retard progress towards the attainment of social and economic justice. But we are being continually told that in order to put into effect a comprehensive economic plan we must change our system of government.

Our failure as a people to work out a sound economic plan is not due to our form of government; it is due to our incapacity as economists and to our failure to cooperate in carrying a plan into effect. The Constitution is so flexible, so readily responsive to new economic conditions, that a plan including the essential elements of the proposals made to Congress could be made operative under it. What is needed is a sound economic plan for the future, not a new political formula. Any minor changes in the Constitution, if any are necessary, need not change our system of government. There is sufficient power in the Federal Government and in the State Governments to carry into effect any and all economic laws that may be neces-

sary to meet the present situation. The danger in the present emergency is not that the central government has too little power but that it will acquire too much power, and that by the constant acquisition of power the government will one day cease to be the creature of the people and become their master.

We are certainly making basic changes in our system of economic life. But the present industrial dislocation requires treatment essentially economic and not changes in our organic law. We need an economic plan for the future that will have as much merit in its sphere as the Constitution has in its. When such an economic plan appears the Constitution will not prevent its accomplishment. Favorable public opinion will make even a defective economic plan workable. Without the support of public opinion no economic plan however perfect can succeed. If a reasonable plan is put into effect, it will eliminate its own defects in the operation if it has the support of public opinion. To make any plan work, it is essential that it have the support of a majority of the citizens who are willing to enforce the plan not solely for their own advantage but for the benefit of all the people.

Throughout this period of distress we have found an abundance everywhere of the un-

bridled vocabulary of condemnation and abuse. Instead of condemnation we should inculcate temperance in our appraisal of the efforts of those who are charged by the people with the responsibility of leadership. Remember also that in the distress so prevalent among us today is the stimulus that will bring forth the combined efforts of the people to lay a foundation for peace, prosperity and happiness in the future. The solution of the present-day problems is not to be found by discarding the experience of the people gained through a century and a half of freedom and progress. Let us search our past for our errors, acknowledging that they are our own errors and that we have gained experience in having made them, but being everlastingly grateful that we have the power in our own hands to correct them. Let us keep in mind the words of George Mason:

“By an inevitable chain of causes and effects, Providence punishes national sins by national calamities.”

Here we might well end the discussion on the Constitution in its relation to the economic problems of the day. But it may be proper for us to consider the systems of government and economics which we are invited to accept

in lieu of our own. These are the isms we are asked to accept in exchange for Americanism.

### COMMUNISM

We are seriously told that a form of communism with a "supreme executive" is the next logical step in the evolution of our government. Without being given any proof of the success of that kind of government in Russia, and with all the available evidence pointing to its failure, we are asked to exchange the experience of a free people in a century and a half of achievements for a system which for the most part is untried. Then, also, there is a difference between the Russian and the American in their experience under free institutions. Before the advent of communism Russia labored under a despotism. The rule of the czar was absolute. Notwithstanding all the talk about a workers' council, communistic Russia is still a despotism where the people are forced to perform the labor assigned to them under the rule of a dictator. The Russian people were never trained in representative government regulated by law. They have never enjoyed the benefits of an all-inclusive system of education. When they overthrew one despotism it was only to become subject to another. We wish the Russian people well. They with all mankind are entitled to

America's good will. But we do not care to emulate them

### FASCISM

There is a group among us who call upon us to follow the "black shirts" of Italy, or the "brown shirts" of Germany, or the "red shirts" of Russia, and sometimes just the plain "stuffed shirts." This group points to the prevailing government in Italy and tells us that this country needs a dictator after the pattern of the one now ruling there, who should control industry, regulate production and distribution, and materially reduce unemployment. We are discussing this group seriously because we have a sincere respect for the great organizing genius and the leadership of Signor Mussolini. We are aware that his rule not only saved his country from a threatened political chaos but has also brought to it an appreciable measure of stability and happiness. Yet we should not hide from ourselves the fact that Italy is under the rule of a despot, although a benevolent one. Fascism is the antithesis of Americanism. In Italy Fascism rules the people and brooks no opposition; in America the people rule themselves. The will of one man rules Italy; the will of the majority of the citizens rules the United States. Signor Mussolini controls the Italian Parliament; he controls the Cabinet and Supreme

Fascist Council; the courts cannot be said to be independent but are the instruments of his policy. In his hands are gathered the three departments of government, legislative, judicial and executive. In the United States these are separated from each other though working toward the attainment of a common end. "Whenever," wrote Judge Story in his Commentaries on the Constitution, "whenever they are all vested in one person or body of men, the government is in fact a despotism by whatever name it may be called."

But we may be answered that whatever the rule in Italy is, it is succeeding; that it has coordinated the activities of that country. As an answer to that argument we will be able to show that in spite of all its faults, and in spite of the present distress, a free government is unquestionably superior to Fascism or any other form of despotism. So long as Signor Mussolini lives, or more exactly so long as in his lifetime he retains his present vigor of mind and force of character, Italy will doubtless be subject to a wise though absolute rule. At the end of his career there must be ready a new dictator equally well equipped and fully prepared to take up the work where he leaves it. Here we touch a fatal defect of despotic government. They who have even a meager knowl-

edge of history know that in the past a wise and able ruler has often been succeeded by a vicious one, or that the death of a wise and benevolent despot has been followed by a period of bloody conflict between rival contenders. Particularly has this been true where the dictatorship was not hereditary. The history of Rome under the Empire, that is, Rome under a series of absolute despots, affords many proofs of this truth. Wishing as we do the Italian people continued peace and prosperity, we cannot see how Fascism can escape this defect of despotism. The American people do not want a dictator or the chaos that would follow any form of absolutism. They can escape these evils so long as they have the virtue and the hardihood and the public spirit to maintain their free government. Under the American system it is the people who will control their elected representatives and their government, rather than become the passive objects in the conflicts of rival contenders.

Where the institutions of a country have their foundations in liberty, the people are free to examine and discuss new measures and to express their judgment of the fitness of the measures and the ability of their chosen representatives. This is one of the ways in which a sense of individual responsibility on the part of the citizens is fostered. These groups who revert



to the idea that one man can rule a people better than they can rule themselves imply that our century and a half of democracy and general education of the masses has been a failure. The whole idea of despotism is based on a lack of confidence in the enlightening influence of education, a lack of faith in the purpose of the people, a lack of confidence in humanity. In despotic governments, it is the will of the despot and not the will of the people that rules, although the despot may frame all his measures for the good of his people. The citizens are not allowed the freedom of frankly criticising either the ruler or his policies. Open and vigorous expression of opinion is harshly suppressed. As a result the habit of enforced obedience imposed upon a people not by themselves but by their dictatorial ruler in the course of time produces a decay of public spirit and a supine apathy which no longer dares to interpose an objection to the sway of any despot no matter how vile. Neither the political institutions nor the character of the citizens of America lend themselves to any form of despotism. These considerations lead us to the conclusion that no matter how efficient Fascism, Hitlerism or communism or any other kind of despotism may be, its success must be of short duration. The lasting happiness of the people can be best secured

by a representative democracy, a "government of the people by the people for the people." When we are asked to depart from the fundamental principles of freedom, let us remember the words of Washington delivered to his countrymen in his Farewell Address:

"One method of assault may be to effect, in the forms of the Constitution, alterations which will impair the energy of the system, and thus to undermine what cannot be directly overthrown. In all the changes to which you may be invited, remember that time and habit are at least as necessary to fix the true character of governments, as of other human institutions; that experience is the surest standard, by which to test the real tendency of the existing constitution of a country."

The challenge which the American people face today is to make the rule of the people safe in the world.

We do not contend that the Constitution is perfect. It is a human document and cannot be expected to remain forever perfect. It has been amended in the past and can be amended in the future. The Constitution has been so general in its application and so salutary in its results, that it has been able to adapt itself to

the needs of the people as their own system of control through the stupendous economic changes that have taken place in all the transitions of commerce and industry from the ox-cart to the airplane and from the town crier to the radio.







BULLETIN

*The* COLLEGE *of*  
WILLIAM *and* MARY  
*in* VIRGINIA

The Making and Keeping of the Constitution

AN ADDRESS DELIVERED BY  
HONORABLE NEWTON DIEHL BAKER  
FORMER SECRETARY OF WAR

AT  
The College of William and Mary  
WILLIAMSBURG, VIRGINIA

December 10, 1934

SEVENTH LECTURE UNDER  
THE JAMES GOULD CUTLER TRUST

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## THE JAMES GOOLD CUTLER TRUST

In 1926 the late James Goold Cutler, Esq., of Rochester, New York, established a trust fund for the benefit of the College of William and Mary in Virginia. Its purpose was to endow the John Marshall Professorship of Government and Citizenship in the Marshall-Wythe School of Government and Citizenship; to provide certain prizes for student essays; and to maintain a course of lectures on the Constitution of the United States. One lecture is delivered annually by an eminent authority on the subject. Mr. Cutler possessed an abiding faith in the American constitutional system, but felt that popular understanding of the Constitution in all its phases is necessary for its continuance.

Mr. Cutler was one of the few eminently successful business men who took time from his busy life to study constitutional government. As a result of his study, he recognized with unusual clearness the magnitude of our debt to the makers, interpreters and defenders of the Constitution of the United States.

He was deeply interested in the College of William and Mary because he was a student of history and knew what contributions were made to the cause of constitutional govern-

ment by men who taught and studied here—Wythe and Randolph, Jefferson and Marshall, Monroe and Tyler, and a host of others who made this country great. He, therefore, thought it peculiarly fitting to endow a chair of government here and to provide for a popular “lecture each year by some outstanding authority on the Constitution of the United States.”

The seventh lecturer in the series was Honorable Newton Diehl Baker of Cleveland, Ohio, Secretary of War under President Woodrow Wilson, former member of the permanent Court of Arbitration at The Hague, and an outstanding authority on the subject of Constitutional law.

# THE MAKING AND KEEPING OF THE CONSTITUTION

NEWTON DIEHL BAKER  
*Former Secretary of War*

MR. PRESIDENT, LADIES AND GENTLEMEN:

Upon an old book plate which I used to see very often, there was in Latin this advice, "If you would trace the course of rivers, seek first the fountains from which they spring"—*sectari rivulos petere fontes*. I wonder how anyone who is to speak on the Constitution could more nearly "seek the fountain from which it springs" than to come here to the halls of this ancient college where many of the men who started that Constitution on its eventful career were educated.

The subject which has been selected for today is "The Making and Keeping of the Constitution." It was no doubt a part of Mr. Cutler's purpose that each speaker who came here should say something about the Constitution itself. Perhaps he was not exacting enough to expect any of us to say much that is new about so venerable and debated a subject. Yet I am persuaded that those who do come here to speak need not despair of at least finding somebody

to whom some of the things they wish to say are unfamiliar.

Not in a complaining, but in a descriptive spirit, may I say that in New York a few days ago it occurred to me that I would like to have a pamphlet copy of the Constitution to hold in my hand today. I sent to the largest bookstores and some of the smaller bookstores in New York to get such a copy. My messenger, however, returned and told me that there were no copies of the Constitution to be had in the bookstores in New York. When one recalls how genuinely the Constitution is the foundation and repository of all of our personal rights and all of our hopes for the continuance of free government, he could well wish that every household in America had on the center table of the room in which the family most often gathers, a copy of that document, and that its famous phrases could be a part of the daily reading and meditation of the people to whom the keeping of that Constitution is entrusted.

Probably few of us, without refreshing our recollection, realize how exceedingly brief a document the Constitution in fact is. The Preamble, which admittedly contains no distribution of governmental power, is a concise and moving explanation of the purpose of the founders in ordaining and establishing the Con-

stitution of the United States. This Preamble is followed by seven articles. They define and distribute the powers of the government and prescribe the mechanics of its organization and operation. Every part of the Constitution indicates clearly that the government to be set up is that of a federated state, and there are many evidences of a consciousness on the part of the makers that jealous and independent sovereignties were pooling their common interests, while preserving their peculiar interests for state and local control.

The first Article deals with legislative power. It creates the Senate and House of Representatives, the method of selection of members, the time and place of meeting; and Section 8 of Article I enumerates under eighteen headings the powers entrusted to Congress. Section 9 contains eight prohibitions upon Congress and Section 10 three prohibitions upon the States.

The second Article has to do with the executive and after providing for the method of his election, makes him the commander-in-chief of the military forces of the Nation and generally imposes upon him the obligation to see that the laws of the Nation are enforced.

The third Article deals with the judiciary. It creates the Supreme Court and entrusts to Congress from time to time the power to ordain

and establish other courts inferior to the Supreme Court, to fix their jurisdiction except as certain elements of jurisdiction are fixed in the Article itself, and to fix compensation for judicial service.

The fourth Article requires each State to afford full faith and credit to the public acts and judicial proceedings of every other State and enumerates the privileges of citizens travelling from one State to another; gives Congress power over territory and provides the method of erecting and admitting new States.

Article V deals with the subject of amendments to the Constitution, upon which I shall have more to say in a moment.

Article VI imposes upon the new government liability for the debts and engagements entered into prior to the adoption of the Constitution; declares the supremacy of the Constitution, the laws of the United States, and treaties made under its authority; and prohibits any religious test for the holding of any office or public trust under the United States.

Article VII outlines the method of ratification and proclaiming the Constitution, if and when ratified.

The brevity of the Constitution is due in the main to two causes. In the first place, it deals with the structure of a government and avoids



mere legislative enactments. It states principles and grants or withholds powers, but the details of the application of those principles and powers are left to be worked out and changed from time to time. In the second place, the men who wrote the Constitution were men who wrote the English language and understood what it meant. It is thus characteristically spare and concise. I have not counted the number of adjectives in the document, but I should be very much surprised were I to discover upon counting that there are so many as four.

The record of the Convention shows the sentiment of that body to have been against granting any power to the general government until the need for it was clearly shown. Madison's notes are full of discussions which seek to limit proposed grants of power. Similarly debates throughout the body of the country were characterized by anxiety lest words carelessly used might be held to have contained grants of power which the States were unwilling to give to the central government.

Article VII of the Constitution provided that the ratification of the conventions of nine states should be sufficient to establish the Constitution between the States so ratifying. Upon the completion of the document, it was, therefore,

submitted to the several States and in many of them subjected to protracted discussion and debate. Twelve of the thirteen States did ratify. One State, Rhode Island, as you may recall, did not ratify for two years and remained for that time outside of the Union. To their acts of ratification, however, many of the States attached reservations and recommendations so that in all there were one hundred thirty-three such reservations to be considered by the first Congress under the Constitution which was to start the government in motion. When that Congress met, James Madison, who more than anybody else had guided the deliberations of the Convention, proposed twelve amendments as containing the substance of the one hundred thirty-three reservations and resolutions transmitted with their acts of ratification by the several States. These twelve amendments were then submitted and ten of them adopted, always thereafter known as the First Ten Amendments.

Perhaps the most common criticism of the Constitution in these state-wide discussions was the absence of a Bill of Rights, and the reservation most often appearing in the ratifying acts aimed to make quite clear that the new government was to be one of enumerated powers and that all the powers not granted were reserved. Accordingly the amendment we now

know as the tenth provides in terms, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." To those who had desired a bill of rights in the Constitution, it had been replied that no such bill was necessary in view of the fact that the general government was to have no powers except those expressly granted, and that, therefore, none of the liberties and immunities ordinarily contained in a bill of rights needed to be expressed since there was obviously no power delegated to the central government which would prejudice such rights. But this assurance was not enough. It was entirely clear to the first Congress that ratification had been secured by a practical promise of amendment to reassure whatever anxiety there was upon this point.

Since the adoption of the First Ten Amendments, eleven more have been adopted. From the beginning, more than three thousand proposals to amend the Constitution have been suggested and submitted to the Congress. Of that three thousand only twenty-seven have been actually submitted to the States, and of the twenty-seven so submitted, only twenty-one have been adopted and one of those repeals an earlier amendment. From this it is clear

that we have regarded the Constitution as a fundamental expression of the principle upon which we desired our government to operate, and that only under very unusual and special circumstances have we been willing to modify it. A rapid glance at the amendments which have in fact been made is a further evidence of the general attitude on this subject.

The eleventh Amendment was a popular response to a decision of the Supreme Court holding that a State could be made a party defendant by citizens of another State. This was deemed a denial of sovereign power by the State of Georgia, the defendant in the suit in question, and the judgment rendered against it was never acknowledged or obeyed. The eleventh Amendment, therefore, remedied what was regarded as a defect and denied the jurisdiction for the future.

The twelfth Amendment had to do with the manner of electing the President and Vice-President and grew out of a practical deadlock occasioned by the inadequate provisions of Section 3 of Article II of the original Constitution.

The thirteenth, fourteenth, and fifteenth Amendments recorded the consequences of the Civil War, dealing primarily with the abolition of slavery and the political and economic rights

of former slaves. The sixteenth Amendment authorized the imposition of income taxes after the Supreme Court of the United States had several times reversed its own rulings upon their validity. The seventeenth Amendment authorized the election of United States senators by direct popular vote. The eighteenth Amendment established prohibition, the nineteenth gave voting rights to women, and the twentieth changed the date of the beginning of the terms of elective Federal officers, executive and legislative. The twenty-first Amendment repealed the eighteenth Amendment. An amendment which, if adopted, would become the twenty-second Amendment, authorizes Congress to regulate child labor. Only fifteen States have, however, so far ratified, while by the provisions of the Constitution itself, three-fourths of the States must concur and submission to the States requires the concurrent vote of two-thirds of the two houses of the National Congress.

There are four ways by which the Constitution of the United States can be amended. First, the formal submission of amendments either to the State legislatures or to conventions called in the States for the purpose. Second, the Constitution makes it possible to call a constitutional convention, the recommendations of which must likewise be submitted for ratifi-

cation. This process has never been tried. In addition to these modes of amendment, however, there are two others. The first of these is interpretation by the Supreme Court of the United States. Through this channel have come continuous amendments until it has been sometimes said that to all intents and purposes, the Supreme Court of the United States is an adjourned session of the Constitutional Convention, sitting constantly to amend and modify the Constitution as the necessities of our developing situation may require. By this I do not mean that the Supreme Court of the United States has ever consciously allowed its views of public policy to persuade it to adopt a strained interpretation of the language of the Constitution, but rather I do mean that with great wisdom and deeply impressed with the responsibility of its function, that great Court has revealed the adequacy of the language of the Constitution to the developing civilization of a growing people and prevented a mere dry interpretation of words from being a restraint upon the spirit of those who designed the Constitution to be the basis of a more perfect union and an adequate assurance of justice and domestic tranquility in a great nation.

One other unwritten mode of amending the Constitution is by disregarding it by unani-

mous consent. We have experimented with this several times with uniformly unfortunate results. It seems to me to be the least desirable of all the modes of amendment, though it is perhaps an application of a thoroughly Anglo-Saxon principle to institutional development.

I am sure that this audience all know that Gladstone once said that "the American Constitution was the most wonderful work ever struck off at one time by the brain and purpose of man." That much of Mr. Gladstone's statement we are fond of quoting. What he really said, however, was, "As the British Constitution is the greatest organization that has ever proceeded from progressive history, so the American Constitution is the most wonderful work ever struck off at one time by the brain and purpose of man."

The American and the British Constitution are two entirely different things. One is a series of great principles sometimes embodied in documents, beginning perhaps with the Magna Carta, and including parliamentary acts, like the Act of Settlement, evolved in revolutionary and dynastic crises in the life of England, but also involving traditional attitudes of mind which have grown up as unconscious predicates in the political thinking of a determined but biologically conservative peo-

ple. There is, of course, no such instrument as the British Constitution. When a bill is under debate in parliament, nobody can point by article and section to a fundamental law as showing the act to be within or without parliamentary power, but somebody is quite sure to arise and he may be a country squire, a college professor, or one of the lords—law, lay, or clerical—and say, “The bill is unconstitutional.” When challenged for his reason, he will say, “Well, it does not seem to me to be British.” So far as a people universally have that kind of instinctive feeling about the fundamental law of their society, it may be that an unwritten constitution is better than a written one, or at least as good. Certainly this is true about the British Constitution, that under it, without strain and without difficulty, there have taken place incidents and episodes which created no crisis and aroused no feeling of violent antagonism and yet have in themselves marked institutional advances which would have been unthinkable to the ancestors of the men who enacted them. One such incident in our own day is strikingly illustrative of this possibility. Not long ago a dozen gentlemen sat around a table in London and decided that the British Empire had already become a federation of self-governing democracies. They, therefore, announced



their conclusion when the meeting was over and without a vote of any kind, either popular or legislative, the imperial pretensions with which Disraeli aroused the imagination of Queen Victoria and her subjects gave way to the more modern and, I think, the nobler conception of self-governing constituencies uniting their external interests for administration by a central government. This was an instance of the operation of progressive history, but it makes a striking contrast to our own experience.

In the two countries the processes have been exactly the reverse of each other. Great Britain started with an empire governing her colonies from Westminster. She grew into a federation in which the right of self-government was claimed by and accorded to her colonies. We started with thirteen independent sovereignties making very jealously guarded grants of right to a central government, and our growth has been in the direction of the absorption of the rights of the States by the Federal Government until one of our noted constitutional writers has described the process in a book entitled *The Vanishing Power of the States*. In other words, Great Britain's development has been in the direction of dispersing power: ours has been in the direction of centralizing power.

The theory upon which our Constitution has

proceeded has been that all power is derived from the people; that the people delegate just so much of their power as they desire to the Government, which is their creature; and it is obvious that both the makers of the Constitution and its earlier interpreters sought to restrain any tendency toward centralization both by the severe requirements for amendment, and by the erection of the judiciary into a disinterested final conservator of the limits both of power and action imposed by the Constitution on the central government.

May I now turn from this hasty view of the mechanics and theory of the Constitution to say a word or two about the making of it.

We are rather disposed, I think, to imagine that the Constitutional Convention of 1787 more or less evolved the document it submitted out of thin air, or at least out of philosophical speculations of an untried and theoretical sort. Of course, that is just not true. The colonial governments in America in the first place had had large experience in the matter of self-government. They had had a long period during which they were tugging against the restraints imposed by royal governors, and in no place is that history more centered than in the very spot where we now are. England in those days was a long distance from America. The British

Parliament was a remote institution concerned primarily with British interests, and it was easy to imagine it with defective knowledge of American conditions. There had grown up in America a race of men who were political figures at home, planters for the most part, with leisure which they had the culture to spend in reading and meditation. These men on the banks of the James and of the Potomac, or in the capitals and county seats of New England, delighted to inform themselves in political theory. There were not many books in those days and all of these scholarly men read the same books and so had an identity of speculative background and more or less an identity of information about political experiments described in history. In other words, they were a highly specialized and educated class and their intimate talk had to do with theories and experiments in government. It used to be said, no doubt with truth, that Thomas Jefferson had at Monticello in the drawer of a desk, a hundred written constitutions of democracies, all of which had failed. Surely one of the great merits of Jefferson, one of his outstanding contributions to our political experiment, lies in the fact that in spite of one hundred failures, he still had the faith to believe that a democracy was a possible thing—that it could succeed. If there was about him at

that time and in the air of America, grave doubt on that subject, there was warrant for such doubt, for the history of the world up to the time of the declaration of independence showed many brave attempts at democracy, all of which gave way readily to dictatorships, which in turn were succeeded by privileged classes under some form of monarchical organization.

When the Constitutional Convention met in 1787, the great bulk of its members were these trained political philosophers, but their colonial experience with local self-government made them practical men. There was little disposition on their part to jump off of the planet and yield to the lure of untried but attractive theories. In addition to that, they had before them the experience of the United States in the so-called "critical period" between the Declaration of Independence and 1787, when a feeble and loosely organized central government existed without a chief executive and the country had gone from one disaster to another. The principle of the Articles of Confederation may be said to have been the creation of a central government which should have power to act only to the extent that it could secure the voluntary cooperation of the States. By the time the Convention met there were no people left who believed that a great nation, or any nation,

could exist in America unless the central government were given supreme power in purely national concerns.

Probably rarely has there gotten together a group of men so prepared to discuss political issues of the first order as at our Constitutional Convention. It was not a large body, but it was a picked body. George Washington presided over it and Virginia contributed in addition to that first character in the Nation, James Madison, called the "Father of the Constitution," and others of her great sons. Washington's contribution was one of character and common sense, but around him on every hand were the finest political intellects to be found in the country and the debates as recorded by Madison were always earnest, often threatened complete failure of the undertaking, and were finally brought into harmony chiefly by the domination of Washington's character and the profound and conciliatory worldly wisdom of Benjamin Franklin.

I do not know any book to compare with *The Federalist*. Most of its papers were written by Hamilton. Jay and Madison contributed those which he did not write. In their original form, these were papers or essays printed in such newspapers as there were and distributed in pamphlet form. As a book they make up

four hundred pages of ordinary print, which educated people in our day find it difficult to read,—it is so compact, so concise and direct in its arguments; it is so weighted with historical references and detailed in its analyses that it makes what we modern people, with our radio minds, call “hard reading.” But we must remember that these papers were addressed to the people of the United States and were understood by them, a fact which shows that they were a great people. Indeed, I imagine that a great literature may be defined as great books written by great men, addressed to the interest of great people who are prepared to understand them. The audience is as much as the author in the making of a great book. The plays of Sophocles could never have been written but for the existence of the people of Athens, nor could Shakespeare’s plays have survived their author but for the fact that he merely recorded the thoughts and emotions of a highly imaginative and daring people, who were building with rough hands a great civilization upon foundations of sound emotion and character. So if we turn the cart around the other way, I think we are obliged to ascribe the greatness of the Constitution and of its literary and argumentative defense to the fact that the people of the United States in 1787 were a highly developed and highly educated political people.

The Constitution was then a crystallization of the experience and wisdom of a people accustomed to political thinking—a people also living through the disheartening experience of a government structurally incapable of effective functioning. When the new Constitution was tendered, it was accepted by the people as an expression of their best hope and of their highest purposes.

We come now to another question suggested by the title of this address. The Constitution having been made and having grown as it has, how can we, the successors and political heirs of the architects and interpreters of the Constitution, best preserve it.

If any analogy is to be drawn from the way in which the Constitution was made, it would seem that the keeping of the Constitution would also depend upon our having two qualifications. In the first place there will have to be dedicated to the Constitution the devotion of the highest trained intellects and consciences of the Nation. By these, of course, I mean those whose historical perspective will assure them against short-range thinking—men who know the experience of the race in its institutional struggle toward liberty and will not be tempted to yield for today's expediency the permanent immuni-

ties and guarantees of the future. Second, and quite equally indispensable, there will have to be a broad and sympathetic appreciation throughout the people of the United States of what the Constitution is and what it means and what its value is to them and to posterity. With that thought in mind, I turn just a moment to the part of this audience made up of young men and young women who are students in this College.

You boys and girls are going to face demands of all sorts for constitutional change. There will be pressed upon you suggestions of convenience and social amelioration, attractive in themselves and especially attractive to the mind of youth, which is spontaneously generous in its responses. Unless you have traced the river of the Constitution to the springs from which it arises, unless you know what the Constitution is and why it may be said to have mothered the greatness of this great Democracy, unless you know the failures and the cause of the failure of other attempts to operate constitutional government, your judgments will necessarily be infirm in the face of such appeals. This then is a challenge to you to be prepared, and preparation lies not only in being generous and sympathetic, but in disciplining those fine emotions into the possibility of practical achievement by



subjecting them to the restraints of a wisdom born only of knowledge and experience.

Now let us look at the Constitution for a moment from another point of view. The Philadelphia Convention was not a harmonious body. There were wide differences of feeling among the colonists and these were reflected by their representatives in Philadelphia. In the body of the Constitution there are evidences of the compromises which were necessary to harmonize these difficulties. As a matter of fact, throughout the meetings of the Constitutional Convention and almost up to its final adjournment, the opinion prevailed in the body and outside that agreement was substantially impossible. Letters from the statesmen of the period, which have been preserved, to their friends indicate almost despair. Most of the members of the Convention were relatively young men. I suppose in the language of today that body may be regarded as our first "Brain Trust." But there was present a man more than eighty years of age who sat sagely through the disputes and controversies of his younger associates, and every now and then, with some captivating bit of humor or, in very grave controversies, with a sentence of solemn prayer, called them back to the business in hand. In the heat of one of these controversies, Benjamin

Franklin said, "Gentlemen, we were sent here to confer, not to contest with one another." Resorting to everything from gentle scolding to patting and praying, Franklin on the floor and Washington in the chair held the Convention together until the Constitution issued.

Some of the compromises of the Constitution are interesting both historically and because of their consequences. One of these which especially interests me is the sort of joint guardianship of the Nation's foreign relations entrusted to the Executive and Senate. If I were in the Congress, I think I would introduce Amendment No. 3001, leaving the initiative of the treaty-making power to the President and requiring the ratification of treaties by a majority vote of the two houses rather than the two-thirds vote of the Senate as the Constitution now has it.

In this modern world where war is just around the corner and just over the hill top, every thing happens with lightning speed. There is left for nations no moment of meditation. The action of every agent is instantly subjected to the emotional judgment of the people. As a matter of fact, the thought which I am thinking now, if it should be transferred to China, would, as a mere matter of calendar and clock time, get there about a day before I say it or think it.

The world is so linked together that we think simultaneously and if we are provoked, we are all provoked at the same time. Indignation does not spread slowly, but its causes wave over us and engulf us all at one time. The atmosphere of the modern world has become explosive and the slow-gaited machinery which was quite adequate in the more reposeful days of the beginnings of the Republic, is quite inadequate now to deal with the tempests of national feeling which are fanning international discords into international conflagrations. There are two reasons, and only two, that I have ever been able to discover for the present allocation of power on this subject in the Constitution. The members of the Convention realized that a certain secrecy, or at least confidential character, was necessary in the preliminary discussions of international questions, and as there were to be but twenty-six senators, the Convention assumed that twenty-six men could keep a secret so that it would be safe for the President to advise with the Senate while national issues and interests were being assessed as they might be affected by one course or another in a prospective treaty. Whether or not the Convention was right in assuming that twenty-six men could keep a secret, it is not now important to consider. The number of senators is now

ninety-six, and among that number it is quite impossible to hope for a universal prevalence of restraint and reserve. Indeed, in quite recent times it has seemed permissible to the Chairman of the Foreign Relations Committee of the Senate to parallel the President's initiative in foreign affairs by himself undertaking to express to foreign representatives his views upon such questions, whether they were at variance with that of the Executive or not. I do not see how any foreign ambassador in Washington, who wants to negotiate a treaty with the United States, can make up his mind whether he ought to begin his conversations with the Secretary of State or the Chairman of the Senate Committee.

The other reason was that in Colonial times there were certain issues deemed of great importance by sections of the country but of relatively little prospective importance in other sections. The people of New England were exceedingly concerned that their fishermen should have access to the waters to the north. Here in the South, and a little farther west and south of us, the people had little concern about fishing rights, but they were quite sure that the expansion and growth of this new country was conditioned by the right of unrestricted navigation of the Mississippi with outlets into the Gulf

of Mexico. Virginia particularly, owning land extending almost indefinitely to the west, was unwilling to have any power given to the Federal Government which would make it possible to barter away the right of navigating the Mississippi for the purpose of securing fishing rights in the northern waters for the people in New England. In all sections of the country there was a fear lest the new government might be tempted by sectional interests to prefer one section to the other, and the two-thirds rule was obviously intended to make it impossible for any section of the country which could not muster more than a bare majority of the senators to prefer northern fisheries to Mississippi navigation, or indeed to effect any settlement with one of our international neighbors prejudicial to some other section of the country.

Now in the long after years, New England's hearty fishermen explore the northern fisheries in serene security from any international restraint, and the commerce of the greatest Nation in the world rides unvexed upon the flood of the Mississippi to the sea, but this compromise is still with us, maiming our power and handicapping us to deal as a modern nation in our international relations. The simple question of the adherence of the United States to the World Court, a court the establishment of

which is distinctly the contribution of an idea to international development by America, a court which is one of the dignified and conspicuous elements in the machinery which a stricken world set up after the devastating World War to preserve international peace, that question is delayed over a dozen years by the unwillingness of the Senate to act upon it. And this inaction is the more noteworthy when it is recalled that every Secretary of State and every President of the United States from the days of Theodore Roosevelt until now has ardently urged either that the United States take the lead in the establishment of such a court, or adhere to it after it had in fact been established.

The time runs and this address will soon exceed the proper limits of the occasion, yet I do wish to say a word about the wisdom of keeping the Constitution.

When the Constitution was first proposed, the debates had very largely to do with revenue and the rights of the States inside the Union. Hamilton's papers in the *Federalist* enlarge upon the advantage of a strong general government to make common cause for us all in dealing with the rest of the world. A more perfect union would enable us to defend our rights from a military point of view, and the national credit would be an element both of military and commercial

strength. In these days of emotional approach, it is not uncommon for men who have not read and thought much about the Constitution to describe it as a document adopted by property owners for the defense of property. Thoughtless and inflamed speakers and writers permit themselves to point out that members of the Convention were themselves large owners of property and to draw from that fact the unwarranted deduction that the greatest patriots in America, who had nearly all of them exposed their lives in the assertion of the country's freedom, immediately became a lot of conspirators, quieting their consciences for the protection of their purses. In the light of history, that is perfectly untrue. It is true that the members of the Convention had the capacity and willingness to pay their debts. They were people of financial responsibility, but nobody can read Madison's debates without realizing that what George Washington said of the Convention was true and that what John Adams said of it was true. Both praised the integrity of the members of the body, and John Adams said of the Constitution that it was "a document produced by sound heads inspired by sound hearts."

I venture to believe that the idea that there is some difference between personal rights and property rights is the product of unclear think-

ing. Property has no rights. Persons have rights with regard to property. There is no higher liberty than that a person should have the right to enjoy property that results from his efforts. Liberty to enjoy the fruits of one's labors takes the form of a property right, but it will be clearer if we say that it takes the form of a personal right with regard to property. It clouds the issue and obscures discussion to set up an imaginary opposition between rights of property and rights of persons. That there should be limitations upon the rights of persons both with regard to other persons and with regard to property is too clear for debate, but the Constitution does not permit us to be blind to the fact that when we take property from one man and give it to another by legislative enactment, we are not preferring the personal right of the recipient to the property right of the person from whom it is taken. In both instances we are dealing with the rights of persons as to property. Indeed, I am persuaded that in the one hundred and fifty years of our experience under the Constitution, a very substantial part of the service rendered to us by the Supreme Court of the United States has lain in its protection of the right to the pursuit of happiness and the vigor with which it has maintained our personal and business ethical obliga-



tions, showing the identity of the conduct dictated by honor with that required by constitutional principle.

Amendments to the Constitution have been relatively few, some of them perhaps not wholly wise. For instance, I am myself not entirely clear that it would not have been better to leave the election of United States senators to the State legislature. I realize that there may well be earnest difference of opinion about this. I do not think the answer to the question is found by merely attempting to compare the distinction of individual members of the Senate selected by one or the other of these processes. The fact is that the democratic principle is subject to two forms of attack. First, a frank denial of its validity. That attack we can always meet both on principle and with the lessons of experience. The second attack, however, is more subtle. It consists in overloading the operation of the principle until its back is broken by the imposition of tasks greater than can be borne. The principle is entirely satisfied by the complete control of ultimate power in the people. If, however, the people are called upon ceaselessly to perform directly the detailed tasks of operation, the burden becomes too great and the response by the people will necessarily be uninformed and ineffective.

In the great cities of this country, the voter faces such a multitude of candidates for such a multitude of offices that the task of selection is an impossible burden. Chance, impulse, and the suggestiveness of the names of candidates become the only canons of choice. The voter may enter the booth with a sense of democratic power, but if he is honest, he emerges with a conviction of democratic defeat.

We have lived to a time when the world is troubling itself about other forms of government. When the World War was over, ancient and traditional forms of government were not only in disrepute, but in a state of collapse. Independent and restless peoples everywhere suddenly realized that they were free. They called constitutional conventions imitating our model. They made bills of rights, distributions of powers, and imagined that that was the end of the old era and the easy and safe beginning of a new one. One after another, these new governments failed, and they failed, of course, because the constitutions they had adopted were not the product of their progressive history. They were not the crystallizations of their own experience. They had had no experience in operating institutions of that sort, and when the multiplying natural difficulties of

operating democratic forms were undertaken by inexperienced people, they soon found themselves adrift at sea, with the result that they called in the Lenins, Hitlers, and Mussolinis to undertake by dictatorial processes the tasks which their unaccustomed hands found it impossible to do. With this the democratic principle began to come into disrepute and there grew up attacks upon it—on the one side by the Fascist theory and on the other side by the Communist theory. The adherents of both of these united only in defaming the principle of democracy. In the United States six months ago there was more uncertainty than there is today as to the pretensions of these alien theories in their competition for the favor which we have always hitherto given to democracy. That uncertainty is being dissipated. Democracy is distinctly regaining its ascendancy in the trained intellect of the world. Even in the countries in which these new and unusual forms have been resorted to, there are evidences of a fresh desire to revert to the democratic process. I doubt whether anybody in Russia really believes that the Communistic State will be the ultimate form of government there. I doubt very much whether anybody in Italy or Germany believes that Fascism or Hitlerism will be the final product of the political turmoil

through which those great countries have passed. In other words, these new forms and fashions attracted for a little while, but their output in human satisfactions has been disappointing to the point of disaster.

Meantime the English-speaking nations of the world, longest trained in the democratic process, have had their troubles too, but the virtue of democracy is that it permits the digestion of experience and unrevolutionary modifications of institutions so long as they are dictated by an informed public opinion.

In the midst of a world filled with political speculation, and in an atmosphere of depression which has tried the faith of men in all human institutions, democracy has remained steadfast. This does not mean that any of the great democracies of the world like ours or that of the British is to stop growing. It does not mean that tomorrow is not to be better than today, but it seems to me that it does mean that the process by which we have grown from our small constitutional beginnings is demonstrated to be the wise and fruitful method of growing, and that our written Constitution, understood by and believed in by our people, evoking their loyalty and their love, and defended by their intelligence, is the best assurance of an increasing happiness and well-being.

That kind of loyalty to the Constitution is the best hope man has yet evolved of an orderly government under which liberty shall remain possible.

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